

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 19 of 2015

BETWEEN:

JOY HOPE ANN VERNON

PLAINTIFF

AND:

EILEEN JENNIFER GREEN

DEFENDANT

Appearances:

Mr Clyde Allen of Clyde H. Allen Chambers on behalf of the
Plaintiff

Mr Andrew Woodcock and Mr Paul Keeble of Hampson &
Company for the Defendant

Before: The Hon. Justice Kawaley

Heard: 14 January 2020

Draft Judgment
Circulated: 19 February 2020

Judgment Delivered: 3 March 2020



HEADNOTE

Personal injuries claim-defendant's application to strike-out plaintiff's action for abuse of process-plaintiff's application for summary judgment-GCR Orders 14, 14A and 18-case management-overriding objective-importance of parties assisting the court to achieve the overriding objective-importance of civility between opposing counsel-costs implications-GCR Order 62 rules 4,11 and 12.

RULING ON DEFENDANT'S STRIKE-OUT APPLICATION & PLAINTIFF'S SUMMARY JUDGMENT APPLICATION

Introductory

1. When conducting and managing civil litigation, every litigant, lawyer and judge should repeatedly and silently intone to themselves the following words, like a ritual incantation:

*"The parties are obliged to help the Court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect."*¹

2. The overriding objective is defined most succinctly in the opening sub-paragraph of the Preamble to the Grand Court Rules: "*1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.*" The Court "*must seek to give effect to the overriding objective when it...applies, or exercises any discretion given to it by these Rules*"². It is these guiding principles which needs must inform the way in which the two present cross-applications are adjudicated. A cursory consideration of the way in which the applications arise immediately raises a strong suspicion that the parties and/or their legal advisers have honoured these principles more in the breach.
3. The highlights of the litigation chronology, for present purposes, are as follows:
 - the action was commenced by a Specially Endorsed Writ of Summons filed on February 6, 2015. The Plaintiff sought damages for personal injuries sustained when the ambulance she was driving collided with a car driven by the Defendant on February 7, 2012. The Defendant on March 26, 2014 pleaded guilty to careless driving and driving under the influence of alcohol in relation to the relevant accident;
 - on November 23, 2016, on the Defendant's application to strike-out for non-compliance with a notice to produce automatic disclosure and alternatively for an "unless order" and specific discovery, Justice

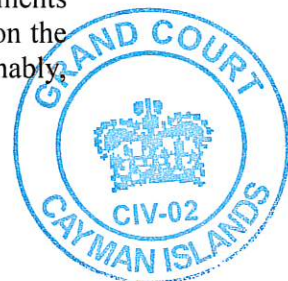
¹ Preamble to Grand Court Rules, paragraph 3.

² Ibid, paragraph 2.1(a).



Williams ordered the Plaintiff to produce various documents (including financial and medical records) relevant to the quantum of her claim and gave general pre-trial directions. Further specific discovery orders were made against the Plaintiff on November 16, 2016 and January 19, 2017. Costs were reserved and the application adjourned for mention;

- on January 19, 2017 at a mention hearing, Williams J further directed the Plaintiff to comply with her specific discovery and evidence filing obligations under the November 23, 2016 Order by January 27, 2017. Costs were again reserved;
- On February 23, 2017 the Defendant filed a Summons to dismiss for non-compliance with the Orders of December 8, 2015, November 23, 2016 and January 19, 2017 and alternatively for an “unless order” and specific discovery which was heard before Williams J on May 18, 2017 (“First Summons”). Further directions were for given for the Plaintiff to obtain pension records, chase up initial requests for medical records and to supply a revised Schedule of Loss, by way of further enforcement of the November 23, 2016 Order. Costs were again reserved and reasons for his decision were delivered (“May 25, 2017 Ruling”);
- on July 21, 2017, the Defendant filed a second Summons to dismiss for non-compliance with the Orders of December 8, 2015, November 23, 2016, January 19, 2017 and May 18, 2017 and alternatively for an “unless order” and specific discovery (“Second Summons”);
- on November 17, 2017, the Plaintiff filed a Summons seeking a split trial on liability and quantum;
- on November 8 and November 24, 2017, the Second Summons and the Plaintiff’s November 17, 2017 Summons were heard before Williams J. A split trial on liability and quantum was ordered on November 24, 2017 pursuant to the Plaintiff’s request and with the concurrence of the Defendant, and the Defendant was granted leave to apply for Justice Williams’ recusal. Directions were given in relation to expert evidence. No order was made on the Second Summons and reasons were given for this decision on December 7, 2017 (“December 7, 2017 Ruling”);
- on July 11, 2019, the Defendant filed a Summons returnable for September 25, 2019 (“Third Summons”) seeking, *inter alia*, to compel the Plaintiff to pay the filing fee so the trial on liability could be listed, dismissing the action for “*contumelious disregard of the Orders of the Court*”, alternatively striking out portions of two Witness Statements and seeking a wasted costs order against the Plaintiff’s counsel on the grounds that the Plaintiff’s Witness Statements had been unreasonably negligently, or improperly drafted;



- on August 26, 2019, the trial on liability was listed for a five day hearing commencing October 1, 2019;
- on September 25, 2019, the Third Summons was heard before Justice Richards for the first time. On the same date Richards J ordered that the Plaintiff's Witness Statement dated and filed June 2, 2016 and that of one of her witnesses dated January 27, 2017 be removed from the file and replaced with new Witness Statements omitting specified paragraphs and including a statement of truth. The Affidavit sworn by the Plaintiff on September 24, 2019 was directed to be removed from the file. The Plaintiff was given leave to file a Summons for summary judgment by noon on September 27, 2019 on terms that if she did so, the trial fixed for October 1, 2019 would be vacated;
- on the afternoon of September 27, 2019, the Plaintiff filed and served a Summons for Summary Judgment under GCR Orders 14 and 14A and for an Interim Payment under GCR Order 29 ("Summary Judgment Summons"). The Summons was supported by the Plaintiff's Affidavit sworn on September 27, 2019 ("September 27, 2019 Affidavit"). The October 1, 2019 trial date was vacated, apparently due the fact that no Judge was available for a 5 day hearing the following week in any event;
- on October 3, 2019, the Defendant filed a fourth Summons to Dismiss ("Fourth Summons") based primarily on the fact that the September 27, 2019 Affidavit contained averments ordered on September 25, 2019 to be removed from the file and which included criticisms of the Defendant's counsel Mr Keeble (which Richards J had found to be "*irrelevant*"). Earlier "*deliberate and contemptuous*" disregard of Orders herein was also complained of, as well as earlier attacks on opposing counsel made by Mr Allen judicially noted in another case;
- on October 25, 2019, Richards J delivered a ruling dealing with costs the costs of the Third Summons ("Costs Ruling"). She awarded the Defendant 50% of her costs to reflect her partial success and declined to award indemnity costs;
- on November 21, 2019, both the Fourth Summons and the Summary Judgment Summons were substantively heard for directions before me for the first time³. I invited both counsel to explore seeking an agreement to proceed directly to the trial on liability stage to avoid further delay and a wasting of costs, having formed the preliminary view that neither application was likely to succeed;

³ Both applications were listed before me on November 12, 2019, but the hearing was adjourned due to the absence of Mr Allen on certified medical grounds.



- on December 5, 2019, the Plaintiff filed an Affidavit sworn on that date in support of her Summary Judgment Summons.
4. It was against this background that the Summary Judgment Summons and the Fourth Dismissal Summons came on for substantive hearing before me on January 14, 2019. Before considering the merits of the respective applications, however, it is necessary to consider the previous contested hearings in somewhat more granularity with a view to developing an appropriate case management framework.

Case Management by Williams J (November 2016-December 2016)

5. Williams J heard the First Summonses and the Second Summonses which each sought the primary relief of dismissing the present action altogether on the grounds that the Plaintiff was conducting her case in a manner which constituted an abuse the processes of the Court. He twice declined to dismiss the action. He twice declined to make an ‘unless’ order. He twice declined to make an immediate punitive costs order. On December 7, 2017 when he had the Second Summons and the November 17, 2017 Summons before him, he granted the primary relief sought by the Plaintiff (a split trial) and refused primary relief sought by the Defendant (dismissal). (The split trial application was not opposed by the Defendant). Seemingly because of the Judge’s attempts to encourage the parties to achieve a compromise, the Defendant’s counsel at the December 7, 2017 hearing applied for Williams J to recuse himself from the trial on liability⁴.
6. The May 17, 2017 Ruling explained the decision to refuse the application to dismiss as follows:

“17. Despite the failure of the Plaintiff to file affidavit evidence with supporting documentation, especially to verify the dates and contents of written requests sent to the various entities, I am satisfied that in the main there has been compliance with paragraph 1 of the order made on 19 January 2017. Although further disclosure is still required for there to be full compliance, even having regard to the Plaintiff’s unsatisfactory responses to parts of the disclosure orders made since 8 December 2015, the remaining non-compliance is not to the degree that the Court could make a finding of intentional and contumelious disobedience of its orders... In light of this finding, although well aware of the principles contained therein, I see little merit in herein conducting an analysis of the case law relating to dismissal...”

⁴ The precise reasons for the Defendant’s application were explained by the Defendant’s counsel in comments on a draft of the present document which went beyond the scope of editorial corrections and are accordingly not recited here. Various other comments amounting to an attempt to re-write this Ruling and/or re-argue the applications have for the same reason been ignored.



27....This case has been stalled by disclosure issues and resultant applications and I trust that the parties agree that this action must now move forward to trial in [a] timely manner..."

7. The December 7, 2017 Ruling recorded the following pertinent case management observations:

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

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

14...I have regard to the responsibility to case manage proceedings and the Overriding Objective to which enables the Court to deal with cases justly and proportionate to cost. I am conscious that this matter, despite the passage of time, is still dealing with issues of disclosure and that there is no hearing date fixed yet...

16. Having regard to the submissions made by Mr Keeble and the law...I am not satisfied that this is a case where I should recuse myself from dealing with the issue of liability. Although I have not reserved this case to myself and indicate that it can be heard by any Judge, I should not too readily accept a suggestion of appearance of bias or recuse myself simply because it may be more comfortable for the Defendant if I did...

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

31. The progression of this matter has been greatly hindered by considerable emphasis being placed on disclosure issues at hearings. I trust that the parties, now being able and required to focus on the liability hearing, will ensure that they comply with all obligations in that regard..."



8. Williams J clearly reached the following pertinent case management conclusions:
- (a) although the Plaintiff had failed to comply with certain aspects of the Court's specific discovery Orders, such non-compliance was not deliberate and did not warrant striking-out the action altogether;
 - (b) the time spent by the parties on discovery was disproportionate and delaying the efficient progress of the litigation in a case where the issue of liability appeared to be relatively straightforward;
 - (c) there should be a split trial on liability and quantum and the parties should focus their efforts.

Case Management by Richards J

9. Where litigants have developed a pattern of non-cooperation which impedes a smooth route to trial, they often by accident (if not design) seize upon the assignment of a case before a new judge as an opportunity for a launching a new campaign of diversionary tactics. After several hearings before Williams J who had clearly developed a good feel for the case and the parties' strengths and weaknesses in conducting their respective cases, the next hearing came before Richards J. It is unclear whether the Defendant's threat of seeking his recusal had any influence on the reassignment decision⁵. In an ideal world, the same judge would retain carriage of every case from beginning to end to increase the prospects for consistent and effective judicial case management.
10. It seems obvious that had the Third Summons come before Williams J on September 25, 2019, he would have made short shrift of the Defendant's third application to dismiss in light of the fact that by the date of the hearing, the Plaintiff had ensured that the liability trial was duly listed. He would most likely have strained every sinew to ensure that the liability trial proceeded on October 1, 2019 or (if, as was suggested before me, no Judge was available on that date) as soon thereafter as reasonably possible. Instead, both parties (at and after the hearing, respectively) devised means to undermine the case management directions given by Williams J in what I consider to be a serious way. Irrespective of the subjective motivations of the parties and/or their counsel, the effect of the litigation steps they pursued had a serious derailing effect. Case management, it must be remembered, is concerned with the objectively identifiable manner in which litigation is actually pursued and the results on the efficiency and expedition of the case in real world terms. What happened at the September 25, 2019 hearing is recorded in the Transcript and Justice Richards' Costs Ruling.
11. The following may be gleaned from the Transcript:

⁵ It is a matter of record that Williams J tacitly acknowledged that valid grounds for seeking his refusal might exist by granting leave for such an application to be made, although in the event it was not pursued.



- (a) the Defendant's application to expunge certain paragraphs of two Witness Statements, the principal statement having been on the Court file since June 2, 2016 without any objection, was admittedly triggered by a decision of Justice Mangatal on May 29, 2019, another case in which Mr Allen appeared for the plaintiff and Mr Keeble for the defendant, and against which decision the Court of Appeal had administratively refused leave to appeal on May 29, 2019;
- (b) the main finding in *Foster-v-Davis*, Cause No: G139 of 2016, Judgment dated May 14, 2019 (Mangatal J, unreported) was that the action was dismissed for failure to comply with an Unless Order. One paragraph of the judgment recorded:

“33. Under paragraph 2 of the Defendant's Summons, I also struck-out the purported Witness Statement of the Plaintiff on the record as being an inadmissible scandalous document, consisting mainly of a personal attack on Counsel for the Defendant and the Defendant's insurer, and because it did not comply with the requirements of GCR Order 38/2A.”;
- (c) the Defendant pursued her application for dismissal based on contumelious non-compliance with Orders of the Courts, but her counsel focussed on the Witness Statement concerns, which were grounded in the assertion that it was inappropriate to for them to contain criticisms of/attacks on the Defendant's counsel, as illustrated by paragraph 33 of Mangatal J's decision in *Foster-v-Davis*;
- (d) the Plaintiff's counsel accepted that leave to appeal had been initially refused for his other client to appeal Mangatal J's judgment, but indicated that his client in that case had instructed him to appeal and that the matter was “under review”⁶. Counsel went on to invite Richards J to place no reliance on criticisms made of him by Justice Mangatal in the unrelated other case for the purposes of the present case⁷;
- (e) the Plaintiff's counsel complained that his client's now impugned Witness Statement had been considered by William J at several hearings and the Defendant's counsel never raised any objections. The Defendant's counsel in answer to the Court confirmed that no request had been made for the defects to be addressed in correspondence before the Third Summons was filed⁸. Richards J summarily determined that the two Witness Statements should be removed from the file and fresh Witness Statements omitting averments identified as inappropriate should be filed. The Defendant's application was in

⁶ Transcript pages 42D-43A.

⁷ Transcript pages 106G-107A.

⁸ Transcript page 106F.



substance granted by Her Ladyship despite the fact that she made it clear that she placed no reliance on *Foster-v-Davis*⁹;

- (f) in the course of the hearing, the Plaintiff's counsel made it clear that he wished to apply for summary judgment based on an alleged admission of liability made by Mr Keeble before Williams J (on or about November 24, 2017 and recorded in his December 7, 2017 Judgment). The Defendant's counsel did not insist that the trial on liability must proceed and that an application for summary judgment at this stage was wholly misconceived. (Mr Keeble did point out that any reliance on an alleged admission by him was "*hopeless*"). Instead he argued that the Judge could not allow his opponent to argue the application without filing a Summons with a supporting affidavit. The Plaintiff's counsel argued that the summary judgment application could very shortly be argued and would potentially save the costs of a five day trial on liability. Richards J accordingly granted leave for the Plaintiff to file and serve any summary judgment by noon on September 27, 2019 in which case the trial date would be vacated.
12. The Transcript suggests that Richards J considered the Third Summons was partially justified in terms of belatedly attacking irrelevant averments in the Plaintiff's Witness Statements, but unjustified as regards the motion to dismiss. She was persuaded by Mr Allen that he should be permitted to vacate the trial if he followed through with his threatened summary judgment application. But Mr Keeble did not in my view resist the principle of such a course as forcefully as he pursued the more peripheral attack on the Witness Statements; this attack, after all, was one which could have been launched at the commencement of the trial. The Defendant's counsel expressed general concerns about losing the trial date. Yet the Transcript suggests that he did not forcefully object to the principle of the Plaintiff filing a summary judgment application at all. He might have invited the Judge to consider directing that any such application should be issued returnable for the beginning of the trial on liability, had the Defendant been genuinely committed to expediting the effective hearing of the trial. Such a course might have addressed his legitimate concerns about having two overseas witnesses on standby¹⁰. Be that as it may, the Defendant was in this regard "*more sinned against than sinning*" and the Plaintiff ought not to have opened the summary judgment door.
13. Had the Plaintiff been as keen not to lose the trial date as her counsel suggested was the case, and if the lawyers had been in cooperation-mode rather than conflict-mode, they might well, after the hearing, still have agreed a basis on which the summary judgment application could have been listed for hearing without vacating the long-awaited trial date. The duty to cooperate and assist the Court to achieve the overriding objective is an ongoing duty and the Court welcomes part-driven practical case management initiatives which result in savings in terms of court time and party and party costs. Richards J quite properly both encouraged such cooperation and

⁹ Transcript pages 106G-107A.

¹⁰ Transcript page 85E-G.



confirmed the main case management imperative of Justice Williams by making the following concluding observations:

“...My hope really is that matters proceed next week, because this is long outstanding, so what I have been trying to do this morning really is to reduce any possible objections that we may have next week. All right. So just try and focus on the issue of liability.”

14. The Costs Ruling confirms in general terms the above analysis of the relevant hearing. Richards J declined to award indemnity costs against the Plaintiff and only awarded the Defendant 50% of her costs reflecting partial success. The Defendant succeeded in attacking the Witness Statements, but the Judge implicitly queried whether the application needed to be made at the juncture when it was:

“25. I also note that these statements have been on file for some two years with the concern not having been raised until July 2019.”

15. To my mind, the most important and insightful case management assessment recorded by Richards J in her Costs Ruling was the following observation:

“23...I am concerned however that the costs in these proceedings are being unnecessarily exacerbated by the inability of the parties to reach common ground on the requirements of the applicable Rules where such are plain.”

16. The subsequent conduct of the parties would not merely confirm that assessment but justify an even broader articulation of judicial case management concern.

The Fourth Dismissal Summons

17. The Fourth Summons was plainly itself unsustainable to the extent that the Defendant sought to characterise as contumelious conduct which had been previously found not to qualify as such by Williams J (twice) and Richards J (once). In light of the litigation chronology, the very filing of this application appeared to be a retaliatory response to the Plaintiff following through with the threatened summary judgment application. After reluctantly conceding that the Fourth Summons could only properly be primarily based on post-September 25, 2019 misconduct on the Plaintiff's part, Mr Woodcock summarised the main complaints advanced by the Defendant as follows:

- (a) the filing of the Plaintiff's Affidavit dated September 27, 2019 in support of the Summary Judgment Summons in a form which



contravened Richards J's September 25, 2019 Order. It undeniably repeated averments ordered to be expunged from the Plaintiff's revised Witness Statement for use at trial. (This Affidavit was at first blush provocative, but the position had been regularised by the time the Fourth Summons was heard);

- (b) the Plaintiff's counsel misleading Richards J on September 25, 2019 about the status of the appeal against this Court's decision in *Foster-v-Davis*, Cause No: G139 of 2016, Judgment dated May 14, 2019 (Mangatal J, unreported) ;
- (c) the Plaintiff's filing of Legal Submissions in support of the Summary Judgment Summons which both contained further personal attacks on opposing counsel and which contained submissions designed to mislead the Court.

18. By the time the present application was heard, the Plaintiff had filed her December 5, 2019 Affidavit in support of the Summary Judgment Summons, and it was filed on the same date as the expurgated version of the Witness Statement. It omitted the offending repetition of the allegations in her Witness Statement which Richards J ruled were irrelevant. Despite any positive explanation of how the Affidavit came to be sworn in that form only two days after the September 25, 2019 Order was made, the most plausible explanation initially appeared to me to be that it was sworn and filed in haste together with the September 27, 2019 Summons in order to meet the two day deadline imposed by the Court. However, Mr Allen in the course of argument submitted that the Affidavit was filed in that form because (a) the purpose of the Affidavit was not the same as the Witness Statement and (b) the rules governing the content of affidavits sworn in support of interlocutory applications are more flexible than the rules governing documentary evidence for deployment at trial.
19. In my judgment it is impossible to fairly conclude that the Plaintiff's conduct in filing her Affidavit dated September 27, 2019 containing averments Richards J had ordered only two days earlier should be expunged from the Plaintiff's trial Witness Statement constituted a deliberate breach of the September 25, 2019 Order. On balance I would accept Mr Allen's submission that no breach occurred. Affidavits for in use interlocutory hearings can contain statements based on information and belief: GCR Order 41 rule 5 (2). At least one of the averments ("*I am shocked to read the purported contents of the Defence filed on behalf of the Defendant by the law firm Hampson and Company*") is not inconsistent with forcefully supporting an application for summary judgment, which application positively requires an averment (usually based at least in part on legal advice) that no triable issue exists: GCR Order 14 rule. To the extent that the Affidavit was defective in form because of some of its contents, GCR Order 41 rule 2 provides: "*An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.*"



20. While GCR Order 41 rule 6 confers a discretionary power to strike out scandalous or irrelevant portions of affidavits, Courts do not usually waste time entertaining such applications in the interlocutory context in advance of the relevant hearing in a freestanding application. In the present case, after the Plaintiff had notice that the Defendant through the Fourth Summons was objecting to the relevant portions of the Plaintiff's September 27, 2019 Affidavit, the Affidavit was effectively abandoned and a fresh Affidavit was filed well in advance of the hearing of the Defendant's Fourth Summons. This complaint reflects yet another instance of the Defendant making a mountain out of a molehill and seizing upon any available opportunity to dismiss the claim before it can be heard on its merits at trial.
21. The suggestion that Mr Allen deliberately misled Richards J about the pendency of an appeal in the *Foster* case also falls well short of supporting grounds for dismissing the application altogether. As I observed in the course of the hearing, if the Plaintiff's counsel had misled the Judge in relation to the status of an entirely different case, this would amount to professional misconduct which could not on any sensible view be attributable to the Plaintiff. The Transcript in any event clearly indicates that:
- (a) Mr Allen merely indicated that the possibility of a further application for leave to appeal in *Foster* was still "*under review*" with his client in that case, not (as the Defendant's counsel sought to suggest through confirming with the Court that no appeal was pending), an assertion the veracity of which I was given no reason to doubt; and
 - (b) more importantly still, even if Richards J was misled into placing no reliance on Mangatal J's decision in *Foster*, this had no material effect on the outcome of the Defendant's application because the impugned portions of the Witness Statements were ordered to be expunged in any event.
22. The remaining complaints were, it seemed to me, 'make-weight' points. I indicated in the course of the hearing that the suggestion that portions of the Plaintiff's counsel' Legal Submissions were misleading in their characterisation of the central facts was a trifling complaint. It was submitted, *inter alia*, that it represented "*an improper and blatant attempt by counsel to offer evidence himself, including signally an untruthful and unsupported account of the mechanism of the accident*". Mr Woodcock centred his attack on the assertion that the evidence shows that the Defendant "*collides with the ambulance*". In fact he argued, (at first blush quite convincingly), the evidence shows the Defendant's car was in the traffic light controlled intersection when the ambulance driven by the Plaintiff collided with the car. Mr Allen responded (at first blush somewhat convincingly) that the Plaintiff's case (in light of simple mathematical analysis) is that if the Defendant had been travelling within the speed limit, the ambulance would have been able to safely enter the intersection without a collision occurring.
23. Which of these two positions is actually correct is manifestly unsuitable for determination at an interlocutory hearing without oral evidence. This was, with respect, the only point the Defendant needed to advance to defeat the summary



- judgment application. To suggest that characterising the evidence in a written submission in a way which the Court might ultimately reject amounts to counsel giving “*untruthful evidence*” amounts to ‘over-egging the pudding’ on steroids. No cases would ever reach trial if an action could be struck-out simply because a defendant’s counsel was able to persuade the Court that the claimant’s counsel in a written submission had placed the wrong ‘spin’ on the facts of the case.
24. The second broad complaint about the Legal Submission was that Mr Allen had (in paragraphs 14-16 of his Legal Submissions) repeated the “*personal attack on Mr Keeble, which has already been the subject of an adverse order by her Ladyship, Madam Justice Richards*”: Responsive Submissions, page 4. It was submitted by reference to citation of seven previous cases where penal orders were made, that Mr Allen had “*personal animus against [Mr Keeble] motivated by [his] unenviable record against Mr Keeble’s clients*”. The impugned paragraphs in the Plaintiff’s counsel’s Legal Submissions appear under the heading “*NO ABUSE OF PROCESS*”. They do little more than to respond to complaints that the Plaintiff has been not complying with Court Orders in an abusive way and making unjustified personal attacks on the Defendant and her counsel. The Plaintiff, in turn, criticises the Defendant and her counsel for supposedly deploying litigation tactics designed to exculpate herself from liability for a meritorious claim without facing a trial on the merits.
25. The complaint that an insured defendant to a personal injuries claim brought by a claimant of limited means is deploying litigation tactics to avoid having a trial on the merits is a “bog standard” complaint in this legal context. As a personal attack on opposing counsel, the litigation tactics complaint comes nowhere near the gravity of the Defendant’s counsel accusing their opponent of deliberately misleading the Court. It is a sufficiently merited complaint in this case because the Defendant has now made four unmeritorious applications to dismiss the action, applications which have been rejected by three different Grand Court Judges. In each case, it has essentially been found that however improperly the Plaintiff’s case has been conducted, seeking dismissal was a disproportionate response. The Court is quite familiar with the other side of the litigation tactics coin. A ‘deep-pocket’ defendant will often complain that an unmeritorious claim is being pursued in an abusive manner with a view to pressurizing the defendant into reaching an unjust settlement. In seeking to achieve the Overriding Objective, the Court must take into account the important ‘merits’ goal of “*ensuring that the substantive law is rendered effective and that it is carried out*” (GCR, Preamble, paragraph 1.2(a)). No defendant with an improbable complete defence should expect to be able to summarily dismiss an apparently strong claim on technical ground not going to the merits of the case.
26. The only mitigating factor about the pursuit of the Defendant’s Fourth Summons, which is hereby dismissed, is that it was undoubtedly issued in partial response to the Plaintiff’s own misguided decision to steer the case off the case management rails which had been clearly laid out by Justice Williams and Justice Richards.



The Plaintiff's summary judgment application

27. The Plaintiff's decision to file an application for summary judgment on the eve of the trial on liability is as incomprehensible as the Defendant's decision to apply to dismiss the action. There was no material change of circumstances which occurred since Williams J ordered a split trial on liability and quantum on November 24, 2017 which transformed a case which was suitable for trial on the question of liability into one which was more suitable for summary determination under GCR Order 14 or 14A.
28. The summary judgment application had two limbs to it. Firstly, reliance was placed on the legal rule that entitled the Plaintiff to rely on the fact of the Defendant's traffic conviction for careless driving as evidence of negligence: Evidence Law (2019 Revision), section 52; *Wauchope-v-Mordecai* [1970] 1 WLR 317 at 321H-322 A-B (Denning M.R.). As the authority the Plaintiff's counsel relied upon demonstrates, a criminal conviction for careless driving is only without more sufficient proof of civil negligence when the factual basis of the careless driving conviction corresponds to the acts of negligence which form the basis for the civil claim. The factual basis of the traffic conviction for careless driving was not before the Court. Assuming there is an overlap between the Defendant's criminal conviction and the civil negligence which the Plaintiff complains of in this action, the result would merely be to alter the burden of proof. The Defendant would still be properly able to rely on expert evidence at trial to seek to show that in fact, for civil purposes, no actionable carelessness on her part occurred.
29. Reliance was secondly placed on the Road Code of the Cayman Islands, 2012 (paragraph 3.12), which undoubtedly requires that other vehicles must give way to ambulances, but that traffic rule does not operate so as to render any driver who collides with an ambulance negligent by operation of law. The Plaintiff will doubtless be able (in light of the Defendant's excess alcohol conviction) to seek to rely on Part 6 of the Road Code and its admonitions about the effects of alcohol on driving competencies. Mr Allen also referred to section 68(d) of the Traffic Law (2011 Revision) which appears on a straightforward reading to exempt emergency vehicles from compliance with traffic signs and signals. Assuming that these legal provisions have the effect contended for by the Plaintiff does not mean that, without more, the Defendant's defence evaporates. It is still open to her to persuade the Court that, although it might appear on paper at this stage to be a very ambitious evidential task for her to undertake, the forensic theatre of the trial will dramatically reveal in the final scene that the seemingly innocent Plaintiff was solely to blame for the accident after all.
30. I can find no proper legal basis for denying the Defendant the opportunity to advance this defence at trial and no justification for summarily determining that such defence does not raise a triable issue. The Plaintiff's apparently strong claim is not based on a point of legal construction which the Court may determine for itself without regard to extrinsic evidence, but on a theory of physical events which can only be tested through oral evidence at trial.



31. Mr Allen sought to suggest that Richards J encouraged the making of the present application by asking whether he had applied for summary judgment. The query was raised as an interjection in the course of September 25, 2019 hearing when the Plaintiff's counsel was seemingly seeking to ward off the Defendant's third strike-out application by demonstrating the strength of his client's case. Richards J subsequently:
- (a) expressly (and very firmly) rejected any suggestion that she was directing the Plaintiff to make such an application¹¹; and
 - (b) (as noted above) at the end of the hearing expressly encouraged the parties to "*focus on*" the trial on liability.
32. Paragraph 4 of the Summary Judgment Summons provided as follows:
- "4. The Plaintiff will for the purpose of the Ord 14 r.1 application also rely on the Judgment of Williams J dated 7 December 2017 at paragraph 11 whereby the Learned Judge recorded that notwithstanding the Defendant's pleaded case, that '...during the hearing Counsel for the Defendant conceded that this case is more likely to be one in which blame for the collision may be apportioned to both parties.'"*
33. The true meaning of an oral statement is often (though not always) best judged by the instinctive reactions of those who hear the utterance. The purported "admission" was made in Chambers on November 24, 2017 in the presence of Mr Allen and Justice Williams. It was recorded by the Judge in his Judgment of December 7, 2017, by the way, with no indication that he considered Mr Keeble to have admitted liability nor is there any suggestion that Mr Allen sought to rely upon the statement as an admission as soon as it was made. The admission was first seemingly raised as constituting a basis for summary judgment in Court before Richards J on September 25, 2019, almost two years after it was made.
34. Perhaps in light of provisional views I expressed about the lack of merit of this limb of the summary judgment application, this ground was not seriously pursued in oral argument. The concession recorded by Williams J, in the course of an exchange with the Judge, was clearly not and not intended to be a formal admission of liability. It amounts at best to a concession of nothing more than what would otherwise be obvious. A Defendant involved in a collision with an ambulance in relation to which she has pleaded guilty to careless and drink driving offences will, on the face of it, be more likely to succeed in establishing partial fault on the Plaintiff's part than to succeed in establishing that the ambulance driver was solely to blame. The trial

¹¹ Transcript page 101A-B: Mr Allen: "On Friday, I am ordered to produce a summons and affidavit." Justice Richards: "I am not ordering you to produce a summons and affidavit...Please do not say that, Mr Allen."



process is uniquely equipped to resolve (in a legalistic sense at least) precisely where the truth lies. The summary judgment application is dismissed.

Provisional views on costs

35. Each party has succeeded in demonstrating that that their opponent has made an application which was not only unmeritorious but ought not to have been made. Both parties have flouted the spirit of the case management directions given by two different Grand Court Judges by veering off the prescribed path leading to a trial on the issue of liability.

36. GCR Order 62 rule 4 provides:

“(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.”

37. This rule complements the Overriding Objective by confirming that since litigation under the GCR generally must be conducted in an economical and expeditious manner, successful parties should only recover costs where they have litigated in a proper manner. Both the Defendant’s Fourth Strike-Out Summons and the Plaintiff’s Summary Judgment Summons have in my judgment, and subject to hearing counsel if required, been pursued in an unreasonable manner. My strong provisional view is that neither party is entitled to recover the costs of their successful opposition to the other’s application. In other words, no order shall be made as to the costs of either of the present applications.

The need for civility between counsel

38. The parties’ duty under the GCR to assist the Court to achieve the Overriding Objective requires a level of cordial relations between opposing counsel which has been visibly lacking in this case as regards the two main protagonists. This is, I should add, in stark contrast to their consistently high standards of courtesy and professionalism in their interactions with the Court and from whom they will always receive a warm reception in the future. It appears in the present case that, perhaps because of wounds inflicted in past encounters, counsel on each side has lost sight of this legal practice imperative. The Ontario Bar’s ‘*Principles of Civility*’ notes:

“Litigation, however, whether before a Court or tribunal is not a ‘tea party’....Counsel can disagree, even vigorously, without being disagreeable. Whether among Counsel or before the Courts, antagonistic or acrimonious behaviour is not conducive to effective advocacy. Rather, civility is the hallmark of our best Counsel.”



39. In this regard, counsel are reminded of the Court's jurisdiction to make wasted costs orders against them (GCR Order 62 rules 11-12), a jurisdiction which they are on the brink of invoking in the present case. The present Ruling is intended to serve as the judicial equivalent of a footballing "yellow card".

Summary

40. For the above reasons, the respective applications of the Plaintiff and Defendant for summary judgment and dismissal are both dismissed¹². Unless any party applies within 21 days by letter to the Registrar to be heard as to costs, no Order shall be made as to the costs of either application.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT



¹² The Plaintiff's application for an interim payment, which was not dealt with, is adjourned generally with liberty to apply. My provisional view is that such an application should now be heard after the issue of liability has been determined.