IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G0183 OF 2020

BETWEEN:

DARYL RENEE BARNES-NEWELL

(Administrator of the Estate of Shaun Newell)

AND:

1) KERRON BIGGS

2) JERRY WOOD

Courtroom 3 (as Chambers)

Coram:	Hon. Justice Marlene Carter
Appearances:	Mr. Clayton Phuran of CP Attorneys for the Plaintiff
	Mr. Paul Keeble of Hampson & Co. for the Defendants
Heard:	31 July 2024
Ruling:	5 August 2024

RULING

The Application

1. The Defendants' summons filed on 15 May 2024 sought the following orders:

> *"1. ... pursuant to GCR Order 33 r.4(2) for a split trial as between the issues of liability and quantum of damages, and directions...*
>
> *2. Their costs of this application and of this action, and such further and other relief as counsel may advise and this Honourable Court permit."*

Background:

2. On 25 November 2019, the Deceased was riding his motorcycle along Crewe Road when he collided with a school bus owned by the Second Defendant and operated by his employee, the First Defendant. A coroner's inquest was held in March 2022 at which evidence was given. The Defendants brought an application for summary judgment in February 2023. In its judgment on that application [herein after the "Judgment"], this court determined that the matter was not fit for summary adjudication and dismissed the application. At that time, the court noted:

> ***"35. The Court has considered the detailed oral and written submissions of Counsel for the parties. This Court has concluded that the question of whether the Plaintiff has a realistic or a fanciful prospect of success cannot be determined without the Court conducting what, in essence, would amount to a mini trial. While the Defendants are confident in their submissions that the evidence relevant to the accident does not allow for any realistic possibility of establishing negligence in the Defendants, where facts are not agreed, expert evidence surrounding the "mechanics of the accident" is not settled; the interpretation of the Pathologist's report, whether it assists the Plaintiff's or Defendants' version of events, is unclear, these are all matters which weigh heavily in support of the view that this is not a matter suitable for summary determination."***

3. The present application was made pursuant to the Grand Court Rules (hereinafter the **"GCR"**):

> *'Grand Court Rules Order 33 r.3 and 33 r.4(2) state:*
>
> *"**Time, etc. of trial of questions or issues (O.33, r.3)***
>
> *3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated.*
>
> ***Determining the place and mode of trial (O.33, r.4)***
>
> *4. (2) In any such action different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others."*
>
> *"**Split trial: offer on liability (O.33, r.4A)***

> *4A. (1) This rule applies where an order is made under rule 4(2) for the issue of liability to be tried before any issue or question concerning the amount of damages to be awarded if liability is established.*
>
> *(2) After the making of an order to which paragraph (1) applies, any party against whom a finding of liability is sought may (without prejudice to the party's defence) make a written offer to the other party to accept liability up to a specified proportion.*
>
> *(3) Any offer made under the preceding paragraph may be brought to the attention of the Judge after the issue of liability has been decided, but not before."'*

The Defendants' Submissions

4. Counsel for the Defendants submitted that, given the issues identified by the court as requiring determination at trial,

> *"11. ... subject to the exchange of the parties' expert accident reconstruction/forensic engineer evidence ... this matter is ready to proceed to trial on liability but not on damages, as soon as possible following the summer recess. The accident occurred over four years ago. Memory does not improve with the passage of time. It is in the interests of justice that evidence should be heard and the issue of liability determined before the memory of witnesses present at the scene fade any further."*

Counsel noted that, by contrast, the Plaintiff's case on the issue of damages was not ready to proceed, that there were no witness statements or affidavits in support of the case on damages and that much of the other information to facilitate a proper assessment of same was not yet in the hands of the parties.

5. Counsel submitted that the court should find favour with the instant application for the following reasons:

> *"32. In summary they are as follows:-*
>
> *(i) Wasted expense if the Defendants succeed on liability in a unified trial.*
>
> *(ii) Wasted Court time if the Defendants succeeds on liability.*
>
> *(iii) Trial on liability is possible very soon and desirable as memories fade. A trial on damages is nowhere near ready. Deferring a trial on damages would not affect the relevant evidence.*

(iv) The issues are discrete. There is no overlap between the evidence on liability and the evidence on damage. There are no overlapping issues of credibility for any other matters. There is no question of any need to give the same evidence twice.

(v) Witnesses on liability are different from witnesses on damages. Accordingly, it will not be necessary for the parties or any witnesses to attend at more than one trial.

(vi) If the Defendants have to deal unnecessarily with expensive and time-consuming issues of damages he may suffer an irrecoverable loss.

(vii) If the Defendants have to deal unnecessarily with expensive issues of damages that will present the Plaintiff with an unfair tactical advantage (Millar v. Peeples) and force the Defendant to compromise a claim which could be successful for fear of incurring substantial and irrecoverable costs of preparing for a trial on damages.

(viii) An order for a split trial will facilitate offers to settle liability under GCR Order 33 r.4A."

6. Counsel submitted further that the Plaintiff would not be disadvantaged by a split trial since, if she were to succeed on liability, she would have a strong case for a substantial interim payment, the effect of which being that she would receive some payment far sooner than if it were necessary to await a unified trial. Further, he argued, the fact that interest would be running on damages may mean that a determination of liability in a split trial, if favourable to the Plaintiff, would undoubtedly promote *"intelligent and directed settlement discussions"*.

The Law

7. The law as to split trials has been considered in a trilogy of recent local decisions:
   - ***Arnage Holdings Ltd. et al. v. Walkers (a firm)***[1] (Doyle J, unreported 5 May 2021)
   - ***Diana Brown v. Dr. George Meggs & Anor***[2] (Williams J. unreported 7 November 2022)
   - ***Pure Air Ltd et al. v. Silva & Anor***[3] (Asif J. KC, unreported 24 April 2024)

8. Both Williams J. in ***Brown*** and Asif J. in ***Pure Air Ltd*** commented favourably upon and followed the six principles enumerated by Doyle J. at paragraph 64 in ***Arnage*** as relevant considerations in determining whether to order a split trial or as it was in ***Arnage***, trial of a preliminary issue.

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[1] 20210505 – FSD0105 of 2014 (DDJ)
[2] 221107 – G0017 of 2022
[3] 240424 – G2022-0111

9. The principles most relevant to this application, as noted by the Defendants, are set out below, followed by the Defendants' specific submission in relation to each of these:

"(1) Each case, of course, must be carefully considered in its own context and on its own facts and circumstances;"

The Applicant's position is that the facts and circumstances of this case are uniquely in favour of a split trial, especially given the matters referred to at (iv) and (v) of paragraph 5 above.

*"(2) The authorities require that a cautious approach should be taken and they warn against potential treacherous shortcuts. The trial of preliminary issues should not be taken unless to do so would be clearly conducive to the just and timely outcome of a case (Chief Justice Smellie in **Sphinx**);*

There is no risk of a *"treacherous shortcut"* on these facts. Liability and damages are entirely discrete and separate, and resolution of liability most definitely will be *"conducive to a just and timely outcome"*

*(3) If considering a direction for a preliminary issues trial, the court should examine the case as a whole, be assured that the issues to be singled out were amenable to proposed discreet [sic] treatment and should have regard to (a) whether determination of the issues would completely dispose of the case or at least a significant aspect of it (b) whether the costs and time involved in preparation for the trial itself would be significantly reduced (c) whether the issues could be determined on established facts or whether further examination of evidence was required (d) the degree of risk that a trial of preliminary issues would increase costs or delay the trial overall and (e) whether it would be just to make an order (Chief Justice Smellie in **Ojjeh Trust, T Trust and TMSF**);*

Determination of liability is in this case uniquely amenable to being dealt with discretely, will most certainly either dispose of the case completely (as the Defendants urge) or at least a significant part of it, and avoid the costs of trial and burden on the parties and the courts in dealing with the disparate issues of liability and quantum. The savings of costs and time in preparation are likely to be significant, with no delay to the trial overall given that the parties are substantively ready to proceed to a trial on liability.

*(4) The court should have regard to the factors outlined in the English case of **Electrical Waste Recycling Group** in particular (a) the possible saving of costs of a second trial (b) trial preparation (c) the inconvenience and strain on witnesses where evidence is required at*

both trials (d) complexity of a single trial (e) any particular prejudice to one or other of the parties if a split trial is held (f) difficulties of defining an appropriate split and whether a clear split is possible (g) risk of duplication, delay and appeals (h) whether a split trial would assist or discourage mediation and/or settlement (i) if an order for a split trial is made late in the proceedings whether the overall costs may actually increase (j) what is perceived to offer the best course to ensure that the whole matter is adjudicated fairly, quickly and efficiently as possible (Williams J in ***Herrara-Frederick*** *and Gunn J in* ***Edwards****)*

None of the difficulties or concerns flagged in (e) through (g) arise. A split trial would most definitely encourage settlement as contemplated by (h). The order for a split trial is not made late in the proceedings (i) - the order for split trial is sought on the first directions hearing. The interests of the parties in avoiding wasted costs, including the considerations imposed by the Overriding Objective, in having the matter adjudicated fairly and efficiently, all militate in favour of a split trial.

(5) there must be good and sufficient reason to split the trial to outweigh the sense and prescribed objective of dealing with as many aspects of the case as is practicable on the same occasion (Williams J in ***Herrara-Frederick****);*

The issues of liability and quantum of damages are, in this case, conveniently discrete and freestanding, with no overlap between them. The costs, savings and benefits of proceeding to an early and relatively straightforward trial on liability, unentangled from considerations of quantum and dependency speak for themselves.

(6) Where credibility and reliability of the parties and/or witnesses [are] interwoven throughout the issues in the case this would normally militate against a split trial as compartmentalizing credibility in such circumstances is likely to cause prejudice to one or other parties by preventing the court from having all of the relevant information before it when making its assessment of their evidence (Gunn J in ***Edwards****).*

There are no issues of assessment of the credibility or reliability of witnesses interwoven or spilling across the trial of liability on the one hand and damages on the other, or which might prejudice either party.

The Plaintiff's response

10. Counsel for the Plaintiff raised the following points for the court's consideration relating to these relevant principles:

(i) That the Defendants' assertion that a resolution of the liability issue before the damages claim may lead to more fruitful discussions about settlement should be looked at in the context of previously failed attempts at settlement.

(ii) Regarding the submission that the split trial may save time and expense, the court must consider that the delay in the case coming to trial lay at the feet of the Defendants, the Defendants having brought a number of interlocutory applications. Counsel argued:

"22. A split trial in this instance will not assist the court with a timely resolution but rather would extend the timeline of these proceedings which to date has been the modus operandi of the Defendant ... Furthermore, the plaintiff has already been subjected to stress which is comparable to the one felt during trial. A split trial in this matter is clearly to the ends of further delays."

(iii) That the court must be careful not to create a situation where the court may have to resolve the matter of liability twice.

(iv) That the court must be mindful that the Plaintiff should not have to endure what would be, in essence, two trials. In this regard, counsel noted:

"15. The matter is not amenable to discreet treatment, the cost for preparation for a trial on liability would be substantively the same as preparation for a trial on liability and quantum and there is a real risk that the trial of preliminary issues would increase costs or delay trial overall and that there is further examination of evidence which is required."

Counsel referred to the Judgment wherein it was stated:

> *"This Court is not satisfied that it is a case that should be decided without a fuller investigation into the facts at trial than is possible or permissible on Summary Judgment. There has not been a full ventilation of the facts at the Inquest..."*

(v) That it was the Plaintiff's view that there was no good and sufficient reason to split the trial since a split trail would override the prescribed objective of dealing with as many aspects of this case as possible on the same occasion.

(vi) That the Defendants' counterclaim for contributary negligence demonstrated *"how correlated the decision of factual issues relates to any question in respect to quantum. This*

is not a case that there can be a distinct line between liability and quantum this is a case that there will be significant correlation of considerations on both questions of liability and quantum that would be best addressed at the same time."

Court's determination.

11. The Defendants' application for a split trial is granted. The facts and circumstances of this case lend themselves to this course. As both counsel emphasize, this is a claim that is now in its fourth year. It appears that there have been delays on both sides. However, the relevant issue is that the Plaintiff has offered no reason of sufficient gravity to outweigh those presented by the Defendants as being both more practical and persuasive in this court's consideration of what is particularly suitable in this case. I bear in mind that the default position is that all matters in dispute should be tried together. However, a case need not be so extraordinary or exceptional for a court to grant an application for a split trial. To this end, this court finds favour with the comments by Williams J in ***Brown***:

> *"In a suitable case, when deciding whether to order a split trial, the Court should take a broad and realistic view of what is just and convenient, which should include the avoidance of unnecessary expense and the need to make effective use of court time. There is no reason to differentiate between an application by a plaintiff and one by a defendant, each case must be considered on its own circumstances. Therefore, the Court should conduct a "pragmatic balancing exercise" balancing the advantages or disadvantages to each party, and should take into account the public interest that unnecessary expenditure of time and money in a lengthy hearing should not be incurred. As a consequence, although the normal practice is still that liability and damages be tried together, as I mentioned in Herrara-Frederick, it is no longer the practice to make an order for separate trials only in extraordinary and exceptional circumstances, but a more robust case management and less restrictive approach is taken in personal injury cases. I have this in mind when I apply the general principles outlined by Doyle J. to the circumstances of this case. [emphasis added]"*[4]

12. I am satisfied that the issues bearing on liability are distinguishable from those bearing on damages. The evidence to be considered at a hearing on liability will be focused on the mechanics of the accident. Most of this evidence will be that of an expert Reconstructionist engaged by each side, neither of whose evidence would be required at a hearing to assess damages. While there are at least two civilian witnesses, neither of these witnesses would need to be called twice to give evidence at the hearing of the separate issues, if such is required. This is a case in which the Deceased's widow has brought an

[4] 221107 – Diana Brown v. Dr. George Meggs & Anor - G0017 of 2022

action on behalf of his estate. Such matters as affect liability do not have any bearing on the matters that will be relevant to the quantum of damages once a determination on liability is made.

13. The fact that the Defendants have alleged contributory negligence on the part of the Deceased does not take the Plaintiff's concerns about the Plaintiff or any other witness having to endure two trials any further. Neither does such claim for contributory negligence serve to demonstrate a significant correlation of consideration on both questions of liability and quantum so that they should be best addressed at the same time. The determination of the claim for contributory negligence is a matter to be determined at the liability stage and will only serve to particularize the extent of the claim for damages. That is the extent of the overlap. This is not a factor to militate against the grant of the application for a split trial.

14. The Plaintiff's position, at this stage, is that an Actuary or other expert may not be required to be called if the damages aspect were to be determined at the same trial. This position was advanced as being support for the submission that the damages claim could be ready for trial within a short time. However, Counsel's confirmation did not directly address the readiness of the parties regarding the many matters referred to by the Defendants as being necessary to enable the court to determine quantum. Counsel did not dispute that matters relevant to quantum include, "*detailed and extensive exploration of issues of and discovery of documents dealing with the Deceased's work history, educational background, earnings records, banking records, future prospects of employment, career advancement, spending habits, the widow's employment, and his child's education and prospects, and likely also expert accounting/actuarial evidence*".[5] There is no indication that these could be in hand so shortly as to enable a date to be set in the near future to assist the determination of both aspects of the claim, liability and damages at the same hearing.

15. Counsel for the Defendants emphasized in his submissions before the court that, in his opinion, one of the matters which should weigh even more heavily in favour of a split trial on this application was the ability of the parties, once liability had been determined by the court, to enter settlement discussions. Counsel invited the court to give this factor even more weight than had been accorded by the authorities. The arguments of counsel for the Plaintiff that the court should look at such arguments with caution because of past unsuccessful discussions between the parties do not sway this court. I am not satisfied that a split trial would increase costs. To the contrary, it may be that a determination on liability would focus the parties' minds on coming to a resolution of all issues. I bear in mind that such a determination

[5] See the Defendants' Skeleton Submissions at paragraph 16.

would conceivably put the Plaintiff in a much stronger position regarding any application for an interim payment, if so warranted.

16. There is no particular prejudice to either of the parties arising from the court's decision on this application. The parties can be ready for a trial on the issue of liability within a relatively short time and, in any event, much sooner than they can be ready for a determination on both issues of liability and quantum. There is a clear demarcation between the issues in this case and a determination of the liability issue may assist in the ultimate resolution of the claim so as to potentially allow for a substantial saving of costs and expense.

17. Consequent to the decision of the court on this application, the directions proposed by the Defendants in the Draft Directions Order should be considered by both parties with a view to arriving at appropriate and convenient dates for all matters relating to discovery, exchange of evidence, witness statements, and/or reports as necessary. The court would be grateful if counsel would revert with those dates so that such directions can be finalized and formally ordered.

18. Costs are costs in the cause.

Hon. Justice Marlene Carter
Judge of the Grand Court