

5-09-12

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN

3 Cause No: G115/2011

4
5 BETWEEN:

6 GREGORY ROBERT BROOKS

7
8 PLAINTIFF



9
10 AND:

11 DR. NELSON CASTELLANO

12 FIRST DEFENDANT

13
14 AND:

15 CAYMAN DENTAL CLINIC LTD.

16 SECOND DEFENDANT

17
18
19 AND:

20 CAYMAN ISLANDS HEALTH SERVICES
21 AUTHORITY

22 THIRD DEFENDANT

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26 Appearances:

27 Mr. Ian Mercer of Samson and McGrath on
28 behalf of the Plaintiff

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30 Mr. Paul Keeble and Mrs. Kim McLaughlin
31 of Hampson & Company on behalf of the
32 First Defendant

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34 No appearance on behalf of the Second
35 Defendant

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37 Mr. Stephen Symons of Bodden & Bodden
38 on behalf of the Third Defendant

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40 Before:

The Hon. Mr. Justice Charles Quin

41 Heard:

42 4th September 2012

43 EXTEMPORE RULING
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1 8. Mr. Keeble, counsel on behalf of the First Defendant, has helpfully directed the
2 Court to the specific statements of which his client seeks Further and Better
3 Particulars:

4 i. Paragraph 7 of the Amended Statement of Claim:

5 *“The Plaintiff was orally advised by Dr. McFarlane that an*
6 *impacted wisdom tooth was causing decay on a rear molar*
7 *tooth...”*

8 Paragraph 8 of the Amended Statement of Claim:

9 *“The Plaintiff was telephoned by Dr. Godfrey of the Second*
10 *Defendant and advised that he required the surgical extraction*
11 *of wisdom teeth...”*

12 The First Defendant requested the following Further and Better
13 Particulars:

14 *“...all the terms of the advice,the detail of the prognosis, the*
15 *risks and benefits of the procedure, whether the same would be*
16 *carried out under general or local anaesthetic,..... whether any*
17 *and if so what specific form of consent would be required from*
18 *the Plaintiff.”*

19 ii. Paragraph 13 of the Amended Statement of Claim:

20 *“None of the Defendants, their servants or agents, conducted a*
21 *pre-operative consultation with the Plaintiff.”*

22 The First Defendant asked for Further and Better Particulars,



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“Was there any opportunity for the First Defendant to conduct a pre-operative consultation with the Plaintiff and if so what opportunity, when and where that would have been.....if there is some duty upon the First Defendant to conduct such a pre-operative consultation and if it is so alleged, from where [does that] duty [arise].”

iii. Paragraph 14 of the Plaintiff’s Amended Statement of Claim:

“At no stage was the Plaintiff advised of any risks associated with the surgery.”

The First Defendant requested Further Particulars: Whether it is alleged that there was any opportunity for the First Defendant to so advise, and if so, when and where that would have been.

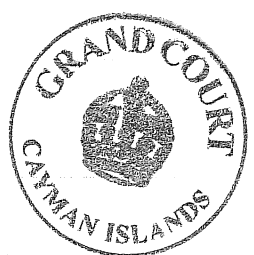
The First Defendant wishes to know exactly what advice ought to have been given.

The First Defendant wishes to know whether the First Defendant knew that no advice had been given to the Plaintiff and how the First Defendant could have so known.

iv. Paragraph 13 of the Amended Statement of Claim:

“A general anasesthetic was administered to the Plaintiff by servants or agents of the Third Defendant.”

The First Defendant seeks particulars of:



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“What information or advice was given by the said servants or agents to the Plaintiff prior to the administration of the anaesthetic.”

- 9. The First Defendant’s counsel submits that it is critical for the First Defendant to know the circumstances in which he and the Plaintiff found themselves on the 4th April 2008 so that he can address his Defence properly and accurately – that is, what is it the First Defendant is alleged to have done or not done.

- 10. The First Defendant submits that he is entitled to know what the Plaintiff would have wanted to happen, had he been conscious, and whether he would have wanted the First Defendant to go ahead with the operation. Counsel argues that it is critically important for the First Defendant to know exactly what the legal duty the First Defendant is alleged to have broken, and, accordingly, the Plaintiff should provided the further and better particulars set out above.

PLAINTIFF’S POSITION

- 11. The Plaintiff’s counsel submits that the Amended Statement of Claim is sufficiently pleaded. Mr. Mercer submits that the Plaintiff’s case against the First Defendant is clear, succinct and properly pleaded.

- 12. The Plaintiff’s position that there is no scarcity of material fact, rendering the pleadings unanswerable. In particular, Plaintiff’s counsel submits that paragraphs 7 and 8 of the Amended Statement of Claim provide sufficient information to allow the First Defendant to plead his Defence.

- 13. Counsel for the Plaintiff contends that the First Defendant does not need to know the further evidential facts as alleged in his request for further and better particulars.



1 Mr. Mercer also makes the makes the same submissions in relation to the request
2 for further and better particulars under paragraphs 13 and 14 of the Amended
3 Statement of Claim.

4 14. Counsel for the Plaintiff submits that the first particular of negligence is that the
5 Defendants (including the First Defendant) failed to provide the Plaintiff with a pre-
6 operative consultation, and the second Particular of negligence is that the
7 Defendants (including the First Defendant) failed to advise the Plaintiff of risks
8 associated with the surgery, including the risk of lingual nerve damage. It is the
9 Plaintiff's contention that these two particulars are straightforward and clear and
10 can be easily answered in the First Defendant's Defence. Counsel for the Plaintiff
11 also submits that the Particulars of negligence pleaded at paragraphs 19c., 19d. and
12 19e. are also clear, and can easily be answered by the First Defendant in his
13 Defence.

14 ***CONCLUSION ON REQUEST FOR FURTHER AND BETTER PARTICULARS***



15 15. I find that the Plaintiff's Amended Statement of Claim, and in particular, the
16 allegations of negligence, are clearly and properly pleaded.

17 16. In his Statement of Claim the Plaintiff has set out clear and precise allegations. The
18 issues are clearly ascertained and there is no ambiguity or lack of clarity. The First
19 Defendant can either admit or deny the Plaintiff's allegations in his Defence.

20 17. GCR O.18 r.7(1) states:

21 *"...every pleading must contain, and contain only, a statement in the summary*
22 *form of the material facts on which the party pleading relies for his claim or*
23 *defence, as the case may be, but not the evidence by which those facts are to be*
24 *proved and the statement must be as brief as the nature of the case admits."*

1 18. Accordingly, as stated by the learned editors in the classic work on pleadings -
2 *Odgers' Principles of Pleading and Practice in civil actions in the High Court of*
3 *Justice*, 21st Ed. At page 83:

4 “This rule [O.18 r.7(1)] involves and requires four separate things:

- 5 (i) Every pleading must state facts and not law.
- 6 (ii) It must state material facts and material facts only.
- 7 (iii) It must state facts and not the evidence by which they are to be
8 proved.
- 9 (iv) It must state such facts concisely in a summary form.”

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11 The learned editors of *Odgers'* go on to state at page 96 of the 21st Ed.:

12 “The fact in issue between the parties is the *factum probandum*, the fact to be
13 proved, and therefore the fact to be alleged. It is unnecessary to tell the other
14 side how it is proposed to prove that fact; such matters are merely evidence,
15 *facta probantia*, facts by means of which one proves the fact in issue.”

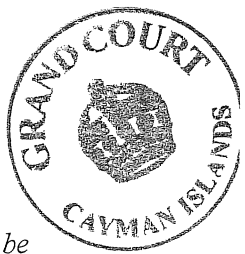
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17 It is the Court's view that the Further and Better Particulars that the First Defendant
18 is seeding are facts that will be relevant at the trial, but they are not material facts
19 for pleading purposes. As the learned editors of *Odgers'* state at page 97:

20 “This was always a clear rule of the common law. Evidence shall never be
21 pleaded because it tends to prove matter in fact, and therefore the matter in fact
22 shall be pleaded.” (*Dowman's Case (1586) 9 Rep. 9b.*)

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24 19. I find that the Further and Better Particulars being sought by the First Defendant are
25 matters of evidence. The First Defendant will have an opportunity after discovery is
26 completed, witness statements exchanged, and experts' reports supplied, to see the



1 evidence which the Plaintiff is relying upon to prove his case against the
2 Defendants.

3 20. As the late Chief Justice Denman stated in *Williams v. Wilcox* (1838) 8 A. & E.
4 314 at p. 331:

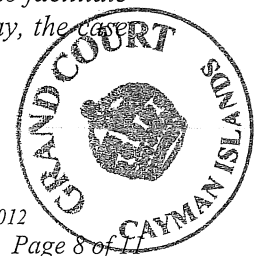
5 *“It is an elementary rule in pleading that, when a statement of facts is relied on,*
6 *it is enough to allege it simply without setting out the subordinate facts which*
7 *are the means of proving it, or the evidence sustaining the allegation.”*

8
9 21. The First Defendant is in a position to understand the allegations contained in the
10 Plaintiff’s Amended Statement of Claim. I find that the particulars of negligence are
11 straightforward, and, it is up to the First Defendant to decide whether he wishes to
12 admit or traverse these allegations. It is trite law to state that if an allegation of fact
13 is not traversed it will be deemed to be admitted. I find that the First Defendant is
14 not hindered in any way from pleading and filing his defence to the averments
15 made and the Particulars of negligence pleaded in the Plaintiff’s Amended
16 Statement of Claim.

17 22. Once the witness statements are exchanged and expert evidence adduced, it is very
18 likely that the witness statements and full discovery will provide the First
19 Defendant with the information he is seeking. However, if the First Defendant is
20 still dissatisfied with the lack of information it is always open for him to serve
21 interrogatories pursuant to GCR O.26. As the learned editors of *Odgers’* stated at
22 page 259:

23 *“The object of interrogatories is twofold: first, to obtain admissions to facilitate*
24 *the proof of your own case; secondly, to ascertain, so far as you may, the case*
25 *of your opponent.”*

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1 and further, at page 261:

2 *“Interrogatories are not like pleadings, confined to the material facts on which*
3 *the parties intend to rely; they should be and generally are directed to the*
4 *evidence by which the party interrogating desires to establish such facts at the*
5 *trial See AG v. Gaskill (1882) 20 Ch D 519”*

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7 23. For the aforesaid reasons I reject the First Defendant’s request for Further and
8 Better Particulars of the Plaintiff’s Amended Statement of Claim.

9 24. The directions which were helpfully agreed between the parties are as follows:

10 *Discovery*

11 i. That the parties do exchange Lists of Documents within 21 days
12 following the close of pleadings with inspection of documents to occur
13 within 14 days thereafter.

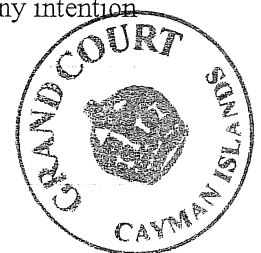
14 *Schedule of Loss and Damages*

15 ii. That the Plaintiff shall deliver his schedule of loss and damages within
16 28 days following the exchange of Lists of Documents.

17 *Witness Statements*

18 iii. That the parties shall in accordance with the provisions of GCR O.38
19 (2)(a) exchange any witness statements and/or affidavits on which they
20 intend to rely at trial, within 28 days following delivery of the
21 Plaintiff’s schedule of loss and damages, giving notice of any intention
22 to rely on hearsay evidence.

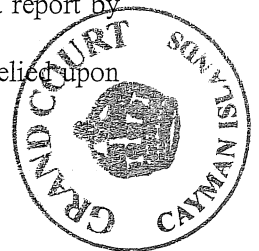
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Expert Evidence

- iv. That the parties shall have liberty to adduce expert medical evidence limited to one expert each in the field of oral surgery/general dentistry.
- v. That the Plaintiff shall deliver copies of the report of his medical expert including his or her curriculum vitae within two months following the exchange of witness statements.
- vi. That the Plaintiff shall attend for defence medical examinations to be conducted within the Cayman Islands (unless by agreement the Plaintiff is willing to travel overseas to attend for examination) by the Defendants' medical experts at the expense of each of the Defendants, and to submit to such tests and examination as those experts reasonably require, producing copies of his current medical/dental records. Such defence medical examination will be conducted within two months of disclosure of the Plaintiff's expert medical reports under the foregoing paragraph. The Defendants shall disclose in advance of such medical examinations the curriculum vitae of each of their experts.
- vii. That the Defendants shall deliver copies of the reports of their medical experts no later than two months following delivery by the Plaintiff's expert's report under paragraph 39(v) of this Order.
- viii. That the Plaintiff shall within one month of disclosure by the Defendants of the reports of their medical experts, deliver a report by his medical experts, disclosing any expert opinion or facts relied upon in response to the reports filed by the Defendants.



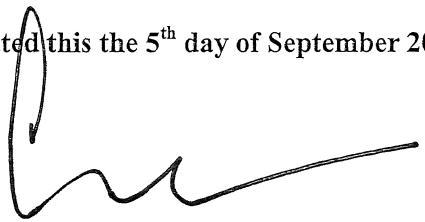
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ix. That there be a further case management conference/directions hearing, to be held as soon as possible following completion of the exchange of experts reports, to consider inter alia:

- a) Whether and to what extent it might be appropriate for there to be a meeting or discussion between the medical experts;
- b) Whether and to what extent the witness statements and affidavits delivered under paragraph 39(iii) of these directions should stand as the evidence in chief of the witness; and
- c) Whether and to what extent it might be appropriate to take the evidence of overseas witnesses by way of video-recorded oral examination pursuant to GCR O.39

25. I order that the costs of the Summons be costs in the Cause.

Dated this the 5th day of September 2012



Honourable Mr. Justice Charles Quin
Judge of the Grand Court

