CAUSE NO. G2/13

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BETWEEN:	**CHARLES MCCOY**	**PLAINTIFF**
AND:	**(1) CAYMAN ISLANDS HEALTH SERVICES AUTHORITY** **(2) DR. JHA**	**DEFENDANTS**

Appearances: Mr. Phillip Ebanks for the Plaintiff
Mr. David Dinner and Mr. Stephen Symons for 1st Defendant
Mr. Paul Keeble for the 2nd Defendant

Before: Mr. Justice Panton (Acting)

Hearing Date: 6th September 2013

GRAND COURT CAYMAN ISLANDS

JUDGMENT

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1. This is a two-pronged application by the second Defendant (Dr. Jha) to strike out the Writ and the Statement of Claim herein. Firstly, the Applicant seeks an order pursuant to Order 18 rule 19(1)(a), (c) and/or (d) of the Grand Court Rules (GCR), that the Statement of Claim discloses no reasonable cause of action, is frivolous or vexatious, and/or is an abuse of the process of the Court. Alternatively, Dr. Jha seeks a determination under Order 14A of the Grand Court Rules that the claim is barred by virtue of the provisions of Section 12 of the Health Services Authority Law (2010 Revision).

2. At this point, it may be noted that although the application was thus framed, Counsel for Dr. Jha concentrated his efforts on the alternative order sought – that is, on Section 12 of the Health Services Authority Law. Indeed, he said it was the main plank of his application. I hope I do no disservice to Counsel's submissions by saying that the application under Order 18 r. 19 became the alternative.

3. In an application to strike out a pleading, the Court is not concerned with the evidence. The court has to assume the truth of the facts contained in the pleading, and then make a determination as to whether that pleading has a reasonable prospect of succeeding: ***TCB v Arthur Anderson*** {2008} CILR 486.

4. In the instant case, the pleading is the Statement of Claim, to which it is now necessary to turn. The endorsement to the Writ reads:

> "The Plaintiff claims against the Defendants to recover damages for negligence in that the Second Defendant, an employee/servant or agent of the First Defendant, failed to undertake the proper diagnostic methods and negligently did not treat the Plaintiff appropriately, rendering services well below the proper standard of care required of him on or about March 2007 and continued to not treat the Plaintiff appropriately until 2008".

The Pleading

5. On 9 April 2013, the Plaintiff filed a claim in negligence against the Health Services Authority and Dr. Jha. The Plaintiff claims that in or about March 2007, that is, six years ago, he attended at the office of Dr. Jha, an employee of the Authority, and complained of shortness of breath. Dr. Jha examined him and advised him to have and x-ray of his chest done. He complied, and Dr. Jha examined the x-ray and informed him that his chest was normal, and sent him home.

6. The Plaintiff suspected that he was being adversely affected by mould at his workplace, and bought a filter on 16 March 2007. He then went to see Dr. Mohanty who referred him to Melissa Shaw, a respiratory therapist.

7. On 5 May 2008, the Plaintiff told Dr. Jha that he believed "the respiratory systems were related to mould". Dr. Jha ordered a "Rhast Panel" blood test for the Plaintiff, and told him he would get in touch with him if anything was wrong. Dr. Jha did not communicate the result of the test, but the Plaintiff ascertained the result from another source. It showed that the Plaintiff was being affected by mould at the workplace. On 5 July 2008, the Plaintiff was attended to a Dr. Fiona Robertson who prescribed "some allergy medicine".

8. The Chief Medical Officer, at the request of Dr. Mohanty, referred the Plaintiff to Mt. Sinai Hospital where he was diagnosed with bronchopulmonary aspergilliosis.

9. The Plaintiff alleges that Dr. Jha "was negligent in his duty of care and not communicating to the Plaintiff as to the test results and not referring the Plaintiff to a Specialist".

10. The Plaintiff claims not only that Dr. Jha failed to diagnose his illness but also that Dr. Jha and the Health Services Authority's "servants and employees" by their negligence caused his illness.

The Submissions

11. Mr. Keeble submitted that Section 12 of the Health Services Authority Law exempts employees of the Authority from liability in damages for their actions or omissions unless it can be proven that the action or omission was in bad faith. There is no allegation of bad faith in the Statement of Claim; hence, Dr. Jha's actions cannot be the subject of a claim, Mr. Keeble submitted. The section, he said, provides a complete defence.

12. The prerequisites under Order 14A((1) have been met, accordingly to Mr. Keeble. The question is suitable for determination without a full trial, and such determination will finally dispose of the entire action.

13. The Health Services Authority incontrovertibly provided health care to the Plaintiff in the exercise of its statutory duties, through its employee, Dr. Jha, and there are no other necessary or material facts in issue, said Mr. Keeble. He said also that it was worthy of note that there were other substantial identical statutory exemptions from liability for acts or omissions of the Cayman Islands Government agencies, servants and employees in respect of the discharge of their functions, save where "bad faith" is shown. In this regard, he listed eleven such statutes.

14. As regards the application under Order 18 rule 19, Mr. Keeble submitted that the stated particulars fail to make out a cause of action in that there is nothing to indicate negligence on the part of Dr. Jha.

15. The response of Mr. Phillip Ebanks, Counsel for the Plaintiff, is as follows: Section 12 of the Health Services Authority Law does not prevent persons from suing the Authority or its employees in negligence. "Bad faith", he said, is a matter of evidence, and by pleading "negligence", the question of "bad faith" becomes a live issue. He referred the Court to Lord Steyn's Judgment in T***hree Rivers DC v. Bank of England*** (No. 3) {2003} 2 AC 1, and to ***Goodman v. Harvey*** {1836} 4 A & E 870. In citing these cases, Mr. Ebanks submitted that gross negligence may be evidence of bad faith.

16. Mr. Ebanks submitted that striking out a pleading was a severe measure that should be done with extreme caution. "The development of the common law", he said, "requires a reluctance to strike out an action".

Orders 14A

17. Order 14A rule 1 reads thus:

> "(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –
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> (a) such question is suitable for determination without a full trial of the action; and
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> (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.
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> (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
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> (3) The Court shall not determine any question under this Order unless the parties have either –
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> (a) had the opportunity of being heard on the question; or
>
> (b) consented to an order or judgment on such determination.

(4) Nothing in this Order shall limit the powers of this Court under Order 18, rule 19 or any other provision of these Rules."

The Health Services Authority Law

18. Section 12 of the Health Services Authority Law reads thus:

> "Neither the Authority, nor any director or employee of the Authority, nor any Committee member, shall be liable in damages for anything done or omitted in the discharge of their respective functions or duties unless it is shown that the act or omission was in bad faith".

19. It is well settled principle in the interpretation of statutes that unless a contrary intention is expressed, words are to be given their ordinary, national meaning. Among those who have conformed this principle is Upjohn, J (as he then was). He did so in ***Re Hall's Settlement*** {1954} 2 All ER 679 at 682D. He said:

> "It seems to me that the only safe canon of construction I can adopt is to give the words their natural meaning unless the context otherwise requires".

20. Section 12 is applicable to:

(a) the Authority, as a legal entity;

(b) the directors of the Authority;

(c) the employees of the Authority; and

(d) all Committee members.

21. Section 6A (1) of the Law establishes the Cayman Islands Health Foundation, and section 6A (2) establishes the Cayman Islands Health Foundation Committee. The purpose of the Foundation is to provide funds for health care facilities and programmes, and for the continuing operational funding requirements of the Authority. The Committee consists of seven members appointed by the Governor in Cabinet, and directors and employees of the Authority are excluded from membership. The Committee is responsible for the day to day management of the Foundation and is accountable to the Ministry responsible for Health.

22. Section 5 of the Law gives the Authority the task of providing health care services and facilities in the Cayman Islands in accordance with the National Strategic Plan for Health prepared from time to time by the Government. It is also the duty of the Authority to provide public health programmes as determined by the Minister, and to provide health care for employees of the Government, indigent persons and such other persons as may be agreed from time to time with the Minister.

23. Finally, as regards this Law, note has to be taken of the provisions of Section 33 (1) and (2). Subsection (1) enables the Minister to give "general and lawful directions" in written form as to the policy to be followed by the Authority in performing its

duties and functions "as appear to the Minister to be necessary in the public interest". And subsection (2) exempts the Authority, its directors and employees from liability for any loss or damage flowing from the directions of the Minister

Is the Plaintiff's claim barred by Section 12?

24. There is no doubt that Dr. Jha is an employee of the Health Services Authority. According to the claim, he worked in the hospital managed at the time by the Authority. The consultation by the Plaintiff was at the hospital, and other employees of the Authority performed services for the plaintiff, because of, and subsequent to, that consultation. There is no allegation that Dr. Jha was not discharging the duties for which he was employed. Nor is there any allegation or claim that he acted in bad faith.

25. I do not find it possible to agree with Mr. Phillip Ebanks in his attempt to equate negligence with bad faith, and thereby conclude that the pleading is in order and is unobjectionable in the eyes of Section 12. Mr. Ebanks relies on the ***Three Rivers Case*** but the most that can be said as regards that case is that it was held by the House of Lords that the tort of misfeasance in public office involves an element of bad faith.

26. In the ***Three Rivers Case***, the Bank of England was sued by former depositors of the Bank of Credit and Commerce International, SA (BCCI) in respect of the perceived failure in supervising the activities of BCCI, the latter being a licensed deposit –

taker. The English Banking Act provided that the Bank was not liable in damages for acts or omissions in the discharge of the regulatory functions, in the absence of bad faith. Consequently, the Plaintiffs alleged in their claim that the Bank's officials were liable for misfeasance in public office.

27. Lord Steyn, on whose judgment Mr. Ebanks relies, said that the case law reveals two different forms of liability for misfeasance in public office. "First there is the case of targeted malice by a public officer, i.e conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful". {p. 191 E}

28. Lord Steyn said that the case was "not one of targeted malice". If there was to be liability, it would have had to be in the second form of the tort. In that regard, he said, having looked at the position in Australia and England:

> "It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form". {p. 192 G}

29. Lord Millett regarded the two limbs as merely different ways in which the necessary element of intention is established. He added:

> "The tort (of misfeasance in a public office) is an intentional tort which can be committed only by a public official. From this two things follow. First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind". {p. 235 B}.

30. In the circumstances, I am unable to see the parallel with the instant matter before me. There is nothing to indicate malfeasance or bad faith, on the part of Dr. Jha, even if that had been pleaded. I am therefore of the view that it is most appropriate and desirable that this claim should be struck out in accordance with the provisions of Order 14A rule1. An individual ought not to be required to defend a suit that is impermissible by clear legislation.

31. Although it may not be necessary for me to give an opinion on the matter, I cannot help thinking that if there has been negligence in the care that was given to the Plaintiff, he may not be without a remedy, in view of the overall provisions of the Health Services Authority Law. Earlier, in this judgment, I quoted several sections of the law which indicate that the Government has clearly undertaken a responsibility to provide health care for its employees, of whom the plaintiff is one. The

Government also has overall responsibility for the Health Services Authority, seeing that the Minister is empowered to give it general and lawful directions as to the policy to be followed by the Authority in performing its duties and functions. If there has been negligence in the provision of health care to one of its employees, the Government would, it seems to me, be liable and the Attorney General would be the proper Defendant in respect of such negligence.

32. Section 12 protects the Authority, its directors, employees and Committee members from liability – except where there is bad faith. However, the section ought not to be regarded as a hiding place for the Government in respect of negligence on the part of its agencies or employees. Whereas the Authority and its employees may not be sued in their respective individual capacities, the Government may yet he held accountable.

Is there a reasonable cause of action?

33. Order 18 r. 19 reads thus:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice , embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading".

34. According to the Statement of Claim, the Plaintiff was experiencing problems with his breathing, so he consulted Dr. Jha. He suspected that his "surroundings where he worked were causing these problems due to mould". The pleading further states that the Plaintiff's suspicion was doubly confirmed about a year later – first by the "Rast Panel" test ordered by the said Dr. Jha, and then at the Mt. Sinai Hospital.

35. The pleading therefore suggest that the Plaintiff's condition was in existence prior to his first visit to Dr. Jha, and that the condition had been brought about by his exposure to the conditions at his workplace. There is nothing to indicate that Dr. Jha was responsible for this exposure. It is therefore quite illogical and puzzling for the

Plaintiff to allege in paragraph 11 of the Statement of Claim that his illness was "caused by the negligence" of Dr. Jha and the Health Services Authority's "servants and employees".

36. It is my view that even if section 12 of the Health Services Authority Law did not exist, the Plaintiff would be in an impossible position as regards proof that Dr. Jha caused his illness through negligence.

37. The claim is not well-founded. In view of the above, it cannot be allowed to stand. Accordingly, I order as follows:

    1. The claim as framed is wholly unsustainable by virtue of the provisions of Section 12 of the Health Services Authority Law (2010 Revision).
    2. In any event, the claim discloses no reasonable cause of action against the Second Defendant.
    3. The cause is hereby dismissed with costs of the application awarded to the Second Defendant.

Seymour Panton
Judge of the Grand Court (Acting)

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