

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

2
3 Cause No: G336/2006
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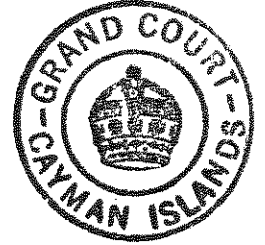
5 **BETWEEN:**

6 **THOMAS FARRELL**

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8 **FIRST PLAINTIFF**

9
10 **CATHERINE FARRELL**

11
12 **SECOND PLAINTIFF**



13
14 **AND:**

15 **CHARLES BODDEN**

16
17 **DEFENDANT**

18
19
20 **Appearances:**

21 **Ms. Denise Owen and Mr. Kyle Broadhurst**
22 **of Broadhurst LLC on behalf of the**
23 **Plaintiffs**

24 **Sir Richard Cheltenham Q.C. instructed by**
25 **Mr. Waide DaCosta on behalf of the**
26 **Defendant**
27

28 **Before:**

The Hon. Mr. Justice Charles Quin

29 **Judgment on Liability:**

31st May 2013

30 **Judgment on Quantum:**

20th September 2013

31 **Plaintiffs' Written Costs Submissions:**

9th October 2013

32 **Defendant's Written Costs Submissions:**

23rd October 2013

33 **Plaintiffs' Reply Closing Costs Submissions** **4th November 2013**

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35 **RULING ON COSTS**
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INTRODUCTION

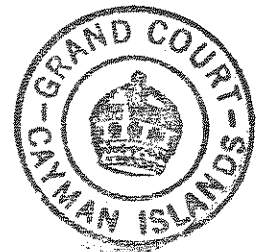
1. In my Judgment on Liability dated the 31st May 2013 I awarded Judgment for the Plaintiffs subject to a thirty percent (30%) deduction for their contributory negligence.

2. On the 20th September 2013 I awarded the Plaintiffs a total of US\$1,749,898.73 in respect of general and special damages with interest thereon. I made an Order that the award itself, interest thereon and the costs should all be subject to the thirty percent (30%) deduction applied in respect of the Plaintiffs' contributory negligence. My division of liability for costs was intended to reflect the division of fault for the occurrence of the accident which led to the Plaintiffs' loss and damage.

3. In finalising the Order the Plaintiffs raised the fact that they had not been given an opportunity to be heard on the question of costs. The Cayman Islands Court of Appeal in *E. E. Smith (Administrator of the Estate of S. Smith Jr.) v. J.D. Smith (Administratrix of the Estate of A. Smith Jr.)* [2004-2005] CILR 225, held at page 226:

“Until an Order had been drawn up, entered and perfected, he (the Judge) could always withdraw or modify it, even when he had delivered written reasons for it as an appeal was not from the reasons given but from the Order made.”

Therefore, it was agreed that both parties would present their submissions on costs in writing.

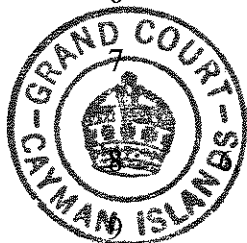


RELEVANT SUMMARY

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2 4. On the 15th August 2006 the Plaintiffs filed their Writ of Summons and Statement
3 of Claim. On the 17th November 2006 the Defendant entered his defence and on the
4 11th December 2006 the Plaintiffs served their Reply.

5 5. The Defendant's defence did not specifically plead contributory negligence, but it
6 did aver that the Plaintiffs were negligent in recklessly and carelessly darting into
7 the path of oncoming traffic.



10

On the 17th November 2006, the Defendant filed his Amended Defence, pleading
that the Plaintiffs were the authors of their own misfortune and specifically
contending that the Plaintiffs' negligence led to the accident as alleged, and the
resultant loss and damage in part or in whole.

11

12 7. On the 7th May 2007 Levers J. made an Order for directions and for discovery and
13 inspection, directing that subsequent to the exchange of experts' reports either party
14 would be at liberty to apply for the matter to be set down for trial.

15 8. On the 27th November 2008 the Plaintiffs filed a Notice of Intention to Proceed and
16 on the 17th March 2011 the Plaintiffs filed a Notice to fix a trial date.

17 9. The trial on liability and quantum was heard from the 27th July 2012 to the 3rd
18 August 2012. There was insufficient time to deal with all the issues relating to
19 quantum and, accordingly, it was agreed between the parties for the Defendant to
20 make written submissions in November 2012 and for the Plaintiffs to provide their
21 written submissions in January 2013. This led to my judgment on liability in May
22 2013 and on quantum in September 2013 as set out in paragraphs 1 and 2 above.

THE PLAINTIFFS' POSITION

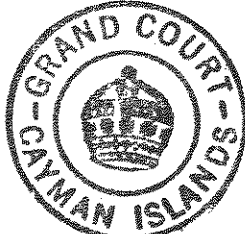
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10. The Plaintiffs rely on GCR O.62 r.4 which states that the overriding objective of this Order is that a successful party to any proceedings should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economic, expeditious and proper manner, unless otherwise ordered by the Court and GCR O.62 r.4(5) which states that costs should follow the event.

11. The Plaintiffs contend that as contributory negligence is not a separate issue but rather an integral part of apportioning liability the Plaintiffs are entitled to their costs in full.

12. The Plaintiffs rely upon the English Court of Appeal decision of *Onay v. Brown* [2009] EWCA civ. 775 where the Appeal Court established the principle that the issue of contributory negligence was part of the trial of liability as a whole and could not be regarded as a separate issue. The Plaintiffs also highlight the fact that *Onay v. Brown* was followed in *Sonmez v. Kebabery Wholesale Ltd.* [2009] EWCA civ. 1386, again by the English Court of Appeal. Counsel for the Plaintiffs submits that applying the principle in *Onay v. Brown*, and looking at the global assessment on liability and quantum, it is clear that the Plaintiffs were the successful parties – despite the finding of contributory negligence – and, as such, the Plaintiffs should recover all their costs in relation to liability.

13. The Plaintiffs also rely upon a without-prejudice letter dated the 22nd March 2012 in which they offered to settle the matter, subject to Quantum, on an eighty percent (80%) to twenty percent (20%) basis in the Plaintiffs' favour.



1 *POSITION OF THE DEFENDANT*

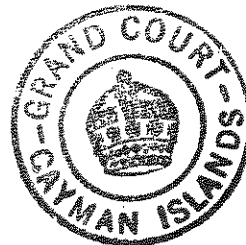
2 14. The Defendant submits that the Plaintiffs never accepted in their pleadings that
3 there was any element of contributory negligence on the part of either Plaintiff.
4 Leading counsel on behalf the Defendant accepts that there was one without-
5 prejudice letter dated the 22nd March 2012, and also without-prejudice meetings.
6 However leading counsel for the Defendant maintains that the parties were too far
7 apart for there to be any meaningful discussions, and the issues surrounded the
8 highly inflated claims of the Plaintiffs' medical experts.

9 *ANALYSIS AND CONCLUSION*

10 15. I am grateful to counsel for both parties for their helpful review of the relevant case
11 law and for their comprehensive and well-reasoned written submissions.

12 *THE LAW*

13 16. In order to analyse the respective submissions of both parties it is necessary to set
14 out the law in the Cayman Islands by starting with GCR O.62 r.4 – “*Entitlement to*
15 *Costs*” which reads as follows:



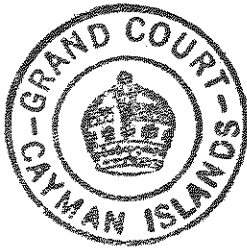
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“PART II: ENTITLEMENT TO COSTS

General principles (O.62, r.4)

- 4.
- (1) *This rule shall have effect unless otherwise provided by any Law.*
- (2) *The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*
- (3)
- (4)
- (5) *If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*
- (6) ...
- (7) *The orders which the court may make under this rule include an order that a party must pay –*
 - (a) *a proportion of another party’s costs;*
 - (b) *a stated amount in respect of another party’s costs;*
 - (c) *costs from or until a certain date only;*
 - (d) *costs incurred before proceedings have begun;*
 - (e) *costs relating to particular steps taken in the proceedings;*
 - (f) *costs relating only to a distinct part of the proceedings; and;*
 - (g) *.....”*



- 17. GCR O.62 r.4(5) mirrors O. 62 r.3(3) of the 1999 Rules of the Supreme Court and reflects the position prior to the CPR in England and Wales.
- 18. Counsel for the Plaintiffs submits that the question for the Court is which party has won. The Plaintiffs’ position is that they won the action and further, pursuant to the English Court of Appeal decision in *Onay v. Brown (para. 12. supra)*, it is settled case law that contributory negligence is not a separate issue or distinct part of the proceedings, but rather, is an integral part of apportioning liability.

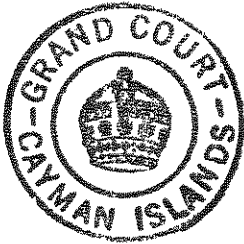
1 19. *Onay v. Brown* was applied by the English Court of Appeal in *Sonmez v. Kebabery*
2 *Wholesale Ltd* (para. 12 *supra*) and the Plaintiffs before this Court submit pursuant
3 to *Sonmez v. Kebabery Wholesale Ltd.*, the fact that the Defendant succeeds in
4 establishing contributory negligence at trial does not mean that he has succeeded
5 and should get such costs. Counsel for the Plaintiffs submits that if liability is
6 established, even subject to a reduction for contributory negligence, the Plaintiffs
7 have won and should get their costs in full.

8 20. Accordingly, applying the principles in *Onay v. Brown* and in *Sonmez v. Kebabery*,
9 the Plaintiffs maintain that the Court should look at the global assessment on
10 liability and find that the Plaintiffs were the successful party – despite the findings
11 of contributory negligence – and, as such, the Plaintiffs should recover all of their
12 costs in relation to liability.

13 21. In addition, the Plaintiffs rely on GCR O.62 r. 10 which states:

14 *“Matters to be taken into account in exercising discretion (O.62 r.10)*

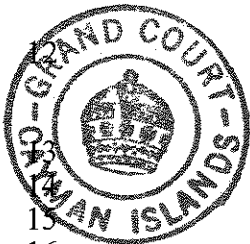
- 15 10. *The Court in exercising its discretion to make an order for*
16 *costs shall take into account-*
17 (a) *any offer of contribution brought to its attention in accordance*
18 *with Order 16, rule 10;*
19 (b) *any payment of money into court and the amount of such*
20 *payment;*
21 (c) *any written offer made under Order 33, rule 4A(2); and*
22 (d) *any written offer made under Order 22, rule 14.”*
23



24 22. On the 22nd March 2012 the Plaintiffs' attorneys wrote to the Defendant's attorneys
25 proposing a split in liability of eighty percent (80%) to twenty percent (20%) in
26 favour of the Plaintiffs. The letter stated that the Plaintiffs' attorneys believed it to
27 be unlikely that the Court would find the Plaintiffs' to be contributively negligent in
28 any amount greater than twenty percent (20%).

1 23. The Plaintiffs submit that, as no response was ever received from the Defendant,
2 they had no option but to incur one hundred percent (100%) of the costs of the
3 litigation in order to recover anything in respect of their claims. The Plaintiffs
4 submit that their offer to settle dated the 22nd March 2012, “*was very close to the*
5 *final apportionment of liability*” and further that as the Defendant made no attempt
6 to respond or negotiate, the Plaintiffs should be entitled to a hundred percent of
7 their costs. The Defendant maintains that the issues between the parties surrounded
8 the highly inflated claims of the Plaintiffs’ medical experts and therefore the parties
9 were too far apart in liability and in quantum.

10 24. At page 1123 at O.62 r.3/5 the learned editors of the 1999 Supreme Court practice
11 refer to the English Court of Appeal decision of *Lipkin Gorman v. Karpnale Ltd.*
[1989] 1 W.L.R. 1340, quoting May LJ:



15 “*In making a proper order for costs the judge must exercise his discretion,*
16 *doing justice in all the circumstances of the case, but bearing in mind the*
underlying principle that the winner, whoever may be described as the winner,
is in general entitled to be paid his costs.”

17

18 25. There is some recent guidance in the Grand Court from the learned Chief Justice,
19 Anthony Smellie, in the case of *A.B. v. M. V.* Cause Number FSD 134 of 2013
20 dated the 16th June 2013. Although this was a trust case, the learned Chief Justice’s
21 Ruling relating to costs examined GCR O.62 in some detail.

22 At paragraph 25 the Chief Justice stated as follows:

23 “*As to the specific question of the nature of the costs jurisdiction, I recognise its*
24 *wide discretion in nature given in the GCR, notwithstanding the mandate of*
25 *GCR O.62 r.4(5) that costs shall follow the event. The real task for the Court*
26 *here is to identify what the real event or outcome was, and to reflect in terms of*
27 *a fair award of costs, and it is in that regard that the rules are meant to be*
28 *flexible, allowing for a wide discretion.*”

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The Chief Justice went on to state at paragraph 26:

“It is in this light that it should be observed that, notwithstanding the retention of the old wording in Rule 4(5), GCR O.62 was amended to bring more expressly, if not exactly, in line with the modern English rules by inter alia the following ss.4(2) and ss.4(7) referred to in paragraphs -- above.”

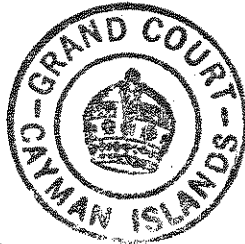
Accordingly, the Chief Justice stated at paragraph 27:

“It seems plain enough to me from paragraphs (a) and (f) [of GCR O.62 r.4(7) in particular] that either a costs order that is proportionate or one based on the issues may be made.”

26. The Chief Justice cited the pre-CPR English Court of Appeal decision of *Re Elgindata* (No.2) [1933] 1 All E. R. 232. Although this was an action for an Order under the Companies Act 1985 that a shareholder in the company could purchase her shares, the English Court of Appeal dealt with the principles of costs in the leading Judgment of Nourse LJ with which Stocker LJ and Beldam LJ agreed. In the holding, the English Court of Appeal stated as follows:

“The principles on which costs were to be awarded were (1) the costs were in the discretion of the Court, (2) that costs should follow the event except when it appeared to the Court that in the circumstances of the case some other Order should be made, (3) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings, and (4) where the successful party raised issues or made allegations improperly or unreasonably, the Court could not only deprive him of his costs, but could also order him to pay the whole or part of the unsuccessful party’s costs.”

27. In *A. B. et al v. M. B. & Ors.* the learned Chief Justice cited with approval previous Cayman case law at paragraph 31:



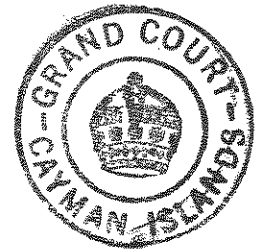
1 *“Further recognition of the power to award costs on the basis of a*
2 *proportionate Order is found in the decision of the Grand Court given in R v.*
3 *Immigration Board Ex Parte Kirk Freeport PLC and Island Companies Ltd.*
4 *1996 CILR N.1”*

5
6 28. I do not accept the Plaintiffs’ contention that the final apportionment of liability of
7 70:30 was “very close” to the Plaintiffs’ one written offer of settlement on liability
8 only. In fact my judgment awarded an additional ten percent (10%) in contributory
9 negligence which was half as much again over and above the only offer of twenty
10 percent (20%), and this demonstrated that the parties were, as the Defendant
11 submits, far apart.

12 29. The First Plaintiff claimed for significant damages for injuries to his right hip, his
13 left knee, his left ankle and his lumbar spine. These claims were all based on the
14 evidence of the Plaintiffs’ primary orthopaedic medical witness Dr. Rose. At
15 paragraph 133 in my Judgment dated the 20th September 2013 I stated that I found
16 that Dr. Rose’s evidence and diagnosis were not consistent with the evidence of the
17 First Plaintiff or with the medical history of the First Plaintiff.

18 30. On the 13th April 2012 Dr. Rose stated in his report,

19 *“....overall this patient (the First Plaintiff) is severely disabled and will have*
20 *difficulty functioning in any capacity on a regular basis.”*

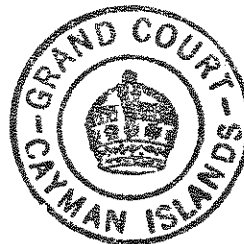


1 31. The evidence from the First Plaintiff is that he played golf within 12 months of his
2 accident which was some eight years before Dr. Rose examined him. He couldn't
3 quite hit the ball 300 yards, but he is a single handicap player, and, whilst he cannot
4 play on consecutive days he can play two or three times per week. Furthermore, the
5 First Plaintiff could take care of himself and do normal household chores. He uses
6 an Elliptical exercise machine three times per week. He is able to jog – although he
7 has a bit of stiffness after jogging.

8 32. Accordingly, at paragraph 127 of my Judgment on Quantum I stated,

9 *“In my view the First Plaintiff cannot, under any circumstances be described as*
10 *severely disabled or as having difficulty functioning in any capacity on a*
11 *regular basis.” I went on to state: “Regrettably, I am compelled to find that Dr.*
12 *Rose was embellishing the extent of the Plaintiff’s injuries when he described*
13 *the First Plaintiff in those extreme terms.”*

14
15 33. Accordingly, having reviewed the respective experts’ evidence I made no award for
16 the First Plaintiff’s claim for injuries to his right hip, left knee, left ankle and
17 lumbar spine. Adopting Nourse LJ’s dicta, I find that Dr. Rose’s inflated claims not
18 only failed but, in light of the First Plaintiff’s own evidence and his medical history,
19 could properly be described as unreasonable. Dr. Rose’s inflated claims caused a
20 significant increase in the length of these proceedings by forcing the Defendant’s
21 orthopaedic specialist to address and respond to the First Plaintiff’s claims for
22 injuries to his right hip, left knee, left ankle and lumbar spine as presented by Dr.
23 Rose.



1 34. I find a thirty percent (30%) award for contributory negligence is a substantial
2 apportionment. The fact that the Defendant claims that the Plaintiffs were not
3 prepared to accept any responsibility greater than twenty percent (20%) lends
4 weight to the Defendant's submission that in these circumstances the Defendant
5 was the more successful party. The conflict in the respective parties' claims
6 inevitably led to the question of costs being an issue before this Court to resolve.

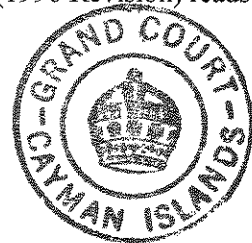
7 35. The 30th December 2013 is the 10th anniversary of the Plaintiffs' accident. When
8 one examines the delay in the prosecution of the Plaintiffs' claim from the Order
9 for Directions dated the 7th May 2007 up to the directions hearing in April 2012,
10 one cannot say that the Plaintiffs' claim has been prosecuted in an economical, or
11 expeditious manner, as set out in GCR O.62 r.4(2).

12 36. When I take into account the delayed prosecution of the Plaintiffs' case, the fact
13 that the Plaintiffs made only one written without-prejudice offer to settle, the
14 inflated claims of the First Plaintiff's medical expert, and, the fact that the Plaintiffs
15 were held to be thirty percent (30%) liable for their loss and damage, I am of the
16 opinion that it would be unfair to order the Defendant to pay a hundred percent
17 (100%) of the Plaintiffs' costs.

18 37. Accordingly, I invoke the second part of GCR O.62 r.4(5) and find "*that in the*
19 *circumstances of this case, some other order should be made as to the whole or any*
20 *part of the costs.*"

21 38. It is interesting to note that s.8(1) of the Torts (Reform) Law (1996 Revision) reads:

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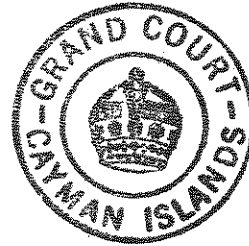
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“Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be depleted by reason of the fault of the person suffering the damage, but the damage is recoverable in respect thereof shall be reduced to such an extent as the Court thinks just and equitable, having regard to the claimant’s share in responsibility for the damage.”

39. Accordingly, I find that this is a proper case to apportion the costs. I find that it is just and equitable, having regard to the Plaintiffs’ share in the liability for the damage sustained, for the Plaintiffs to be awarded seventy percent (70%) of their costs, which corresponds to the Court’s finding of their contributory negligence.

40. Having read the submissions of counsel for both parties I confirm that my award of US\$1,749,898.73 the costs and interest will be subject to the Plaintiffs’ contributory negligence.

Dated this the 23rd December 2013



Honourable Mr. Justice Charles Quin
Judge of the Grand Court

