IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 19 OF 2015

BETWEEN:

JOY HOPE ANN VERNON **Plaintiff**

AND

EILEEN JENNIFER GREEN **Defendant**

Appearances:	Mr. Clyde Allen of Chambers for the Plaintiff Mr. Paul Keeble & Ms. Sulekha Tummala of Hampson and Company for the Defendant
Before:	Hon. Justice Richard Williams
Heard:	24 November 2017
Draft Judgment circulated:	4 December 2017
Date of Judgment:	7 December 2017

HEADNOTE

Personal injury – split trial – disclosure issues and application to dismiss – schedule of loss & damages – recusal of Judge

JUDGMENT

Introduction

1. This case concerns the Defendant's application brought by Summons dated 21 July 2017 for (i) an order to dismiss the Plaintiff's claim brought by her Writ of Summons and Statement of Claim filed on 6 February 2015 and (ii) for judgment

to be entered for the Defendant dismissing the action. In the alternative to dismissal, an unless order in relation to outstanding disclosure is sought with a date for compliance specified pursuant to GCR O.45, r.6(2). The Defendant also seeks orders for additional specific disclosure pursuant to GCR O.24, r.7. Finally, pursuant to O.26, r.4 an order is sought granting leave to the Defendant to serve Interrogatories on the Plaintiff, and require replies within 28 days of the date of the order, coupled with an unless order. The Summons is supported by an affidavit of Sulekha Tummala sworn on 1 November 2017. The Plaintiff filed an affidavit relating to the Summons on 7 November 2017.

2. The application in the Summons is made pursuant to GCR O.24, r.20(1) for purported failure to comply with orders for discovery made on 8 December 2015, 23 November 2016 and 19 January 2017 with particular regard to paragraphs 2 (iii) - (vi) of the Order of 25 May 2017. The alleged failure to produce a Schedule of Loss in the appropriate form is also relied upon as ground of the application.

3. The application in the Summons is also made pursuant to the inherent jurisdiction of the Grand Court to control its own processes as there has been an abuse of process due to the manner in which it is alleged the Plaintiff has "*engaged in a concerted and deliberate course*" of intentional and contumelious disobedience of peremptory orders of the Court. The application to dismiss is also made pursuant to O.25, r.(1)(4) and the inherent jurisdiction of the Grand Court for want of

prosecution, and/or inordinate and inexcusable delay in the prosecution of the action.

4. In the Summons specific disclosure is sought in relation to medical records held by Dr. Marcouza pertaining to the Plaintiff which the doctor had said were for a period of over 20 years. An order was also sought for specific disclosure of the Plaintiff's income records from her employment with CIHSA for a five year period prior to the accident along with details of sick pay received post-accident. Disclosure has also been sought of the Plaintiff's records, whether banking or otherwise (i) documenting and supporting her claimed earnings of $150 each time she taught a course as an instructor and (ii) documenting earnings with Dr. Marcouza of $250 per week, both pre-and post-accident.

5. That Summons first came before the Court on 8 November 2017. At that hearing I raised, having regard to the Overriding Objective, whether the efficient handling of this case would be promoted by there being a split trial so that the issue of liability be adjudicated on first, and then, if required, there would be a separate hearing in relation to damages.

6. GCR O.33, r.4(2) provides that in any action begun by writ:

> *"... 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."*

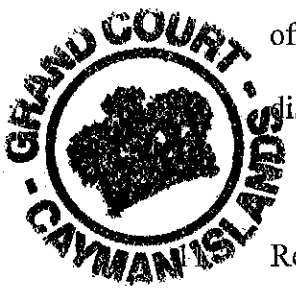
7. It became clear at the 8 November 2017 hearing that the Plaintiff sought a split trial, although she had not made a formal application. I was conscious that neither party had the opportunity to prepare for a hearing dealing with the issue of a split trial and offered an adjournment. Both parties wished to take up the offer and the hearing was adjourned to 24 November 2017 when the issue, along with the content of the Defendant's Summons, could be considered.

8. Following the hearing, the Plaintiff filed a Summons dated 17 November 2017. That Summons is also now before me for determination today. In that Summons an order is sought that the question of liability of the Defendant to the Plaintiff be tried as a preliminary issue and only thereafter with the issue of damages be tried as directed by the Judge. An order was also sought that the discovery be limited to liability which requires the Defendant to provide any or all documents in support of its claim that it is not liable or that the Plaintiff is liable in support of its case within 21 days from the date of the order, giving the Plaintiff 21 days to file any documents in reply.

9. On 21 November 2017 the parties exchanged written submissions in relation to the issue of whether there should be a split trial.

Split Proceedings – Parties' Positions

10. The Plaintiff contends that there should be a separation of the issue of liability in damages as this would be in the interest of justice and fair to the parties. A concern is expressed that the Defendant may resist admitting liability to incur unnecessary legal costs, especially if there is an imbalance between the resources of an insurance company and an individual. It is contended that the numerous discovery hearings are an attempt to frustrate the true purpose of the Court.



Reliance is placed on the fact that although the Defendant has already pled guilty to careless driving in the Summary Court, which the Plaintiff contends makes the issue of liability more straightforward; the Defendant's pleaded case is that there is no liability at all for the accident. However, during the hearing Counsel for the Defendant conceded that this case is more likely to be one in which blame for the collision may be apportioned to both parties.

12. In the Skeleton Argument filed on behalf of the Defendant, it became evident that the Defendant had no issue with there being a direction for a split trial on liability in damages pursuant to O.33, r.4(2), at which issues of contributory negligence and seatbelt usage can be determined separate from the issue of the quantum of damages. However, this position was subject to the disclosure sought by the Defendant in relation to the quantum of damages not being placed on hold or stayed pending the trial of liability. The Defendant claims that the alleged gaps in

disclosure are presenting a "*stumbling block to sensible discussion and possible resolution*" of the claim and that "*the inability to obtain cogent particulars of the plaintiff's claim*" prevents "*an intelligent and informed assessment of the plaintiff's damages claim.*" The Defendant is concerned about the expenditure resulting from a trial dealing with liability, which may become unnecessary if there was sufficient information to understand what damages are being sought.

Determination of Split Trial

13. I accept that normally liability and quantum are both determined at one trial. However, in this case I am satisfied that it is more convenient for liability to be determined at the first hearing and the issue of quantum, if liability is established to be dealt with at a later hearing. There appears to now be no issue between the parties in this regard.

14. This is a case in which liability is likely to be more straightforward than, if required, determining the issue of quantum. There is no need for the Court to find that this case is in any way unusually difficult for ordering a split trial. The test is whether it would be just and convenient at the split trial, which I find it would be. I have regard to the responsibility to case manage proceedings and the Overriding Objective which enables the Court to deal with cases justly and proportionate to cost. I am conscious that this matter, despite the passage of time, is still dealing with issues of disclosure and that there is no hearing date set. Splitting the trial

will not mean that a fixed trial at which damages were going to be ascertained has had to be adjourned.

15. Although I note the proviso of the Defendant's agreement to a split hearing being conditional on there not being a delay in receiving or better on seeking relating to damages, I am satisfied that a trial on issues of liability should take place first with the trial of quantum proceeding later if required. In light of that decision I will need to deal with what disclosure relating to the liability hearing and possibly to damages is required at this time.

Application by Defendant for Williams J to Recuse Himself from Hearing the Liability Trial

16. Having regard to the submissions made by Mr. Keeble and the law as laid down by the House of Lords in ***Magill v Porter*** [2001] UKHL 67, [2002] 2 AC 357 and my review of the law in relation to recusal in the case of ***KCP v JB*** Fam 245 of 2010, I am not satisfied that this is a case in which I should recuse myself from dealing with the issue of liability. Although I have not reserved this case to myself and indicate that it can be heard by any Judge, I should not too readily accept a suggestion of appearance of bias or recuse myself simply because it may be more comfortable for the Defendant if I did.

17. Numerous hearings to date have on occasion, primarily with an attempt to see if issues can be narrowed, taken on the character of a discussion with some

exchanges on the issue of liability during which statements may have been made by me concerning the surrounding facts and how that may impact on the issue of liability. However, at the hearing there was little clarity about the statements that the Defendant states have caused her such concern that I should recuse myself. If the Defendant seeks to pursue the application, I direct that she file and serve an affidavit in support of the occasion. The parties agree that written submissions on behalf of the Defendant should be filed and served on the Plaintiff, and that the Plaintiff be afforded the opportunity to file written submissions within a reasonable period thereafter. It is agreed by the parties that the Court then armed with that material could consider the application to recuse on the papers.

Orders in Relation to the Defendant's Summons

18. The disclosure ordered at subparagraphs 2(iii) - (vi) of the Order of 25 May 2017 which forms the basis of the applications in paragraph 1 (i), (iii) and (iv) in the Defendant's Summons has, on the whole, been complied with. Accordingly, I need not consider the applications in paragraph 1.

19. There seems to have been some disclosure of the information which is requested at paragraph 4 in the Defendant's Summons. If any is still outstanding, I am not minded to direct that it needs to be produced at this stage. The nature of the disclosure is such that its absence would not affect the ability of the parties to have constructive negotiations concerning damages.

20. There is no requirement for leave, as is sought at paragraph 5 of the Summons, to be granted to the Defendant to serve Interrogatories contained in the form appended to the Summons. The Plaintiff has provided details in relation to the wearing of the seatbelt in her affidavit sworn on 7 November 2017. If that evidence is not accepted, the appropriate approach would be for the Defendant to challenge it by cross-examination at the liability hearing or by expert evidence.

21. The main issue for the Defendant at the hearing related to paragraph 1 (ii), (iii) and paragraph 2 in her Summons, due to the format and content of the latest version of the Plaintiff's Schedule of Loss and Damages provided on 19 June 2017 by email. It is submitted that it does not comply with paragraph 5 of this Court's order dated 25 May 2017 which provides:

> *"The Plaintiff is to submit a revised Schedule of Loss and Damages to include the required multiplicand a multiplier calculations. The Plaintiff may add a proviso to the Schedule to the effect that she reserves the right to serve an updated Schedule, not restricted by the heads of loss and damage in the current Schedule. The revised Schedule is to be served on the Defendant's attorneys by 4 PM on 19 June 2017."*

22. In my Written Judgment dated 18 May 2017 I outlined my earlier Order of 23 November 2016 relating to the provision of a Schedule of Loss in the appropriate form. I noted that the Schedule was "*not in an easy to read format and it requires some revising.*" I highlighted the absence of any Practice Direction, case

precedent or Grand Court Rule relating to the filing of and the content that should be in a Schedule of Loss of Damages in personal injury cases in the Cayman Islands."

23. In my 18 May 2017 Judgment I looked at the practice in England and Wales to see if helpful suggestions could be made having regard to it. I remarked that the English approach "*encourages a Plaintiff to obtain all of the relevant quantum information at an earlier stage which promotes and enables more timely and informed settlement negotiations.*" I made reference to the England and Wales Personal Injury Pre-action Protocol which requires a claimant to send as soon as practicable a "*Schedule of special damages with supporting documents, in particular whether the defendant has admitted liability.*"I noted that although Paragraph 4.2 of the English Practice Direction to CPR, Part 16 provides: *the claimant must attach to this particular claim a schedule details of any past and future expenses and losses which he claims.*" the Civil Procedure Rules do not provide for the format of such a schedule or its contents. I referred to the pre-CPR English Practice Direction [1984] 3 All ER 165 which contains the sensible observation at paragraph 1 that "*time is too often wasted at the trial of personal injury actions because the parties do not try to agree the items of special damage, or to find out to what extent they disagree and why...*" I added that paragraph 2 of the Practice Direction stated:

"In any personal injury action in which the damages claimed consist of or include a claim for (a) loss of earnings, (b) loss of future earning capacity, (c) medical or other expenses relating to or including the cost of care, attention, accommodation or appliances, (d) loss of pension rights, particulars, where appropriate in the form of a schedule, shall be prepared by the parties making such claim and ..... shall be served on all other parties against whom such a claim is made."

The Practice Direction indicates that non-compliance with requirements may well be relevant to the issues of costs

24. To assist the Plaintiff, in the Judgment, I pointed out that there were specimen schedules which would be helpful as to the format and content, and then elaborated upon that. I concluded by stating that the Plaintiff's Counsel:

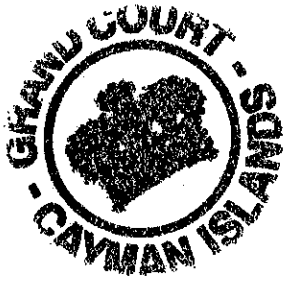
> *"may wish to consider whether the provided schedule is user friendly and whether he should resubmit it in a less narrative format in certain parts, thereby assisting the Court (and the Defendant) in better gaining an informed understanding of the nature and quantum of the damages his client seeks, at this stage I am simply going to direct that the Plaintiff submit a revised Schedule to include the required multiplicand and multiplier calculations.*[1] *The Plaintiff may add a proviso in the Schedule to*

[1] Following circulation of the draft judgment pursuant to GCR O.1, r.12 and Practice Direction No. 1/2004, on 25 May 2017 Mr. Allen provided the following comments – *".... the Witness Statement dated 2 June 2016 provided by my client which included some of the information required for the Schedule of Loss based on the available information at that time. For the purpose of any assessment of damages, when considering the Ogden tables it will require the person to set out the extent of any disability, employment status and, subject to my client's LLB examination results this summer, whether they are tertiary educated or equivalent. That information is at paragraphs 7 and 8 of the Witness Statement. However, as stated in court and the Witness Statement a formal Schedule of Loss will be provided prior to trial in this matter."*

the effect that she reserves the right to serve an updated Schedule of loss and damages, not restricted by the heads of loss and damage in the current schedule."

25. The Defendant contends that if one compares the Schedules provided by the Plaintiff, the latest version is "*in its material part...identical*" to the earlier version of the Schedule. It is submitted that there has been a failure by the Plaintiff to provide a Schedule that "*remotely approaches what is required*" and that in the circumstances "*the irresistible inference is that the plaintiff by her attorney has elected to contemptuously disregard*" the 25 May 2017 order and it amounts to "*a deliberate thumbing of the nose at the authority of the Court.*" As a consequence, the Defendant submits that the Plaintiff's claim should be dismissed pursuant to the inherent jurisdiction of the Court to control its own process as there has been an abuse of process. In the alternative, it is contended that a direction should be given for a proper and complete schedule to be filed by a specified date with an unless order attached.

26. I accept that often the initial version of the schedule will not be as complete as the final schedule filed closer to the damages hearing. That said, I want to make it clear that whether it be a preliminary version or final hearing version of the Schedule, it is a very important document which should include full particulars of the special damages claimed for expenses and loss already incurred and an estimate of any future expenses and losses including loss of earnings and pension



rights. In addition to defining the respective party's case, a properly drafted Schedule provides a template for a Plaintiff's written evidence upon the issue of quantum and a signpost for the judge to follow when assessing a damages claim.

27. Having reviewed the latest Schedule, similar to my position in paragraph 21 of my Judgment of 25 May 2017, I do not "*adopt the emotive sentiments*" of Mr. Keeble. The Schedule of Loss appears to have substantial detail in it, although its format is not as easy to follow as it would be if it had been in the less narrative form found in specimen schedules. It may well be for the reasons outlined in the footnote on page 11 of this Judgment, including the Plaintiff's student status, that a complete schedule with multiplicands cannot be produced at this stage. If that turns out not to be the actual case, then there may be detrimental financial consequences for the Plaintiff at a later stage of these proceedings. If it is later found that there are elements of the claim which are known and quantifiable at this stage which are not provided in the present schedule and, if the Defendant wishes to try to settle, but the lack of adequate particulars of special damages prevents a valuation of the claim, there may later be arguments that interest should be disallowed and the Plaintiff should have some responsibility for costs. If the format of the Schedule at trial is unnecessarily difficult to follow resulting in unnecessary greater time needed to be expended at trial to analyse and deal with it in evidence and submissions, then there may also be cost consequences.

Additionally, if special damages are not expressly pleaded, the Plaintiff may be precluded from giving evidence about them.

28. Accordingly, at this stage I make no further order in relation to the Schedule of Loss or Damages. However, note should be taken by the Plaintiff to my above observations concerning potential cost implications.

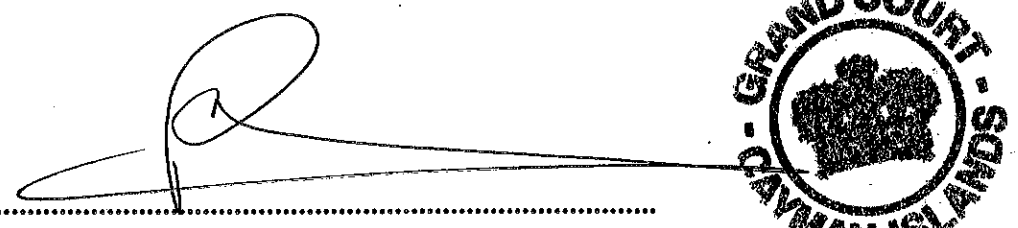
Further Directions

29. I am satisfied that leave should be given to the Plaintiff to file an addendum to the recently filed Collision Reconstruction Report of their expert Brian Smith. At the close of the hearing it was agreed by Mr. Allen that the addendum report would be filed and served by 5 January 2018, and I so direct. I understand the frustration of the Defendant (who has complied with the direction) resulting from the belated production of this report, as the Court had directed at paragraph 9 of its Order dated 8 December 2015 that any such report must be delivered by 4 March 2016, with any reply by 1 April 2016.

30. In light of the above direction, I afford the Defendant the opportunity to file and serve a report in reply. That report is to be filed and served by or on 28 February 2018. I also give leave for the Defendant, if so advised, to file an audibility report by or on 28 February 2018.

31. The progression of this matter has been greatly hindered by considerable focus being placed on disclosure issues at hearings. I trust that the parties, now being able and required to focus on the liability hearing, will ensure that they comply with all obligations in that regard, including the filing of proper paginated bundles and skeleton arguments in compliance with the GCR. At a number of the hearings in this matter some affidavits and documentation have been filed and served on the cusp of or at hearings. I do not expect there to be any evidence filed close to the trial, as that must now be done in a timely fashion.

32. I direct Mr. Keeble to draft an order reflecting the directions made in this Judgment. A copy of the draft order should be sent by Mr. Keeble to Mr. Allen to provide an opportunity for comment. If Mr. Allen does not provide Mr. Keeble with any written comments on the draft order within 48 hours of service upon him of the draft order, then Mr. Keeble may submit the draft order to the Court for the Court to review and approve.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT