

IN THE EASTERN CARIBBEAN SUPREME COURT
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IN THE HIGH COURT OF JUSTICE

Antigua and Barbuda

Claim No: ANUHCV 2014/0482

BETWEEN:

IRVIN BAPTISTE

Claimant/Respondent

and

CARLTON LEWIS

DANIEL MURRAY

Defendants/Applicants

Before:

Master Jan Drysdale

Appearances:

Cherissa Roberts-Thomas and Latoya Letlow of counsel for the
Claimant/Respondent

C. Debra Burnette, Mandi Thomas and Chatrisse Beazer of counsel for the
Defendants/Applicants

2019: February 27

March 22

DECISION

- [1] **Drysdale, M.:** The matter for consideration is an application by the defendants/applicants to strike out the two affidavits filed by the respondent in support of an assessment of damages hearing.

Background

- [2] On 9th September 2014 the respondent filed a claim form and statement of claim seeking damages for personal injuries sustained as

a result of a motor vehicle collision. At paragraph 4 of the statement of claim the respondent referred to several medical reports from Dr. Benjamin dated 3rd November 2011 and 20th December 2011 and the same were attached to the statement of claim. The respondent also referred to a report of Dr. Patrick Matthews which report was also attached to the statement of claim.

- [3] On 17th March 2015 the defendants filed an acknowledgment of service indicating an intention to defend the claim. Notwithstanding no defence was filed and some two years later on 13th February 2017 a judgment in defence was entered against the defendants. The matter thereafter proceeded to assessment of damages.
- [4] In pursuance of an order giving directions for assessment the respondent filed and served several affidavits in support of his claim for damages. The disputed affidavits with exhibits attached thereto concern those deposed to by Yvette Edwards and Dr Singh. In addition to those affidavits the applicants also dispute the admissibility of certain documents in particular the medical reports of Dr. Louisang dated 31st March 2016 and 2nd May 2016 and the medical reports of Dr. Miguel dated 4th January 2012, 25th February 2014 and 14th August 2014.
- [5] In relation to the disputed affidavits of Dr. Singh and Yvette Edwards the premise of the application to strike out is based on the assertion that they both rely on documentary hearsay and further have purported to give expert testimony without any application for them to be deemed as experts.
- [6] Concerning the medical reports the applicants argue that Dr. Louisang and Dr. Miguel though being the authors of the respective reports have not been called as witnesses by the respondent. Further that neither of those two doctors were appointed as experts.
- [7] As it relates to Dr. Miguel the applicants further assert that his medical reports were available prior to the filing of the claim yet were not attached thereto. This the applicants alleged denied them the ability to consider these reports with respect to CPR 10.6. This coupled with the failure to produce a witness statement of the aforesaid doctor the applicant argues would result in severe prejudice to them.

THE ISSUES

[8] The issues for further consideration are twofold:

- (i) Whether the failure to appoint Dr. Singh and Yvette Edwards as expert renders their evidence as inadmissible.
- (ii) Whether the claimant may adduce into evidence medical reports without the author of the same producing a witness statement.

ANALYSIS AND APPLICABILITY OF THE LAW

Whether the failure to appoint Dr. Singh and Yvette Edwards as expert renders their evidence as inadmissible.

Evidence of Yvette Edwards

[9] The evidence of Yvette Edwards is contained in an affidavit filed on 31st August 2018. It is extremely short only containing 4 paragraphs. Out of the said four paragraphs two of them relate to her role and function in relation to these proceedings. In summary the deponent indicates that she is an accountant who was engaged to carry out an analysis of the gross earnings of the claimant prior to the accident in order to establish the effect on his business. She indicates that she was provided with income tax returns for the years 2008 to 2011 and has produced an analysis based on that information. She further deposes that this analysis was performed utilising basic mathematical averages or methods and estimates that the loss attributed to the claimant was the sum of \$172,652.00. Attached to her affidavit is her report detailing her findings.

[10] As indicated the objection to this witness was based on the argument that she has relied on documentary hearsay and further has not been appointed as an expert. As it relates to the issue of documentary hearsay the documents relied on by Ms. Edwards were the tax returns of the claimant which were produced and signed by him. Hearsay evidence is evidence the credibility of which is dependant on a party that is not a witness before the court. However as the claimant is not only the author of the documents which form the basis of the analysis but is also a witness this assertion that the documentation is tantamount to documentary hearsay is not sustainable.

- [11] As it relates to the assertion that this witness is only capable of giving evidence as an expert witness the court also disagrees with this submission. Firstly the witness has asserted that her findings were based on basic mathematical average. There appears to be no particular or special skill and further this witness has not purported to interpret or comment on any other document or report. Further expert testimony according to CPR 32 is required where the same would be of assistance to the court. Based on the deponent's affidavit I do not find anything in her evidence which would raise her evidence to that of an expert.

Evidence of Dr. Singh

- [12] Like Yvette Edwards, the affidavit of Dr. Singh is remarkably short only containing 5 paragraphs. In summary the witness deposes that he had attended to the claimant on several occasions as a consequence of the injury he sustained in September 2011. Dr. Singh however notes that he first saw the claimant in May 2015 when he presented to him with a medical report prepared by Dr. Benjamin dated 20th December 2011 and radiological studies done by Dr. Miguel in 2012 and 2014. These reports were attached to the affidavit.
- [13] Dr. Singh goes on to indicate that the claimant was examined on several occasions and in addition to various radiological studies he prepared two medical reports detailing his findings and course of treatment. The affidavit also details a recent examination conducted in August 2018 wherein a further MRI was ordered and refers to another report which states his prognosis and course of treatment recommended. The affidavit does mention that he had sight of another medical report produced by Dr. Lousaing and another MRI undertaken in May 2018 however nothing appears to have turned on this as an examination of each of the medical reports produced by Dr. Singh do not reveal that he relied on any medical report which he may have had sight of. What however the medical reports clearly demonstrate is that Dr. Singh personally examined the claimant, ordered various tests and came to his own independent conclusion on the diagnosis and or prognosis of the claimant. Having regard to the aforesaid I therefore consider Dr. Singh to be a witness of fact testifying as to his own examination and treatment of the claimant. Dr. Singh is not purporting to render a medical opinion on the causation of the injury neither does

Dr. Singh purport to review information outside his own medical records which would put him within the realm of an expert witness.

- [14] In deciding whether medical professional are capable of giving opinion evidence without being appointed as an expert the court also takes cognisance of and relies on the case recently delivered in the Court of Appeal of **LICS LIMITED v GAY –YIN –WONG**¹. In dismissing the appeal and affirming the decision of the High Court Judge that the medical evidence did not purport to be expert evidence, the court stated ‘[i]t is our view that the doctor who is giving factual evidence may also proffer statement of opinion which are reasonably related to the facts within his knowledge.’
- [15] Having regard to the above I find that there is no obligation in these circumstances for a part 32 application for Dr. Singh to be appointed as an expert in order to give evidence before this court.

Whether the claimant may adduce into evidence medical reports without the author of the same producing a witness statement.

- [16] The claimant as part of his evidence has listed and exhibited various medical reports including various imaging reports produced by Dr. Miguel and other medical reports produced by Dr. Lousaing, both of whom appear to be functioning in their private capacity in private clinics. These documents were produced subsequent to the filing of these proceedings but prior to judgment being obtained. Further no witness statements or affidavits have been filed with respect to these two medical professionals.
- [17] Pursuant to CPR 29 and 30 a witness statement or affidavit is essentially the document containing the evidence of any witness which a party intends to rely on at trial in relation to any issue of fact. CPR 16.2(5)(a) goes on to further stipulate that the claimant is ‘entitled to rely on the evidence of all witnesses called by him or her pursuant to the witness statements filed and served by him or her and to make submissions to the court.’
- [18] Further the filing of the a witness statement or affidavit allows a defendant to critically examine the contents thereof and or to opt to cross examine the maker of that document and test the assertions made therein.

¹ ANUHC VAP2018/0026 (delivered 15th March 2019)

[19] The claimant not having previously exhibited these reports as part of his claim or subsequently having filed them before judgment was obtained can therefore only adduce them into court by virtue of a witness statement or affidavit by the maker of those reports. It is insufficient for the claimant to simply annex them to his witness statement as proof of the assertions contained therein. The claimant therefore is unable to rely on those medical reports in the pursuance of this matter. This principle of course is subject to the any exception to the rule against hearsay which does not apply in this instance as the doctors' reports do not form part of the rubric of public records which is a known exception to the rule against hearsay.

[20] In light of the above and there being some success by each party in the consideration of this application, the court will decline to make an order for the payment for costs.

Order

[21] For the reasons advanced above I make the following order:

1. That the application to strike out the affidavits of Dr. Singh and Yvette Edwards is refused.
2. The medical reports of Dr. Miguel and Dr. Lousaing are hereby struck out.
3. No order as to costs.

Jan Drysdale

Master

By The Court

Registrar