IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 6 of 2008

BETWEEN:

CIARA HERRARA-FREDERICK
(A Minor, suing by her mother and next friend, Doris Morris)

Plaintiff

AND:

THE HEALTH SERVICES AUTHORITY

1st Defendant

AND:

DR. GILBERTHA ALEXANDER

2nd Defendant

Appearances:	Mr. James Kennedy of Samson & McGrath for the Plaintiff Ms. Peta-Gaye Golaub-Symons & Mr. Stephen Symons of Bodden & Bodden for the 1st Defendant Mr. Simon Dickson and Ms. Amy Bond of Mourant Ozannes for the 2nd Defendant
Before:	Hon. Justice Richard Williams
Heard:	10th and 14th February 2014
Decision given:	14th February 2014
Draft Judgment circulated:	19th February 2014
Date for final comments:	7th March 2014
Date of Judgment:	7th March 2014

JUDGMENT

The Background

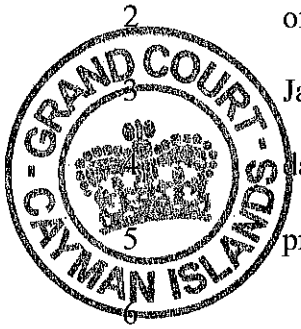
1. The Plaintiff, Ciara Herrara-Frederick, is a minor and is suing by her mother and next friend, Doris Morris. These proceedings were initiated by a Writ of Summons and Statement of Claim filed on 4th January 2008.

2. On 10th November 2005 the Plaintiff was born at the George Town Hospital, a facility administered by the First Defendant, the Health Services Authority.

3. The Second Defendant, Dr. Gilbertha Alexander, is an employee of the First Defendant and she was the physician attending at the delivery of the Plaintiff.

4. It is contended on behalf of the Plaintiff that during the course of the delivery she developed shoulder dystocia. It is alleged that, to combat this condition, the Second Defendant during the course of the delivery applied excessive downward traction and/or tilting of the Plaintiff's head. It also claimed that the Second Defendant failed to employ other safer methods. It is contended that the actions of the Second Defendant caused severe nerve root damage and severe brachial plexus injury to the Plaintiff's right shoulder (brachial plexus palsy). This eight-year-old female's injuries are also particularised to include "*total paralysis of the right upper extremity; limited movement of the digits on the right hand; and permanent neurological damage.*" It is claimed that the Plaintiff's condition will require extensive reconstructive and another surgery in the future. It is contended on behalf of the Plaintiff that the full consequences of her injury are not yet established.

5. In support of the Plaintiff's contention that that the injury was caused by the negligence of the Second Defendant reliance is placed upon the contents of a report prepared by James O'Leary M.D. (Consultant Perinologist, Maternal – Fetal Medicine Specialist) dated 13th August 2007. I have been informed by the parties that a copy of this report was provided to the First and Second Defendants in 2009.



6. The Statement of Claim provides little insight to the Defendants if they seek to ascertain the particulars of loss and damage, particulars of past loss and out-of-pocket expenses, and any other special damages. On 10th January 2014 the First Defendant served a Request for Further and Better Particulars of the Statement of Claim on the Plaintiff. On 12th January 2012 the Second Defendant was provided with a copy of the Plaintiff's schedule of damages dated 3rd January 2012. It does not appear that this schedule was served on the First Defendant until it was provided to them by the Plaintiff following the hearing on 10 February 2014.

7. The First Defendant filed its Defence on 10th March 2008. On the whole the Defence contains a simple denial of the claim. Save for some obviously uncontentious admissions, the Defence has the character of a blanket denial of all of the Plaintiff's allegations. The Plaintiff's brief Reply to the Defence was filed on 31st March 2008.

8. The Second Defendant's initial Defence is dated 15th May 2008. Her Amended Defence was dated and filed on 14th July 2009. This is a more satisfactory pleading than that submitted on behalf of the First Defendant because, although it also contains a number of

denials, there are some brief elaborations as well as appropriate admissions. The Plaintiff's brief Reply to the Amended Defence was filed on 24th of July 2009.

9. Initially, it appears that the First Defendant took the initiative by filing a Summons for Directions on 22nd October 2009. The directions sought were not necessarily as detailed as one might ordinarily expect in a clinical negligence case, especially in relation to expert evidence. I note with interest that a Summons for Directions was not brought by the Plaintiff, the party whom one might ordinarily expect to be most anxious to move matters forward.

10. That Summons came before Quin J. on 8th February 2010. It appears that the directions were agreed by all the parties, as Quin J. reiterated the content of the Summons in his Order. The parties were ordered to file and exchange updated Lists of Documents within 30 days of the Order. Inspection of documents of the said lists was ordered to take place within 14 days of the exchange. Each party was required, within 90 days of the inspection of documents, to disclose to the other parties their witness statements of the witnesses on whose evidence they proposed to rely at trial. The Plaintiff was ordered to submit to defence medical examinations by suitably qualified medical practitioners in the 'relevant fields' to be arranged by the Defendants within 90 days from the date of the Order. Quin J. ordered that, upon completion of the above, the case would be ready to proceed to trial and that the Plaintiff was responsible for setting the matter down for hearing. I note with interest that no application had been made at that time for a split hearing on the issues of

liability quantum. It was clear that at the time of the directions which were made four years ago, the parties were intending the trial to deal with both quantum and liability.

11. Following on from the directions hearing there has been delay and the case has not really proceeded in a satisfactory manner. The Second Defendant, unlike the First Defendant, took the appropriate steps to have the Plaintiff examined and to obtain an expert report. From the date of Quin J.'s order until 28th May 2013, when Samson & McGrath came on the record for the Plaintiff, little appears to have been done to move his case forward save for the Plaintiff filing a Notice of Intention to Proceed on 28th December 2012. Soon after coming on the record Samson & McGrath filed a further Notice of Intention to Proceed on 25th July 2013.

12. I accept that the content of the Summons heard by Quin J. bore a similarity to the automatic directions for personal injury cases contained in Order 25, r.8(3) of the Grand Court Rules ("GCR"). The automatic directions are intended to reflect what have come to be regarded as being standard directions historically made in personal injury cases. However, this does not prevent parties from carefully considering what other orders could and should be obtained. The parties should, pursuant to Order 25, r.8(3) GCR, consider giving sufficient consideration to shoring up the automatic directions at that stage, especially in relation to medical and expert evidence. The directions should make provision to ensure that the parties provided all of their written experts' reports on each other by a certain date, should identify the number of expert witnesses and their specialities, as well as making provision for possible expert meetings with a view to

resolving their differences. The automatic directions set out at Order 25, r.8(1)(c) GCR make it clear that expert witnesses should be limited in any case to two medical experts and one expert of any other kind. Having regard to the automatic directions referred to in Order 25, r.8(1)(b) and (c) GCR and Order 25, r.8(3) GCR, the purpose of this would be to:

(i) see if the experts could be agreed, which of course would result with substantial savings in costs through not having to call experts to give evidence; and

(ii) to limit expert evidence to what is reasonably required to resolve the proceedings. It would also have the benefit of enabling effective case management to trial.

Present Applications

13. This ruling primarily seeks to address paragraph 1 of a Summons for Directions filed by the Plaintiff on 29th October 2013. The Plaintiff seeks an order for a split trial, with the issue of liability being heard prior to the issue of quantum pursuant to Order 33, r.4(2) GCR.

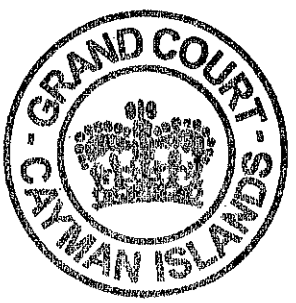
14. In relation to that specific application I have received oral submissions made by the attorneys on behalf of all three parties. I have considered the written submissions prepared on behalf of the First Defendant. I have also considered the Affidavit of Doris Morris sworn on 14th January 2014, the Affidavit of Fiona Robertson sworn on 6th January 2014 and the Affidavit of May Douglas sworn on 31st January 2014.

15. The Summons filed by the Plaintiff also seeks the Court to make a number of set out directions if a split trial is ordered.

16. The First Defendant has filed a Summons for Directions on 31st January 2014 to which a draft order for directions is attached. The first direction sought is that the Plaintiff's application for a split trial be dismissed. This direction is supported by the Second Defendant.

17. In its Summons the First Defendant seeks consequent directions in relation to disclosure as well as other directions (including more detailed directions in relation to medical and expert evidence).

18. On Friday, 14th February 2014 I informed the parties that I had decided to order a split trial and I indicated that this written judgment, containing my reasoning, would follow shortly thereafter. The parts of the Summonses requesting disclosure and directions had not been canvassed by the parties with the Court before the decision was made. However, after providing the parties with my decision, comprehensive agreed directions were made at the hearing on 14th February 2014 at the request of all of the parties. This judgment deals solely with the issue of whether there should be a split trial on liability and quantum, and is based on the submissions received prior to 14th February 2014.



The Law

19. It is quite clear that, pursuant to Order 33, r.4(2) GCR, the Court has a general power to order split trials, trials on different occasions of the issue of liability and the issue of damages. Although the Grand Court Rules do not include a specific provision for the Court in personal injury actions considering ordering a split trial similar to those set out at RSC 33 r.4(2A), I do not accept the First Defendant's contention expressed in the letters from Bodden & Bodden dated 14th November 2013 and 18th December 2013 to the Plaintiff's attorney and at paragraph 24 of its written submissions that split trials should only be ordered in "*exceptional circumstances where the advantage far outweighs the risk.*"

20. 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 to 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[1] 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

[1] Paragraph 15 Electrical Waste Recycling Group Limited - see full reference at paragraph 30 below.

approach to RSC Ord. 33, r.4(2) commended by Lord Denning M.R. in ***Coenan v Payne*** [1974] 2 All ER 1109[2] when he stated:

> *"In future the court should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together. But the court should be ready to order separate trials wherever it is just and convenient to do so.*[3]*"*

21. There appears to be little case law in the Cayman Islands concerning applications for split trials. With this in mind, I herein review some recent cases which may offer some future guidance. As a consequence, this judgment is lengthier than one might ordinarily expect for an application of this nature.

22. Apart from the English case of ***Coenan*** referred to above, the only other case brought to my attention by the parties is Smellie C.J.'s ruling in ***Tassaruf Mevduati Sigorta Fonu v Misteria Bay Limited, Utterton Limited, Abdallah Ibrahim Al-Ayed and Registrar of Shipping*** [2007 CILR 310].[4]

23. In that case the plaintiff sought a declaration that mortgages registered against two vessels on the Shipping Register were fraudulent and invalid. The defendants were primarily seeking an order from the Court to strike out a claim based on foreign law in which it was contended that the plaintiff had failed to set out clearly and specifically the relevant provisions of the foreign law. The Chief Justice refused the application to strike out. He then went on to briefly consider the alternative application made by the

[2] Transcript of case produced by the Plaintiff.
[3] My underlining.
[4] Transcript of case produced by the First Defendant.

defendants, namely that the question of title to the vessels should be tried as a preliminary issue. The impression gained from the judgment is that the alternative was not fully argued. Smellie C.J. refused the application and the headnote reflects that he found the allegations of fraud and the validity of the mortgages to be highly contentious issues of fact that could only be decided after an adversarial hearing and were therefore unsuited to a preliminary trial, which would only prolong the case with the attendant risk of increased costs. The Chief Justice stated at paragraph 32 of his judgment:

> *"The case authorities admonish against seeking to resolve factual allegations by way of trial of preliminary issue, a process designed mainly to resolve discrete or narrow issues, the resolution of which should assist in the more efficient disposal of the case. Any attempt at resolution of such acrimonious and intensely factual issues as these by way of preliminary trial would, in my view, be at great risk of serving only to prolong and postpone the final disposition of the case with the further attendant risks of increased costs. In re T Trust and Tilling v Whiteman are very much on point."*

24. In the written submissions submitted on behalf of the First Defendant, great reliance is placed on the ruling of the Chief Justice. The First Defendant appears to contend that the Chief Justice's approach in that case is equally applicable to all personal injury cases when an application for a split trial is sought and that it supports the contention that it should only occur in exceptional cases. I am not convinced that was the intention of the Chief Justice. Each case must turn on its own facts. In that case the Chief Justice remarked that there were five applications before him by way of various summonses brought by the parties. It is also evident from his ruling that this was a matter that had, over the three year period since its inception, spawned a number of interlocutory

hearings, including one before the Court of Appeal. The Chief Justice viewed the case as being one *"characterized by opposition at every turn."*

25. I accept that split trials are more appropriate where the issues in dispute are discrete and narrow and that the resolution of which may finalise the proceedings. That is precisely what forms a part of the basis of the Plaintiff's reasoning for split trial in the matter before me. The nature of the subject matter of the proceedings before the Chief Justice and the highly contentious overlapping factual issues to be determined in that case are clearly very different to those before the Court in this and in a number of personal injury cases. I accept that apart from personal injury and patent actions, it is more unusual to order split trials, precisely for the reasons set out by the Chief Justice. I do not accept that the Chief Justice's ruling means that there should be a departure from the more modern approach advocated by Lord Denning M.R. to applications for split trials in personal injury matters.

26. That said, although it may now be more commonplace for the Courts to order a split trial, especially in high value personal injury cases including clinical negligence cases, the Court must still exercise its discretion judiciously. The Court should consider a number of factors when exercising its discretion either way. With this in mind, at the outset of the hearing, the Court provided all of the parties with:

(i) a transcript of Hildyard J.'s ruling in ***Electrical Waste Recycling Group Limited & City Electrical Factors Ltd v Philips UK Electronics Limited & GE Lighting***

Limited & Osram Limited & Havells Sylvania Limited & Recolight Limited [2012] EWHC 38 (Ch);

(ii) a summary of the case of ***Leaflet Co Ltd v Royal Mail Group Ltd*** [2008] EWHC 3514 (Ch)[5]; and

(iii) a summary of the unreported case of ***Da Costa v Oloho***, QBD 25 May 2012.

These cases contain helpful guidance concerning possible factors to consider in split trial applications. The Court afforded the parties an opportunity to review this material and make any submissions they wished arising out of these cases.

27. Some of the reasons why a split trial may be preferable in certain cases are:

(i) that, having regard to the overriding objective,[6] by conducting separate liability and quantum hearing there is a better use of court time and resources, as well as a reduction of costs. In certain circumstances split trials may lead to a speedier conclusion, caused by the narrowing down of considerations, thereby saving costs;

(ii) if liability is established following a split trial then both parties can focus on the issues of quantum without being distracted by the other issues of breach of duty and causation;

(iii) if a Plaintiff succeeds on liability, this may promote negotiations leading to agreement and settlement out of court. However, I note that the 2nd Defendant submits that, as the Plaintiff suggests that there would be a potential savings of

[5] Case referred to by Hildyard J. in Electrical Waste Recycling Group Limited.
[6] 1.1 Preamble GCR- The overriding object of the Rules is to "*enable the Court to deal with every cause or matter in a just, expeditious and economical way.*"

costs due to medical/expert evidence not being obtained unless necessary after the liability issue had been determined, it may well have the opposite effect as the parties will need to have such evidence to enable informed negotiations to take place at this time; and

(iv) of course, if the claim does not succeed an early liability hearing will mean that the Plaintiff will know at an earlier stage that he is not successful and the matter will not be hanging over a Defendant for a potentially longer period of time.

28. On the other hand, in certain cases separate hearings may prolong the overall duration of the action, and may have the opposite effect in relation to costs by increasing them. This is particularly so when one considers duplication of costs which would occur if causation arguments are linked to issues of condition and prognosis. For example, there may be an overlap of expert evidence. The split trial may also mean that the Plaintiff and the Defendants have to in endure the stress of two trials rather than one.

29. In the fairly recent case of ***Electrical Waste Recylcling Group Ltd*** Hildyard J. provided some useful guidance to judges faced with an application for a split trial. The case involved a competition law claim where the boundaries between liability and causation were not clear and the judge found that there was likely to be an overlap of the evidence required on the issues. Expert evidence had already been prepared in relation to quantum. The Court found that mediation was likely to be assisted by a single judge. There were also concerns about further delay and possibly resulting divided appeal processes. Hildyard J. was of the view that a split trial could lead to duplication of costs rather than

being cost saving. Accordingly, he declined to order a split trial of liability in quantum. Hildyard J. stated that a balancing exercise should be carried out by the judge, remembering that each case should be considered on its own *"facts, features and peculiarities."*[7]

30. Although this is a competition law case procedurally governed by the CPR from England and Wales, I find the following guidance from Hildyard J. to be helpful when considering applications brought pursuant to Order 33, r.4(2) GCR in personal injury cases:

> *"5. Where the issue of case management that arises is whether to split trials the approach called for is an essentially pragmatic one, and there are various (some competing) considerations. These considerations that seem to me to include 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 child is necessary; what are likely to be the advantages and disadvantages in terms of trial preparation and management; whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials; 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; whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation for damages); whether there are difficulties of defining an appropriate split or whether a clean split is possible; what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process; generally, what is perceived to offer the best course to*

[7] Paragraph 8 of his judgment.

ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.

6. Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a commonsense and a pragmatic approach, may include whether a split would assist or discourage mediation and/or settlement; and whether an order for a split late in the day after the expenditure of time costs might actually increase costs.

7. All these sorts of factors seem to me to be potentially relevant and need to be taken into account in what is essentially a pragmatic balancing exercise in assessing how the case is likely to unfold according to whether there is or is not a split.

8. It follows that each case falls to be assessed by reference to its own facts, features and peculiarities. Further, the assessment has to be made before the court can responsibly take any reliable view as to the prospects of success, and thus as to whether quantum will be a live issue or not."

31. Hildyard J. rightly cautioned that the assistance given in the case should be regarded as being general rather than definitive guidance, and stressed that if there is a split trial there should be a demarcation in relation to the issues to be dealt with at each hearing. He noted that case law may assist in the setting up of a checklist of matters that may be relevant. At paragraph 10 of his judgment Hildyard J. referred to the ***Leaflet Company*** case and highlighted that the determining factors in favour of a split trial in that case were that:

> *"(a) the boundaries between liability, causation and quantum were tolerably clear (b) there were no significant issues of causation that could not safely be left to be dealt with at a second stage or trial (c) the trial slot and date would be likely to be lost if no split was made (d) a split would ease the burden on the judge at trial, given that the infringement liability*

issues were "heavy enough" and, perhaps most important of all (e) there were 16 allegations of infringement, leading to what the Chancellor described as "an over – large number of possible permutations", such as both to complicate the expert evidence and increase the likelihood of the experts and the court having to address a number of permutations that never in fact would arise according to whatever might be the determination of liability."

At paragraph 16 of his judgment Hildyard J. concluded that there was not sufficient reason to split the trial, citing the following reasons:

(a) the boundaries would become difficult to draw and abide by, especially on issues of causation;
(b) there was a likely overlap of evidence;
(c) the likelihood that quite a lot of expert evidence had already been prepared;
(d) there was no reason to suppose that quantum could not be accommodated under the new directions timetable;
(e) the comparatively narrow range of issues;
(f) the permutations would be limited, quantum of the separate claims could be individually addressed and was not dependent on other claims;
(g) concern about further delay and a "bifurcated appeal process";
(h) mediation might be assisted by the parties having to bring more certainty to the amount of money at stake; and
(i) the overriding objective was likely to be furthered by a single trial.

32. In ***Da Costa v Oloho*** Judge McMullen Q.C., sitting in the Queen's Bench Division, concluded that a Master had exercised his discretion correctly at a case management conference when he declined to order a split trial in a personal injury claim on the basis that there was an overlap on the issues of liability in quantum. In that case the appellant

had been catastrophically injured in a road traffic accident in 2009. When crossing the road he was struck by a vehicle driven by an unqualified and uninsured driver, the first respondent. The appellant landed on the vehicle's bonnet, the driver accelerated, striking a stationary car before colliding with a wall. The appellant was crushed and was left paralysed and blind.

33. The appellant argued that the Master had erred in the exercise of his discretion and had failed to give sufficient reasons for his decision. The respondent submitted that there was no basis to overturn the Masters order, contending that a split trial would mean that some experts would have to be called twice, as their evidence is relevant to both liability and quantum.

34. Judge McMullen Q.C. found that the Master did have in mind the nature of the accident as well as the particular injury sustained by the appellant. The learned judge found that the Master had concluded that there was a need for one judge to look at the whole matter. Before I move on, I note that would not usually cause concern in the Cayman Islands, as ordinarily the judge who heard the liability hearing would also hear the quantum hearing. Judge McMullen Q.C. was satisfied that the Master understood the overlap of evidence, namely that the experts instructed in relation to the appellant's spinal injuries and blindness be relevant to both liability and quantum.

35. Having regard to the above case law and applying the same to the matter before me, I remind myself that it is important to analyse the particular circumstances of this case

against the helpful general factors or criteria identified in the cases. I also recognise that in a clinical negligence case there will likely be some duplicated evidence. The causation of injury and extent of the injury are often linked, the former being the consequences of the negligence, the latter being the consequences of the underlying injury. With this in mind, I turn to the submissions made on behalf of the parties.

Submissions on Behalf of the Plaintiff

36. The Plaintiff's time estimate for the liability hearing is 3 to 4 days. Mr. Kennedy contends that that their evidence for liability hearing is in position and therefore that hearing could take place relatively quickly, despite the fact that the First Defendant is still to obtain any expert evidence in relation to liability. Ms. Robertson in her affidavit filed in support of the Plaintiff's application is of the view that each party will need to call an overseas obstetrician to give evidence. Ms. Robertson is of the belief that the Second Defendant, the mid-wives and Doris Morris will have to give evidence at a liability hearing. In her affidavit Ms. Robertson makes reference to other expert evidence that the Plaintiff will be calling in relation to liability, but does not specify further what that might be. Mr. Kennedy in his oral submissions stated that a trial to resolve liability may involve three experts, one of whom is an Obstetrician and one of whom is a Gynaecologist, and three to four lay witnesses.

37. It is contended on behalf of the Plaintiff that if a quantum hearing is necessary, then the Plaintiff will also require:

(i) a medical expert to give evidence concerning the condition and prognosis for the Plaintiff;

(ii) an employment expert to give evidence concerning the likely effect of the injury on the Plaintiff's future employment prospects in the Cayman Islands;

(iii) a care specialist to give evidence concerning the cost of all past and future care requirements and the cost of any future surgeries; and possibly

(iv) an actuarial expert to give evidence on the appropriate discount rate to be applied for the Ogden Tables.

38. The Plaintiff contends that the Defendants will likely have to call similar experts, and that it is likely these experts will have to be sourced from overseas. As a consequence, the Plaintiff estimates that a quantum hearing in itself would take in the region of 3 to 4 days, and would likely be more costly than a liability hearing due to the number and nature of the expert evidence that would have to be called. The Plaintiff estimates the cost for experts for a hearing dealing with quantum and liability to be in the region of CI$40,000. The Plaintiff contends that if the Defendants succeed on liability then those costs will have been wasted, and submits that this should be of particular concern in a case where there is legal aid funding.

39. The Plaintiff submits that the issues involved in liability and quantum are entirely separate. The Plaintiff believes that due to the large amount of evidence and experts needed to address both issues, a single trial would not take place within 12 months. However, although I note that the Plaintiff is scheduled to have further surgery in April

2014, this assertion is not backed by any detail concerning dates to establish when experts would be able to provide the necessary reports. It is submitted on behalf of the Plaintiff that these factors coupled with the submissions in relation to the costs of the quantum hearing make it prudent for there to be a split trial.

Submissions on Behalf of the First Defendant

40. Although offered the opportunity by the Court to comment on the case law handed down and make submissions concerning the applicability of the guidance set out therein to the circumstances of this case, oral submissions made on behalf of the First Defendant primarily concentrated on the content of the written submissions. I should add I am grateful to Counsel for the First Defendant for taking the time to prepare the helpful written submissions.

41. The First Defendant, rather unappealingly, characterises the application for a split trial to appear *"by all sense of reason to be an expensive experiment."* The First Defendant contends that a split hearing will greatly draw out these proceedings and that any difference in cost is not worthwhile. A concern is expressed that there would be additional costs incurred by the need for further direction(s) hearings if the Plaintiff successfully argues liability. I am not satisfied that there would be a number of directions hearings and I do not agree with Counsel's submissions that any direction hearing may lead to costs spiraling out of control. If the parties are properly prepared, as they should be to enable the Court to effectively case manage, there should only be a need for one directions hearing after a liability hearing.

42. The First Defendant does not agree with the Plaintiff's assertion that four quantum experts will be required. It is submitted that an Occupational Therapist would be able to speak to employment prospects as well as to the skills that the Plaintiff would require to adjust in the workplace. It is contended that there is no need for an actuary, and therefore for a trial dealing with both issues the experts could be restricted to an Obstetrician, midwife, Occupational Therapist and an Orthopaedic Surgeon.

43. It is submitted on behalf of the First Defendant that the costs of experts to prepare reports and attend to give evidence at a single trial would fall well below the CI$40,000 estimated by the Plaintiff, especially if some of the witnesses are permitted to give evidence via video link. I note that no party has presented to the Court sufficient evidence for the Court to reach an informed decision about the likely cost of experts.

44. Despite the rather dilatory approach to obtaining expert evidence following Quin J.'s directions made in 2010, it is submitted on behalf of the First Defendant that they would be able to have all of their expert reports in relation to the issue of quantum prepared within the same period as those sought to deal with the issue of liability.

45. The First Defendant concludes that a split trial will bring with it a risk of high cost and increased length of litigation. It is submitted that the convenience outlined by the Plaintiff is not "*so great as to outweigh the associated risk to the public purse, in respect of the*

court's time and to the detriment of the Plaintiff (in terms of the time to finality of the matter), should the plaintiff succeed on the matter liability."

Submissions on Behalf of the Second Defendant

46. The Second Defendant rightly highlighted the incongruous approach to the issue of delay now been taken by the Plaintiff. Mr. Dickson rightly indicates that the Plaintiff was obligated to have provided disclosure ordered by Quin J. in 2010. He rightly indicates that one would ordinarily have expected an application for a split trial to have been made before, or at the very least, the 2010 hearing before Quin J., which was almost 2 years after the Plaintiff had commenced the proceedings. There is some merit in such a contention, especially when, almost four years later, one of the arguments put forward by the Plaintiff for a split trial is grounded on a submission that a split trial will enable the matter to proceed in an expeditious manner. It is a rather questionable approach for the Plaintiff to now raise and seek to rely upon a concern that delay may cause witnesses to have problems with recollection, when the primary cause of the delay should, and I accept in the period before Samson & McGrath came on the record, lie firmly and squarely at the Plaintiff's door. That having been said, the Court's role is to move the case forward at this time in as efficient manner as possible. When doing so, the Court should have regard to the overriding objective as well as the circumstances that now prevail, rather than seeking to penalise the Plaintiff for inaction at the expense of best case management of the case moving forward.

47. Mr. Dickson, in his oral submissions, commendably sought to comment upon the case law. He highlighted that this is not on the face of it a complex personal injury case, of the nature that might overburden a judge. He highlighted that although there were two Defendants, it was likely that their evidence would be similar.

48. It is contended that the Second Defendant may well use the same orthopaedic expert to deal with issues of liability as well as quantum. When considering the issue of costs, he is of the view that the potential savings of costs arising out of an investigation of quantum if liability is not established does not outweigh the likelihood of increased aggregate costs if liability is established and there is a resulting trial. He contends that there would be no saving, if the same expert had to be called at both hearings rather than having to attend at only one.

49. One might ordinarily expect in a case of this nature that the significant expert evidence on the issue of liability would be given by an Obstetrician and, to a lesser persuasive degree, by a midwife. The orthopaedic evidence may likely be more relevant to the issues which one would expect to be raised at the quantum stage, rather than directly addressing issues of liability and causation. However, I make this comment with some caution, recognizing that the parties have not sought to inform me why they say an expert in a certain field is better placed or preferred in the circumstances particular case to give evidence on either or both liability and quantum issues. Mr. Dickson highlighted that there may be inconvenience caused by his witnesses having to attend two hearings. Although Mr. Dickson appears to indicate that orthopaedic evidence would likely be

primarily relied upon at both stages of the hearing by his client, this view does not appear to be shared by the other parties in relation to their experts. I am not satisfied that there would be the such degree of duplication of evidence that outweighs, when I carry out the recommended balancing exercise, the benefits in this case of the advantages from a split trial.

50. Mr. Dickson contends that there would be no disadvantages in terms of trial preparation and management if all issues were dealt with at the same hearing. He noted that case management pursuant to Quin J.'s Order meant that expert evidence in relation to both quantum and liability should already have been obtained. It is rightly submitted by Mr. Dickson that ordinarily at this stage of the proceedings and with such a passage of time following the directions hearing, the parties would be expected to have all the expert material in relation to both quantum and liability prepared and disclosed. That is not the position here, and it appears that costs expended by the First Defendant and to a degree by the Second Defendant on expert evidence, especially on the issue of quantum, has to date been minimal.

51. When considering the disadvantages in terms of trial preparation and management that may be caused by a split trial, I must have regard to the possibility of that approach imposing unnecessary inconvenience and strain on witnesses who may be required to attend both hearings. It is submitted by Mr. Dickson that these proceedings have been hanging over the head of his client for a number of years. He rightly reminds the Court that this is particularly stressful to a member of the medical profession who is a party to a

clinical negligence claim. It is submitted, that with this background the strain caused by two hearings would be substantial on his client. On the limited evidence before me, it is likely that the Second Defendant will only be required to give evidence at the liability hearing and will not have the strain of doing so at two hearings. For reasons which I will later express herein, I am not satisfied that a split trial will result in a delay in a final resolution of these proceedings, in fact it may result in an earlier conclusion, because:

(i) liability may not be established and they would be no need for quantum hearing, and

(ii) if liability is established the parties can, after that hearing, concentrate on the issue of quantum free of doubts caused by undecided liability issues which in turn may encourage case settlement negotiations as and when their expert evidence is received.

It is useful to remind oneself that applications in personal injury cases for split trial are not the sole prerogative of Plaintiffs, and from this Court's experience applications are sometimes made when a Defendant believes there to be a weak case on liability, but which is likely to involve much expensive medical evidence in relation to quantum.

52. When I consider the submissions made on behalf of the Second Defendant concerning expert evidence I note the content of the Draft Order for Directions filed by the First Defendant. It appears that there may be additional experts not highlighted in the oral submissions required by the First Defendant. In the draft order, leave is sought for each party to instruct one expert in the field of obstetrics, midwifery, orthopedics and

occupational therapist. Both Defendants' were rather vague when outlining to the Court what experts they had already retained and at what stage of preparation any expert they may have instructed had reached. Save for one expert retained by the Second Defendant (for which no report has been exchanged), it appears that not a great deal had been done by particularly the First Defendant in this regard. The impression given to the Court is that since Quin J.'s directions in 2010 that little expert preparation has been undertaken and that hitherto the expenditure on experts, in particular in relation to quantum, has been minimal. This means that if initially there was to be a separate liability hearing at which the Plaintiff was unsuccessful, substantial costs would not have already been wasted on quantum expert evidence.

53. Mr. Dickson rightly submitted that, having regard to the nature of the dispute and issues involved in this case, a single trial would not impose an undue burden on a judge of the Grand Court. He contended, without sufficient specificity, that there was a degree of overlap between quantum and liability.

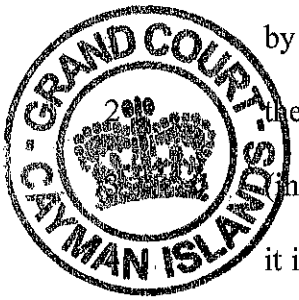
54. Mr. Dickson submitted that two hearings may result in a delay caused by a possible appeal following a liability hearing. Although this is a factor which may be taken into account, to place too great a weight on this submission in all cases would mean that there would never be a split hearing ordered. The importance of this concern may heighten in a case where there have been a number of keenly contested interlocutory applications, especially if they have spawned appeals. The concern in relation to appeal may be more relevant to the abovementioned case heard by Hildyard J. due to the nature of the subject

matter in that competition claim and the fact that the case involved two Plaintiffs and five Defendants.

Conclusions

55. When considering the balancing exercise, I recognise that this case must be considered on its own facts. Therefore, although I have regard to the guidance helpfully provided in the case law mentioned herein, I approach the checklist or factors set out therein, acknowledging that they do not apply to every case, and should not be applied rigidly to every case.

56. This case has hardly progressed due to the failure to give full compliance with Quin J.'s directions in 2010. This means that at this time there is no trial slot or date that would be lost if a split hearing was ordered. None of the parties have made any enquiries with the Listing Office to enable them to make informed submissions concerning the likely dates when a four-day quantum hearing could be heard or when a five to six to eight day single trial could be heard. Prior to informing the parties of my decision on Friday, I had made enquiries and had been informed by the Listing Officer that if a listing was sought at this time, four days could be accommodated at any time form June 2014. If an eight day hearing was required, it could also likely be heard at that time. I am therefore satisfied that a four-day hearing dealing with liability could be heard within a reasonable time. I am also satisfied that the parties should be able to prepare sufficiently enabling them in a position to deal with a liability hearing sooner than they would be in a position to deal with a single hearing. I note from paragraph 14 of the draft order for directions submitted



by the First Defendant, which rightly contains more provisions for a structured approach to the obtaining and analysing of expert evidence especially in relation to quantum (including possible meetings of the experts, which this Court ordinarily encourages) that it is envisaged that a single hearing could take place towards the close of this year. If the liability issue is determined earlier, and liability were established, then it is likely that a hearing on quantum, if properly sought at that time, could be accommodated within four months. I am satisfied that little or no delay would be caused to the determination of these proceedings by the holding of initial separate hearing to deal with the issue of liability. Any remaining directions required to case manage towards a possible quantum hearing could be dealt with at or shortly after the liability hearing.

57. On the limited evidence before me and the submissions received, the boundaries between liability, causation and quantum appear tolerably clear. I am satisfied that, although in particular the Second Defendant has indicated that there is some overlap, it is not clear from the submissions made what she contends that overlap to be and to what degree it exists. I am not satisfied that it is impossible to draw meaningful distinction between issues of liability on quantum, which would in turn lead to a duplication of costs, rather than a cost saving.

58. Although no directions in relation to a split trial were sought before Quin J in 2010 which would have left the Defendants with an understanding that the matter would proceed to a single trial, it does not appear that the Defendants have dedicated a significant amount of resources to investigating quantum.

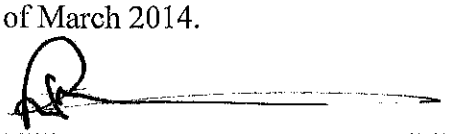
59. Although I accept that the liability issues, on the information before me, may not be clearly regarded as being highly complex and "*heavy enough*" so that a split trial would be needed to ease the burden on a judge hearing a single trial, I find that there is sufficient reason to split the trial outweighing the usual objective of dealing with as many aspects of the case as possible on the same occasion. Having regard to the current state preparation of the parties, I am also satisfied that the split trial could potentially result in a significant saving of court time and costs if liability is not established. However, even if a separate quantum hearing becomes necessary, although there may be some increase in costs, the potential savings of liability hearing first outweigh those risks.

60. I am satisfied that it is just and convenient for a separate determination to be made on the issue of liability. This approach will best enable the Court to deal with the matter in a just, expeditious and economical way.

61. Accordingly, I order separate trials, with the issue of liability be decided first and then afterwards, if necessary damages.

62. I am minded to make an order to reserve costs at this time. However, the parties may make any further submissions concerning costs before the order is perfected.

Dated this 7th day of March 2014.



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