IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO. 32 OF 2014

BETWEEN:

BILIKA HARRY SIMAMBA

PLAINTIFF

AND

CAYMAN ISLANDS HEALTH SERVICES AUTHORITY

DEFENDANT

Appearances:

The Plaintiff appeared in person

Mr Michael Wingrave of Dentons for the Defendant

Before: **The Hon. Justice Kawaley**

Heard: **6 May 2019; 3 June 2019**

Draft Judgment Circulated: **11 June 2019**

Judgment Delivered: **17 June 2019**

HEADNOTE

Defendant's application to strike-out or obtain summary judgment on plaintiff's medical negligence claim-GCR Order 14 rule 12-GCR Order 14 rule 12- Health Services Law (2010 Revision)section 12- effect of statutory immunity from suit clause-whether immunity clause inoperative for inconsistency with Bill of Rights in Cayman Islands Constitution Order-judicial precedent-effect of previous decisions of courts of coordinate jurisdiction-sufficiency of expert

evidence-whether discretion to strike-out should be exercised before trial-whether further opportunity to cure evidential deficiencies should be granted

RULING ON DEFENDANT'S STRIKE-OUT APPLICATION

BACKROUND

Introductory

1. The Plaintiff commenced the present action by a Writ of Summons filed with a Statement of Claim on March 6, 2014. He asserted two claims alleging medical negligence on the Defendant's part, described in his pleading as the "Medical Case" and the "Dental Case", respectively. In a nutshell, the two limbs of the Plaintiff's case may be summarised as follows:

   (a) **the Medical Case**: the Urologists employed by the Defendant who treated the Plaintiff for a prostrate-related illness negligently prescribed a drug without warning the Plaintiff of adverse side-effects, causing him damage;

   (b) **the Dental Case**: the Dentists employed by the Defendant who treated him in relation to a cavity treated him negligently resulting in pain and suffering and the avoidable loss of a tooth.

2. The Defence dated May 30, 2014 admitted the existence of a duty of care to the Plaintiff in respect of each case but made no admissions as to its content or scope. On July 30, 2015, the Plaintiff filed a Summons for Directions. By a Summons dated September 2, 2015, the Defendant sought Orders that:

   "1. That the Plaintiff's claim be struck out pursuant to Ord. 14, r.12 of the Grand Court Rules;

   2.Alternatively, that the Plaintiff's claim be struck out as an abuse of process pursuant to Ord. 18, r.19 of the Grand Court Rules;

   3.In the further alternative, if not struck out, that the Plaintiff amend his Statement of Case to bring it into compliance with the Medical Negligence (Non-Economic Damages) Law 2011…"

3. The Defendant's Summons was supported by the First Affidavit of Dominika Chrachalova sworn on September 2, 2015, and supported the case for striking-out the Plaintiff's claim on the primary ground that the Plaintiff had in correspondence indicated that he did not intend to adduce further expert medical evidence in support of his claims. Reference was also made to the fact that the Plaintiff claimed damages at the level of $1.7 million despite the Medical Negligence (Non-Economic Damages) Law 2011 limited liability for non-economic loss to CI$500,000.

4. Before the Defendant's Summons was heard, the implications of section 12 of the Health Services Law as a bar to medical negligence claims against the Defendant was comprehensively addressed by Williams J in *Thompson-v- HSA & Alexander* [2016 (1) CILR 93], and in *Thompson-v- HSA & Alexander* [2017 (1) CILR 441] the Bill of Rights implications of the immunity clause were also extensively addressed. Mangatal J sensibly awaited an expected appeal in the *Thompson* case which would have potentially resolved the immunity issue through a binding decision of the Cayman Islands Court of Appeal. When the appeal in *Thompson* was discontinued following a settlement, the Defendant's Summons (and the Plaintiff's Summons for Directions), were both revived.

The Plaintiff's remote participation in the hearing

5. The Plaintiff is a former Cayman Islands Government lawyer who is a resident of the Cayman Islands but has been in Canada since late last year due to medical and family reasons. As a litigant in person he has unsurprisingly not always been able to conduct his case in an entirely dispassionate and objective fashion. The Court accommodated his request to participate in a short case management hearing via video-link, which hearing took place on January 9, 2019. He was abroad and it seemed obvious that requiring his personal attendance at a perfunctory hearing would be disproportionate in terms of the expense he would incur in travelling from Canada. How the Plaintiff would participate in the two-day hearing of the Defendant's Summons was not expressly addressed by the parties or by the Court. Shortly before the hearing fixed for May 6, 2019 with no directions having been given to exempt the Plaintiff from the usual requirement of personal appearance in Court, the Plaintiff formally requested permission to participate remotely.

6. I declined that request and decided to deal with the Defendant's Summons primarily on the basis of the detailed written submissions filed by the parties. No special reasons were advanced by the Plaintiff to justify the Court taking the unusual course of permitting a party to civil proceedings to participate remotely in circumstances where they are not even represented by counsel before the Court. The Grand Court rules ("GCR") do not contemplate such participation although the Court undoubtedly

possesses the inherent jurisdiction to facilitate access to justice by permitting remote participation where declining to do so would effectively nullify access to the Court altogether. Unexpected illness, inability to travel and impecuniosity are the most obvious grounds likely to require the Court to consider permitting remote participation where an adjournment would not be appropriate. In the present case, no administrative arrangements had been made for a video-conference hearing and it was not practicable to do so in any event.

7. In my judgment, when a litigant fails without good cause to attend a scheduled hearing without having obtained directions to participate remotely from the Court, the Court may in its discretion proceed by default. Instead of treating the Plaintiff as having failed to appear in opposition to the Defendant's application and granting it on an unopposed basis, I decided to deal with the case primarily on the papers. This would ordinarily be a course which would only be adopted on a consensual basis as regards the deciding the merits of a contested application. Nevertheless, I considered that as the application turned primarily on points of law and detailed written arguments had been submitted on both sides, a full oral hearing was not required. The Plaintiff, after all, made it clear in email correspondence with the Court that his primary interest was in the case proceeding rather than being adjourned.

8. The May 6, 2019 hearing listed in Chambers for two days was consequentially curtailed and lasted for only half an hour. The hearing was recorded and a digital copy of the hearing record was forwarded to the Plaintiff who requested an opportunity to address matters arising from the hearing via video-link. I declined to convene a further hearing until the Plaintiff identified the matters he wished to address. In the event he received the audio recording on May 21, 2019 and requested and was granted until May 28, 2019 to file supplementary submissions. He emailed the Court 'The Plaintiff's 3rd Skeleton Arguments' in which, *inter alia*, he complained that hearing he had failed to attend was unfair and reiterated his request for an oral hearing by video-link. The Plaintiff was advised that he had no right to a remote hearing but that if he explained why he was unable to appear in person for the scheduled hearing, I would consider directing a half-hour hearing to afford him equal time to address the Court via video-link to afford him the same period of time the Defendant's counsel had been given on May 6, 2019.

9. In the event, I was persuaded that the Plaintiff did not appreciate that a formal application was required to exempt him from the usual requirements of attending the scheduled hearing. In all the circumstances of the present case I felt that the Plaintiff had not appreciated that his attendance was required and that I could myself have avoided any misunderstanding by expressly raising the mode of his attendance at the directions hearing. The second hearing eventually took place on June 3, 2019 and lasted for over one hour.

GOVERNING LEGAL PRINCIPLES

Legal findings: general principles governing strike-out applications

10. The principles governing the Court's discretionary jurisdiction to strike-out cases before trial on the grounds that further prosecution of the claim would amount to an abuse of process because the claim is bound to fail are well settled. A civil litigant has a right of access to the Court but no absolute right to take his case to trial. A defendant has a fair hearing right not to be forced to defend at trial a case which is it is possible to determine at the interlocutory stage is bound to fail because it is plain and obvious that the claimant will not be able to prove his case at trial. Before considering the strike-out jurisdiction, it is important to remember that the Court now has a positive duty to actively manage cases with a view to achieving the overriding objective.

11. The Preamble to GCR firstly defines the Overriding Objective as follows:

> "*1.1 The overriding objective of these Rules to enable the Court to deal with every cause or matter in a just, expeditious and economical way.*
>
> *1.2 Dealing with a cause or matter justly includes, so far as is practicable—*
>
> *(a) ensuring that the substantive law is effective and carried out;*
>
> *(b) ensuring that the normal advancement of proceedings is facilitated and rather than delayed;*
>
> *(c) saving expense;*
>
> *(d) dealing with the cause or matter in ways which are proportionate—*
>
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case; and*
> *(iii) to the complexity of the issues;*
>
> *(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings.*"

12. Having regard to the Plaintiff's attempt to characterise his right to a trial as an absolute one, it is important to emphasise the express requirements in the Overriding Objective to promote economy and save costs. However, having regard to the Plaintiff's fall-back position that he should if needed be afforded a further opportunity to adduce more expert evidence rather than having his claim struck-out, it is important to bear in mind that the Overriding Objective also incorporates the goal of ensuring that "*the substantive law is effective and carried out*". In other words, the substantive legal rights of the parties must be taken into account as an element of justice alongside the 'colder' and more mechanical efficiency-focussed elements of procedural justice.

13. These principles do not operate in a vacuum but are required to be applied by the Court when other provisions of the GCR are engaged. Paragraph 2 of the Preamble states:

> "*2.1 The Court must seek to give effect to the overriding objective when it-*
> *(a) applies or exercise any discretion given to it by these Rules; or*
>
> (b) *interprets the meaning of any rule.*"

14. The Preamble not only imposes a duty on the parties to "*help the Court to further the overriding objective*" (paragraph 3). It also imposes a duty on the Court to "*further the overriding objective by actively managing cases*" (paragraph 4.1). The management powers non-exhaustively listed in paragraph 4.2 include "*(b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*". These overarching principles provide an important overlay for interpreting and applying the strike-out jurisdiction.

15. GCR Order 18 rule 19 provides as follows:

> "*(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) it is otherwise an abuse of the process of the court;*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1)(a)...*"

16. Where an application is made to strike-out under Order 18 rule 19 (1)(a) on the grounds that the pleadings disclose no reasonable cause of action, no evidence is admissible and the pleaded facts are presumed to be true. *Grupo Torras SA-v- Bank of Butterfield (Cayman) Ltd* [2000] CILR 441, upon which the Plaintiff relies, merely confirms this principle. The present strike-out application, to the extent that it relies upon the absence

of expert evidence ground, is not an application under Order 18 rule 19(1)(a). The "doomed to fail" ground clearly relies on either rule 19(1)(b) ("*frivolous*") or rule 19(1)(d) a claim which is bound to fail is "*an abuse of the process of the court*").

17. No question of assuming the Plaintiff's pleaded case to be true therefore arises in relation to the lack of expert evidence limb of the strike-out application. The immunity point is a pure point of law which properly falls within Order 18 rule 19(a) and should be approached, for what it is worth, on the basis that no evidence is admissible and all factual matters pleaded by the Plaintiff are true.

18. It is well recognised and clearly common ground in the present case, that striking-out a case before trial is a discretionary jurisdiction which should only be exercised in "*plain and obvious*" cases: *Henning-v-Henning*, Grand Court Cause No. G250 of 2014, Judgment dated February 27, 2015 (unreported) (Mangatal J, at paragraph 20(3)).

Legal findings: principles governing summary judgment applications under GCR Order 14 rule 12

19. GCR Order 14 rule 12 provides as follows:

> "*12. (1) Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the whole or part of the plaintiff's claim has no prospect of success or, in respect of a claim for damages, that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for the defendant on the whole or part of the claim...*"

20. Because I am myself unfamiliar with Order 14 rule 12, I find it necessary to review the underlying judgments in the two cases which were merely mentioned (or briefly noted) in the submissions placed before the Court.

21. The English Court of Appeal considered the English counterpart to the Caymanian rule shortly after it was introduced into CPR Part 24.2 in *Swain-v-Hillman* [2001] 1 All ER 91; [1999] EWCA Civ 3053. Lord Woolf MR defined the jurisdiction's function and limits in the following passages in his judgment for the Court:

> "*7. Under Part 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder submits, they*

direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success...

> *20. ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.*"

22. Pill LJ (concurring) stated:

> "*27... I have come to the conclusion, as has the Master of the Rolls, that the judge was entitled to hold in this case that there was a real, as distinct from a fanciful, prospect of success within the meaning of CPR 24.2. There are matters of fact for trial by a judge and on those grounds, like the Master of the Rolls, I would dismiss this appeal.*"

23. And, finally, Judge LJ (as he then was, also concurring) opined as follows:

> "*28. To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding.*

> *29. This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court.*"

24. *Southdown Regency Development Ltd-v-Cayman National Bank Ltd* [2007 CILR Note 4] is a Note of Levers J's apparent approval and application of the principles enunciated

by Lord Woolf MR in *Hillman-v-Swain*. No version of a fuller unreported judgment is available. The precious Note reads as follows:

> "*In an application for striking out an originating summons under the Grand Court Rules, O.18, r.19(1) or seeking summary judgment under O.14, r.12 (1), the burden rests on the defendant to show that the case has 'no real prospect of success.' This phrase is to be construed literally-the court must judge whether there is a realistic rather than a fanciful prospect of success (Swain v Hillman, [2001] 1 All E.R. 91, dicta of Lord Woolf MR applied).*"

25. I have no hesitation in following the *Southdown Regency Development Ltd.* case and adopting the approach to Order 14, rule 12 articulated by Lord Woolf MR in *Swain-v-Hillman* [2001] 1 All ER 91. The test which the Defendant must meet is to establish that the Plaintiff has no "*realistic as opposed to fanciful*" prospect of success. However, in my judgment the standard of proof which the Defendant is required to meet is somewhat lower than the threshold required to justify striking-out. A 'merits' strike-out application can only succeed if the applicant demonstrates not just that the respondent has no realistic prospect of success, but also that it is "plain and obvious" that the respondent's case is bound to fail.

26. As regards the immunity point, this is a pure point of law and these principles are straightforward to apply.

27. However, as regards the expert evidence point the critical question is not simply whether or not there is a prospect of success based on a summary appraisal of the evidence. The Plaintiff crucially argues that if the absence of expert evidence at this stage is fatal to his case, then he ought to be afforded an opportunity to produce the requisite evidence. This requires the Court to assess not simply the prospects of success based on the present evidential lacuna but also the prospects of the Plaintiff being able to adduce the requisite evidence before trial. The judgment of Judge LJ provides support for the following supplementary propositions:

(a) granting summary judgment against a claimant who is appearing in person is a "*serious step*" which should only be taken if clearly appropriate; and

(b) if the Court is not satisfied that there is no realistic prospect of success but merely doubtful about the claimant's prospects of succeeding, an intermediate case management order should be made rather than finally shutting out the claimant from the seat of justice.

28. In the course of the short May 6, 2019 hearing, Mr Wingrave conceded (without directly addressing the specific nuances of GCR Order 14 rule 12) that even if the Court found in his favour a residual discretion would exist to afford the Plaintiff an opportunity to fill the evidential gap in his case.

THE EXPERT EVIDENCE POINT

The evidence

29. The Plaintiff has filed no expert evidence from an Urologist in support of his Medical Case and no expert evidence at all in support of his Dental Case.

30. The Plaintiff has filed an Expert Report from Forensic Pharmacologists Dr Stephanie Sharp and Dr Paul Skett of the Glasgow Expert Witness Service Limited. They opine that Terazosin, the drug prescribed to the Plaintiff, "*is known to commonly cause erectile dysfunction in the male*" (Report, page 10). However, they very properly admit that it is outside their expertise to offer an opinion on:

(a) the duty of a Urologist prescribing the drug;

(b) whether the majority of Urologists would mention the side effects;

(c) the UK practice in relation to prescribing physicians warning of side-effects.

31. The Defendant has already expert evidence positively asserting that no breach of duty or causation of loss occurred.

The Defendant's submissions

32. The Defendant's main point was the expert evidence point. The case was primarily advanced on the basis of an application for summary judgment in the Defendant's favour (GCR Order 14 rule 12) and alternatively on the grounds that the Plaintiff's case was liable to be struck-out as it was bound to fail.

33. It was submitted that under Order 14 rule 12, the Defendant had to show that the Plaintiff's claims had no realistic prospect of success: *Southdown Regency Development Ltd-v-Cayman National Bank Ltd* [2007 CILR Note 4]. That authority

suggested that the test for striking-out was the same and cited the English Court of Appeal decision of *Swain-v-Hillman* [2001] 2 All ER 91.

34. The viability of the Plaintiff's case was attacked by reference to the following legal propositions which did not appear at first blush to be controversial:

(a) establishing a breach of duty in medical negligence cases requires proof that the treatment fell below a standard of practice regarded as proper by a reasonable body of relevant professionals: *Bolam-v-Friem Hospital Management Committee* [1957] 1 WLR 582 applied in Cayman Islands law in *MB and CB-v-RB* [2012 (1) CILR 232];

(b) allegations of medical negligence unsupported by expert medical evidence are unsustainable and liable to be struck-out: *Pantelli Associates Ltd-v-Corporate City Developments Number Two Ltd* [2010] EWHC3189 (TCC) (at paragraphs [16] and [19]);

(c) the Plaintiff's Medical Case requires proof that the risks to which he complains he was exposed were the sort of risks which a reasonable urologist should have warned him of: *Chester-v-Afshar* [2004] UKHL 41; *Richard Meiklejohn-v-St George's Healthcare Trust* (2014) LTL 13/2/14;

(d) proof of causation of damage in a case alleging medical negligence is inherently impossible without expert evidence.

The Plaintiff's submissions

35. In the 'Plaintiff's 1st Skeleton Arguments', the broad complaint was made that the strike-out jurisdiction was being misused by the Defendant to (a) prevent an adequately pleaded case from being tried and (b) deny the Plaintiff the opportunity to prove his case after discovery. It was contended that the Defendant's application had the effect of imposing a requirement that the Plaintiff obtain leave to proceed when he was not making a judicial review application. It was submitted that the Medical Case was in any event supported by Forensic Pharmacology expert evidence and that the Dental Case could be pursued in reliance upon the *res ipsa loquitur* doctrine. It was further submitted that the Plaintiff was entitled to rely at this stage upon the rule that the pleaded facts were presumed to be true: *Grupo Torras SA-v- Bank of Butterfield (Cayman) Limited*

[2000] CILR 441[1]. It was not "plain and obvious" that his case would fail and this was the test which the Defendant had to meet: *Henning-v-Henning*, Grand Court Cause No. G250 of 2014, Judgment dated February 27, 2015 (Mangatal J). The Plaintiff also submitted that it appeared that the strike-out Summons was motivated by irrelevant concerns about the prospect that if the Defendant succeeded at trial it would be unable to recover its costs.

36. The Defendant's submissions were directly addressed in the '*Plaintiff's Response to the Defendant's Skeleton Arguments-Expert Evidence*'. It was submitted:

(a) **breach of duty**: the statements of law in paragraphs 3-6 of the Defendant's Skeleton were "*generally speaking correct*" but that cases of failure to warn of side effects were distinguishable from ordinary clinical negligence cases. Whether there was a need for further evidence was a matter for trial. It was asserted that the Plaintiff had attempted to obtain an expert report for his Dental Case but had been unable to obtain copies of his records to send overseas. As regards both limbs of his claim, further evidence could be obtained through further directions;

(b) **causation**: the Plaintiff did not respond directly to the Defendant's submission that causation could not be proved without expert evidence and merely argued that questions of proof were matters for trial;

(c) **doomed to fail**: it was submitted that the Defendant's arguments were matters for trial. The Plaintiff's fall-back position was that he could adduce further medical evidence if ordered to do so.

37. Many of these issues were revisited in the Plaintiff's 3rd Skeleton Arguments without to any material extent undermining the central tenets of the Defendant's case. Section B addressed the distinction between the summary judgment jurisdiction and the strike-out jurisdiction in general terms. Section C advanced the important point that if there was any deficiency in his case it could be remedied by his producing expert evidence. He had some time ago been in contact with two Jamaican urologists. It was asserted that he had not produced expert evidence in support of his Dental Case for a mixture of financial and logistical reasons-he had not expected to be overseas and separated from his records for so long.

[1] This appears to be the same case decided in 1995 which is cited by the Plaintiff as "*Groupo Torras SA v X Bank (1996) 14 CILB 19*". The CILR report was placed before the Court.

38. The Plaintiff elaborated upon his earlier challenge to the Defendant's submissions on the deference to be shown to the decision of courts of coordinate jurisdiction. With reference to the Judicial Code of Conduct for the Cayman Islands Judiciary, it was submitted a judge's duty to be independent, impartial and intellectually honest could not be diluted by undue deference to previous judicial decisions. Section D reiterated previous submissions on the immunity point, notably that section 12 did not provide a substantive defence or bar to action and that the inconsistency between sections 5 and 12 (as construed by the Defendant and in Thompson 1) led to an absurd result.

39. Responding to my allusion at the May 6, 2019 hearing to the possibility of an "unless order" being made against him, the Plaintiff submitted (with reference to cases previously cited at page 32 of his 1st Skeleton) that such orders are rarely made. Finally, the valid legal point was made that the Court's modern case management powers could not be used to dilute the fair trial rights guaranteed by section 7 of the Bill of Rights. He also rightly submitted that such orders are only made as a last resort. The Plaintiff referred to *Hadkinson-v-Hadkinson* [1952] P 285. In the course of the hearing the Defendant's counsel conceded that the Plaintiff was not in breach of any prior Court Orders in relation to producing expert evidence. I indicated my provisional view that this made imposing what is supposed to be a sanction for non-compliance or contempt on the Plaintiff inappropriate at this stage.

40. The Plaintiff reiterated his submission that it was inappropriate to exercise the jurisdiction to strike-out at this stage at the June 3, 2019 hearing. He referred to authorities which were not, properly understood, responsive to the Defendant's case. In *Omni Securities Ltd (No 3)* [1998 CILR 272], as in the present case, the defendants sought to terminate proceedings brought against them under Order 14 rule 12 and/or under Order 18 rule 19. Their application was dismissed by Smellie CJ. The plaintiff's claims were for breach of contract and in (professional) negligence. The summary judgment/strike-out application was clearly not based on the central complaint that the plaintiff had no evidence to prove an essential element of a professional negligence claim. Indeed, it was clearly expected that important issues such as the scope of duty and causation of financial loss would be addressed by factual rather than expert evidence (see e.g. page 286-287, 288-291).

41. It was in these circumstances, where it would in any event have been unclear until trial if the plaintiff needed to rely on his claim in tort at, that Smellie CJ concluded (at 291):

> *"In any event, I also concluded that it would have been inappropriate to seek to dispose of any of these involved issues on a summary basis without the benefit of full discovery and on the basis only of untested affidavit evidence. Notwithstanding the court's power to strike out which proceeds upon some analysis of the evidence, there can be no usurpation of the role of the trial judge*

and no abridgement of the parties' rights to full discovery and, if appropriate, to further particularization of the pleadings."

42. In *Omni Securities-v-Deloitte & Touche* (2000) CILR 102, the Court of Appeal considered the same claims in contract or tort by a company against its former auditors. The case mainly concerned the plaintiff's unsuccessful appeal against the striking-out of time-barred aspects of his claim. But it did (as the Plaintiff contended) include a finding (on the defendants' cross-appeal) about the way the jurisdiction to strike-out claims should be exercised. It is clear from the passage upon which the Plaintiff relied (by reference to the headnote to the report) that (a) the crucial issues did not depend solely on expert opinion evidence, (b) there was no suggestion that that there was no evidence to prove an essential element of the claim and (c) the closely connected contract claim would have to be tried in any event. Collett JA (with whom Zacca P and Georges JA concurred) concluded (at page 117):

> "*In the final analysis I am unable to say, as a matter of common sense or otherwise, that the allegations pleaded in the impugned paragraphs and Schedules of the statement of claim are so unarguable or bad in law that they ought not to be tested at trial, a trial which, in any event, will proceed upon the other issues raised. This court has to weigh in the balance the prejudice which may result to the defendants if plainly untenable allegations are allowed to be pursued to trial—with consequent increases in costs and wasted effort—against the prejudice which must result to the plaintiff through being prevented from developing and persuading an arguable case for damages which it may eventually recover. In this instance, I consider the danger of prejudice to the plaintiff is the greater. I would accordingly dismiss this appeal by the defendants also.*"

Findings: merits of summary judgment/strike-out application based on the absence of any expert evidence to support the Plaintiff's case

43. In my judgment it is plain and obvious that the Plaintiff's case is bound to fail if he is unable to adduce expert evidence form an Urologist and a Dental Surgeon in support of his Medical Case and his Dental Case, respectively. Applying the strike-out test commended to the Court by the Plaintiff himself, in the absence of expert evidence I find that his case is "*obviously and almost incontestably bad*": *Duchy-v-A-G* [1911] 1 KB 410 at 419 (Fletcher-Moulton LJ). I accept Mr Wingrave's main legal submissions that:

(a) expert evidence is required to prove that a duty of care to the Plaintiff was breached because the treatment he received fell below a standard of practice regarded as proper by a reasonable body of relevant professionals (Medical Case and Dental Case);

(b) expert evidence is required as regards the Medical Case to prove that that the risks to which he complains he was exposed were the sort of risks which a reasonable urologist should have warned him of; and

(c) expert evidence is required to prove that the injuries of which the Plaintiff complains were to the requisite extent caused by the Defendant's alleged negligence (Medical Case and Dental Case).

44. The Plaintiff did not advance any submissions capable of undermining the soundness of the authorities upon which the Defendant's counsel relied. These authorities were supported by a decision which I made available to the parties, the Court of Appeal for Bermuda decision in *Ministry of Education-v-Clemons* [2018] CA (Bda) 7 Civil (23 March 2018). That was a case in which I was the trial judge and the claimant was a litigant in person. My finding that the claimant had established liability in negligence because the defendant had caused her to suffer elevated hypertension, reached without the benefit of expert evidence, was reversed on appeal. Baker P concluded (at paragraphs 29, 32):

> "*In my judgment the Chief Justice was in error in finding that expert medical evidence was not required to support findings both that the Respondent suffered a physical illness in the form of a worsening of existing hypertension and that such an illness can be, and was in this case, caused by stress….the death knell to the Respondent's claim is that there was simply no evidence of the cause of the Respondent's hypertension or any exacerbation of it.*"

45. As Mr Wingrave rightly submitted at the May 6, 2019 hearing, a medical negligence claim even more clearly requires a relevant expert to opine that the relevant professional standards were not met, as well as to opine that the injuries complained of were caused by the alleged breach of the duty of care. The *Clemons* case does not, as it might at first blush appear, support the Plaintiff's case that expert evidence is a matter for trial. On the contrary it illustrates the importance of ensuring that expert evidence is adduced before trial to prevent an unsustainable claim only being dismissed at the final hurdle after wasting considerable costs.

46. At the June 3, 2019 hearing, the Plaintiff submitted that the Defendant had cited no authority in the medical negligence context which supported the proposition demonstrated in the construction negligence context by *Pantelli Associates Ltd-v-Corporate City Developments Number Two Ltd* [2010] EWHC3189 (TCC). In my judgment, the following statements of principle by Coulson J in that case (at paragraph 17) apply with equal force to medical negligence cases and professional negligence cases generally:

> "*17. Save in cases of solicitors' negligence where the Court of Appeal has said that it is unnecessary (see* ***<u>Brown v Gould & Swayne</u>*** *[1996] 1 PNLR 130) and the sort of exceptional case summarised at paragraph 6-009 – 6-011 of* ***Jackson & Powell****, Sixth Edition, which does not arise here, it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view? CPR Part 35 would be unworkable if an allegation of professional negligence did not have, at its root, a statement of expert opinion to that effect.*"

47. In fact the proposition that the breach of duty element of the Plaintiff 's claim must be supported by expert medical evidence was demonstrated by Mr Wingrave by reference to the oft-cited case of *Bolam-v-Friern Hospital Management Committee* [1957] 1 W.L.R. 582 where McNair J held (at 586): "*The test is the standard of the ordinary skilled man exercising and professing to have <u>that special skill</u>.*" (Emphasis added). *Pantelli* is an illustration of the application of the same broad test to the strike-out context. The legal test makes it clear that it is not sufficient to say, as the Plaintiff sought to contend, that he is entitled to rely on expert evidence from another discipline altogether (Pharmacology) or indeed (as regards the Dental Case) on *res ipsa loquitur*.

48. It follows that that the Defendant has established that, <u>based on the material presently before the Court</u>, the Plaintiff has no realistic prospect of success so that his claim is both liable to be dismissed under Order 14 rule 12 and struck-out under Order 18 rule 19. It remains to consider whether the Plaintiff should be afforded an opportunity to adduce the expert evidence which might materially improve the merits of his claim, and how that impacts on the summary judgment and strike-out analysis.

49. As regards the Defendant's case under Order 14 rule 12, I must have regard to the fact that the Plaintiff expressly <u>now</u> seeks an opportunity to adduce further expert evidence. The fact that he has persisted in maintaining his primary position that he should not be

required to produce such evidence at this stage is only relevant as regards costs. In these circumstances, recording a finding that the Plaintiff's claim has no realistic prospects of success without affording the Plaintiff that opportunity can only be justified if I am also able to find that there is no realistic prospect of his being able to adduce the relevant evidence. It is not enough, as Judge LJ pointed out in *Swain-v-Hillman* [2001] 1 All ER 91, for me to grant summary judgment because I believe it is "*improbable*" that the Plaintiff will be able to do so.

50. Mr Wingrave's submissions pushed me to the brink of the conclusion that the Plaintiff, beyond having failed to obtain the requisite medical evidence at this stage, has no realistic prospect of obtaining the requisite expert support for his Medical Case and/or his Dental Case. Reliance was placed on the fact that the medical records do not provide support for any timely complaint by the Plaintiff about the symptoms of which he now complains. On balance, I consider that this level of detailed analysis is only appropriate at trial, and cannot reliably be adjudicated (or even meaningfully) assessed at an interlocutory hearing. In this narrow context and to this limited extent, I accept the Plaintiff's submissions about the inappropriateness of having a "trial" before trial.

51. On balance, I am unable to confidently find that the Plaintiff has no realistic prospect of success, taking into account the possibility that he might yet be able to adduce expert evidence which would enhance the viability of his claim. Even if it was open to me to find that he has no realistic prospect of improving his case, I would in the exercise of my residual discretion to afford him a last opportunity to adduce the expert evidence that the Defendant has put him on notice that he requires since filing its Summons on September 2, 2015. GCR Preamble paragraph 1.2 (a), in defining the meaning of the Court's obligation to deal with cases justly, requires the Court first and foremost to seek to uphold the substantive law principles in every case. This means that the Court should not deny substance justice because of a procedural deficit in a litigant's case.

52. In my judgment the Plaintiff has not conducted the present litigation in such a manner as to justify refusing him an opportunity to adduce the expert evidence the Court has now ruled is essential for the survival of his claim. I accordingly refuse the Defendant's application for summary judgment under Order 14 rule 12 on this narrow basis and to this limited extent. Without deciding the matter, it seems on the face of it obvious that the Plaintiff's initial response to the Defendant's present Summons, nearly five years ago, ought to have been to request an opportunity to adduce further expert evidence, not to contest the need for him to do so. But opposing an application on legal grounds which are later proven to be wrong only qualifies for a costs penalty, and does not warrant dismissing a party's case altogether.

53. The same analysis applies with equal force to the strike-out application. A case for striking-out has clearly been made out, based on the material before the Court. The Plaintiff has invited the Court to exercise its discretion to afford him an opportunity to

obtain expert evidence from an urologist and/or a dental surgeon. The jurisdiction to strike-out is discretionary. In a 'pleadings strike-out' case, the Court routinely grants an opportunity to amend a defective pleading. A 'merits strike-out' application only ever succeeds where it is plain and obvious that the plaintiff's case is hopeless, not just based on the evidence before the Court at the strike-out stage, but crucially having regard to the evidence the Plaintiff is likely to be able to adduce at trial.

54. The fact that the Plaintiff has now been proven to have been wrong to insist on proceeding to trial without demonstrating that his claim has realistic prospects of success is in my judgment insufficient to justify a finding at this stage that there is no realistic prospect of his filling the lacuna in his case which this judgment has only now formally identified. I do not ignore the fact that the Plaintiff's failure to obtain the requisite expert evidence does raise the potential inference that he has failed to do so because he cannot do so. I am not able to fairly draw this inference at this stage; because it is equally plausible that the Plaintiff is subject to financial constraints which he is reluctant to reveal and was unwilling and/or or unable to incur the expense of retaining further experts unless absolutely necessary. This version of events was confirmed at the June 3, 2019 hearing when the Plaintiff indicated that he proposed to apply for Legal Aid.

55. Subject to my findings on the immunity from suit issue, which are set out below, I would grant the Plaintiff a reasonable opportunity to produce credible expert evidence in support of his Medical Case and/or his Dental Case, failing which all or part of his case will be dismissed or struck-out.

THE IMMUNITY POINT

The statutory provision and previous Grand Court decisions interpreting it

56. The Defendant's alternative ground for summary judgment or striking-out relies on section 12 of the Health Services Authority Law (2010 Revision) (the "Law"). Section 12 ("Immunity") provides as follows:

> *"12. Neither the Authority, nor any director or employee of the Authority, nor any Committee member, shall be liable in damages for anything done or omitted in the discharge of their respective functions or duties unless it is shown that act or omission is in bad faith."*

57. In my judgment a straightforward reading of that provision suggests that it confers immunity from suit on the Defendant from all claims in damages save for those alleging bad faith. The original enactment of this provision in its 2010 Revision form appears to

have been primarily through section 2 of the Health Services Authority (Amendment) Law 2004, which received the Governor's Assent on January 13, 2005. However, the words "*nor any Committee member*", which are not material for present purposes, were inserted section 6 of the Health Services Amendment Law, 2009[2]. Because the result of a literal interpretation is surprising, the construction of section 12 is not as straightforward as it at first blush appears.

58. It is ultimately unsurprising, nonetheless, that the only known decisions to address this statutory immunity clause have concluded that the section means what it clearly states. The first dealt with the matter somewhat summarily; but the second undertook a fulsome analysis of the legislative provision. The two decisions are:

- *McCoy-v-Health Services Authority*, Grand Court Cause No. G2/13, Judgment dated September 6, 2013 (unreported) (Panton J, Acting);
- *Thompson-v-Health Services Authority & Alexander* [2016 (1) CILR 93] (Richard Williams J).

59. The 2016 decision in *Thompson* prompted the Legislative Assembly to repeal the immunity from suit by adding (through section 3 of the Health Services Authority (Amendment) Law 2016) the underlined two words:

> "*12. Neither the Authority, nor any director or employee of the Authority, nor any Committee member, shall be liable in damages for anything done or omitted in the discharge of their respective functions or duties unless it is shown that act or omission is in <u>negligence or</u> bad faith.*"

60. Another important related decision is *Thompson-v-Health Services Authority & Alexander* [2017 (1) CILR 441] in which Williams J, in another comprehensive judgment running to over 130 pages, ruled that section 12 prior to 2016 had been inconsistent with section 2 (the right to life) and section 9 (the right to private and family life) of the Bill of Rights "*having regard to the nature of this case*". He did not grant a declaration of incompatibility however because he ruled that the Bill of Rights (enacted as of 2009) did not have effect so as to retrospectively invalidate section 12 as at 2005 when the damage complained of was sustained. The finding that section 12 of the Law was <u>not</u> inconsistent with the Bill of Rights <u>on its face</u>, but merely in circumstances where a claimant had suffered life-threatening injuries or loss of life was possibly

[2] The extract from the 2009 Law states that it was published on May 11, 2009.

strictly *obiter*. However, that conclusion was reached after a detailed analysis of various authorities and so is very persuasive indeed.

61. So, arguably, it matters not (as regards section 2 of the Bill of Rights) that the Plaintiff's case is clearly distinguishable to the extent that his claims relate (in large part at least) to a period of time after the operative date of the Cayman Islands Constitution Order 2009 incorporating the Bill of Rights (November 6, 2009[3]). The facts of his case (which do not allege life-threatening injuries) arguably do not engage the right to life at all, if the approach of Williams J to the interaction between section 12 of the Law and section 2 of the Bill of Rights is correct.

62. The same cannot obviously be said of the right to family life (section 9 Bill of Rights). Williams J crucially concluded (perhaps, technically *obiter*, but after a comprehensive analysis of the issue nonetheless):

> *"239...If I had not made the findings in relation to the non-retrospectivity of the BOR, s.12 would have been incompatible with s.9 of the BOR as the State would be in violation in respect of the State's duty to make available judicial remedies capable of holding accountable those responsible for P's life-threatening injuries and providing appropriate civil redress to P."*

63. This particular strand of the immunity point was not addressed by the parties and I considered inviting supplementary submissions. At the June 3, 2019 hearing I merely foreshadowed reserving the issue for future determination if required. The Plaintiff originally took the stance that he did not need to rely on the Bill of Rights but since he is a litigant in person, I have been obliged to identify points which might have been taken had he been represented by counsel. On balance, having regard to the Overriding Objective, further analysis of this point at this stage would be wasteful in costs terms in light of my findings on the expert evidence point. However, to assist the parties in the event that the issue does need to be determined, the broad outlines of the legal point are summarised below.

64. It is arguable that if the Plaintiff were able to establish that by reason of the Defendant's negligence he suffers from the most serious of his complaints arising under his Medical Case, the denial of a remedy for such an injury would contravene his right to family life under section 9 of the Bill of Rights, applying the reasoning of Williams J in *Thompson-v-Health Services Authority & Alexander* [2017 (1) CILR 441]. It is important to reiterate that the Plaintiff in this case presently lacks the necessary evidential support

[3] Proclamation No. 4 of 2009.

to engage the right to family life as an answer to the immunity point and based on the second *Thompson* decision.

65. The issue which may have to be determined is whether or not section 12 of the Law (as in force during most of the period covered by the Plaintiff's claim) is an "existing law" under section 5 of the Cayman Islands Constitution Order which is (a) inconsistent with section 9 of the Bill of Rights and (b) <u>must</u> accordingly be given a modified effect so as to bring it into conformity with the Constitution. Section 5 of the Constitution Order provides so far as is material for present purposes as follows:

> "***Existing laws***
> *5.—(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

66. A helpful illustration of this application of section 5 of the Constitution Order is afforded by the recent decision of the Chief Justice in *Day and Bush-v-Governor of Cayman Islands and others*, Grand Court Civil Cause 111 & 184 of 2018, Judgment dated March 29, 2019 (unreported)(see e.g. paragraphs 110- 115). Most significantly, Smellie CJ held as follows:

> "*110. Similar provisions to section 5 of the Order exist in the constitutional arrangements of other British Overseas Territories and former British territories which are now independent nations.*
>
> *111. There is settled case law which confirms that in cases of repugnancy, the courts <u>must</u> apply section 5 to make "such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*" [Emphasis added]

67. Mr Wingrave foreshadowed the argument that the Bill of Rights would not be engaged in any event if section 12 was viewed as a substantive rather than a merely procedural bar. I acknowledge that it is far from clear whether the complicated analysis undertaken by Williams J as to the circumstances in which a duty to afford procedural remedies for the breach of fundamental rights would apply to the distinctive facts of the Plaintiff's case, even if it is supported by potentially relevant expert evidence. I repeat for the

avoidance of doubt that nothing in these remarks should be read as anything more than an outline sketch of legal points which may require further consideration. Whether or not the Plaintiff can establish that section 12 is inoperative because it is unconstitutional must accordingly be left open for future determination, if necessary.

Findings: the construction of section 12

68. I accept the Defendant's submission that courts of coordinate jurisdiction should ordinarily follow previous decisions unless satisfied that the previous decisions are wrong: *Re China Shansui Cement Group Limited* [2015 (2) CILR 256]. Mangatal J opined as follows:

> "*64. I have, therefore, the uncommon, unwelcome and uninvited task of having to look at another judge's judgment in order to see what I make of its correctness. This is in circumstances where I sit as a judge of co-ordinate jurisdiction, not as an appellate judge. I appreciate that, in the interests of judicial comity and certainty, I would be inclined to follow the judgment, unless I am convinced that it is wrong. I am also, on the other hand, cognizant that if I am convinced that the decision is wrong, I cannot shy away from not following it.*"

69. Mr Wingrave also relied upon the earlier English High Court decision of *Lornamead Acquisitions Ltd-v- Kaupthing Bank HF* [2013] 1 BCLC 73. This case is particularly instructive not just for the statement of principles but also as an illustration of how strongly the principles of judicial comity are actually applied. Gloster J (as she then was) firstly summarised the governing principles as follows:

> "*53. Volume 11, paragraph 98 of Halsbury's Laws states as follows:*
>
> > *'98. Decisions of co-ordinate Courts.*
> >
> > *There is no statute or common law rule by which one Court is bound to abide by the decision of another Court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate*

jurisdiction should follow that decision; and <u>*the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong ....*</u> *(emphasis supplied.)*

...

In The Makedonia *[1958] 1 QB 365, [1958] 1 All ER 236, Pilcher J did not follow a prior decision of a Court of co-ordinate jurisdiction (*The Telemachus *[1957] P 47, [1957] 1 All ER 72) on the ground that it was wrong, although in* Re Cohen, National Provincial Bank Ltd v Katz *[1960] Ch 179, [1959] 3 All ER 740, Danckwerts J felt bound to follow a decision of Harman J which had been doubted, although not overruled, in a dissenting Court of Appeal judgment. It is undesirable that different judges of the same division should speak with different voices:* Re Howard's Will Trusts, Levin & Bradley *[1961] Ch 507 at 523, [1961] 2 All ER 413 at 421, per Wilberforce J;* Alma Shipping Co SA v VM Salgaoncar E Irmaos Ltda *[1954] 2 QB 94 at 104, [1954] 2 All ER 92 at 97, per Devlin J. See also* Osborne to Rowlett *(1880) 13 ChD 774;* Gathercole v Smith *(1881) 44 LT 439; affd on appeal 17 ChD 1, CA.6;* Minister of Pensions v Higham *[1948] 2 KB 153, [1948] 1 All ER 863; applied in* Colchester Estates (Cardiff) v Carlton Industries plc *[1986] Ch 80, [1984] 2 All ER 601; itself applied in* Re Cromptons Leisure Machines Ltd *[2006] EWHC 3583 (Ch), [2006] All ER (D) 178 (Dec).*"

70. Gloster J applied these principles of judicial comity between courts of coordinate jurisdiction as follows:

"*56. Following the approach set out in the passage quoted from Halsbury (supra), and in circumstances where:*

(i)Burton J's decision:

(a) *was made after hearing full argument on the point in issue from three separately represented parties over the course of three days;*

(b) *was set out in a cogent and fully reasoned judgment, with its conclusions expressed in the clearest and strongest terms; and*

(c) *was supported by reference, among other things, to the evidence of Kaupthing's own expert on Icelandic law, on whose evidence Kaupthing also relies in the present case;*

ii) *Burton J's decision was clearly 'a definite decision on a matter arising out of a complicated and difficult enactment', which, moreover, affected the recognition of Kaupthing's insolvency status, in relation to which it was highly unsatisfactory to have differing views at first instance;*

iii) *there are clearly arguments to the contrary to those presented by Mr. Goldring;*

iv) *the decision in Rawlinson will now fall to be considered by the Court of Appeal in any event;*

I have concluded that, in the interests of judicial comity, and deployment of judicial resources, the appropriate course is for me to say that, despite my doubts, I am not 'convinced' that Burton J was wrong and that, accordingly, I should follow his decision…"

71. The governing principles, assuming they apply, do not allow me to simply reconsider the construction of section 12 and take a different view. The Plaintiff bears the burden of convincing me that the earlier decisions are "*wrong*". The Plaintiff's elaborate attempts to displace the literal meaning of section 12 implicitly concede that the construction of section 12 involves construing a "*difficult and complicated enactment*". This threshold is in any event met as regards the first *Thompson* case, in my judgment, because section 12 in its pre-2016 iteration was a *sui generis* provision which achieved a controversial and potentially unconstitutional result. Was there a "*definite decision*" on the matter? Clearly there was in both cases.

72. *McCoy-v-Health Services Authority*, Grand Court Cause No. G2/13, Judgment dated September 6, 2013 (unreported) (Panton J, Acting) was a strike-out application. The plaintiff's claim was struck-out because Panton J held, applying the natural and ordinary meaning of the words of section 12, that an immunity was conferred for claims of simple negligence not involving bad faith. He expressed doubts, interestingly, about whether the Government might not in some other emanation be liable in negligence. If

this was the only previous decision, I would be bound to find that the "*difficult and complicated enactment*" was not met; the question was dealt with summarily in *McCoy*.

73. *Thompson-v-Health Services Authority & Alexander* [2016 (1) CILR 93] (Richard Williams J) is a reported judgment running to more than 40 pages. The case was argued on both sides by leading counsel. 25 cases were cited and the legislative history was explored. Other linked legislation was considered. The principles of statutory interpretation were considered and arguments that the literal meaning of section 12 was inconsistent with other parts of the Law (e.g. sections 3(3), 12A and 32(2)) were entertained and rejected. Williams J in the final analysis reached the following eloquent and cogent conclusion:

> "*118 Having conducted a greater review of the principles of statutory interpretation when considering s.12 of the HSAL 2004 than that undertaken by Panton, Ag. J. in* McCoy *(12), due to the more comprehensive submissions made by the parties before me, I still reach the same conclusion as him, namely that s.12 of the HSAL 2004 is clear and, in the absence of bad faith, the section debars claims in medical negligence. As already stated, although I feel uncomfortable with such immunity and although the consequences of the defendants' interpretation are troubling, I do not find that they would lead to an absurdity. When I reach this conclusion I endorse the observations of Murphy, J. in* In re B *(3), in which he found that the relevant section of the Succession Law was clear and unambiguous and that the court was bound to accord to its plain reading despite it unfortunately resulting in two illegitimate children being unable to claim rights arising upon the intestacy of their deceased father. Murphy, J. stated (1999 CILR at 467–468):*
>
> *'That result may not be fair. It may point to a lacuna in our law. It may not accord with the values and mores of our society in the 21st century. Those are not my direct concerns as a judge. I may have my own views and they may not accord with what I have decided. That is irrelevant. My function is to apply what I perceive the law to be and I have done that. My function is not that of a social engineer or to impose my own values by creative judicial interpretation. If there is to be reform in this area that is for the legislature, not for me.'*"

74. On what basis, therefore, did the Plaintiff boldly and bravely seek to convince me that Williams J was wrong? In his 1st Skeleton (at page 12), he summarised his attack on *Thompson* as follows:

> *"First, the Court did not properly articulate the literal rule of interpretation and therefore did not properly apply it. In particular, it did not recognize that in its modern iteration, the rule is not as rigid as was often thought. In particular, the Court failed to make a distinction between objective and subjective absurdity, which need different treatment by a court.*
>
> *Second, the court totally ignored and did not mention at all the maxim generalia specialibus non derogant, which the Cayman Court of Appeal has used more than once (like many other courts in the Commonwealth) to resolve apparently inconsistent provisions in statutes."*

75. These summary points were then elaborated upon, primarily through statements of broad principle which do not succeed in demonstrating any serious error of approach in Williams J's analysis. The suggestion that the literal rule was applied in an old-fashioned and mechanistic manner is manifestly unsupportable in light of a fair and straightforward reading of the judgment in *Thompson.*

76. The contention that there was a failure to identify objective absurdity is based on a posited inconsistency between the imposition on the Defendant of a general duty "*to promote the health and wellness of patients*" (section 5(2) (b)) and the immunity in section 12. This is admittedly a point that was not argued in *Thompson*, but it is not a very convincing argument. In my judgment there is no absurdity or inconsistency in a statutory health authority being charged with caring for the health of patients and being given immunity from suit as regards claims in negligence. The statutory body's functions are defined by section 5 and its amenability to legal suit is limited by section 12. I reject the submission that Williams J ought to have reached a different conclusion because of an inconsistency between these two distinct provisions.

77. In the Plaintiff's oral submissions on June 3, 2019, he argued forcefully that the most basic error in *Thompson* was a failure to appreciate that the language of section 12 was not a bar to any legal proceedings but only a bar to recovering damages. Referring to page 23 of his 1st Skeleton Arguments, he pointed out the more explicit language used in other legislation such as the Constitution of Jamaica, section 3B(3) and the Constitution of Trinidad and Tobago, section 17(2) ("*immunity from suit and legal process*") and the local Legislative Assembly (Immunities, Powers and Privileges Law (2015 Revision) ("*No civil or criminal proceedings may be instituted…*"). He contrasted the language of section 12 of the Law and submitted that it only in any event excluded an award of damages, not declaratory relief. A straightforward explanation for the difference of language is that the broader immunities are intended to exclude liability for all manner of claims while section 12 is merely intended to exclude liability in tort and/or contract.

78. In my judgment no authority is required for the proposition that when a statute provides that the staff of a health authority shall not be "*liable in damages*", the words used are intended to exclude liability for, *inter alia*, the tort of negligence. A claim in negligence is an action for damages. The elements of the cause of action require proof of the breach of a duty of care and the causation of damage. In *Thompson*, Williams J considered very extensive argument on the natural and ordinary meaning of the words of section 12. Amongst the other statutory provisions considered (at paragraphs 102-105) was section 166 of the Public Health (Scotland) Act 1947, which provided that a management board "*shall not be liable in damages…for anything done by themselves in the bona fide execution*" of duties under the Act.

79. In *McGinty-v-Glasgow Victoria Hospitals* 1951 S.C. 200, the Court did not find that the words "*shall not be liable in damages*" did not confer immunity from suit at all. Rather, the Court found that the scope of the immunity was limited by the subsequent words of the provision and that the immunity was not applicable to acts which were not in the execution of duties under the statute. Section 12 was distinguished because the scope of the immunity was not limited in the same way. Williams J in *Thompson* clearly accepted the defendant's submission that "*s.12 relates to actions that result in a liability for damages, one being negligence*" (at paragraph 104). I concur with his findings in this regard.

80. In the Plaintiff's Response Skeleton, he firstly (without supporting authority) challenges the doctrine of judicial comity between courts of coordinate jurisdiction. As a result, the general approach he adopts is to effectively seek to re-argue the merits of the immunity point rather than assuming the burden of demonstrating that the first decision in *Thompson* is so clearly wrong that this Court is entitled to depart from it.

81. Even if I am wrong in concluding that I am bound to follow *Thompson* unless convinced that it was wrongly decided in the interests of judicial comity, I would in any event have no hesitation in reaching the same result as was reached by both Panton J (Acting) and Williams J, concluding that section 12 confers immunity from suit on the Defendant in respect of the Plaintiff's claims. This is a provisional finding, subject to reconsideration in the event that the Plaintiff is able to advance the argument that section 12 is inoperative to bar his claim because on its face or in its effect it contravenes his rights under section 9 of the Bill of Rights.

Summary: immunity issue

82. In light of my findings on the expert evidence issue, I postpone entering any formal decision on the immunity issue. This issue falls away altogether if the Plaintiff fails to adduce the expert evidence which is necessary for his claim to proceed to trial. If such evidence is adduced, the parties have liberty to apply for a determination of the further issue of whether or not section 12 of the Law (as in force during most of the period

covered by the Plaintiff's claim) is an "*existing law*" under section 5 of the Cayman Islands Constitution Order which is (a) inconsistent with section 9 of the Bill of Rights and (b) <u>must</u> accordingly be given a modified effect so as to bring it into conformity with the Constitution. This point seems arguable, assuming:

(a) that the 2010 Revision of the Law did not operate as fresh re-enactment of the version of section 12 in force on November 6, 2009 when the Constitution took effect, a matter on which I do not at this stage express any provisional view; and

(b) that Williams J did find in *Thompson-v-Health Services Authority & Alexander* [2017 (1) CILR 441] that section 12 would have been inconsistent with the Bill of Rights but for the fact that the Bill of Rights did not have retrospective effect.

DISPOSITION OF DEFENDANT'S SUMMONS

83. In my judgment the Plaintiff should be given an opportunity to adduce expert evidence even though the Defendant has succeeded in demonstrating that without such evidence the Plaintiff's claim is bound to fail. At the second hearing, the Plaintiff indicated that he would need between six to eight weeks to produce his expert evidence, if afforded an opportunity to do so. Mr Wingrave indicated that based on his experience a more realistic period was three months. The Plaintiff also foreshadowed making an application for Legal Aid.

84. Accordingly, I propose to direct that the Plaintiff shall file and serve expert evidence from an Urologist and/or a Dental Surgeon on or before October 31, 2019 and that the Defendant's Summons should be adjourned with liberty to apply. Subject to hearing the parties, I would propose to reserve costs until the Defendant's Summons is finally disposed when the appropriate allocation of costs can be more fairly assessed. That said, it is difficult to see why the costs of the expert evidence issue should not logically be awarded to the Defendant in any event.

CONCLUSION

85. The Defendant's summary judgment and/or strike-out application is resolved in the following way:

(a) the Defendant has succeeded in establishing that it is entitled to summary judgment under GCR Order 14 rule 12 and/or that the Plaintiff's claim is liable to be struck-out. This is because in the absence of expert evidence from an Urologist in respect of his Medical Case or a Dentist in respect of his Dental Case, his claim has no realistic prospect of success and/or is bound to fail;

(b) the Plaintiff has, in this event, requested a further opportunity to adduce expert evidence. In the exercise of my discretion, I find that he should be given a further opportunity to serve and file expert medical and dental evidence. Should he fail to do so, the Defendant will be at liberty to apply for the relief to which it is *prima facie* entitled on its Summons;

(c) subject to hearing the parties if required, I would direct that the Plaintiff has leave to file and serve expert evidence from an Urologist in support of his Medical and/or a Dental Surgeon in support of Dental Case on or before October 31, 2019 and reserve the costs of the present application;

(d) the determination of the immunity issue is adjourned with liberty to apply and the costs relating to that issue are also reserved.

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