IN REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 277 of 2012

BETWEEN

CHRISTIANNE KELSICK

(An infant suing by her father and next of kin, RAWLE KELSICK)

Appellant

AND

DR. AJIT KURUVILLA

NORTH WEST REGIONAL HEALTH AUTHORITY

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondents

PANEL: P. Jamadar, J.A.

N. Bereaux, J.A.

M. Rajnauth-Lee, J.A.

APPEARANCES:

Mr. D. Mendes, S.C., Mr. S. Young and Ms. A. De Matas for the Appellant.

Mr. C. Hamel-Smith, S.C. and Ms. D. Thompson for Dr. Ajit Kuruvilla.

Ms. D. Peake, S.C., Mr. R. Nanga and Ms. A. Bissessar for the North West Regional Health Authority.

Mr. A. Sinanan, S.C. and Mr. Alsaran for the Attorney General.

DATE OF DELIVERY: 19th, March, 2013.

JUDGMENT

Delivered by P. Jamadar, J.A.

Introduction

1. The Claimant is an infant girl, who through her father and next friend, alleges that she suffered severe brain damage as a result of the medical negligence of the Defendants during the course of her birth and subsequent care and treatment. This decision arises out of a procedural appeal by the Claimant[1] and also a counter notice by the First Defendant[2] against the order of the trial judge made on the 29th November, 2012. The judge refused to grant permission to the First Defendant/Respondent to call a medical expert witness to give evidence at the trial and/or to use her expert report (pursuant to Part 33.5, CPR, 1998) and/or to grant permission to do so by way of video link from the United Kingdom (pursuant to Part 29.3, CPR, 1998). The grounds of appeal are set out in the notices of appeal of the Claimant and the First Defendant.

Disposition

2. In the circumstances of this case, the trial judge erred in the exercise of his discretion both in refusing to make the order granting permission to call Dr. Janet Rennie as an expert witness and in refusing to allow her evidence to be given by way of video link. The appropriate orders that should have been made in November, 2012 were, inter alia, the following:

(i) That permission be granted to call Dr. Janet Rennie as an expert witness and to have her prepare an appropriate expert report (in conformity with the relevant requirements of Part 33.10, CPR, 1998).

(ii) That permission be granted to allow Dr. Janet Rennie to give her evidence without attending court in Trinidad and Tobago through video link (or by such other means as the court may otherwise order).

[1] Filed on the 6th December, 2012 pursuant to Parts 64.5 and 64.9, CPR, 1998.
[2] Filed on the 20th December, 2012 pursuant to Part 64.7, CPR, 1998.

3. These orders should have been accompanied by supporting orders with respect to the expert's right to apply to the court for directions (Part 33.3) and to service (Part 33.5). In the settling of the court's orders and directions, consideration ought also to have been given to the matters provided for in Parts 33.6, 33.7 and 33.8, CPR, 1998.

4. The original application is therefore remitted to the trial judge in light of these orders and observations, for the necessary and relevant supplementary orders and directions to be given.

Appellate Role

5. The role of an appellate court in reviewing the exercise of a trial judge's discretion is well known. The decision of the trial judge must be shown to be plainly wrong.[3] A decision is plainly wrong, not only if a judge is shown to have erred in principle, by disregarding relevant considerations or taking in consideration irrelevant ones, or because the decision is against the weight of or cannot be supported by the evidence; but also when a judge is required to balance multiple considerations and the approach to and/or result of this balancing exercise is plainly wrong.[4]

6. In this case the trial judge had at least two layers of factors to consider. First the part 33.4, CPR, 1998 considerations per se, and second, how those considerations were to be interpreted and applied in light of the overriding objective[5]. In our opinion the trial judge was plainly wrong in his approach to and in the result of this balancing exercise.

Test: Part 33.4/Overriding Objective

7. **The principle to be applied in determining whether or not permission ought to be granted to allow expert evidence is as provided for in Part 33.4, CPR, 1998: "*Expert evidence must be restricted to that which is reasonably required to resolve the proceedings***

[3] See the joint opinion of the Court of Appeal in **A.G. v Regis**, Civ. App. No. 29 of 2011, at paragraphs 10 and 11.
[4] See **A.G. v Regis** and **Mann v Chetty and Patel**, (a decision of the UK Court of Appeal, October 26th, 2000, New Law 2001019201; extracted in Expert Evidence under the CPR: A Compendium of Cases from April 1999 to April 2001; Day and Le Gat; Sweet and Maxwell, 2001).
[5] Part 1.1 and 1.2, CPR, 1998.

justly". **In this regard, the overriding objective is an aid to analyzing the legitimate considerations that impact on deciding what dealing justly with a case involves.**[6]

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**[7] the proposed expert evidence will be; and

(ii) how **useful** or **helpful**[8] it will be to resolving the issues that arise for determination.

In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess **proportionality**[9] should also be weighed in the balance:

(iii) 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);

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

(iv) fairness;

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[6] See Part 1.2, CPR, 1998. Part 1.1, CPR, 1998 provides as follows:

(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, as far as practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[7] See Parts 33.1 and 33.2, CPR, 1998; and the mandate that an expert must be impartial, independent, objective and unbiased.

[8] See Part 33.1(1), CPR, 1998.

[9] See Part 1.1 (2) and **Mann v Chetty and Patel** supra.

(v) prejudice;

(vi) bona fides; and

(vii) the due administration of justice.

9. Under cogency, the objectivity, impartiality and independence of the proposed expert, together with the qualifications and experience of the proposed expert, in relation to both the specific subject under consideration and the particular issues to be resolved, are material considerations. At this stage of the proceedings a trial judge is simply required to assess how cogent the expert evidence is likely to be. That is, how convincing and compelling it is likely to be based on the stated considerations. Under usefulness or helpfulness, the technical nature of the evidence to be reconciled and the focus of the issues to be determined, as well as the familiarity of the expert with the areas under scrutiny, are material considerations, especially when that expertise is relevant for necessary fact and/or inferential findings. As with cogency, at this stage of the proceedings the trial judge is only required to assess the likelihood of usefulness or helpfulness.

10. These two factors (of cogency and usefulness/helpfulness) contain some commonalities and there will often be overlap in what one considers under these two heads. Proportionality involves a comparative assessment of the multiple considerations stated in the Overriding Objective (Part 1.1, CPR, 1998). These considerations are not exhaustive and only serve to assist the court in determining what is required to deal with a case justly.

11. In summary, for expert evidence to be appropriate in light of the CPR, 1998, and for permission to be granted to use it, that evidence ought to be relevant to matters in dispute, reasonably required to resolve the proceedings and the proposed expert must be impartial and independent and have expertise and experience which is relevant to the issues to be decided. In addition, the use of expert evidence must also be proportionate in light of the factors set out in Part 1.1, CPR, 1998. Economic considerations, fairness, prejudice, bona fides and the due administration of justice are always matters that may have to be considered depending on the circumstances of each case.

12. To ensure that there is no uncertainty we wish to clarify that the above factors are not to be understood as hurdles to be cleared when considering whether to grant permission for expert evidence. They are intended to function as guidelines to assist the court in determining whether to grant permission. We also wish to note, that the factors of cogency and usefulness/helpfulness may also be relevant at the stage in the proceedings when the trial judge has heard the evidence and is analyzing the expert evidence and determining the matter on the merits.

Issues

13. As indicated, in this case the Claimant is an infant (born on the 21st June, 2004), who alleges (through her father) that she suffered severe brain damage (diagnosed with cerebral palsy) as a result of the medical negligence of the defendants (jointly or severally). In relation to the First Defendant, it is alleged that the brain damage was caused and/or contributed to by negligence in failing to have the infant delivered at the Port of Spain General Hospital (where she could have been transferred to ICU without delay) and/or by caesarean section (instead opting for normal delivery) and/or in failing to adequately explain to her parents the risks of the choices that he made (to stay at WestShore for delivery and to deliver by normal delivery) and the options that were available. In relation to the Second and Third Defendants, it is alleged that the brain damage was caused and/or contributed to by the negligence of their servants and/or agents in failing to monitor and/or respond in an appropriate and timely manner to her distress and/or in administering the drug dexamethasone intravenously.

14. The Claimant in her statement of case and reply, duly particularized these allegations of negligence and also set out twelve medical reports upon which she intended to rely. In addition, several documents were agreed by the parties for use at the trial (since the 10th November, 2010), including reports and correspondence from Dr. Vanessa Stewart of the Neonatal Special Care Unit, Port of Spain General Hospital. Among those documents was a letter written by Dr. Stewart to the Chief of Staff of Port of Spain General Hospital (Mr. Winston Welch), which stated in relation to the administering of dexamethasone, that both oral and intravenous routes were acceptable. However, it also stated that the preparation of *"an unsterile, particulate suspension is the root of the problem". In Dr. Stewart's opinion: "Particulate matter delivered*

directly into the blood stream is likely to cause obstruction within the micro vasculature whether cerebral or otherwise. The infant had an acute, severe deterioration immediately following the drug administration. It would be unreasonable to assume that there was no link between the two".

15. Though framed in the negative, Dr. Stewart's statement that: "it would be unreasonable to assume that there was no link between the two" (that is, the administering of dexamethasone and the deterioration of Christianne), was agreed evidence before the judge that was clearly suggestive of a causal relationship between the administering of dexamethasone and the deterioration of Christianne's condition at a certain point in her care at the Port of Spain General Hospital.

16. In their defences both the First Defendant and the Second and Third Defendants deny that they (or their servants and/or agents) were negligent as alleged or at all.

17. The First Defendant, in his amended defence specifically denied *"that the infant Christianne suffered the alleged or any brain damage or cerebral palsy by reason of the actions or default of the First Named Defendant whether as alleged or at all".*[10] *He also asserted positively that "the infant Christianne's condition is a result of complications associated with her pre-term birth and/or of matters to which the First Named Defendant is a stranger".*[11] Additionally, the First Defendant asserted positively that: *"The decision to keep Mrs. Kelsick* (Christianne's mother) *at WestShore … did not cause the development of the infant's subsequent conditions".*[12]

18. This defence of the First Defendant must be seen in light of the agreed and accepted facts that: Christianne was premature and did suffer respiratory distress at birth and subsequently, and suffered cardiac arrest secondary to intracranial hemorrhage and air leak syndrome, resulting in acute renal failure (day two), which improved, but was followed by an acute large pulmonary

[10] See paragraph 7 of the Amended Defence of the First Defendant.
[11] See paragraph 9 of the Amended Defence of the First Defendant.
[12] See paragraph 11(e) of the Amended Defence of the First Defendant.

hemorrhage (day eight) and bronchopulmonary dysplasia (day fourteen), and again after improvement suffered severe acute cardiorespiratory decompensation following "the inadvertent administration of dexamethasone oral suspension by intravenous route," accompanied by renal failure and seizure activity (day 26).[13] There is no dispute that Christianne is suffering from cerebral palsy.[14]

19. Thus, while the First Defendant accepts that Christianne has been diagnosed with cerebral palsy, he is adamant that this is as a result of either pre-term birth complications or "matters to which (he) is a stranger" – which would include matters which may have taken place after discharge from WestShore, but during her care at the Port of Spain General Hospital.

20. The Second and Third Defendants in their defence are clear, that while they *"do not admit" that Christianne "suffered severe brain injury and has been diagnosed with cerebral palsy"*,[15] they positively assert that *"severe brain damage and cerebral palsy are complications associated with prematurity and the pre-existing medical condition of the infant following delivery"*.[16] In this regard, it is significant to note that these Defendants pleaded specifically that *"at the time the infant was transferred to the Neonatal ICU, she was premature ... had developed respiratory distress ... (and) upon admission the infant was in a critical condition and had a stormy ventilatory course"*.[17]

21. Indeed, the Second Defendant specifically avers (at paragraph 11 of its defence):

> *"11. This Defendant will maintain that in light of the infant's pre-existing condition, this Defendant provided competent and adequate medical care to the infant who was being managed for chronic medical conditions associated with a premature birth. These complications included difficult respiration, cardiac arrest, renal failure, acute*

[13] See the Medical Summary of Dr. Judy Seesahai, Acting Registrar, Division of Neonatology, Port of Spain General Hospital, dated 4th November, 2004. This document is among those relied on by the Claimant, and is also one of the agreed documents in the bundle agreed on the 10th November, 2010.
[14] See paragraph 7 of the Amended Defence of the First Defendant and paragraph 14 of the Defence of the Second Defendant.
[15] See paragraph 8 of the Amended Statement of Case
[16] See paragraph 14 of the Second and paragraph 5 of the Third Defendants Defences.
[17] See paragraph 5 of both the Second and Third Defendants defences.

deterioration, pulmonary hemorrhaging, chronic lung disease (bronchopulmonary Dysplasia), hyperbiliribinaemia and complicating patient ductus arteriosus."

22. On the cases stated and on the agreed documents, it is therefore clear that Christianne is suffering from cerebral palsy and that from the time of her premature birth had medical complications that were serious and protracted. Did these circumstances cause her brain damage and dysfunctionality – cerebral palsy? And in turn, what precipitated these medical circumstances? As Mr. Hamel-Smith, S.C. suggested, the following possible explanations can account for the brain damage and cerebral palsy suffered by Christianne:

(i) circumstances apart from the care and treatment by the First Defendant at the time of birth;

(ii) circumstances apart from the care and treatment by the Second and Third Defendants;

(iii) the negligent care and treatment of the First Defendant at WestShore;

(iv) the negligent care and treatment of the servants and/or agents of the Second and Third Defendants at the Port of Spain General Hospital; and/or

(v) some combination(s) of the above.

23. The Defendants each deny responsibility, but by unequivocal implication suggest that the other's care and treatment could have been the cause of Christianne's brain damage and cerebral palsy.

The Judge's Role

24. The trial judge is the primary finder of fact in a case such as this. Before issues of negligence can be considered the relevant findings of fact and conclusions of inference on issues such as causation must be determined. Where (as in this case) there are multiple potentially overlapping options, and the medical evidence and derived inferences are critical to liability, and the Defendants are all potentially implicated, a trial judge can only benefit from an impartial and relevant medical expert whose primary duty is to assist the court in objectively resolving these issues. In our opinion, on the basis of the various claims and defences, and on the respective

cases stated, denied and implied, and also on the basis of the medical reports and correspondence intended to be relied upon or agreed, this case is a fit case for the use of a relevant medical expert witness and of medical expert evidence.

25. In relation to the particular application of the First Defendant to call Dr. Janet Rennie as an expert witness and to prepare an expert report pursuant to Part 33.5 of the CPR, 1998, the trial judge ought to have granted permission for these purposes. This is because the key issues to be determined in this case involve the likely consideration and analysis of contradictory medical evidence.

Cogency, Usefulness, Proportionality

26. First, the criterion of cogency. There is nothing that suggests that Dr. Rennie will be anything other than an objective, impartial and independent expert witness. Dr. Rennie's curriculum vitae, which was before the court on the application, demonstrates that Dr. Rennie has the qualifications and experience in the relevant medical areas to be of invaluable assistance to a court in resolving the issues at hand. Not only is Dr Rennie a specialist consultant in neonatal medicine, but she is also a senior lecturer in this field. Moreover, she has conducted research in this area, including *"an active research programme with a particular interest in cerebral blood flow velocity in relation to neonatal brain injury"*, while a consultant in neonatal medicine at Cambridge University Teaching Hospitals Trust (1988 to 1995). In light only of what Dr. Stewart has opined in relation to the administering of dexamethasone, Dr. Rennie's expertise and research can only be of great assistance to a court.

27. Second, the criterion of usefulness and helpfulness to the trial judge. Dr. Rennie's specialization and experience as well as her areas of research (as indicated above), taken together in the context of her teaching and publications history, suggest that given the particular issues to be resolved in this case and the specific medical history of the infant Christianne, both while at WestShore and at the neonatal unit of the Port of Spain General Hospital, the trial judge can expect to receive significant assistance from Dr. Rennie in resolving the issues that he is called upon to decide in this case.

28. The trial judge in his management of this case allocated five (5) full trial days for the hearing of this matter. Clearly in his opinion he considered the evidence and issues sufficiently important and complex to justify this allocation of court resources. We have no reason to disagree.

29. From the Claimant's perspective this case is of great importance. The possible quantum of damages can be unprecedented. The entire future care and treatment of infant Christianne is at stake. One may say, her life, the quality of her life, is at stake. For the First Defendant, the issues are no less important, though in different ways. His professional reputation and hence his career is also at stake; as well as the possibility that he may be liable for significant damages. The Second and Third Defendants must also consider this matter important. Professional reputations and institutional reputations are at stake, as is also liability for damages and accountability to the population. For these Defendants (Second and Third) the important consideration of public trust and confidence is also on the line. Few issues evoke the public ire or awe as those that involve infants!

30 Financially, the parties stand on obviously unequal footing. We have been advised that this matter is being undertaken pro bono on behalf of the infant Christianne. The Second and Third Defendants enjoy the largesse of the State, and all things being equal the First Defendant being a professional man is in a position to fund this litigation.

31. How then do these considerations weigh in the balance, so as to deal with this case justly, ensuring that the parties are on an equal footing as far as is practicable, and bearing also in mind the mandate to deal with matters expeditiously and to take into account court resources.

Part 33: Dealing Justly

32. Part 33 provides for the calling of expert evidence and the use of expert reports only with the permission of the court and only when it is reasonably required to resolve the proceedings justly.[18] An expert witness and an expert report, though solicited by a party, are in effect a

[18] See Parts 33.4 and 33.5(1), CPR, 1998.

witness and report of the court. Part 33.1 provides that the duty of an expert is to impartially help the court on matters relevant to his/her expertise. Part 33.2 states that this duty *"overrides any obligations"* to any other party, including those from whom the expert has received instructions (and payment). Part 33.2 says that the expert evidence and report must be an *"independent product … uninfluenced as to form or context by the exigencies of the litigation"*, and that the duty of the expert is to *"provide independent assistance to the court by way of objective unbiased opinion"*. This duty to the court is reinforced by Part 33.15, which provides that an expert appointed by the court *"may be cross-examined by any party"*, suggesting that an expert is the court's witness. Moreover, Part 33.5 suggests that, consistent with the extensive powers of the court at case management,[19] the court may with or without an application call an expert witness.[20] Part 33 exists for the benefit of the court and as an aid to the mandate to determine cases justly.

33. Even though in this appeal the specific question of whether a court can call an expert on its own initiative does not arise for determination, the above analysis is important. This is because the trial judge considered the Claimant's alleged failure to call medical evidence and the fact that the application to call Dr. Rennie was made by the First Defendant, in the context of the "adversarial nature" of proceedings, of significance to his decision.

34. In our opinion the trial judge may have, in so doing, lost sight of the real purpose and value of expert evidence and reports under the CPR, 1998. Expert evidence and reports are not simply partisan, however they come into being. They are only and always primarily for the benefit of the court. In this regard, it matters not who seeks permission to obtain expert evidence or reports. What matters is whether the evidence and reports are reasonably required (Part 33.4) to help the court (Part 33.1 (1)) resolve the proceedings justly (Part 33.4).

35. In this case, irrespective of whether the Claimant, the First Defendant and/or the Second and Third Defendants had made the application, the test to apply was the same. To the extent that the judge thought otherwise, he fell into error. It is to be noted, that this was an application

[19] See Part 26.1 (1) (w), CPR, 1998.
[20] See Parts 33.5(3) and 33.6(1) and (4); and by way of comparison, see also Part 33.13 (1) – in relation to assessors.

made pursuant to Part 33.5 and NOT pursuant to Part 33. 8. Clearly therefore the court's powers under Part 33.6 fell to be considered, including the powers under Part 33.6 (4). In so far as the trial judge failed to recognize this, he also fell into error. With or without an application, a trial judge is entitled to consider the use of expert evidence and reports so that he/she can resolve proceedings justly. This consideration has nothing to do with who makes the application or whether an expert witness or report may help or hinder a party. It has to do with the court's duty to resolve the issues before it justly.

Timing

36. On the issue of the timing of the application, it is clear that the general rule is that a court ought to consider whether to use expert evidence and reports at the stage of case management.[21] However, this is not an absolute rule. Flexibility must be applied by the court because an expert is there primarily to assist the court. In this case, the fact that the application was made in October, 2012, five months before the date scheduled for trial, was in and of itself of little consequence. What mattered were the considerations of cogency, usefulness and proportionality, applied to the circumstances of the case, as have been discussed above. Always, an underlying consideration for the trial judge ought to be: ***Can this expert evidence and report help in determining the issues I am called upon to resolve?*** The question must be posed and held in a neutral way and considered from the court's perspective and responsibilities – not solely from the parties.

37. The general rule that the use of expert evidence ought to be considered at case management is there for guidance and as a matter of common sense, given the judge driven case flow management process that now operates in civil litigation. However, whenever an application to use expert evidence is made, the approach should be to consider admissibility, cogency, usefulness and proportionality, together with, when relevant, fairness, prejudice, bona fides and the due administration of justice. These must be weighed and balanced, and the tension that will sometimes arise between what is 'reasonably required' to resolve issues and the 'just resolution' of proceedings worked out on a case by case basis.

[21] See Part 33.5 (2) CPR, 1998.

38. Thus in so far as the trial judge considered it important that: *"No explanation has been given for why the **formal** application was not made at the case management stage"*, it only bears repeating that no formal application or any application at all was required.[22] The matter having been raised at case management, the trial judge was entitled, maybe even duty bound given his powers at case management and the mandate of the overriding objective, to consider whether or not expert evidence was reasonably required to resolve these proceedings justly. The powers of the court stated at Part 26, CPR, 1998 indicate that the old adversarial model of litigation is no longer applicable.

39. It may even be more desirable if the need for expert evidence is raised by a trial judge at the earliest opportunity, independently of the parties; and to even do so prior to any expert being approached or suggested by the parties. This approach is consistent with the mandate under Part 33, CPR, 1998. Such an approach would avoid unnecessary objections and applications and the unnecessary expense attendant thereto.

40. Given the cogency and usefulness of the medical expert evidence of Dr. Rennie, the importance of this case to all the parties, the possible quantum of damages involved, the complexity of the issues and the financial position of the parties; any lateness and delay in making this application was far outweighed by the compelling benefits to be derived from the expert evidence and report and the considerations to be weighed in determining how one deals with a matter justly.

41. Further, this application could have come as no surprise to either the judge or the parties. The use of expert evidence was being discussed for some time with the knowledge of the judge. The application was made on the 8th October, 2012; some five (5) clear months prior to the trial dates fixed (21st, 25th, 26th, 27th and 28th February, 2013). In our opinion, all that was required to be done in relation to granting permission to use expert evidence including the preparation of submissions and the sharing of an expert report, could quite easily have been accomplished

[22] See Part 33.5 (3) CPR, 1998.

within that five-month period. Indeed Dr. Rennie had indicated in writing her willingness to do what was required.[23]

42. The trial judge got the balancing exercise that was incumbent on him to carry out plainly wrong. In addition, the trial judge did not appear to approach the exercise in a manner that demonstrated an evaluation of cogency, usefulness and proportionality, as we have attempted to outline. In failing to do this, the trial judge fell into error, in that his approach to the application was both methodologically flawed and evaluatively disproportionate.

Evidence by Video Link

43. The CPR 1998 provides that the court may allow a witness to give evidence without attending in person through a video link or by any other means.[24] This specific power in relation to giving evidence is supported by the general powers of the court as provided by Part 26.1, CPR, 1998 as follows:

(i) 26.1(1*) "The court may (p) hold a hearing by telephone or use any other method of direct oral communication".*

(ii) 26.1(1) *"The court may (w) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective".*

44. The court has the jurisdiction and power to allow evidence by video link. When should it do so?

45. The general rule in relation to the giving of evidence at a trial (Part 29.2) is as follows:
29.2(1) *"The general rule is that any fact which needs to be proved at trial by the evidence of witnesses is to be proved by their oral evidence given in public."*

[23] See Dr. Rennie's letter of the 1st October, 2012, which was before the trial judge.
[24] See Part 29.3 CPR, 1998.

46. Evidence by way of video link is thus considered an exception to the general rule and permission ought to be granted when it is reasonable and just to do so. In this regard the factors set out in the overriding objective are among those to be considered.[25] The question to be posed in this case may be formulated as follows: ***Would permitting Dr. Rennie to give her expert evidence in this case by video link enable the court to deal with the matter fairly and justly?*** Such an approach would permit a weighing up of the pros and cons of giving the evidence by way of video link. This is a neutral evaluative approach, which is cognizant of the general rule stated in Part 29.2(1), but which also recognizes that Part 29.2 (2) states: "This is subject to – (a) to any provision to the contrary contained in these Rules or elsewhere …"; and that Part 29.3 is arguably such a contrary provision. In any event, an audio video link, given the state of modern technology that exists, can also arguably come close to 'oral evidence given in public'.

47. In the Caribbean, the Jamaican Court of Appeal interpreted and applied a similar provision in **Panton v Sun Development Ltd**.,[26] a family estate dispute. That court made reference to the House of Lords decision in **Polanski v Conde Vast Publications Ltd**.[27], a libel case. Both decisions have been helpful to us.

48. In neither of these cases was the evidence to be given that of an expert witness.

Expert Evidence by Video Link

49. In this case the trial judge was of the opinion that *"the reasons advanced on behalf of Dr. Rennie were not adequate … to justify her giving evidence by video link".* In his opinion: *"The court's advantage realized by the ability to see and assess a witness in person and the general right of a party to cross-examine a witness in person are not overridden by the 'busyness' of a witness not being able to travel from England to Trinidad in an age where direct flights are available."*

[25] See Parts 1.2 and 1.1, CPR, 1998.
[26] JM 2009 CA 42.
[27] (2005) UKHL 10.

50. In our opinion the appropriate approach to be taken in Trinidad and Tobago in relation to experts is as follows:

(i) The primary question is whether permitting the giving of evidence by video link in the circumstances of the particular case will enable the court to deal with the matter fairly and justly.

In answering this question the court should have regard, inter alia, to the following:

(i) the general rule and the advantages to be gained by hearing and seeing in person a witness testifying, especially in relation to assessing demeanour – where that is likely to be a relevant consideration.

(ii) the use of a video link to give evidence is explicitly recognized and accepted by the CPR, 1998 (and is therefore not an indulgence).

(iii) the use of a video link to give evidence is technologically appropriate and increasingly feasible.

(iv) the convenience and cost saving considerations that may arise through the use of a video link.

(v) the value and usefulness of the evidence of the expert that may be made available to the court to assist it in resolving the proceedings justly.

(vi) the degree of control over an expert witness that may be required and that a court can exercise over the witness at a remote site.

(vii) the practicality of the process given logistical considerations, such as the nature and volume of the evidence, and what may be involved in testifying.

(viii) whether the use of a video link to give evidence will likely be beneficial to the effective, efficient, fair and economical disposition of the matter, due weight being given to the Part 1.1 (2) CPR, 1998 considerations.

(ix) any particular unfairness or prejudice or injustice that may result from the use of a video link to give expert evidence.

51. Applying these principles to the giving of Dr. Rennie's evidence by way of video link, we are of the opinion that the trial judge was plainly wrong in refusing to permit it.

52. In this case, where Dr. Rennie is a foreign based medical expert who has apparently had no prior dealings with the parties, there is likely to be little advantage to seeing and hearing her testify in person in so far as demeanour and credibility are concerned. She is the court's independent, impartial witness and a professional who, from the evidence, has no personal, professional or partisan interest in the outcome of this matter. The video link technology is available in England and here in Trinidad and Tobago and can be easily accessed for this purpose. Dr. Rennie has used it as a means to give evidence before, and is presumably familiar with both technological aspects and litigation conventions in relation to its use. Giving evidence by video link in this case is both convenient and cost saving. Costs-wise, assuming five days of trial, the costs of flying directly to and from England, securing accommodation, providing sustenance, and including the cost of absenteeism from her professional life in England, and all other things being equal, it must be preferable to use a video link. The value and usefulness of Dr. Rennie's evidence to the trial judge and to the parties in helping to resolve the issues justly have already been explained. We also do not see that the trial process will be jeopardized because of any lack of control by the trial judge over Dr. Rennie being present at a remote location.

53. Further, Dr. Rennie is, on the evidence before us, a reputable professional of the highest standing. Her evidence is likely to be mainly technical and evaluative. On the matter of logistical practicality, one assumes that within a few days the relevant bundles of documents

properly indexed and paginated can be sent to Dr. Rennie for her use during examination and cross-examination. In relation to the proportionality considerations, these have already been explored and operate in favour of using a video link. Finally, no suggestion of unfairness, real prejudice or injustice to any party has been raised or is foreseeable. In our opinion the potential benefits of Dr. Rennie's evidence to the trial judge so far outweigh any limiting considerations, that we have no hesitation in the view that the trial judge should have allowed this expert evidence to have been given by video link on the application that was before him.

Abuse of Process

54. Finally, it has been argued that because the Claimant filed this appeal when the First Defendant made the original application, this appeal is an abuse of process. We disagree.

55. There is no jurisdictional limitation in relation to who can appeal a court order as between parties to litigation. That much was agreed. Why then should it be an abuse of process if the Claimant, who adopted a neutral position on the original application and we are told did bring to the court's attention the jurisdiction of the court to make an order for expert evidence and reports on its own motion, lodges this appeal? The court declined to make the order, and the Claimant thinks that the court was wrong to do so given the relevant considerations and the circumstances of this case. There is no abuse in such an appeal.

Conclusion

56. This appeal is allowed and the orders of the trial judge set aside. The orders that should have been made in November 2012 are as set out above, together with a direction to the judge to consider what further supporting orders or directions may be appropriate in light of this ruling. The parties will now be heard on the issue of costs.

P. Jamadar
Justice of Appeal

I have read the judgment of P. Jamadar, J.A. and for the reasons given I agree that the appeal be allowed and the orders of the trial judge be set aside.

N. Bereaux
Justice of Appeal

I have also read the judgment of P. Jamadar, J.A. and for the reasons given I also agree that the appeal be allowed and the orders of the trial judge be set aside.

M. Rajnauth-Lee
Justice of Appeal