

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**
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4

5 **Cause No: G0218/2014**

6 **BETWEEN:**

7 **ANNA PARSONS**

8 **PLAINTIFF**
9

10 **AND:**

11 **DR. SANJIB MOHANTY**

12 **DEFENDANT**
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15 **Appearances:**

16 **Mr. James Kennedy of Samson & McGrath for**
17 **the Plaintiff**

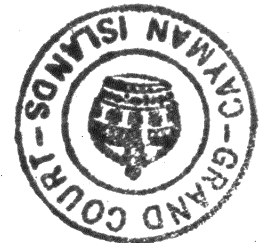
18 **Mr. Paul Keeble of Hampson & Co. for the**
19 **Defendant**
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22 **Before:**

Mr. Justice Seymour Panton

23 **Heard:**

9th and 30th September 2015
24



25 **JUDGMENT**
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- 28 1. Before me were two summonses: one, by the Defendant, seeking further and better
29 particulars of the statement of claim in this action, and, the other, by the Plaintiff, for a
30 directions order. I heard submissions on the 9th September 2015 for the better part of
31 the day, and noted that there was much heat generated by counsel in the matter. I gave
32 my decision on the 30th September 2015, stating my reasons orally in a summary form.
33 Subsequently, there was a request for me to put the reasons in writing. This I now do.
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2. The suit before the Court is one in which the Plaintiff is claiming that the Defendant, a medical doctor, was negligent in performing a colonoscopy on her. The particulars of negligence are set out in paragraph 14 of the statement of claim. The Defendant has denied negligence on his part and has stated that he explained the procedure to the plaintiff who signed a statement indicating her understanding that there was a risk of perforation as a complication of colonoscopy which could occur without negligence on the part of the surgeon.

FURTHER AND BETTER PARTICULARS

3. In respect of the summons for further and better particulars, the request was directed at paragraph 14 of the statement of claim. The particulars stated therein are as follows:

- (a) Failure to negotiate the colonoscope through the rectosigmoid colon so as to avoid injury;
- (b) Causing a direct trauma of the colon wall;
- (c) Applying excessive force with the colonoscope with too much force against the wall of the bowel and/or excessive traction on the sigmoid loop by careless pushing of the scope proximally;
- (d) Failing to keep full and accurate surgical notes of the operation;
- (e) Failing to recognize the injury at the time of the operation;
- (f) Failing to identify the perforated colon when withdrawing the colonoscope; and
- (g) Failing to take all reasonable steps to avoid injury to the Plaintiff.



1 4. In respect of (a): The Defendant wished the Plaintiff to state precisely how it is alleged
2 that the Defendant negotiated the colonoscope, and how he ought to have done it so as
3 to avoid injury. The Plaintiff responded that this was a matter for evidence. I agreed
4 with the Plaintiff; so the request was denied.

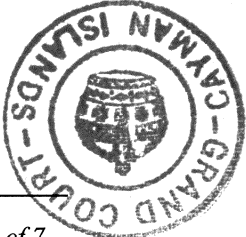
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6 5. As regards (b): It seems that the parties were agreed that this too was a matter for
7 evidence as the Defendant did not treat with it in his response to the Plaintiff's reply to
8 the request.

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10 6. The Defendant wished the Plaintiff to state how much force would amount to
11 reasonable force, and how much traction on the sigmoid loop would amount to
12 reasonable traction. The Plaintiff's response was that these were matters for evidence. I
13 agreed with the Plaintiff. It seems further to me that the question of reasonableness is
14 one for the determination of the trial judge after hearing the evidence of the parties as
15 to how the operation was performed.

16
17 7. I agreed with the Defendant that failing to keep full and accurate surgical notes was not
18 a matter that would have contributed to the commission of the alleged tort. Hence, I do
19 not see why it has been introduced in the statement of claim as a particular of
20 negligence.

21
22 8. Failing to recognize the injury at the time of the operation may only be a particular of
23 negligence if such failure preceded further action on the part of the Defendant which
24 exacerbated the injury caused. In this regard, therefore, the Defendant is entitled to
25 have further particulars from the Plaintiff.

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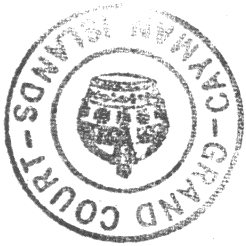
1 9. Failing to identify the perforated colon when withdrawing the colonoscope is hardly
2 likely to be a particular of negligence, although it may be evidence of ignorance that
3 there had been a perforation of the colon. In this regard, the defendant is entitled to
4 have further particulars from the plaintiff.

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6 10. In the event that these particulars are not forthcoming, paragraphs (e) and (f) are to be
7 struck from the pleading.

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9 11. “Failing to take all reasonable steps to avoid injury to the plaintiff” is far too wide.
10 Further particulars are required.

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12 12. The order therefore is that:
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14 a. As regards paragraph 14 (a) (b) and (c): The request for further particulars is
15 denied.
16 b. As regards paragraph 14 (d): This is not a particular of negligence.
17 c. As regards paragraph 14 (e) (f) and (g): The request for further and better
18 particulars is granted.

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21 **DIRECTIONS ORDER**



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23 13. A draft directions order was submitted to the Court by the Defendant. Submissions
24 were made by both parties on what each considered the appropriate directions to give.
25 There was much debate on the question of experts’ reports and the order in which they
26 should be exchanged. In the end, I accepted the draft order as being a good guide and I
27 made amendments thereto in finalizing my order.

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1 14. I amended paragraph (1) of the draft order (dealing with particulars) to make it be in
2 conformity with the order I made on the request for particulars. Paragraphs 2, 3, 4, 5, 6,
3 8, 10, 11, 12, 13 and 14 of the draft were approved by me in the form presented. In
4 respect of paragraphs 7 and 9, I ordered that there be sequential exchange of experts'
5 reports, including curriculum vitae of those experts, with the Plaintiff to deliver her
6 experts' reports on or before the 30th December 2015, and the Defendant to deliver his
7 experts' reports on or before the 30th January 2016.

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9 15. The order in which the reports of the experts should be served was a cause for much
10 discussion. In his written submissions as regards the Plaintiff's summons for
11 directions, Mr. James Kennedy, for the Plaintiff, submitted that guidance "*can be*
12 *found on the usual course of exchange from O.25 r.8 of the GCR*". He objected to Mr.
13 Paul Keeble's suggestion that there be sequential exchange of experts' reports, with the
14 Plaintiff first disclosing her experts' reports. Mr. Kennedy referred to O.25 r.8 (1) (b)
15 which provides for the disclosure to the other party within ten (10) weeks (of the
16 closure of the pleadings) of any expert evidence to be relied on by one party, and to
17 O.25 r.8 (2) which provides for such disclosure to be done by mutual exchange,
18 medical for medical and non-medical for non-medical. He submitted that there was no
19 reason to depart from the Rules and that there was no merit in Mr. Keeble's
20 suggestion.

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22 16. Mr. Keeble for the Defendant submitted that the simultaneous exchange of experts'
23 reports did not apply in the instant case. He referred to O.25 r. 8(5) which excludes the
24 application of r.8 from the instant case. O.25 r.8 (5) reads thus:

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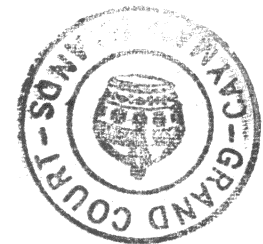
1 “(5) This rule applies to any action for personal injuries except -
2 (a) any admiralty action; and
3 (b) any action where the pleadings contain an allegation of a
4 negligent act or omission in the course of medical
5 treatment.”
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7 17. It is clear that Mr. Keeble is right that O.25 r.8 is inapplicable.

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9 18. Mr. Kennedy for the Plaintiff submitted that “cases such as this usually boil down to
10 the experts reviewing the medical notes and records and statements of the medical
11 professionals who were there at the time”. It will be, he said, for the experts to give
12 their evidence and be cross-examined and for the judge to make a determination. The
13 idea that the Defendant’s experts’ reports have to be responsive is not so, he said.

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15 19. Counsel cited cases such as *Kirkup v British Rail Engineering Ltd*¹ and *Banque*
16 *Commerciale (Cayman) Ltd v Coopers & Lybrand*²; and reference was also made to
17 O.18 r.12 (1A) of *The Supreme Court Practice (The White Book)*.

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19 20. I took the view that the exclusion of a case of this nature from the general practice
20 regarding the exchange of reports means that a Judge of the Grand Court has a
21 discretion as regards the order to be made. In the circumstances I considered it
22 appropriate for the Defendant to be aware of the contents of the Plaintiff’s experts’
23 reports in order for him to properly defend the suit, if he can.



¹ [1983] 1 W.L.R. 190

² (decided in the Grand Court on 16 February 1989)

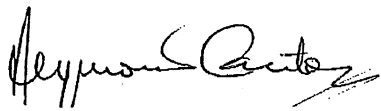
1 21. I have not been informed of any prejudice that would befall the Plaintiff if she
2 discloses what her experts are saying in the matter so that the Defendant may know
3 what he is facing. The Plaintiff's experts will have an opportunity to deal with any
4 response made by the Defendant's experts. The days of ambush litigation are behind
5 us.

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8 **.Dated this the 6th day of October 2015**

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11 **Mr. Justice Seymour Panton**
12 **Acting Judge of the Grand Court**

