THE REPULIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **2014-01413**

BETWEEN

BERTLYN BARKER

Claimant

AND

EASTERN REGIONAL HEALTH AUTHORITY
NORTH CENTRAL REGIONAL HEALTH AUTHORITY
NORTH WEST REGIONAL HEALTH AUTHORITY

Defendants

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 21st February, 2018

Appearances:

Mr. Roger Ramoutar for the Claimant

Ms. Kandace Bharat for the 1st Defendant

Ms. Sushma Gopeesingh for the 2nd Defendant

Ms. Christlyn Moore for the 3rd Defendant

JUDGMENT-PROCEDURAL APPLICATION EXPERT EVIDENCE

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1. By application dated 20th February, 2018, the Claimant applied for an order for leave to be granted for the Court to appoint an independent medical expert pursuant to Part 33 of the Civil Proceeding Rules 1998 as amended (CPR). The application was dismissed on 21st February, 2018 with oral reasons given at the hearing. My reasons are as follows.

2. First the onus is on the Claimant to prepare its case and to discharge its burden to prove that the Defendants are guilty of medical negligence of course satisfying the well-known **Bolam v Friern**

Hospital Management Committee (1957) 1 WLR 582 test[1]. It is for the Claimant to arm himself with the requisite medical expertise to do so and in the appropriate case, make the appropriate application under Part 33 of the Civil Proceeding Rules 1998 (as amended) to have the relevant expert appointed to assist the court in making that determination.

3. A Part 33 application is not a speculative affair. It is an application being made by a party who can bring before the Court the relevant or identify the relevant expertise that is required to address the questions that are raised on the determination of the **Bolam** test.

4. The application that I have before me firstly does not identify the particular rule, the specific rule under Part 33 CPR under which the application is being made whether 33.5, 33.6 and/or 33.8 CPR.

5. Secondly, the Court's powers under Part 33.6[2] to appoint single experts do not discharge the onus on the Claimant to identify specifically the relevant expertise that is required to determine the

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[1] **In Bolam v Friern Hospital Management Committee** (1957) 1 WLR 582 McNair J stated :

> "But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not, is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent."

[2] Part 33.6 of the CPR provides:

> **Court's power to appoint a single expert**
> **33.6** (1) Where the court gives permission to call an expert witness or put into evidence an expert's report, it may direct that evidence is to be given by a single expert appointed—
> *(a)* jointly by the parties;
> *(b)* by the court;
> *(c)* by the court from a list prepared by the parties; or
> *(d)* in such manner as the court may direct.
> (2) If the court gives such a direction the parties must, so far as is practicable, agree—
> *(a)* the questions to be submitted to the expert;
> *(b)* the instructions to be given to him; and
> *(c)* arrangements for—
> (i) the payment of the expert's fees and expenses; and
> (ii) any inspection, examination or experiments which the expert wishes to carry out.
> (3) If the parties cannot agree these matters any party may apply to the court to decide them.
> (4) A single expert may be appointed by the court—
> *(a)* instead of the parties instructing their own experts;
> *(b)* to replace experts instructed by the parties;
> *(c)* in addition to experts instructed by them; or
> *(d)* to assess the evidence to be given by experts instructed by them.

questions raised in this case to satisfy the **Bolam** test or information to determine whether one or more experts are needed in different areas of expertise.

6. Thirdly, the application on its face is speculative. It has not identified the relevant doctor or the relevant areas of expertise to assist this Court in determining issues of negligence[3]. In fact the application refers generally to "procedure, treatment and management." These are all different areas of expertise. The particulars of negligence in the statement of case refers to improper diagnosis, preventative measures, treatment for gangrene, failing to investigate complaints and X-Ray management. What area of expertise is required in this application, I simply do not know. This is not the Court's case, it is the Claimant's case.

7. The application fails to cross the threshold of the principle test set out **Kelsick v Kuruvilla** Civil Appeal No. P 277 of 2012. In **Kelsick v Kuruvilla** Jamadar JA represents our settled law on the utility of expert evidence. Jamadar JA provided the governing principles in the case of expert evidence by the Court in granting an application under Part 33 CPR:

> "8. In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):
>
> (i) How cogent the proposed expert evidence will be; and
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> (ii) How useful or helpful it will be to resolving the issues that arise for determination.
>
> (iii) In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:
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> (iv) The cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations);

[3] In reference to paragraph 8 of the affidavit in support of the application the Claimant's attorney specifically told me that he wasn't seeking the appointment of Dr. Stephen Ramroop.

(v) Depending on the particular circumstances of each case additional factors may also be relevant, as such:

(vi) Fairness;

(vii) Prejudice;

(viii) Bona fides; and

(ix) The due administration of justice.

8. The applicant has not provided to this Court or identified the medical evidence which is cogent relevant or useful.

9. Fourth, it is not therefore proportionate at this point in time on this bare application to appoint or to engage in such a speculative exercise on such an expensive matter of appointing experts.

10. Fifth, the application has been made quite late in the day when this should have been made at least before me last year when I raised this issue. Finally a similar application in almost identical terms was made before Justice R. Mohammed on 21st January, 2016 which was dismissed and no appeal was filed against that order.

11. For those reasons the application is dismissed with no order as to costs.

Vasheist Kokaram

Judge