EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS (SAINT CHRISTOPHER CIRCUIT)

SKBHCVAP2014/0021

BETWEEN:

KEITHLYN BERGAN

Appellant

and

SHERYL EVANS

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

Appearances:

Mr. Damian Kelsick with him, Mr. Garth Wilkin for the Appellant
Ms. Angelina Gracy Sookoo instructed by Rénal Edwards for the Respondent

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2016: October 13.

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Civil appeal – Personal injury claim – Admissibility of expert evidence – section 163 of Evidence Act, 2011 – Part 32 of Civil Procedure Rules 2000 – Whether learned judge erred in finding that objectives of CPR Part 32 are not interfered with by operation of section 163 of Evidence Act, 2011 – Whether Part 32 and section 163 schemes complement each other – Admissibility in civil proceedings of prior criminal conviction as evidence of conduct constituting offence – section 91(2) of Evidence Act, 2011

The respondent, who was the claimant in the court below, sought from the appellant, damages for personal injuries suffered as a result of an accident. On the morning of the trial, the appellant took a number of preliminary objections to the admission of the medical reports from one Dr. Laws and one Dr. Hendrickson; the decision of the learned magistrate relating to the outcome of the criminal charge; and a witness summons issued by the court office. This resulted in the court having to vacate the trial date and request that the parties provide it with written submissions on the objections raised. Having considered submissions from both parties, the learned judge dismissed all the preliminary objections. The appellant, dissatisfied with the learned judge's decision, appealed.

There were three main issues for determination on appeal: firstly, whether the appellant had sufficiently put the medical reports of Dr. Laws in issue by objecting to them on the morning of the trial; secondly, whether the further medical report of Dr. Hendrickson was inadmissible on the basis that it was not in compliance with Part 32 of the Civil Procedure Rules 2000 ("CPR"); and thirdly, whether the certificate of the learned magistrate relating to the criminal charge was admissible at trial.

Held: dismissing the appeal and awarding costs to the respondent fixed at two thirds of the costs awarded in the court below, that:

1. CPR 10.6 (2) sets out requirements with which a defendant must comply in a claim for personal injuries and clearly outlines the proper procedure to be followed by a defendant who is faced with a medical report attached to the claim form or statement of claim. This provision requires no less than an express statement to the effect that one or more specific parts of the medical reports tendered into evidence is/are disputed or alternatively, a statement affirming that the medical reports are agreed. Therefore, it was incumbent that the appellant do either of those. The appellant's pleading at paragraph 5 of the defence that he neither admits nor denies the allegations pleaded in the statement of claim in relation to the medical report was insufficient for satisfying the requirements of CPR 10.6.

2. Section 163 of the Evidence Act, 2011 is a separate regime to CPR Part 32 for the tendering into evidence of certain types of expert reports, including those of a registered medical practitioner. It is a standalone provision. CPR Part 32, on the other hand, applies to any kind of expert evidence which a party may be seeking to admit for the purpose of assisting the court. Thus, Part 32 is wider in scope than section 163. Additionally, none of the provisions contained in section 163 offend the rules of procedure contained in the CPR relating to expert evidence. The two regimes complement each other.

3. In Saint Christopher and Nevis, section 91 of the Evidence Act, 2011 has created exceptions to the common law rule that, evidence of a criminal conviction is inadmissible against a defendant in subsequent civil proceedings as prima facie proof that the person convicted was guilty of the conduct for which he/she was convicted. As long as the certificate of the learned magistrate fell into the exception in section 91(2), it would have been properly admissible as evidence that the appellant had been convicted of the offence. The appellant was charged with and apparently convicted of the offence of driving without due care and attention which is directly relevant to the tort of negligence alleged against him.

   Hollington v F. Hewthorn and Company, Limited, and Another [1943] KB 587 considered.

REASONS FOR DECISION

[1] **PEREIRA CJ:** This appeal followed on from an action arising from a motor vehicle accident in which the respondent, who was the claimant in the court below, sought from the appellant, damages for personal injuries suffered as a result of the accident. The appellant admitted in his defence in the court below that his vehicle had collided with the rear of the respondent's vehicle, but denied that he was negligent. He further denied that the respondent had suffered any injuries, loss or damage as a result of the alleged (or any) negligence on his part.

[2] In the court below, the appellant took a number of preliminary objections on the morning of the trial of the matter which resulted in the court having to vacate the trial date and request that the parties provide it with written submissions on the objections raised by the appellant.

[3] The appellant had objected to the following:

(1) A medical report of one Dr. Duane Hendrickson which was filed by the respondent pursuant to section 163 of the **Evidence Act, 2011**[1] on the basis that it did not comply with Part 32 of the **Civil Procedure Rules 2000** ("CPR").

(2) Medical reports of one Dr. Mervyn Laws relating to the respondent's condition and treatment post-accident, which reports had been attached to the claim form by the respondent.

(3) A witness summons for one Mr. Devlin Thompson who had not provided a witness statement, which summons was issued by the court for him to attend and give evidence at trial.

[1] Act No. 30 of 2011, Laws of Saint Christopher and Nevis.

(4) The admission of a decision of the magistrate relating to the outcome of a criminal charge of careless driving which had been determined by the magistrate.

[4] The learned judge found that before the day when the trial was scheduled to begin, the appellant did not take any objection or raise any preliminary issue to the admission of the two medical certificates, the decision of the learned magistrate relating to the outcome of the criminal charge, or to any of the witness summonses issued by the court office. He stated that at a pre-trial review held about one month before the trial date, the court inquired of the parties whether there were any issues outstanding in the matter and, apart from an incidental point relating to filing of an amended claim form to reflect that certain paragraphs had been ordered struck out by the court, neither party raised any issue.

[5] After considering submissions from both parties on the preliminary points raised by the appellant, the learned judge dismissed all the preliminary objections. The appellant appealed the judge's decision, contending, among other things, that: i) the learned judge erred in holding that the appellant never objected to the admission of the two medical reports, and additionally, he erred in holding that a party is required to state at a pre-trial review or at any other pre-trial conference that he intends to challenge the admission of any documents into evidence (particularly in circumstances where the trial bundle includes a statement as to which documents have been agreed and those which have not been agreed); ii) the learned judge erred in law when he ruled that the objectives of Part 32 of CPR are not interfered with by the operation of section 163 of the **Evidence Act, 2011** and that the two legislative schemes complement each other; iii) the judge erred in law in holding that the certificate of the magistrate was admissible at trial without having regard to the relevance of said certificate to prove any of the facts in issue before the court; iv) the learned judge erred in ordering that the appellant pay the respondent $2,500.00 in costs due to the manner and timing of his objections.

[6] The appeal was heard on 13th October 2016 and at the hearing, the Court dismissed the appeal and fixed costs in the appeal at two-thirds of the costs awarded in the court below, stating that it would provide its reasons for this decision at a subsequent date. These reasons are now set out below.

[7] Based on the grounds of appeal set out by the appellant in his notice of appeal, the Court found that there were three main issues for determination on appeal:

(1) Whether or not the appellant had sufficiently put the medical reports of Dr. Laws in issue, by objecting to them on the morning of the trial.

(2) Whether the further medical report of Dr. Hendrickson was inadmissible, on the basis that it was not in compliance with Part 32 of CPR.

(3) Whether the certificate of the learned magistrate relating to the criminal charge was admissible at trial.

Appellant's Submissions

[8] In relation to the first issue, the appellant argued that by stating in his defence that he 'neither admits nor denies the allegations as pleaded' in the relevant paragraphs of the respondent's statement of claim (where the respondent made reference to the medical reports of Dr. Laws which had been attached to the claim form) 'as he has no knowledge thereof', this was sufficient for complying with the provisions of CPR 10.6, which rule sets out special requirements applying to claims for personal injuries. He argued further that no objection was raised before the learned judge because a previous application by the respondent pursuant to Part 32 to call Dr. Laws as an expert witness was dismissed by another judge who had heard the application. He stated that the learned judge (in the present appeal) erred in ruling that he (the appellant) had an obligation to disclose prior to the trial the nature of all objections that he would be taking to documents to be tendered into evidence and to witnesses giving evidence.

[9] In relation to the admissibility of the medical report of Dr. Hendrickson, the appellant submitted that the report did not meet the requirements of an expert report and usurps the function of the judge as it merely sets out the doctor's conclusions (for instance, relating to the causal link between the accident and the patient's injuries) which conclusions should properly be made by the court. Additionally, the appellant argued that the report did not contain 'the necessary scientific criteria for testing the accuracy of [Dr. Hendrickson's] conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.'[2]

[10] Concerning the final issue relating to the appellant's tendering of the magistrate's decision on the criminal charge into evidence, the appellant took issue with the following statement made by the learned judge stated at paragraph 43 of his judgment:

> "A magistrate has no power to caution anyone unless it is on the basis that there has been a plea of guilty or a conviction [section 3 of the Alternative Sentencing Powers Act Cap.3.20.]. The fact that this certificate shows that the defendant [appellant] was 'cautioned' must then be taken to mean that he was properly convicted".

The appellant argued that the learned judge erred in law and misdirected himself, as he failed to consider whether this certificate was relevant to the determination of any fact in issue in the proceedings. He further argued that the fact that he was cautioned for the offence of driving without due care and attention is not relevant to prove any fact in issue in the claim.

Respondent's Submissions

[11] The respondent argued that the medical reports of Dr. Laws were attached to her claim form in accordance with CPR 8.9(3) and CPR 10.6 requires a defendant to state in his defence whether or not he disputes any part of any attached medical reports and to state the nature of the dispute. The respondent stated that the appellant simply stating in paragraph 5 of his defence that he neither admits nor

[2] Phipson on Evidence (11th edn., Sweet & Maxwell 1970) para. 1280.

denies the allegations as pleaded in the paragraphs in the statement of claim which stated that Dr. Laws was at all material times and is the attending physician of the claimant, was not sufficient to satisfy the requirements of CPR 10.6 as it is not a specific statement objecting to the medical reports and does not provide any reasons for the objection. The statement which ought to be made by the defendant should alert the claimant to the disputed areas of the medical reports.

[12] The respondent further argued that the dismissal of the respondent's application to call Dr. Laws as an expert did not make the medical reports attached to the claim form inadmissible as the reports were produced pursuant to CPR 8.9 and were not expert reports for the purposes of Part 32. The fact that the application was dismissed simply meant that Dr. Laws could not give expert evidence at the trial or produce an expert report. Accordingly, the learned trial judge holding that the appellant was barred from disputing any part of the medical reports at trial did not overrule the decision of the previous judge who dismissed the respondent's application.

[13] Concerning the appropriate point in time for a party to raise objections or indicate an intention to challenge the admission of documents, the respondent submitted that CPR and section 163 of the **Evidence Act, 2011** both provide clear procedures for a party to raise any objections to medical reports attached to a claim form and tendered into evidence under section 163 itself. The appellant did not follow any of these procedures and accordingly, could not subsequently object to the medical reports and the evidence tendered pursuant to section 163, at trial.

[14] In response to the appellant's contention that Dr. Hendrickson's report usurps the function of the judge as he drew conclusions which properly ought to have been left to the court, the respondent submitted that the doctor's medical report was tendered pursuant to section 163 of the **Evidence Act, 2011**, section 1(a) of which sets out particular questions which the medical practitioner has to address in the report for it to be admissible. These questions include, in particular, conclusions

made by the medical practitioner as to what caused the medical injury. Accordingly, the conclusions drawn by Dr. Hendrickson which the appellant took issue with were required for the doctor's medical report to be admissible under section 163 of the Act.

[15] The respondent submitted that in relation to the appellant's argument that the certificate of the learned magistrate is irrelevant or has no probative value, section 91(2) of the **Evidence Act, 2011** provides that evidence of a conviction in legal or administrative proceedings is admissible subject to a few exceptions, none of which are applicable in the present case. The certificate is simply evidence that there was a conviction as opposed to a dismissal of the charge, which is prima facie proof of the conduct which constitutes the offence. Accordingly, this certificate is relevant to an action for personal injury caused by negligence, and it raises a prima facie presumption of the underlying fault of the party who was found guilty of the driving without due care and attention.

Discussion

The Pleading requirement – CPR 8.9 and 10.6

[16] The first issue which the Court had to deal with concerned the medical reports of Dr. Laws which the respondent sought to tender into evidence when she filed the claim, and whether the appellant had any proper basis for objecting to these reports on the morning of the trial. CPR 8.9 carves out specific requirements applying to claims for personal injuries. The respondent quite rightly attached the medical reports of Dr. Laws to the claim form pursuant to CPR 8.9(3). Furthermore, CPR 10.6 sets out additional requirements with which a defendant is required to comply in a claim for personal injuries. For instance, the defendant is required to state whether he disputes any part of the medical report on personal injuries alleged in the claim. In particular, CPR 10.6(2) speaks to what the defendant to such a claim is required to do if the claimant has attached to the claim form or statement of claim a report from a medical practitioner. CPR 10.6(2) states as follows:

"(2) If the claimant has attached to the claim form or statement of claim a report from a medical practitioner on the personal injuries which the claimant is alleged to have suffered, the defendant **must state in the defence** –

(a) whether all or any part of the medical report is agreed; and

(b) if any part of the medical report is disputed, the nature of the dispute." (my emphasis)

[17] The above rule clearly outlines the proper procedure to be followed by a defendant who is faced with a medical report attached to the claim form or statement of claim. The only question for the Court was, therefore, whether the appellant had stated in the defence whether all or any part of any of the medical reports was agreed and, if any part of it was disputed, the nature of the dispute. At paragraph 8 of the claim form, the respondent stated that Dr. Laws was at all material times and is the attending physician of the claimant, and referenced the copies of the four medical reports of Dr. Laws which were attached to the claim form. The respondent, at paragraph 5 of the defence, merely neither admitted nor denied the contents of the paragraph and attempted to argue that as a result of this statement in the defence, CPR 10.6 had been satisfied. This Court took the view that the appellant's pleading at paragraph 5 of the defence was clearly insufficient for satisfying the requirements of CPR 10.6. This provision would require no less than an express statement to the effect that one or more specific parts of the medical reports tendered into evidence is/are disputed or alternatively, a statement affirming that the medical reports are agreed. It was incumbent that the appellant do either one of these. However, in the circumstances, he did neither of them. Notwithstanding that CPR Part 32 applies to expert evidence, a claimant and defendant involved in a personal injuries claim would still be required to follow the requirements of CPR 8.9 and 10.6. In so doing, there is no derogation from CPR Part 32 which deals with expert evidence generally. CPR rules 8.9 and 10.6 merely provide for a more specific time and cost saving regime when the claim is one for damages for personal injuries.

Section 163 of the Evidence Act, 2011

[18] The appellant also took issue with the admissibility of the further medical report of Dr. Hendrickson which had been served on him by the respondent pursuant to section 163 of the **Evidence Act, 2011**. He argued that this report could not be admitted because it did not comply with Part 32 of CPR. He submitted that section 163 of the **Evidence Act, 2011** could not stand in light of Part 32. More specifically, he contended that the determination whether the medical report can be admitted into evidence would be based on the provisions of CPR, and not the **Evidence Act, 2011**. The question for determination was, therefore, is section 163 of the **Evidence Act, 2011** in conflict with Part 32 of the CPR? In answering this question, I refer to section 163 of the **Evidence Act, 2011**. It states:

> "163. **Admissibility of medical certificates and reports.**
>
> (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 registered medical practitioner 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;
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> (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; and
>
> (b) a certificate or report of an analyst or consultant in the field of bacteriology, pathology, radiology or toxicology in respect of his examination or analysis of any matter.
>
> (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 knowledge and belief and the opinions expressed therein to be honestly held;
>
> (c) before the hearing at which the document is to be tendered in evidence,

(i) a copy thereof 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.

(3) Subsection (2) (c) does not apply if the parties to the proceedings agree, before or during the hearing, to the tendering of the document.

(4) Notwithstanding subsection (1), the court may, of its own motion or on application by any party to the proceedings, require a person who tendered a document in evidence under this section, to attend before the court and give evidence."

The umbrella words of this section are instructive. It provides that a medical report which fulfills the parameters of subsection (1) and meets the conditions of subsection (2) is admissible in evidence irrespective of any other enactment or law. Ergo, such a medical report is admissible irrespective of Part 32 of the CPR.

[19] Reference is also made to paragraph 24 of the learned judge's judgment, where he stated as follows:

> "The objective of Part 32 of **CPR 2000**, however, is not defeated by the clear operation of section 163 of the **Evidence Act**. Section 163 creates two ways in which **CPR 2000** can be properly avoided without affecting the underlying jurisprudential basis for the expert evidence regime of **CPR 2000**. The first is where all the pre-conditions set out in section 163(2)(c) are satisfied. It is noted that this includes the right of the other party to object within seven days of the service of the document by giving notice of such objection. This right of objection is not to be glossed over. Here the other party by simply putting in a notice of objection literally then forces the other party who is seeking to admit the certificate or report to move the court under Part 32 to get his expert evidence in. Section 163 actually provides a mechanism to save the court time and money in avoiding the need for an application if the other party having seen the certificate or report filed pursuant to the section declines to object. How then does this collide with the expert evidence regime of **CPR 2000**? I do not see it. It does not."

[20] This Court agreed entirely with the above pronouncements of the learned judge. Section 163 of the **Evidence Act, 2011** is a separate regime for the tendering into evidence of certain types of expert reports, including those of a registered medical practitioner.[3] Part 32, on the other hand, applies to any kind of expert evidence which a party may be seeking to admit for the purpose of assisting the court. Thus, Part 32 is wider in scope than section 163. Most importantly however, as stated by the learned judge at paragraph 24, none of the provisions contained in section 163 offend the rules of procedure contained in CPR relating to expert evidence. In fact, the two regimes complement each other.

[21] As pointed out by the learned judge at paragraph 22 of his judgment, section 163 is substantive law while CPR is subsidiary legislation. Additionally, as stated above, section 163 begins with the words 'Notwithstanding any enactment or law' and was therefore not intended to be subject to any other provision of substantive legislation, far less to subsidiary legislation. Accordingly, section 163 of the **Evidence Act, 2011** is a standalone provision and a party seeking to admit a medical report into evidence therefore has the option of tendering the report pursuant to section 163 or pursuant to Part 32 of CPR.

The certificate of conviction of the magistrate

[22] The appellant contended that the fact that he was cautioned for the offence of driving without due care and attention was not relevant to prove any fact in issue in the claim. In Saint Christopher and Nevis, section 90 of the **Evidence Act, 2011** has created exceptions to the common law rule established in **Hollington v F. Hewthorn and Company, Limited, and Another**.[4] In **Hollington**, it was established that evidence of a criminal conviction was inadmissible against a defendant in subsequent civil proceedings as prima facie proof that the person

[3] The other kinds of expert evidence to which s. 163 applies are certificates or reports of analysts or consultants in the field of bacteriology, pathology, radiology or toxicology in respect of the analyst/consultant's examination or analysis of any matter.
[4] [1943] KB 587.

convicted was guilty of the conduct for which he/she was convicted. Sections 90 and 91 of **the Evidence Act, 2011** state as follows:

> "90. **Exclusion of evidence of judgments and convictions.**
>
> (1) Subject to subsection (2) and sections 91 and 92, evidence of a decision in legal or administrative proceedings is not admissible to prove the existence of a fact that was in issue in the legal or administrative proceedings.
>
> …
>
> 91. **Exceptions.**
>
> (2) … [I]n civil proceedings, section 90(1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction
>
> (a) in respect of which a review or appeal, however described, has been instituted but not finally determined;
> (b) that has been quashed or set aside; or
> (c) in respect of which a pardon has been given."

[23] Therefore, pursuant to section 91(2), as long as the certificate of the learned magistrate did not fall into any of the categories (a)-(c) set out above, it would have been properly admissible as evidence that the appellant had been convicted of the offence. As mentioned earlier, the appellant was charged with and apparently convicted of the offence of driving without due care and attention, in essence, negligent driving. This bears a direct relevance to the tort of negligence alleged against the appellant in the claim in respect of the same collision giving rise to the criminal charge and conviction. According to the learned trial judge at paragraph 52, 'the consequence must therefore be that the evidence can be used as prima facie proof of the conduct constituting the offence which was proven and placing an onus on the defendant who disputes this to prove that notwithstanding the conviction, he was not guilty of the offence nor was he negligent'. The Court agreed with the findings of the learned trial judge. This ground was without merit and did not advance the appellant's case.

Disposition

[24] The appellant not having succeeded on any of the three issues at the appeal hearing, the appeal was dismissed and costs were awarded to the respondent, fixed at two thirds of the costs awarded in the court below.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar