

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-02479

BETWEEN

Bhagwantee Singh Weeks

Claimant

AND

South West Regional Health Authority

Defendant

Before Madam Justice Avason Quinlan-Williams

Attorneys at Law:

Mr. Anand Ramlogan S.C., Alvin Shiva Pariagsingh and Chelsea J. Stewart Attorneys for the Claimant.

Ms. Krystal Kawal and Messrs Girwar and Deonarine Attorneys for the Defendant.

REASONS FOR DECISION

1. By Notice of Application filed on the 15th January, 2018 the Claimant sought the court's permission to adduce expert evidence from Dr. David Mayers (hereinafter referred to as "Dr. Mayers"). The court refused the application on the 10th May, 2018. Following are the reasons for the Court's decision.
2. The application was supported by an Affidavit from Kavita Sarran. The proposed witness statement of Dr. Mayers was annexed to the affidavit of Kavita Sarran. Attached to Dr. Mayers' proposed witness statement was an annexure labelled "BRIEF NOTE" dated the 21st of August, 2017 from Freedom Law Chambers. Paragraphs 10 and 11 of the "BRIEF NOTE" states as follows:

10. We ask that you prepare a report to be tendered into evidence in these proceedings, and to give oral evidence as an expert witness without attending, through a video link or by other means unless it is necessary to attend at the trial of these proceedings to give oral evidence as an expert witness on the following:

- i. Whether the particulars of negligence pleaded against the Defendant have any merit and if so, whether the breach of duty of care caused the death of Navin Singh, and
- ii. Your comments and rebuttal to the expert evidence filed on behalf of the Defendant by Professor Vijay Naraysingh and Dr. Harnarayan as it relates to the Deceased.

11. We ask that in your report you address each of these issues above, separately. If however, there are other matters which you think are relevant then we ask that you also include those in your report.

3. The court considered the law relating to the evidence of expert witnesses. The CCPR Part 33, particularly Rules 33.1 and 33.2 state:

Expert's overriding duty to the court

33.1

- (1) *It is the duty of an expert witness to help the court impartially on the matters relevant to his expertise.*
- (2) *This duty overrides any obligations to the person from whom he has received instructions.*

Experts—way in which duty to court is to be carried out

33.2

- (1) *Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.*
- (2) *An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.*
- (3) *An expert witness must state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded view.*
- (4) *An expert witness must make it clear if a particular matter or issue falls outside his expertise.*
- (5) *If an expert's opinion is not properly researched then this must be stated with an indication that the opinion is no more than a provisional one.*

(6) If the expert cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.

(7) If after exchange of reports an expert changes his view on a material matter such change of view must be communicated to the other party.

4. Additionally, the court considered Rule 33.10 that the expert's report must give details about the literature and other material which the expert has used in making his report.

Rule 33.10 states:

Contents of report

33.10

(1) An expert's report must—

(a) give details of the expert's qualifications;

(b) give details of any literature or other material which the expert has used in making his report;

(c) say who carried out any test or experiment which the expert has used for the report;

(d) give details of the qualifications of the person who carried out any such test or experiment; and

(e) where there is a range of opinion on the matters dealt with in the report—

(i) summarise the range of opinion; and

(ii) give reasons for his opinion.

At the end of an expert's report there must be a statement that—

(a) the expert understands his duty to the court as set out in rules 33.1 and 33.2;

(b) he has complied with that duty;

(c) his report includes all matters within his knowledge and area of expertise relevant to the issue on which his expert evidence is given; and

(d) he has given details in his report of any matters which to his knowledge might affect the validity of his report.

(3) There must be also attached to an expert's report copies of-

(a) all written instructions given to the expert;

(b) any supplemental instructions given to the expert since the original instructions were given; and

(c) a note of any oral instructions given to the expert,

and the expert must certify that no other instructions than those disclosed have been received by him from the party instructing him, his attorney-at-law or any other person acting on behalf of the party.

(4) Where expert evidence refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

5. The court also considered the decision of **N.E.W. (West Indies) Insurance Limited V David Strisiver, Asad Asphaph and MHC (2000) Limited. Civ Appeal No. P223 of 2012.** In that case the judgment of the court was delivered by Rajnauth-Lee J.A. (as she then was). The justice of appeal noted, inter alia, the expert stated that his principal task included “Rebut the testimony of Dr. Farrell”. The justice of appeal quoted from the report of the expert at material parts and concluded at paragraph 16 of the judgment:

The foregoing reveals that Mr. Gold has actively taken up the cause of his clients to such an extent that his report lacks impartiality and objectivity. He seeks to give character evidence on behalf of the First and Second Respondents. He criticizes the appellant on behavioural grounds suggesting that they lack the integrity and honour of the First and Second Respondents. He refers to the Appellant as calloused. There can be no doubt that the Gold report fails to meet the requirements of impartiality and objectivity set out in Rules 33.1 and 33.2(2).

6. It was observed that the “BRIEF NOTE” from Freedom Chambers referred to Dr. Narinesingh and Dr. Harnarayan as having filed expert evidence on behalf of the Defendant. This is incorrect as the court order dated 20th February, 2017 indicated that permission was granted to appoint Dr. Patrick Harnarayan as a joint expert. The court noted that Dr. Mayers was asked specifically to rebut the opinions of Dr. Narinesingh and Dr. Harnarayan as they related to the Deceased. Dr. Mayers’ expert opinion is contained in a report addressed to the court and dated the 30th December, 2017. The court considered the contents of that report. The report is damning almost from the first word of Dr. Mayers opinion. Nevertheless, certain aspects of the opinion raised major concerns for the court. Dr. Mayers noted that an improved awareness of the clinical presentation of necrotising fasciitis (herein after referred to as “NF”) was required by the standard of care (hereinafter referred to as “SOC”) for General Practitioners and Emergency Doctors in 2014 due to events of an underlying case which occurred in 2014.
7. Dr. Mayers proffered an opinion of what was required in 2014 at the Princes Town District Health Facility but without any knowledge of the said Health Facility. He further noted

that the improved SOC was as a result of a case in 2014 that occurred in the United States. The court was of the view that the only reason Dr. Mayers would offer such opinions about events and expectations for 2014, in the Princes Town District Health Facility from events in 2014 in the United States, was because he was purposefully attempting to fulfil his mandate of “rebuttal to the expert evidence filed on behalf of the Defendant by Professor Vijay Naraysingh and Dr. Harnarayan as it relates to the Deceased.”

8. In supporting his claim of the increased awareness of NF, Dr. Mayers noted quite astonishingly that:

The mainstream media has helped bring NF front and center before the public-at-large (see, e.g. CBS News, “Seattle boy survives flesh-eating bacteria.” (April 11, 2014); Fox News, “Florida resident dies from flesh-eating bacteria, officials confirm.” (July 30, 2014); ABC News, “Warm Water Sparks Flesh-Eating Disease Warning in Florida.” (July 29, 2014); CNN News, “A summertime flesh eating bacteria: Bacteria in warm water claims woman’s leg” (August, 2014). It is therefore no longer acceptable for a physician, who has specialized knowledge and training beyond that of the general public, to claim that because NF might be “uncommon,” and because the early signs and symptoms of NF might be “minimal” or “vague,” he or she has no duty to consider it or to include it in a patient’s differential diagnosis. Such a position, ostensibly adopted by both Dr. Nayaysing and Dr. Harnarayan, is no longer tenable and is in direct violation of SOC as it existed in 2014, the aforementioned experts’ reliance on outdated studies notwithstanding”

9. In supporting his claim that NF was front and center in 2014, Dr. Mayers referred to four (4) broadcasts from American television stations: CBS, Fox News, ABC News and CNN News. Moreover, the broadcasts were from April, 2014 to July, 2014. The Deceased was examined at the Princes Town District Health Facility in October, 2014. Dr. Mayers does not support his assertion that these broadcasts from the American television stations should have been part of the SOC in the Princes Town District Health Facility in October, 2014.
10. Further Dr. Mayers said in his opinion at page 5: “It should be further noted that neither expert identified the materials reviewed or relied upon as the basis of their opinion. As a result, I respectfully submit that such opinions are without foundation and should be weighed accordingly”. Rule 33.10 requires the expert to give details of any literature or

other material used in making his, the expert's report. This requirement is not to be considered in vacuo. The purpose must be for the court and the parties to have sufficient knowledge of what materials were used by the expert. The court considered that the instructions to Dr. Narinesingh was to "review the medical notes/records of the deceased..." (letter dated the 17th August, 2015 from Girwar and Deonarine to Dr. Narinesingh). Just a few references in Dr. Narinesingh's opinion shows that he did review the medical notes and records of the deceased and puts a lie to this assertion made by Dr. Mayers. Dr. Narinesingh's opinion dated 9th October, 2015 states "According to the progress notes, On October 25th, 2014..". At page 2, "Although not stated in the patient recorded..." and "as given in the records...". Dr Narinesingh quotes at different parts of his opinion and in detail, specifics about the patient's examination from the patient's records. Additionally, Dr. Narinesingh noted the citations of six (6) referenced material he considered to his opinion dated the 9th October, 2015. Dr. Narinesingh also noted the citations of three (3) referenced material he considered in his opinion dated 13th November, 2015. This assertion that Dr. Narinesingh did not identify the materials reviewed is patently false and should have been obvious to Dr. Mayers. The court concluded that the only reason Dr. Mayers would make such an obviously false statement is to "rebuttal the expert evidence filed on behalf of the Defendant by Professor Vijay Naraysingh and Dr. Harnarayan as it relates to the Deceased".

11. Similarly the joint expert, Dr. Harnarayan's opinion, puts a lie to Dr. Mayers' assertion that there was no reference to the materials reviewed or relied upon. It should have been obvious to Dr. Mayers that Dr. Harnarayan received joint instructions to review the medical notes for the deceased. The opinion expressed by Dr. Harnarayan states at page 3, "Final Report". At page 4, "The progress notes..". At page 8, the opinion states "...the written report of the clinical presentation to the two individual medical officers...". At page 11 "Detailed review of the 'Notes' from 'Final Report'". Additionally, Dr. Harnarayan's opinion is replete with details from the patient's notes. Dr. Harnarayan also gives the citation of fifteen (15) references he considered. It is similarly difficult for the court to conclude on what basis Dr. Mayers asserted that Dr. Harnarayan did not identify the materials reviewed or relied upon. The only conclusion the court could make for such a finding is Dr. Mayers' mandate to "rebuttal the expert evidence filed on behalf of the

Defendant by Professor Vijay Naraysingh and Dr. Harnarayan as it relates to the Deceased”.

12. The court was therefore not satisfied that Dr. Mayers could assist the court impartially, independently and unbiased as he is required by Part 33 of the CPR. The court was satisfied that Dr. Mayers obligation to the party retaining him overrode his obligation to the court as outlined in the decision **N.E.W. (West Indies) Insurance Limited V David Strisiver, Asad Asphaph and MHC (2000) Limited (supra)**. In those circumstances the court was not satisfied that Dr. Mayers’ opinion could be of any assistance to the court on the issues relevant to this claim.

Justice Avason Quinlan-Williams

JRC: Romela Rambarran

9th October, 2018