SAINT LUCIA

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

CLAIM NO: SLUHCV 2009/0172

BETWEEN:

JENNIFER PRESCOTT

Claimant

and

ALDRICK PARRIS
JOHN H. PRIMUS

Defendants

Appearances:
Mrs. Lydia Faisal for the Claimant
Mr. Eghan Modeste for the Defendants.

2010: November 30th
2010: December 15th & 21st
2011: January 11th & 25th
2011: April 7th

RULING

[1] WILKINSON J.: The Claimant filed her statement of claim on 19th February 2009, and therein stated that on 5th March 2006, at approximately 9.00 p.m. she was walking along the side of the Marc main road in the direction of Castries when a motor vehicle licenced PB 448 owned by the Second Defendant and driven by the First Defendant at great speed in the opposite direction veered across the road and collided with her. The Claimant pleaded that the First Defendant was negligent. As a consequence of the impact she states she suffered the injury, loss and damage particularized in her statement of claim.

[2] Attached to the Claimant's statement of claim were (a) 3 medical reports from University Hospital Centre of Fort–De-France Pierre Zobda-Quitman Hospital dated 18th October 2006, 21st November 2006 and 16th February 2008 prepared by Dr. H. Dintimille, and (b) a report dated 11th July 2008, prepared by Dr. Ndidi Dagbue. The Claimant subsequently filed a medical report dated 7th May 2010, prepared by Dr. Ndidi Dagbue, and an invoice dated 19th October 2010, for an MRI Scan and which had thereon also a statement of costs for certain future medical procedures.

[3] The case management order in this suit was made at 28th April 2009, and therein trial was fixed for 9th March 2010. Pre-trial review occurred on 11th February 2010. The matter as ordered, came on for trial on 9th March 2010, and at this time it was brought to the Court's attention that the Defendants had filed on 8th March 2010, an application to strike out the Claimant's claim on the grounds that she had failed to comply with CPR 2000 Rule 3.12, she having failed to include a certificate of truth on the claim form, and failed to include her date of birth or age in her statement of claim. The Court up to that point had not had sight of the application. The Court after considering that (a) the Defendants had waited until the day before trial to file their application to strike out the claim, (b) having regard to the Court's discretion granted pursuant to Rule 3.13(1), (c) the fact that there was a certificate of truth affixed to the statement of claim, (d) having regard to the fact that Rule 8.9(2) while mandatory did not provide a sanction, and therefore the Court could have regard to Rule 26.9 in the exercise of its discretion, and (e) having regard to the fact that the Defendants had made certain payments for the Claimant's medical expenses, the application to strike out the claim was dismissed and the matter ordered to mediation. The matter came on 6th October 2010, for report on mediation and the only Counsel present was another Counsel holding for Counsel for the Claimant. The Court was informed that mediation had failed and so trial was fixed for 25th October 2010. On 25th October 2010, when the matter came on for trial, Counsel for the Defendants said that he had not received notice of the trial date and said much about the state of the Registry, the posting of notices via email and so forth. There being no evidence that the Court's order of 6th October 2010, had been served on the Defendants and or their Counsel, the Court adjourned the trial to 30th November 2010.

[4] On 30th November 2010, the matter came on for trial and present were Counsel for both parties, the Claimant, and the First Defendant. Counsel for the Defendants said that he had informed the Defendants that the matter would be heard on 30th November 2010, and he had shortly before trial

been informed that the Second Defendant was unwell but he did not have a medical report in support. As the Claimant was about to take the witness stand, Counsel for the Defendants without prior notice to the Claimant or the Court made two (2) oral applications.

Defendants' Applications

[5] Counsel's first application was that of an attack on what he described as hearsay evidence in the witness statement, hearsay, he said, as defined by the Evidence Act[1]. He said that it was hearsay evidence at paragraphs 9, 13, 14, 15, 16 and 17 of the Claimant's witness statement when she said:

> "9. I am informed by my legal practitioner, that the 2nd Defendant owns the vehicle that collided with me on the date of the accident, I am further informed and do believe that the 1st Defendant was driving with his knowledge, permission and authorization or as his servant or agent….
>
> 13. At St. Jude Hospital, I saw a general practitioner, who referred me to the in-house bone specialist namely Dr. Ndidi Dagbue. Both doctors informed me that it was clear to them that ligaments in my right knee were torn. Here is now shown to me a copy of the medical report of Dr. Dagbue marked 'JP2
>
> 14. The Dr. Dagbue recommended a course of physiotherapy, which I started at St. Jude Hospital itself. I took it for about two months or a little less. However, there was no improvement in my condition and as a result the therapist suggested that I should request an MRI scan.
>
> 15. I therefore spoke with Dr. Dagbue who informed me, that no hospital in St. Lucia provided MRI scans, that I should be prepared to travel overseas for that purpose. He gave me a referral letter. Here is now shown to me the letter of referral marked 'JP3'
>
> 16. I know and believe that the owner of the said motor vehicle had asked his insurer (West Indies General Insurance Company Ltd.) to compensate me for my loss. Accordingly, from the outset, a Ms. Alfred of West Indies General Insurance Company Ltd. has been in contact with me as regards the accident. I have received some money from the insurance company in respect of the costs of my surgery amounting to EUR 2,471.69 and $5,239.00 ECD. Here is now shown to me copies of the cheques received by me from the Insurer marked "JP4".

[6] He said that pursuant to sections 48 and 50 of the Evidence Act, the paragraphs were not admissible and therefore they ought to be struck out.

[1] No.5 of 2002.

[7] Counsel's second application was in relation to the medical reports. He started his attack on the medical report dated 7th May 2010, and invoice dated 19th October 2010. He then added that his application applied to all of the medical reports in the matter. He said the document which purported to be an invoice, was not an invoice.

[8] He submitted that the medical report dated 7th May 2010, and the other medical reports ought to be struck out and disregarded by the Court because the Claimant had not obtained the proper permission to rely on these documents. Counsel referred the Court to Rule 31.1(1) - (3), Rule 32.6 (1) – (3) and submitted that even if a report is disclosed in the list of documents, the Rules make it clear, and in particular Rule 32.6, that permission of the Court must be obtained at the case management conference if a party intends to call the evidence of an expert.

[9] He said that it would follow that when such an application was made at the case management conference the order would reflect that in addition to the number of witnesses that each party was allowed, there was also liberty to call an expert or put in his report in evidence whether the expert be a surveyor or medical practitioner. In this matter the case management order gave no permission to call the medical expert and indeed no such request had been made by the Claimant although the Claimant had ample opportunity to make such representation.

[10] The Claimant he said had a further opportunity to make an application for an expert at the pre-trial review and did not take it. Now, at trial, some 8 months post the pre-trial review order, the Claimant had still not made an application for an expert.

[11] Rule 8.9(3) he said makes it clear if the Claimant intended to rely on the evidence of the medical practitioner, she must attach the medical report to the claim form but having attached that medical report to the claim form, the Claimant must subsequently obtain the permission of the Court to adduce it into evidence. Rule 8.9(4) simply prevents circumstances where the Claimant is restricted to only the medical reports which she had permission to admit. Therefore, the Claimant having not obtained permission for the first set of medical reports she could not rely on them or venture to put them or any other medical reports into evidence.

[12] As to why the applications were being made on this the 3rd attempt at commencing the trial, he submitted that CPR 2000 made provision for the Claimant to amend her statement of claim before the case management conference, and sometimes permission could be obtained to permit

amendment post the case management conference, and so if the Defendants had made their applications prior to the day of trial, the Defendants would have been prejudiced, and the Claimant would have been prompted and invited to do what she ought to have done over one and a half years ago. There was no ambush of the Claimant but simply the application of the Rules on the most lenient of terms.

Claimant's submissions

[13] Upon the Claimant's Counsel application, and in light of the timing of the Defendants' applications, the Court fixed a subsequent date for the Claimant's response to the applications.

[14] Counsel for the Claimant had strong words for the timing of the applications and insisted that they were a deliberate ambush of the Claimant. She said that the ethos behind CPR 2000 was a departure from ambush and a promotion of co-operation among parties and counsel and this is with the intent that the hallowed overriding objective would be preserved.

[15] Counsel defined the applications as being analogous to applications for striking out of the claim, when the Defendants asked for striking out of the medical reports, this being a claim for personal injuries. An application for striking out of the claim could not be made without notice, and it must identify the nature of the Rules breached and in this regard Rule 26.4 applied.

[16] She said that while the Court must pursue procedural correctness in the application of CPR 2000, the Defendants' applications on the morning of the trial when opposing Counsel for the Claimant was sure that Counsel for the Claimant was unprepared to respond, they could not be in the pursuance of justice or the overriding objective. In any event, had the Defendants been more vigilant, they could have made the applications earlier than on the morning of trial.

[17] In respect of the application to strike out paragraphs 9, 13,14, 15, 16, and 17, she said that firstly with respect to paragraph 9 there was no hearsay as without the words, "I am informed by my legal practitioner", the statement is one principally of personal belief as to the ownership of the vehicle. The witness could be cross-examined to determine the basis of that belief. In relation to the belief that the First Defendant was driving with the Second Defendant's permission, she said that this could not be excluded since the Court must be satisfied that the basis for the belief is only the information given by the legal practitioner, and without cross-examination, this could not be established.

[18] In relation to paragraph 13 she submitted that the application to strike it out must fail on two (2) grounds. Firstly, the evidence is medical evidence which is admissible under section 152 of the Evidence Act. Secondly, under section 50 (b)of the Evidence Act, the report of Dr. Dagbue was attached as "a document in so far as it contains the representation or some other representation to which it is reasonably necessary to refer in order to understand the representation."

[19] As regards paragraph 16 she submitted that the paragraph contained no hearsay but rather it contained a statement of knowledge and belief, the basis of which could be verified on cross examination.

[20] As regards paragraph 17, she said that the paragraph did not contain any hearsay, and the purpose of the statement was to show how the Claimant's contact with Dr. Jeffers was initiated. Further Section 50 of the Evidence Act was not applicable.

[21] She submitted that based on Section 50, all first-hand hearsay, involving the conversations between the Claimant and third parties, are an exception to the hearsay rule in the proceedings and this was because the Claimant personally heard the representations being made.

[22] In relation to the application to strike out the medical reports for non-compliance with CPR 2000, she said that based on Rule 8.9(3), it cannot be the case that Rule 31.1. (1)-(3) refers to the expert report of a medical doctor. Rule 8.9(3) subsumes all of Rule 31.1(1) in so far as disclosure of medical reports are concerned. Rule 8.9 (3) created a pre-condition for the disclosure of medical reports intended to be relied upon by the Claimant as they must be disclosed upon the filing of the claim as an attachment thereto. The disclosure of the report pursuant to Rule 8.9 (3) was for the purpose of indicating to the Defendant and the Court, the Claimant's intention to rely on the medical report.

[23] The intention to rely on a document was the very same essence of the requirement under with Rule 31.1(1) (b). Therefore, having complied with the intention to show the document relied upon, it was not logical that the requirement of Rule 31.1. would be applicable to medical reports. She submitted that the reference must be to evidence other than medical reports.

[24] As regards Rule 32, she submitted that it did not apply to medical reports and in any event the admission of medical reports into evidence in civil proceedings was governed not by CPR 2000 but

by statute, in particular section 152 of the Evidence Act. By virtue of section 152, the Defendants' application which is premised on CPR 2000 Rule 31 and Rule 32 was ill-conceived and a waste of the Court's time and resources. Dr. Ditimille is a Martiniquan medical practitioner who performed the surgery on the Claimant at 14th October 2006 at Martinique, his reports were admissible under Section 55 (2)(a) (ii) read together with Sections 56(1),(2) and (3) of the Evidence Act.

[25] The reports of Dr. Jeffers were admissible under Section 152 of the Evidence Act. Dr. Jeffers' first report dated 7th May 2007, contained a declaration certifying the contents of the report in accordance with section 152(2)(b). The supplemental report while not containing the declaration, but being only 3 days later, 10th May 2007, it was an extension of the original report and so the certificate of 7th May 2007, was applicable to both reports. As to the more recent report of Dr. Dagbue, the second report contained the declaration and since it sought to explain matters in his first report, the declaration ought to be applied to both reports. Further the reports pertained to the same patient and the same facts. The second report was filed 19th October 2010, pursuant to Rule 8.9(4) and Section 152 of the Evidence Act. Finally, she said the Defendants could not complain at this juncture about the medical reports as they should have done so pursuant to section 152(2)(c) i.e. within 7 days of the documents being served on them.

Law

[26] The Civil Procedure Rules 2000 provides:

> Special requirements applying to claims for personal injuries
>
> 8.9 (1) This rule sets out additional requirements with which a claimant making a claim for personal injuries must comply.
>
> (2) The claimant's date of birth or age must be stated in the claim form or statement of claim.
>
> (3) <u>If the claimant intends to rely at trial on the evidence of a medical practitioner, the claimant must attach to the claim form a report from the medical practitioner on the personal injuries alleged in the claim.</u> (My emphasis)
>
> (4) Paragraph (3) does not restrict the right of the claimant to call other or additional medical evidence at the trial of the claim. (my emphasis)

(5) The claimant must include in, or attach to the claim form or statement of claim a schedule of any special damages claimed.

Applications to be dealt with at case management conference

11.3(1) So far as is practicable all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review.

(2) If an application is made which could have been dealt with at a case management conference or pre-trial review the court must order the applicant to pay the costs of the application unless there are special circumstances. (My emphasis)

Court's general power to strike out statement of case

26.4 (1) If a party has failed to comply with any rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order".

(2) Such an application may be made without notice but must be supported by evidence on affidavit which –

(a) contains a certificate that the other party is in default;

(b) identifies the rule or order which has not been complied with: and

(c) states the nature of the breach.

Form of witness statement

29.5 (1) A witness statement must –

(a) be dated;

(b) be signed or otherwise authenticated by the intended witness;

(c) give the name, address and occupation of the witness;

(d) include a statement by the intended witness that he or she believes the facts in it to be true;

(e) not include any matters of information or belief which are not admissible or, where admissible, must state the source of any matters of information or belief. (My emphasis)

Use of plans, photographs, etc. as evidence

31.1 (1) A party who intends to rely at a trial on evidence which is not –

(a) to be given orally; and

(b) contained in a witness statement, affidavit or expert report; must disclose that intention to the other parties in accordance with this rule.

Court's power to restrict expert evidence

32.6. (1) A party may not call an expert witness or put in the report of an expert witness without the court's permission.

(2) The general rule is that the court's permission is to be given at a case management conference."

[27] The Evidence Act provides:

Interpretation

2. In this Act –

"representation" includes an expressed or implied representation, whether oral or in writing, and a representation to be inferred from conduct";

Exclusion of hearsay evidence

48. – (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

(2) Where evidence of a previous representation is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove the existence of an asserted fact.

(3) In this Part "asserted fact" means a fact referred to in subsection (1).

Restriction to "first-hand" hearsay

49. A reference in this Division to a previous representation is a reference to a previous representation that was made by a person whose knowledge of the asserted fact, in this Division referred to as "personal knowledge", was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived, other than a previous representation made by some other person about the asserted fact.

Exception: civil proceedings where maker not available

50. In civil proceedings, where the person who made a previous representation is not available to give evidence about an asserted fact, the hearsay rule does not apply in relation to –

(a) oral evidence of the representation that is given by a person who saw, heard

or otherwise perceived the making of the representation: or

(b) a document so far as it contains the representation or some other representation to which it is reasonably necessary to refer in order to understand the representation."

Exception: documentary records

" 55.(1) A statement in a document is admissible in any proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if –

(a) The document is or forms part of a record compiled by a person acting under a duty, from information supplied by another person, whether the other person was acting under a duty or not, who had, or may reasonably supposed to have had, personal knowledge of the matters dealt with in that information: and

(b) Any condition set out in subsection (2) is satisfied.

(2) The conditions mentioned in subsection (1) (b) are –

(a) that the person who supplied the information –

(i) is dead or by reason of his or her bodily or mental condition unfit to attend as a witness;

(ii) is outside of Saint Lucia and it is not reasonably practicable to secure his or her attendance;

(iii) cannot reasonably be expected, having regard to the time that has elapsed since he or she supplied or acquired the information and to all the circumstances, to have any recollection of the matters dealt with in that information:

(b)…

(c) …

(3) Subject to subsections (4), (5) and (6) where oral evidence in respect of a matter would be admissible in proceedings, a statement made in a document that was created or received by a person in the usual or ordinary course of business is admissible as evidence of the truth of its content in proceedings, upon production of the document.

Application of section 55

56.(1) Section 55.(1) applies whether the information contained in the document was supplied directly, or subject to subsection (2), indirectly.

(2) Where information referred to in subsection (1) was supplied indirectly, section 55(1) only applies if each person through whom the information was supplied was acting under a duty.

(3) Information referred to in subsection (1) also applies where the person compiling the record is himself or herself the person by whom the information was supplied.

(4) Where a document referred to in subsection (1) contains evidence that a person, if called as a witness, could be expected to give and the document has been prepared for the purpose of any pending or contemplated proceedings, a statement contained in the document shall not be given in evidence without the leave of the court.

Admissibility of medical certificates and reports

152.(1) Notwithstanding any enactment or law, and subject to the conditions specified in subsection (2), the following documents are admissible in evidence before a court in civil and criminal proceedings –

(a) the certificate or report of a medical practitioner within the meaning of the Medical Registration Ordinance, Cap. 150, in respect of any of the following –

(i) the medical condition of a person:

(ii) the nature and extent of any injuries to that person, including the probable effects of the injuries;

(iii) the cause of the medical condition or of any of the injuries:

(iv) the nature of the instrument, if any, with which any of the injuries were caused;

(v) the degree of force that was used; and

(vi) any other significant aspects of the injuries;

(b) ….

(2) The conditions to which subsection (1) refers are that –

(a) the document purports to be signed by the person who made it;

(b) the document contains a declaration by the person making it, declaring the facts set out therein to be true to the best of his or her knowledge and belief and the opinions expressed therein to be honestly held;

(a) before the hearing at which the document is to be tendered in evidence –

(i) a copy of the document is served by or on behalf of the party proposing to tender it on the other parties to the proceedings; and

(ii) none of the other parties to the proceedings have, within seven days from the service of the document, served on the party serving the document, a notice objecting to the document being tendered in evidence".

Findings

[28] This matter having come on for trial on 2 prior occasions, and adjourned on 1 occasion specifically on the request of the Defendants, the Court is inclined to agree with Counsel for the Claimant that there was an ambush. The same way in which the Defendants are urging the Court that applications could have been made from case management onwards by the Claimant to remedy what they perceive as procedural defects, it is in the same way the Defendants had an opportunity from the time the witness statements were filed to bring the applications they were making by way of oral applications on the 3rd morning fixed for commencement of the trial. Indeed these very applications could also have been made by the Defendants at pre-trial or at the latest together with their other oral applications when the matter first came on for trial on 9th March 2010.

[29] CPR 2000 11.3(1) provides two time frames by which applications ought to be made and they are at the case management conference and at the pre-trail review. Further, it is mandated that they must be in writing. The Court rejects the Defendants' statement that they would have been prejudiced had they made the applications earlier as the Claimant might have been allowed to amend her statement of claim. Neither of the Defendants' applications would have in the Court's view brought about amendment to the claim form or statement of claim. The Defendants' attacks were on the evidence in the witness statements and as disclosed in documents, and not the pleadings. In any event even if the attacks were on the pleadings and they may have moved the Claimant make an application to amend her pleading, the Defendants could not possibly be seeking to usurp the Court's authority and discretion pursuant to CPR 2000 as to whether or not to allow the amendment to the pleadings.

[30] At the pre-trial review, the Parties assured the Court that they were ready for trial and so the pre-trial order was made, thereafter the matter came on for trial on two (2) prior occasions. The assurance of Counsel at the pre-trial review is of great importance. It ensured in this particular case

that (a) the matter was getting to trial in a timely manner as the first trial date was 1 year and 3 weeks from commencement of suit, and (b) that the Court's scarce resources were not being wasted. By these applications the Defendants are now saying to the Court that even though they gave the Court the assurance that they were ready for trial, and accepted further directions in preparation for trial, including not 1 but 3 trial dates, and a mediation attempt, they were indeed not ready but holding back these two (2) applications. Outright deceit in the face of the Court, and clearly an abuse of process. These are exactly the types of applications that are to be visited with costs pursuant to Rule 11.3(2).

[31] Referring to the Defendants' first application, the issue of hearsay evidence in paragraph 9, this can be resolved shortly. In her statement of claim the Claimant said:

> "3. At all material times, the 2nd Defendant was the owner of the motor vehicle TB 448 which the 1st Defendant drove with the knowledge, permission and authorization of the 2nd Defendant or as his servant or agent." (My emphasis)

The First Defendant in response to this pleading said in his defence:

> " 4. As regards paragraph 3, it is denied that the Second Named Defendant was the owner of Motor Vehicle TB 448. It is further denied that the First Named Defendant drove Motor Vehicle TB 448 or any other vehicle as the servant or agent of the Second Named Defendant at the material time." (My emphasis)

The Second Defendant in response to the same pleading said in his defence:

> "4. As regards paragraph 3, it is denied that the Second Defendant was the owner of Motor Vehicle TB 448. It is denied further that the First Named Defendant drove Motor Vehicle TB 448 or any other vehicle as the servant or agent of the Second Named Defendant. The Second Named Defendant contends further that registered owners of a vehicle are only liable for the negligence of the use of the vehicle if they (the owners) have some interest in the purpose for which the vehicle was being used at the time of the alleged negligence and this was not the case here, nor was the First Named Defendant driving as his servant or agent at the material time. (My emphasis)

[32] The case management order was made at 28th April 2009, and provided that the witness statements filed by the parties were to stand as examination-in-chief at the trial.

[33] The First Defendant in his witness statement said:

> " 5. Mr. Parris owned a vehicle which required parts and needed to be repaired.
>
> 6. When Mr. Parris got parts for the vehicle and it was repaired, Mr. Parris did not

drive it and so I started driving it from time to time because it was not used

7. On March 5th 2009 at about 9.00 p.m. I was driving the vehicle along the Castries/Bexon Highway....

11. As I was completing the turn into the Marc road, while still on the left side of the road, I noticed a lady who I now know to be Jennifer Prescott cross from the left side of the road to the right side of the road. (My emphasis)

[34] The Second Defendant in his witness statement said:

" 3.I am the owner of Motor Vehicle Registration Number PB 448 however, I was not present at the time of the accident nor was I in any way involved in the accident.

4.Mr. Aldrick Parris is employed by myself as a maintenance man....

5. Motor Vehicle Registration Number PB 448 which was owned by me was in need of repair and required certain parts.

6. When the parts for the vehicle were obtained and the vehicle was repaired, I had no use for it as I hardly even drove and Mr. Parris began driving it from time to time." (My emphasis)

[35] It is clear therefore, that notwithstanding the Defendants' initial position of denial of ownership of the motor vehicle licenced TB448, they both in their witness statements and which pursuant to the case management order, was their evidence-in-chief, admitted that the motor vehicle TB 448 was indeed owned by the Second Defendant.

[36] As the Court sees it, even if the Court were to strike out paragraph 9 of the Claimant's witness statement, the Claimant had at paragraph 3 of her witness statement identified the motor vehicle with which she had the accident as TB 448, and both Defendants have in their witness statements given evidence that the Second Defendant owned the vehicle.

[37] The issue of ownership of the motor vehicle is therefore no longer an issue.

[38] In looking at paragraphs 13, 14, 15, 16 and 17, of the Claimant's witness statement, there are facts within them that are evidence of actions taken by Claimant and so these statements would certainly not be amenable to any hearsay rules. Perhaps the Defendants' ought to have looked a

little more closely at the paragraphs in their entirety and challenged only certain parts of the paragraphs instead of asking for the entire paragraphs to be struck out.

[39] In light of the fact that the Defendants' application was to strike out paragraphs 13, 14, 15, 16 and 17 in their entirety, and the Court finds all of the paragraphs to contain evidence of actions taken by the Claimant, and so to be permissible evidence, the application of the Defendants to strike the paragraphs in their entirety as being hearsay is to be denied.

[40] Even if the Court is wrong on its prior determination on paragraphs 13,15 and 16, the Court is of the view that section 50 of the Evidence Act on which the Defendants rely does not assist them. In each case the Claimant exhibited the "representation" in document form so that all concerned could "understand the representation." The Court is supported in this position by the learning on the Evidence Act of New South Wales[2] where section 63, a provision not unlike section 50 provides: -

> "63. Exception: civil proceedings if maker not available
>
> [1] This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
>
> [2] The hearsay rule does not apply to:
>
> (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
>
> (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation."

The authors explain the section thus:

> "A*bout this section*
>
> 63.2 This section allows previous representations to be used in civil proceedings (a proceeding in other than a criminal proceeding) to prove facts intentionally asserted in them where:

[2] The New Law of Evidence. 2nd Ed. Jill Anderson, Neil Williams SC, Louis Clegg. 210

- the person who made the representation (the maker) is unavailable to give evidence;
- the maker had personal knowledge of the fact/s asserted in the representation: s.62; and
- at the time of making the representation, the maker was competent to give evidence about the fact/s:see s.61 (competence presumed unless proved to the contrary).

If these factors are satisfied, the hearsay rule will not apply to:

(a) evidence of the representation being given by someone who saw, heard or otherwise perceived the representation being made: s.63(2)(a);
(b) tendering the representation is in documentary form: s. 63(2)(b).

Note that pursuant to s.63.(2)(b), the hearsay rule will also not apply to a document in so far as it contains 'another representation to which it is reasonably necessary to refer in order to understand the representation.' This section waives the hearsay rule in respect of representations in documents, not the documents as such. Accordingly, where a party seeks to tender a document under s.63 it is necessary to consider the admissibility of each representation in the document. The aim of the provision is to enable the best evidence that the parties have available to be lead." [3]

[41] The application to strike out paragraphs 9, 13, 14, 15, 16 and 17 of the Claimant's witness statement is dismissed.

[42] In regard to the second application pertaining to the medical reports, the Court is of the view that section 152 of the Evidence Act is crystal clear and so CPR 2000 being subordinate legislation the Claimant could opt to follow either CPR 2000 or the Evidence Act in relation to tendering her medical reports as evidence. Claimant's Counsel has submitted that the medical reports are being tendered pursuant to section 152 of the Evidence Act. The specific words of section 152 also take precedence over sections 48 and 55. The court is supported in this position by the following:

[3] Ibid

" 875.General and particular enactments

Whenever there is a general enactment in a statute which, if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative, and the general enactment must be taken to effect only the other parts of the statute to which it may properly apply[1]. This is merely one application of the maxim that general things do not derogate from special things[4].

[43] Before the Court addresses further the issue of the medical reports being tendered pursuant to section 152, the Court makes an observation about the CPR 2000 provisions on personal injuries. Rule 8.9 addresses solely the issue of claims for personal injuries, and therein mandates a protocol at Rule 8.9(3) that if a claimant intends to rely on the evidence of a medical practitioner, the report from the medical practitioner must be disclosed with the claim form. Thereafter, the claimant is at Rule 8.9(4) provided with a further opportunity to disclose additional medical reports. There can be no doubt that what is occurring here is that the opposing party is being informed of the case he has to meet by the disclosure being made.

[44] Rule 31 it is also clear seeks to ensure that there is full disclosure. The Court however, does not agree with the Defendants that this Rule applies even after disclosure had been made pursuant to Rule 8.9. The Rule itself sets out when it will be applicable, and that is when the evidence is not going to be given orally, or it is not contained in a witness statement or affidavit or expert report. In the present instance there exist the medical reports which were previously disclosed and then subsequently brought into the witness statement of the Claimant by reference. Their incorporation in her witness statement does not require her to recite their contents for there to be incorporation.

[45] Reverting to the application of section 152 of the Evidence Act to the medical reports before the Court, the sole issue left is whether the medical reports have complied with the mandatory conditions stipulated at section 152(2)(a) and (b) i.e. the signature of the doctor, and the declaration. These conditions have no bearing on section 152(2)(c) which provides the Defendant a 7 days period after service of the medical report to serve a notice of objection, and so the Court

[4] Halsbury's Law of England 4th edition Vol. 44 p. 534

rejects the Claimant's submission that the Defendants ought to have objected within the stipulated time frame. Before the Defendants time can run, the medical reports must be in compliance with section 152 (2) (a) and (b).

[46] On perusal of all of the medical reports, the Court finds that the locally prepared medical reports of Dr. Horatius Jeffers made 7th May 2006, and Dr. Ndidi Dagbue made 7th May 2010, are in compliance with both requirements of section 152(2) (a) and (b).

[47] The Defendants' application to strike out all of the medical reports is therefore only partially allowed.

ORDER:-

1. The Defendants' application to strike out paragraphs 9, 13, 14, 15, 16 and 17 of the Claimant's witness statement is dismissed.

2. The Defendants application to strike out all of the Claimant's medical reports is only partially allowed.

3. The Court having found that the Defendants could have made the applications before the third morning fixed for trial, and they having failed on one of their applications, and only partially succeeded on the other, the Defendants are to pay the Claimant costs in the sum of $4,500.00 on or before April 30th 2011.

Rosalyn E. Wilkinson
High Court Judge