IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO. G 222 of 2014

BETWEEN

SOPHIA EDWARDS

RESPONDENT / PLAINTIFF

AND

DR SARETH DE ALWIS-SENEVIRATNE

APPLICANT / RESPONDENT

Appearances:	Mr Keeble for the Applicant/Respondent
	Miss Mullen for the Respondent/Plaintiff
Before:	Hon. Justice Kirsty-Ann Gunn (Actg)
Hearing date:	8th June 2018
Date of decision:	8th June 2018
Draft Judgment circulated:	20th June 2018
Date for final comment:	25th June 2018
Date of Judgment:	29th June 2018

HEADNOTE

Personal injury – split trial and credibility - strike out/dismissal of part of claim of battery

JUDGMENT

1. This judgment concerns the Defendant's application brought by Summons dated 20th November 2017 for an order –

   (I) Striking out/dismissing paragraph 24(b) of the Plaintiff's Amended Statement of Claim alleging battery pursuant to GCR Order 18 r.19(1)(a) and/or (b), Order 14 r.12 or Order 14A; and

(II) For a split trial, with a "preliminary and fundamental determination of factual issues in dispute between the parties".

2. I refused both applications and undertook to provide my reasons in writing. These are given now.

SUMMARY OF CASES

3. For the purposes of this application it is only necessary to briefly outline each party's case.

4. The Plaintiff's case is that Dr Charles admitted her to CTMH with abdominal pain on 31st November 2012. After several days in hospital she was diagnosed with tumours. Dr Charles contacted the Defendant who agreed to surgically remove these. The Plaintiff asserts that she met the Defendant the day before the surgery and they spoke (on 5th December). She asserts that the Defendant did not discuss the removal of her reproductive organs with her at that time. The Plaintiff was not asked to sign the consent form until shortly before surgery on 6th December and without any explanation or opportunity to read it. During the surgery the Defendant performed a full abdominal hysterectomy. The Plaintiff asserts that she was not advised that this was what the Defendant had intended to do and she did not agree to this procedure. Furthermore, a full hysterectomy was unnecessary as the Plaintiff's condition was as a result of an ectopic pregnancy and a cyst on her ovaries, not tumours. The Plaintiff asserts that the Defendant ought to have, but failed to diagnose the ectopic pregnancy and treat her accordingly. As a result of these circumstances the Defendant either committed a battery or was negligent. Additionally, the Plaintiff alleges that the Defendant maintained the false diagnosis even after the surgery and she only discovered the true diagnosis from Dr Charles some weeks later.

5. The Defendant accepts that he performed the hysterectomy. He denies that he met the Plaintiff prior to surgery on 6th December or that he diagnosed her condition. His case is that Dr Charles contacted him on the day of the surgery requesting his assistance. That is when Dr Charles advised him of the diagnosis. When he attended CTMH the Plaintiff was in a critical state, close to collapse and needed emergency surgery. The Defendant asserts that he explained the hysterectomy procedure and the consequences of the procedure to the Plaintiff and that she consented to the procedure. Consequently, he was neither negligent in his care of the Plaintiff nor did he commit battery.

STRIKE OUT/DISMISSAL

6. Mr Keeble, on behalf of the Defendant, submitted that paragraph 24.b of the Statement of Claim should be struck out because -

(a) The Plaintiff has not pleaded the basis for "misrepresentation"

(b) "Misrepresentation" in this instance means "misdiagnosis". Therefore the substance of this allegation is negligent *misdiagnosis*, not battery. Negligent Misdiagnosis is pleaded at paragraph 15 of the State of Claim and paragraph 24b is therefore duplicitous.

(c) Mr Keeble submitted that consent obtained as a result of misdiagnosis is still valid consent and therefore the doctor is not committing a battery. Mr Keeble relies on the decisions in **Chatterton v Gerson** [1981] QB 43, **Hills v Potter** [1983] 3 All ER 716, **Abbas v Kenny** 31 BMLR 157 and **Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital** [1984] 1 QB 493 in support of his client's position. The argument that there was no "genuine consent" has no basis in law/has no prospect of success.

(d) It is an unwarranted second attempt to plead battery which is pleaded at paragraph 24.a;

(e) That the allegation of battery as pleaded in 24.b. is unsustainable in law :-

*"**Battery***

24. In the premises:

(a) the Plaintiff did not consent to the said Surgery, being the removal of her

cervix, uterus, both fallopian tubes and both ovaries; and

(b) the consent she did provide for the removal of two tumours from her abdomen was obtained by misrepresentation of her condition and was not a

genuine consent."

7. For the same reasons Mr Keeble asserts that paragraph 24.b constitutes an abuse of process and/or is frivolous and vexatious.

8. Miss Mullen on behalf of the Plaintiff opposed the application and submitted that –

(a) Strike Out applications should be used in instances where most or all of the other party's case will be struck out, rather than a narrow and discreet issue which will not significantly impact on the conduct of the proceedings, as is this case.

(b) Paragraph 24.b is not the entirety of the Plaintiff's claim for battery. Therefore, even if paragraph 24.b is struck out, the issue of battery will remain an issue to be determined at trial. Consequently, the Defendant's application is inconsistent with the overriding objectives that applications should be made with consideration to what is just, expeditious and economic.

(c) The Defendant misrepresented to the Plaintiff, both before and after the surgery, that she had cancer. Misinformation, whether or not innocently given, and withholding information which is sought by the patient may well "vitiate consent". Reliance was placed on the dictum in **Re: T (Adult: Refusal of Treatment) [1993] FAM 95**). The Plaintiff believed that the tumours were to be removed which she consented to. She was not told of, nor had she consented to, a full abdominal hysterectomy, thereby constituting battery.

The Law

9. GCR Order 18 r19 provides that at any stage the Court may strike out any pleading or part of a pleading on the ground that it –

(a) discloses no reasonable cause of action or defence (subsection (1)(a));

(b) may prejudice, delay or embarrass the trial of the action (subsection (1)(c)); and

(c) is otherwise an abuse of the process of the court (subsection (1)(d)).

10. The Court should exercise its jurisdiction to strike out in the most plain and obvious cases (see **Kalley v Manus** 1999 CILR 566).

11. The Court must consider 'whether the statement of claim discloses an alleged cause of action which has some chance of success' (**Drummond Jackson v BMA** [1970] 1 WLR 688). The mere fact that the case is weak and not likely to succeed is no ground for striking it out (**Moore v Lawson** (1915) 31 TLR 418; **Wenlock v Moloney** [1965] 1 WLR 1238; [1965] 1 All ER 871). Therefore, the threshold for "reasonable course of action" is low. If the matter requires a detailed scrutiny of documents or assessments or the evidence, the Court will leave those matters to be determined at trial (**Cayman Health Ltd v Trincay Medical Services,** 23rd July 2013)

12. Where the application involves a prolonged and serious argument, the Court should decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleadings, but in addition, is satisfied that striking out would obviate the necessary trial or substantially reduce the burden of preparation for trial. **Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd** [1986] AC 368; [1986] 1 All E.R. 129 and **In the Matter of Omni Securities Ltd (No.3)** 1998 CILR 275).

13. In order to succeed on an application under Order 14 r.12 the Defendant has to show that the Plaintiff's claim is unsustainable (Re **Omni Securities Ltd (No. 3)**. The purpose of such an application is to save cost and time. If the Plaintiff can show more than a faint possibility of succeeding then the application fails.

14. Order 14A provides that the Court may determine any question of law summarily if -

(a) the question is suitable for determination without a full trial of the action; and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

15. If the application requires an examination of the facts then the Court should not exercise its discretion under Order 14A (**Brown v Green Thumb Nursery** [1994-95 CILR N-7]).

Analysis

16. It is apparent that Paragraph 24.b will require a more detailed examination than is appropriate for a summary dismissal/strike out application.

17. Much will turn on the use of the word "misrepresentation" which will require the court to make some factual determinations after hearing evidence, including whether the Defendant withheld the true nature of the Plaintiff's condition, or advised her of a misdiagnosed condition. There may well be a distinction to be drawn between those two propositions, depending on what the court finds to be the true facts surrounding the Plaintiff giving consent. I note that the Court in **Sideway** and **Re T** observed that consent is vitiated if it is obtained by fraud or misrepresentation. If the Court finds as a matter of fact that there was a "misrepresentation" as opposed to "communication of a misdiagnosis" then the Plaintiff's claim of trespass as set out in paragraph 24.b may succeed. Paragraph 24.b therefore has some chance of success, albeit, at present, not necessarily a strong one. Paragraph 24.b therefore discloses a course of action.

18. Striking out paragraph 24.b pursuant to any provisions of Order 18 r.19 is, therefore, not appropriate. For the same reasons I found that it is not appropriate to exercise my discretion under Order 14 r.12 either.

19. As I have already set out, paragraph 24.b does require some consideration of the evidence and is, therefore, not solely a point of law. Neither will it finally determine the entire cause. Exercising my discretion under Order 14A is therefore not appropriate either.

SPLIT TRIAL

20. The Defendant proposed a preliminary determination of the following issues:

(i) Whether the Defendant was consulted by the Plaintiff on 1st December 2012[1] and was the surgeon on that date and thereafter as alleged by the Plaintiff; or

(ii) Whether the Defendant was first informed of and consulted in respect of the Plaintiff's case on 6th December 2012 as he asserts.

21. Mr Keeble submitted that this case is an exceptional one that warrants a departure from the usual practice of one trial to deal with all matters. He argued that the factual findings of the preliminary issues of when the Defendant was consulted is appropriate because –

(a) It is impossible for Defendant to instruct a medical expert without the date being fixed. Alternatively, the medial experts could focus on one set of facts rather than provide opinions on various version of event in accordance to the various dates proposed by the parties. This would save on costs and simplify their evidence.

(b) It would resolve which standard of care is to be applied to the Defendant's actions;

(c) It will simplify/streamline the second part of the trial as counsel need only focus on one set of facts, thereby reducing preparation time, cross-examination, re-examination and speeches.

(d) Although two trials will increase costs, it would provide savings with regards to preparation (see (c) above).

[1] The Plaintiff's Statement of claim refers to 1st December 2012; however, counsel for the Plaintiff has indicated that this is an error and should read 5th December 2012. It was proposed that the Plaintiff seeks leave to amend the Statement of Claim.

(e) It will simplify the issues for the trial judge to consider, they would not need to consider multiple factual possibilities.

(f) The Defendant's professional skills and credibility are being called into question and these should be resolved as soon as possible. A trial on the preliminary issue would require only 1 day. This could be listed much sooner than a 5-8 day trial addressing all issues.

(g) Although the determination of the preliminary issue will not resolve the trial, it may encourage settlement.

(h) Following the determination the parties may be able to agree damages, thereby shortening the length of the second trial.

(i) The parties would have to give evidence twice, but the Plaintiff will only be required to speak to consent during the second trial.

(j) The balance of convenience is in favour of a split trial;

(k) Neither party would suffer prejudice by having two trials;

(l) A clean split is possible as the preliminary hearing concerns a comment (not discreet and narrow) issue.

22. The Plaintiff opposed a split trial arguing that such a course would –

(a) Increase costs, as the Plaintiff's Queen's Counsel would need to travel from the UK twice;

(b) The proceedings were commenced in 2014. A split trial would cause considerable further delay as a result of the Defendant not instructing his expert until after the preliminary trial.

(c) The Plaintiff and the Defendant would have to give evidence on almost all aspects again at the second trial.

(d) Giving evidence twice will place significant emotional strain on the Plaintiff.

(e) A preliminary trial will be prejudicial to the Plaintiff's case, as the court would be looking at her case "through a keyhole" by focussing on a narrow and discreet issue and disregarding other relevant material.

(f) A preliminary trial will not be determinative as there are other factual disputes to be addressed.

(g) The medical experts are able to address the various factual scenarios without significantly increasing costs.

(h) The Plaintiff may have to call her expert at both hearings, therefore, increasing her costs.

(i) Local counsel would also have to prepare for 2 trials, which would increase costs.

(j) Defining a clean split was not possible.

23. I also raised with counsel the fact that the Court will have to determine the veracity of both the Plaintiff and Defendant's accounts at the preliminary trial. I invited them to address me on how a finding on credibility / reliability at the preliminary trial would affect their cases at the second trial, given that the second trial would also necessitate an assessment of their credibility/reliability. Is it appropriate for the Court to make a finding on credibility and reliability having only heard part of the conflicting narratives? Would a finding at the preliminary trial prejudice the party who is found to be unreliable/untruthful going into the second trial? Mr Keeble argued that the court frequently has to make such findings when the split trial is between liability and quantum and referred me to **Vernon v Green** (G19 of 2015, Judgment 7th December 2017). He submitted that the same judge would be hearing both trials and can, therefore, take into consideration his/her finding on credibility at the first trial when assessing credibility for the second trial. Miss Mullen argued that credibility ran throughout the case and could not be neatly split as in **Vernon**.

The Law

24. Whether a split trial is appropriate will depend on the facts of each case.

I am mindful of the overarching objective of the Grand Court Rules is to enable to Court to deal with every cause or matter in a just, expeditious and economical way.

Dealing with a cause or matter justly includes, as far as is practicable –

(a) Ensuring that the substantive law is rendered effective and that it is carried out;

(b) Ensuring that the normal advancement of the proceedings is facilitated rather than delayed;

(c) Saving expense;

(d) Dealing with the cause or matter in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case; and

(iii) to the complexity of the issues.

(e) Allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings.

25. In **Ciara Harrara-Frederick v HSA and Dr Alexander (Cause No. G6 of 2008; Judgment 7th March 2014**) Williams J at (paragraph 20) summarised the approach to an application for split trials -

> *"The Court should be satisfied that there is a good reason for ordering a split trial before doing so, however that should not be regarded as unduly fettering the Court's inherent jurisdiction. I reach this conclusion whilst at the same time reminding myself that paragraphs 4.1 and 4.2 of the Preamble of the GCR highlight the Court's duty to case manage cases consistent with the overriding objective. Pursuant to Paragraph 4.2 (g) I should consider whether the likely benefits of taking a particular step will justify the cost of taking it. Having regard to paragraph 4.2 (h) I share Hildyard J's view [in Electrical Recycling Group Limited[2]] that there should be 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." The appropriate test is that which was at the time viewed as being a new approach to the RSC Ord. 33, r.4(2) commended by Lord Denning M.R. In* ***Coenan v Payne*** *[1974] 2 All ER 1109 when he stated*
>
> *"In future the court should be more ready to grant separate trials than they used to. The normal practice should be that liability and damages should be tried together. <u>But the court should be ready to order separate trials where it is just and convenient to do so</u>[3]."*

[2] *Electrical Recycling Group Limited and Another v Philips Electronics UK and others [2012] EWHC 38 (CH)*
[3] Underlining as per Williams J

26. Hildyard J in **Electrical Waste Recycling Group Limited** at paragraphs 5 and 6 concluded that the Court should take a common sense and pragmatic approach to such applications. He provided a set out factors the court should consider -

(a) whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary;

(b) what are likely to be the advantages and disadvantages in terms of trial preparation and management;

(c) whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;

(d) whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case;

(e) whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);

(f) whether there are difficulties of defining an appropriate split or whether a clean split is possible;

(g) what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process;

(h) would a split trial assist or discourage mediation and/or settlement;

(i) if the order for a split trial is made late in the proceedings, whether the expenditure of time and costs might actually increase the overall costs; and

(j) generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated is fairly, quickly and efficiently as possible.

27. Both **Harara** and **Electrical Waste Recycling Group Limited** were considering splitting the trial on liability from quantum, which is the more common application. The current case is not seeking a split in the same way.

Analysis

28. It is helpful to summarise some of the main issues that would need to be explored and determined-

(a) When did the Defendant first have knowledge of the Plaintiff's case?

(b) What were the circumstances in which the Defendant came to be involved in the case?

(c) When did the Defendant first meet the Plaintiff?

(d) At what stage did the Defendant become the treating physician for the Plaintiff?

(e) What was the Plaintiff's medical condition in the days leading up to the surgery?

(f) What was the Plaintiff's medical condition immediately before "surgery"?

(g) What examinations and tests were performed at CTMH?

(h) Who diagnosed the Plaintiff?

(i) When did Dr Charles first contact the Defendant?

(j) Were Dr Charles' record entries false or misleading?

(k) What did Dr Charles tell the Defendant about the Plaintiff's condition?

(l) What steps did the Defendant take to inform himself of the Plaintiff's diagnosis and the grounds thereof?

(m) What did the Defendant communicate to the Plaintiff about her diagnosis?

(n) When was that diagnosis communicated?

(o) What did the Plaintiff understand her diagnosis to be?

(p) Did the Defendant fully explain the surgical procedure which was to be performed and the consequences thereof?

(q) What did the Plaintiff understand the surgical procedure was going to be and the consequences thereof?

(r) Was the Plaintiff's consent to surgery valid, given what was communicated to her?

(s) What were the Defendant's post-operative statements to the Plaintiff?

(t) What is the appropriate standard of care to which the Defendant is to be held?

(u) Did the care provided by the Defendant meet the appropriate standard?

(v) (If the Defendant is found to have been negligent or committed a battery) Quantum of damages.

29. Mr Keeble proposed that the preliminary trial would be limited to matters concerning (a) – (d), (h) and (i) as they would speak to the issue of when and how the Defendant became involved in the Plaintiff's treatment. However, during submissions, Mr Keeble flagged up that the Defendant will argue that the Plaintiff's recollection of which doctor came to see her on 5th December was affected by her critical condition. These are matters relevant to (e) and (f). In order to make this assessment the Court would need to hear considerable medical evidence, most likely from the experts that evidence is directly relevant to issues (r) and (s). Presumably the Defendant would seek to argue the same point with regards to the Plaintiff's recollection of discussions about the surgery and consent (items (n) – (p)), which, according to Mr Keeble's proposal, would be limited to the second trial. With such a course, the Court would need to hear medical evidence as to the Plaintiff's medical status prior to, and on 6th December, at both trials. This is likely to result in some duplication and overlap of the expert evidence and thereby significantly increasing costs. Similarly, the Plaintiff will seek to prove that the Defendant continued to make false statements about the surgery after the event. If the Court were to find that the Defendant did make intentional false statements then that would be a factor to take into consideration when assessing the weight to be attached to his account of all of the events leading up to the surgery. Consequently, (q) would become relevant at the preliminary trial also.

30. These are just a few examples of how credibility and reliability of the parties is interwoven throughout the issues in the case and cannot be neatly separated. Any attempt to do so would be highly artificial and likely to prejudice one or both parties by preventing relevant evidence being adduced at the relevant time.

31. Although I accept that at times there is a need, and it is appropriate, for a judge to reassess a witness' credibility / reliability in split trials, these tend to be in circumstances when credibility is confined to narrow and discreet issues. **Vernon** is an example of such, where the split was between liability and quantum. However, in instances where credibility / reliability is so central and interwoven into many aspects of the case on liability, it is simply not appropriate. Compartmentalising credibility in such circumstances is likely to cause prejudice to one or other party by preventing the Court from having all of the relevant information when making its assessment of their evidence. Furthermore, a party may be left with the impression that they will suffer prejudice at the second trial, when the Court has already decided during the first trial that some or all of their evidence on one or more matters cannot be relied upon that is also relevant to issues to be determined in the second trial.

32. Besides the difficulty with the marshalling of evidence, both parties agree that a determination of the date on which the Defendant first became involved in the case would not avoid the need for the second trial. This argues against a split hearing.

33. I rejected Mr Keeble's assertion that it would be difficult and costly to instruct an expert to speak to the various factual scenarios. He has not provided any evidence to corroborate his assertion. I find that it is unlikely that a report considering the different scenarios and different standards of care would very significantly add to the overall cost of the report or length of time the expert will be giving evidence. This additional cost will be significantly less than if the experts had to give evidence twice.

34. Furthermore, a preliminary trial would significantly delay proceedings. Delaying the instruction of the Defence expert until after the preliminary trial is likely to push the matter beyond the 6 year anniversary of the surgery. It is well-documented that our ability to recall events is adversely affected by the passage of time. Any further delay is likely to prejudice both parties as they both will be heavily relying on their recollection of conversations and meetings, rather than documents from which they can refresh their memory.

35. I accept that trial preparation may be reduced to some degree, I do not believe it will reduce the overall time for cross-examinations, re-examination and speeches over 2 trials. Mr Keeble suggested that one trial with several factual scenarios would be difficult for the parties and the judge to manage effectively. The Court frequently deals with factually complex matters. I do not consider the issues at this trial to be particularly complex. I consider that a split trial is likely to complicate matters more, rather than simplify the proceedings. Additionally the Plaintiff and the Defendant will have to give substantial evidence at both trials and will likely cover the much of the same ground on both occasions.

36. The additional cost of the Plaintiff's counsel flying in from overseas is another factor in favour of one trial.

37. Finally, the parties agree that a split trial will not lead to a determination of the matter, meaning that a second trial will be necessary in any event. Any agreement as to quantum is unlikely to significantly affect the overall time required to conclude the matter or save costs.

38. It is apparent that both parties wish for a swift resolution of this matter. However, I concluded that a split trial will not only cause significant delay and additional costs. The issues to be addressed at a preliminary trial as proposed by Mr Keeble are not narrow and discreet; and a clean split is simply not possible. In this instance it is not just, convenient or expeditious to split the trial.

For the reasons outlined the Defendant's applications are refused.

Hon Justice Kirsty-Ann Gunn
Acting Judge of the Grand Court

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