Trinity Term

[2019] UKPC 33

Privy Council Appeal No 0044 of 2018

JUDGMENT

Bergan (Appellant) vEvans (Respondent)
(St Christopher and Nevis)

From the Court of Appeal of the Eastern Caribbean Supreme Court (St Christopher and Nevis)

before

Lord Carnwath

Lord Hodge

Lady Black

Lord Briggs

Lord Kitchin

JUDGMENT GIVEN ON

1 July 2019

Heard on 9 May 2019

Appellant	Respondent
Damian Kelsick	James Guthrie QC
Garth Wilkin	Angelina Gracy Sookoo-Bobb
(Instructed by Myers Fletcher & Gordon)	(Instructed by Simons Muirhead & Burton LLP)

LORD BRIGGS:

Overview

1.
This appeal, brought with the permission of the Court of Appeal of the Eastern Caribbean, is concerned with the procedure for the deployment of medical expert evidence in personal injury litigation in St Kitts and Nevis. Specifically, the issue is whether the special provisions about the attaching of medical reports to a statement of claim for personal injuries in the Civil Procedure Rules 2000 ("the CPR"), and the special provision for admissibility in evidence of written medical reports in section 163 of the Evidence Act 2011, displace what, read on its own, appears to be a general rule,

applicable to all expert evidence, that it may not be deployed without the court's permission, in rule 32.6 of the CPR.

2.
The Board approaches issues about civil procedure and the law of evidence with considerable restraint, all the more so where it is, as here, invited to depart from the broadly uniform view about those issues taken by the courts below. Those courts are generally better informed than the Board about the particular conditions and norms of civil litigation in which the rules of procedure and the law of evidence have effect. Even in a case, such as the present, where Part 32 closely follows the slightly earlier provision about expert evidence in the Civil Procedure Rules of England and Wales, it forms part of a body of procedural rules which are by no means the same, read as a whole, and regulates the conduct of civil proceedings in a jurisdiction with which the courts below are much more familiar than is the Board. It by no means follows therefore, merely because a rule is, like rule 32.6, worded in almost identical terms as its English ancestor, that it must be assumed to have precisely the same meaning, effect and scope.

3.
As will appear, on the facts of the present case, the dictates of fairness, common sense and justice militate strongly in favour of the outcome reached by the courts below. Nonetheless, as the Court of Appeal acknowledged, the route by which that outcome was reached involves an interpretation of the CPR and the Evidence Act (and their potential interaction) which gives rise to an important point of practice, likely to have consequences across the whole of the important field of personal injury litigation. It is for that reason, rather than because of the particular merits of this case, that the Court of Appeal thought it appropriate to give permission to appeal to the Board.

The Facts

4.
The respondent Sheryl Evans was involved in a road traffic accident on 15 August 2006, in which she alleges that she suffered a neck injury due to the negligent driving of the appellant Keithlyn Bergan.

5.
The respondent issued proceedings in August 2012. In her Amended Claim Form she described her injury as:

"'Chronic myofascial neck pains' and 'cervical disc disease as a result of disc herniation with mass effect on the spinal cord …'."

Since she wished to rely upon the evidence of her attending physician Dr Mervyn Laws, she attached to her claim form four successive reports from Dr Laws about her injuries, as required by CPR rule 8.9(3).

6.
In his defence filed in October 2012 the appellant pleaded that he "neither admitted nor denied" the allegations of personal injury, since he had no knowledge thereof. More generally, he denied that the claimant had suffered any injury, loss or damage as a result of any negligence on his part.

7.
Although there was a Case Management Conference in December 2012, which gave directions for trial, the court did not at that stage make any case management provision about expert evidence. In March 2013 the respondent applied for, but was refused, permission to call Dr Laws as her expert

medical witness, to give evidence in accordance with his reports, as attached to the Amended Claim Form. The documents before the Board do not explain why this application was refused, but the Board was informed by Mr Guthrie QC for the respondent, upon instructions, that the application had been refused because, although summarised in Dr Laws' reports, his curriculum vitae had not been set out in the affidavit in support of the application.

8.
The respondent did not appeal that refusal, or make a fresh application for permission to deploy Dr Laws' evidence under rule 32.6 with a further affidavit setting out his CV, because, so the Board was informed, her legal team had by then concluded that, those reports having been attached to her Amended Claim Form, no such permission was required.

9.
In April 2013 the respondent filed and served a further medical report, from a Dr Hendrickson, indicating by a Supplemental List of Documents an intention to rely upon it. Again, no application for permission to do so was made under rule 32.6 because the respondent's legal team conceived that section 163 of the Evidence Act made it unnecessary for her to do so, there having been no objection to the admissibility of Dr Hendrickson's report under section 163(2)(c)(ii).

10.
No issue about the deployment of expert evidence was raised at the pre-trial review on 15 November 2013, nor (in response to an inquiry from the trial judge), on 16 December 2013, the day before the trial was listed to commence.

11.
At the beginning of the trial on 17 December, objection was taken on the appellant's behalf to the admission of the expert evidence of both Dr Laws and Dr Hendrickson, on the basis that permission to do so had not been obtained by the respondent under Part 32. The trial was adjourned for written submissions about those (and other procedural) issues. In August 2014 the trial judge Ramdhani J (Ag) ruled that the evidence of both doctors could be deployed at the resumed trial. He held that Dr Laws' evidence could be relied upon by the respondent because of the appellant's failure to deal with it in his defence, contrary to rule 10.6, even though permission to rely upon it under rule 32.6 had been sought and refused. As to Dr Hendrickson's evidence, the judge ruled that section 163 of the Evidence Act enabled the respondent to rely upon his report without needing to obtain permission under rule 32.6. The Court of Appeal (Pereira CJ, Blenman and Thom JAA) agreed with that analysis.

The Law

12.
This appeal turns entirely on the interpretation of the CPR and the Evidence Act, and the inter-relationship between them. The relevant provisions of the CPR are as follows:

"PART 1

The Overriding Objective

(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, so far as is practicable, that the parties are on an equal footing,

b. saving expense,

c. dealing with cases in ways which are proportionate to the -

i. amount of money involved;

ii. importance of the case;

iii. complexity of the issues; and

iv. 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.

Application of overriding objective by the court

1.2 The court must seek to give effect to the overriding objective when it -

a) exercises any discretion given to it by the Rules, or

b) interprets any rule.

Duty of parties

1.3 It is the duty of the parties to help the court to further the overriding objective.

Part 25 deals with the court's duty to forward the overriding objective by active case management."

13.
Part 8, headed "How to Start Proceedings", sets out at rules 8.6 and 8.7 the general requirements for setting out the claimant's case in the claim form or statement of claim. Rule 8.7A provides that:

"The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree."

14.
Under the heading "Special Requirements applying to claims for personal injuries", rule 8.9 provides (so far as is relevant) as follows:

"8.9(3) 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.

(4) Paragraph (3) does not restrict the right of the claimant to call other or additional medical evidence at the trial of the claim."

15.
Part 10 deals with the requirements of a Defence. Under the heading "Defendant's duty to set out case" rule 10.5 sets out the general requirements as follows:

"(1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim -

(a) are admitted;

(b) are denied;

(c) are neither admitted nor denied, because the defendant does not know whether they are true;

and

(d) the defendant wishes the claimant to prove.

(5) If in relation to any allegation in the claim form or statement of claim, the defendant does not -

(a) admit it; or

(b) deny it and put forward a different version of events;

the defendant must state the reasons for resisting the allegation."

16.
Under the heading "Special requirements applying to claims for personal injuries", rule 10.6 provides as follows:

"(1) This rule sets out additional requirements with which a defendant to a claim for personal injuries must comply.

(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.

(3) If the defendant intends to rely on a report from a medical practitioner to dispute any part of the claimant's claim for personal injuries and the defendant has obtained such a report, the defendant must attach that report to the defence."

17.
Mirroring rule 8.7A, rule 10.7 provides, under the heading "Consequences of not setting out defence" as follows:

"10.7 The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree."

18.
Part 25 headed "Case Management - The Objective" requires the court to further the overriding objective by actively managing cases. Specific examples of active case management include the following:

"25.1 … (b) considering whether the likely benefits of taking a particular step will justify the cost of taking it; …

(k) giving directions to ensure that the trial of the case proceeds quickly and efficiently;

(l) identifying the issues at an early stage …"

19.
Part 32 headed "Experts and Assessors" deals comprehensively with the provision of expert evidence to assist the court. Under the heading "General duty of court and of parties" rule 32.2 provides that:

"Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly."

20.
Under the heading "Court's power to restrict expert evidence", rule 32.6 provides as follows:

"(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.

(3) When a party applies for permission under this rule -

(a) that party must name the expert witness and identify the nature of his or her expertise;

and

(b) any permission granted shall be in relation to that expert witness only.

(4) The oral or written expert witness' evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.

(5) The court must direct by what date the report must be served."

Rule 32.7 provides that expert evidence is to be given in a written report unless the court directs otherwise, but that this rule is subject to any enactment restricting the use of hearsay evidence.

21.
The Evidence Act 2011 makes new provision about evidence in (inter alia) civil proceedings. Section 163, headed "Admissibility of medical certificates and reports" provides as follows:

"(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;

(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."

22.
The Evidence Act 2011 replaced an evidence regime, in force at the time of the inauguration of the CPR in 2002, which broadly replicated the English law of civil evidence. In particular, section 12 of the Evidence Act Cap 3.12 (for St Kitts and Nevis) provided that:

"Every document, which, by any law now in force, or hereinafter to be in force, is or shall be admissible in evidence in any Court of Justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any court in the state, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence."

Analysis

23.
An important part of the reasoning of the courts below for their conclusion that the respondent was entitled to rely at trial on the reports of Dr Laws was that the appellant had failed to plead properly in relation to those reports in its defence, contrary to rule 10.6, by a mere non-admission, upon the basis that he had no knowledge of the particulars of the injuries alleged. At para 33 the judge said:

"In this case the defendant did not, in his defence, dispute any part of any of the medical reports which were attached [to] the claim form. This being the case, the defendant is now barred from taking any issue with the medical reports of Dr Laws which were attached to the claim form."

24.
Mr Kelsick for the appellant submitted that the judge's analysis (with which the Court of Appeal agreed) was wrong. Rule 10.6 did not deprive the defendant to a personal injury claim of the ordinary right simply not to admit (rather than admit or deny) an allegation of fact where he had no knowledge of its truth or falsity. In the context of a system of civil procedure which did not provide for pre-action

protocols, a construction of rules 10.5 and 10.6 which prohibited the defendant to a personal injuries claim from not admitting particulars of the claimant's injuries, as set out in the claimant's annexed medical reports, would have draconian consequences. A defendant might typically be faced with detailed particulars of injuries about which he could not be expected to know anything until he had requested and obtained an opportunity for his own medical expert to carry out an examination of the claimant. Rule 10.6 was not intended to derogate from a defendant's ordinary right to plead a non-admission, set out in rule 10.3(c). Bearing in mind that the time provided for service of a defence by rule 10.3(3) is 28 days, and that the parties may only agree an extension up to 56 days, under rule 10.3(7), if rule 10.6 does prohibit the defendant to a personal injuries claim from not admitting the detailed contents of the claimant's attached medical reports, then such defendants will generally find themselves hard-pressed to plead compliant defences within the ordinary time periods specified by the CPR, unless there happens to have been a co-operative process, including a medical examination of the claimant by the defendant's medical expert, prior to the issue of proceedings.

25.
This is a sensible and forceful submission, but the Board is nonetheless persuaded that the rigorous interpretation of rule 10.6 by the courts below, prohibiting the mere non-admission of the matters alleged in the claimant's attached medical report, is correct. The Board's reasons are as follows.

26.
Rule 10.6(2) is clear and prescriptive in its language, in relation to the particular category of civil claims consisting of a personal injuries claim where the claim form or statement of claim has a medical report attached. The defendant "must state in the defence" whether all or part of the medical report is agreed and, if a part is disputed, the nature of the dispute. The contrast between rule 10.5 (which expressly permits non-admissions) and rule 10.6 (which does not) is sharp, and makes it impossible either to imply a right to plead a non-admission into rule 10.6, or to treat such a right as available even in personal injury cases, by reason of rule 10.5. Furthermore, rule 10.6(3) requires a defendant who intends to rely on a report from his own medical practitioner to dispute any part of the claimant's claim for personal injuries to attach any report which he has obtained to his defence.

27.
The clear purpose of these provisions, which impose front-loading burdens on claimants and defendants in personal injury cases, is to require the parties at the earliest stage, before the court undertakes detailed case management, to flesh out the detail of the dispute (if any) about the extent of the claimant's injuries, rather than to leave the ambit of that dispute to emerge as the case proceeds towards trial, or even to appear for the first time during cross-examination, all under the cover of a pleaded non-admission. Medical expert evidence may be relevant not only as to the extent of personal injuries but as to the causes of them and those issues frequently form a central part of the issues for determination at any trial. Furthermore, an early identification of the ambit of the dispute about the claimant's injuries is likely to facilitate the resolution of the case by mediation or some other form of alternative dispute resolution.

28.
While it is true that 28 days would be a very tough timetable in which a defendant could respond in detail to particulars of medical injuries notified for the first time in a medical report attached to the claim form, the parties are both required by rule 1.3 to help the court further the overriding objective, and the court has power to extend the time for service of a defence beyond the 56 day period upon which the parties may agree. If a claimant declined to co-operate in submitting to an early medical examination by the defendant's expert, then it may easily be supposed that the court would be

generous in affording the defendant an extension of time. Furthermore, although there are no formal pre-action protocols in force in St Kitts and Nevis there is no reason to suppose that a claimant in a personal injuries claim will not typically provide reasonably detailed information about their injuries to an intended defendant before the commencement of proceedings, together with an opportunity for a medical examination, even before the claim form is served. There is nothing to stop a defendant threatened with such a claim from seeking a medical examination of the claimant before the issue of proceedings, and any lack of co-operation in that regard by the claimant may, again, easily justify the court in giving a defendant generous extra time to prepare and serve a properly particularised defence.

29.
By contrast, the construction of rules 10.5 and 10.6 which preserves a defendant's right not to admit particulars of the claimant's injuries set out in an attached medical report because the defendant does not at that stage have knowledge of them, would subvert the obvious purpose of the special requirements applying to claims of personal injuries both in rule 8.9 (affecting claimants) and rule 10.6 (affecting defendants). In particular, uncertainty as to the ambit of the dispute in relation to the claimant's injuries is likely to impede the court's duty, under rule 32.2, to restrict the expert evidence to that which is reasonably required to resolve the proceedings justly.

30.
It follows that the Board agrees with the judge's conclusion that the appellant's defence was defective when served and, because no application to amend it was made thereafter, that it remained defective until the date fixed for the trial.

31.
The second question is whether that defect in the defence of itself enabled the claimant to establish its case at trial as to the extent of her personal injuries. It is not clear to the Board from reading the relevant part of the judge's judgment (quoted at para 23 above) whether the judge thought that the consequence of the defendant's failure to deal with Dr Laws' reports in his defence meant that their contents were deemed to be admitted, so that no evidence (written or otherwise) was needed to prove that part of the claimant's case, or whether the defective defence simply entitled the claimant to prove her case as to the extent of her injuries by relying on Dr Laws' reports, without needing permission to deploy them under rule 32.6, and indeed despite having had permission to do so previously refused.

32.
The Board can see no route to the judge's conclusion by means of a deemed admission by the defendant of that part of the claimant's case. Nothing in the CPR providing for such a deemed admission was drawn to the Board's attention, and the general rule is that, leaving aside judgment in default, a claimant faced with a defective or even non-existent defence still has to prove her case, even though that may typically be achieved in a relatively summary way, and the court may in such circumstance prohibit the defendant, as a matter of discretion, from taking any active steps to resist that part of the claimant's case, whether by cross-examination or the deployment of evidence by way of challenge.

33.
Nor is the Board persuaded by the alternative analysis, namely that a failure by a defendant to plead, in conformity with rule 10.6, to the claimant's attached medical report means that the claimant can then deploy that report in evidence without the need to seek permission under rule 32.6. In short, the

ability to deploy the attached medical report in evidence is not the automatic consequence of a defective defence. Deployment of expert evidence is governed by rule 32.6, and is subject to the court's control of case management.

34.
A defendant's failure to plead, as required by rule 10.6, to a claimant's attached medical report will however, in the Board's view, frequently constitute a strong reason for the court to give permission to the claimant to deploy the attached report in evidence for the purpose of proving its case, under rule 32.6. Indeed, the Board finds it most surprising that the court did not give that permission when the respondent applied for it in March 2013, some four months after the service of the defective defence, and (apparently) in the absence of any application by the defendant to amend to bring it into conformity with rule 10.6. Although that refusal was not appealed (because, apparently, the respondent thought it unnecessary to do so), it created no issue estoppel. Since it was based on the narrowest technical objection, namely that Dr Laws' CV was contained in his reports rather than in the accompanying affidavit, that defect, if it really is a defect, could now easily be remedied and Dr Laws' reports admitted into evidence for the simple reason that, nearly seven years after the service of the claim form and the attached reports, the appellant has still not identified what, if any, parts of them are in dispute.

35.
The courts below did not hold, nor did the respondent submit to the Board, that the mere attaching of medical reports to the claim form (or statement of claim) has the effect of enabling a claimant to deploy them at trial, regardless of whether the defendant complies with, or is in breach of, rule 10.6. That must be correct. The regime for pleading in personal injury cases constituted by the combined effect of rules 8.9 and 10.6 is merely aimed at establishing a convenient way of identifying the issues susceptible to medical evidence, rather than identifying the evidence which the court may permit to be deployed for the resolution of those issues. In the ordinary course, where a claimant attaches medical reports to her claim form or statement of claim, a defendant may well respond by attaching medical reports of his own to his defence. But the court may well conclude that the ambit of the dispute is such that it may more justly and proportionately be resolved by the use of a single expert, independent of either of the parties, as Mr Kelsick informed the Board commonly occurs. More generally, rule 8.9(3) does not limit the claimant to attaching only a single medical report to her claim form, or reports from a single medical expert. In the present case the claimant attached four of them. It would be an extraordinary restriction upon the court's duty and power to limit expert evidence to that which is reasonably required to resolve the proceedings justly if the claimant could secure the right to deploy any number of experts of her choice, merely by attaching their reports to her claim form.

36.
The Board can see no good reason why the CPR should be interpreted as conferring that disproportionate right upon a claimant merely because the defendant's defence failed to comply with rule 10.6. On the contrary, in such a case, where the defendant had failed to identify the ambit of any dispute about the claimant's injuries, it would be likely that less, rather than more, expert evidence would be required to be deployed at any trial.

37.
The practical outcome of this appeal, in relation to Dr Laws' evidence, is therefore that permission to deploy his evidence is still required under rule 32.6 but that obtaining it, even at this late stage, ought to be a formality, subject only to the question, which the Board has not been invited to examine,

whether in the absence of any pleaded challenge to his reports by the defendant, the deployment of all four of them, or the attendance of Dr Laws at trial, is really necessary.

38.
Turning to Dr Hendrickson, the conclusion of the courts below that the claimant is at liberty to deploy his expert evidence was based upon their reasoning that, where section 163 of the Evidence Act renders the written report of a medical practitioner admissible as documentary evidence in civil proceedings, the party relying upon it may deploy it as expert evidence in civil proceedings without the need to obtain permission to do so under rule 32.6. Their conclusion, supported by the respondent's submissions to the Board, was that section 163 constitutes an entirely separate route to the deployment of the evidence of registered medical practitioners which by-passes the requirements of rule 32.6, both because it is a specific provision about a narrow type of expert evidence which ousts the generality of rule 32.6, containing its own procedure for court control in the face of objections, and because section 163(1) provides that it is to apply "notwithstanding any enactment or law" to the contrary.

39.
The Board respectfully disagrees with that analysis. Section 163 is about the admissibility, or otherwise, of documentary medical evidence, as opposed to the traditional requirement to adduce oral testimony. That is a cold question of law about admissibility. It has nothing at all to do with the quite separate case management question as to what evidence a party is to be permitted to adduce (whether in oral or documentary form) by way of expert evidence, within the general duty of the court and the parties to limit expert evidence to that which is reasonably required to resolve the proceedings justly, under rule 32.2. That may be described as a deployment question rather than a matter of admissibility. The two concepts are entirely distinct, and the provision for admissibility of documentary medical evidence in section 163 does not override the requirement of permission for its deployment under rule 32.6 because the two provisions are not in any way inconsistent with each other.

40.
Starting with section 163, it is important to note that its operation in rendering admissible a documentary medical report or certificate under subsection (1) is entirely mechanical and admits of no discretionary intervention by the court. The document is admissible if it is of a type identified in subsection (1) but only if the conditions in subsection (2) are satisfied, and those conditions include non-objection by any other party to the proceedings within seven days from the service of the document: see subsection (2)(c)(ii). If there is objection, then the document is simply not admissible pursuant to the Act. If there is no objection, it is admissible. The exercise of the court's statutory power under section 163(4) to require a person tendering such a document in evidence to attend and give evidence does not render the document inadmissible.

41.
Turning to rule 32.6, read in conjunction with the court's and the parties' general duty to limit expert evidence in rule 32.2, these provisions were intended (as in England and Wales) to work a sea-change in the approach to expert evidence in civil proceedings by subjecting the entirety of the deployment of expert evidence to active judicial control by way of case management, in the pursuit of the overriding objective and, in particular, the need to ensure proportionality and economy in the resolution of civil disputes. At the time when Part 32 was introduced for St Kitts and Nevis in 2002 its law of evidence was broadly the same as that in England and Wales, and it cannot sensibly be supposed that the

underlying purpose of rule 32.6 was narrower in those islands than it was in England and Wales, where that fundamental reform was originally introduced, as a result of Lord Woolf's Reports.

42.
To treat section 163 as a separate gateway to the deployment of medical expert evidence in civil proceedings (rather than merely rendering documentary medical evidence admissible) would be in the Board's view to drive a coach and horses through the beneficial effect of the introduction of court case management control of expert evidence under rule 32.6, when there is nothing in the language of section 163 to suggest that this is what was intended.

43.
If section 163 were to constitute a by-pass around rule 32.6, then any party could (if the other party failed to object in time) use it as a means for the deployment of any amount of medical expert evidence from any number of registered practitioners, without the court being able to do anything about it apart from require the persons tendering the documents to attend court and give evidence. This would, in particular, enable parties, by non-objection to each other's tendered documents under section 163(2)(c), to burden the court and the proceedings, at their own whim, with a riot of disproportionate expert evidence, leaving the court powerless to do anything about it. Yet it is central to the new civil procedural culture introduced by the CPR that the parties are no longer at liberty to conduct their civil disputes in a disproportionate or inappropriate manner, because of the court's power and duty actively to case manage the proceedings in furtherance of the overriding objective.

44.
For those reasons, the respondent did not obtain the right to deploy Dr Hendrickson's report by way of expert medical evidence in these proceedings merely because it fell within the confines of section 163(1) and the conditions in subsection (2) (including non-objection by the defendant) were satisfied.

45.
But that is not the end of the matter. In his judgment dated 20August 2014 the judge (at para 30) having indicated that he had read Dr Hendrickson's report in full, directed that the claimant could deploy his report in evidence and further directed that Dr Hendrickson attend to give evidence and be cross-examined. No doubt he did so thinking that section 163, rather than rule 32.6, was the basis of his jurisdiction to make those directions. Nonetheless they plainly permit the respondent to deploy his evidence (both in documentary and oral form) at trial. Dr Hendrickson had a real contribution to make as to the precise nature and consequences (in terms of therapy) of the respondent's injuries, beyond the evidence to be found in Dr Laws' reports, and the Board can think of no good reason why, if the matter had been approached, as it should have been, as an application for permission under rule 32.6, permission should have been refused, all the more so since, by the date listed for the trial, the appellant had known for some time that the respondent wished to rely upon Dr Hendrickson's evidence, and had taken no steps, in particular at the pre-trial review or in response to the judge's question to the parties on the day before the trial, to raise any objection to its deployment. Thus the judge's decision to permit Dr Hendrickson's report to be deployed and to require him to attend to give oral evidence in fact satisfied the requirements of rule 32.6, objectively viewed, and should not now be set aside. The appellant made criticisms of parts of Dr Hendrickson's report as containing opinions about matters outwith his personal knowledge, but these are matters of detail which should be resolved at trial.

46.

In the absence of any explanation to the contrary from the appellant, the Board regards the objections taken at the outset of the trial to the deployment of Dr Laws' and Dr Hendrickson's evidence as something in the nature of an ambush, far removed from the defendant's duty, as a party to civil proceedings, to help the court to further the overriding objective. The Board is provisionally minded to take that into account when dealing with the costs of this appeal, after receiving the parties' written submissions.

Outcome

47.
For the reasons given, the Board will humbly advise Her Majesty that this appeal should be allowed, to the extent indicated above.