IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 190 OF 2013

BETWEEN:

DONETTE THOMPSON
(A minor, suing by her mother and next friend, NORENE THOMPSON)
Plaintiff

AND

(1) THE CAYMAN ISLANDS HEALTH SERVICES AUTHORITY

(2) DR. GILBERTHA ALEXANDER
Defendants

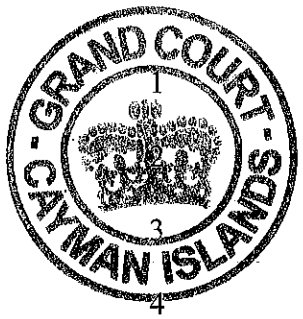
Appearances: **Mr. Jonathan A.D. Jones Q.C. instructed by Ms. Kim Grandage of Samson & McGrath for the Plaintiff**
Mr. Paul Bowen Q.C. instructed by Mr. Stephen Symons and Mrs. Peta-Gaye Golaub-Symons of Bodden Litigation for the First Defendant
Mr. Paul Bowen Q.C. instructed by Mr. Simon Dickson and Mrs. Alexandra Coe of Mourant Ozannes for the Second Defendant

Before:	**Hon. Justice Richard Williams**
Heard:	**30 June 2015, 1 - 3 July 2015**
Additional written submissions	**31 July 2015 & 7 August 2015**
Draft Judgment circulated:	**12 February 2016**
Date of Judgment:	**19 February 2016**

JUDGMENT

Background

1. Donette Thompson ("P"), aged 10, was born on 9 July 2005 at the George Town Hospital ("the Hospital"). The Hospital is maintained and operated by the First Defendant, the Cayman Islands Health Services Authority ("the Authority"). All births now take place at the hospital using the Authority's staff even though a



privately paid obstetrician may be the patient's doctor. At the time of the birth, and thereafter, the Authority had and has in place insurance for medical malpractice.

2. The Second Defendant, Dr. Gilbertha Alexander, was the attending Consultant Obstetrician at P's birth and was an employee of the Authority under a contract of employment dated 11 February 2005. It is agreed that at all material times, the Authority was responsible for the general management of the hospital and the nursery and midwifery care therein.

3. Norene Thompson, P's mother and next friend, states that at no point during her ante-natal care or during the labour was she advised or warned that she would not be able to sue Dr. Alexander or the Authority if she received negligent medical treatment. She stated that she did not see signs on any notice board at the Hospital concerning indemnity and/or immunity. The consent to surgery, anaesthesia or other invasive procedure form was signed by P's mother just prior to her operation. The said form did not contain any notice concerning immunity from suing for any negligent treatment.

4. This is a sad and troubling case as it is submitted that P, who attended the earlier stages of the hearing with her mother, suffers from spastic quadriplegia, hypoxic ischemic encephalopathy, seizures, microcephaly, cortical blindness, bilateral brachial plexus injury and global developmental delay. It is claimed that P's

condition resulted from the negligent management of her mother's labour and delivery of P by the Authority's clinicians, midwives and Dr. Alexander. It is also claimed that P suffered bilateral brachial plexus injuries as a result of Dr. Alexander's negligent performing of a caesarean section on her mother. The parties set out what they concede occurred during the induction of labour and delivery of P in the Agreed Statement of Facts dated 2 April 2015. Having regard to the nature of the preliminary issues to be determined I need not herein repeat that detail or the similar content set out in the parties' affidavits and submissions. It is agreed that the interpretation of the immunity may be undertaken on the assumption that P makes out her case in negligence and causation against both Defendants. For the purpose of this hearing there is no contention that the Authority or its employees did anything or omitted to do anything in bad faith. I note that where a plaintiff relies on negligence something more than negligence must be present to oust good faith or to put it another way, it cannot be said that wherever there is negligence there cannot be good faith.

5. These proceedings were commenced by P's Writ of Summons and Statement of Claim filed on 7 June 2013. P, pursuant to a Court Order dated 26 November 2014, filed her Amended Statement of Claim on 9 February 2015. P sues in respect of her injuries suffered at her birth[1] which she alleges were caused by the negligence of staff employed by the Authority, including Dr. Alexander who all owed her a "*duty of care to provide reasonably competent medical care.*" It is alleged that the Authority is either vicariously liable for the negligent acts and

[1] Briefly outlined in paragraph 4 above.

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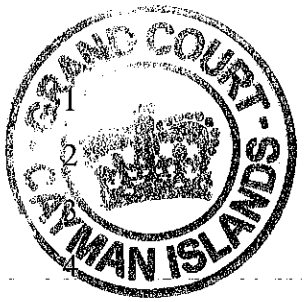
omissions of its servants or agents, including Dr. Alexander, alternatively it is directly liable for those acts of negligence under a non-delegable duty of care. It is claimed that Dr. Alexander is personally liable for failing to provide competent medical care to P.

6. The Authority filed its Defence on 11 July 2013 and its Amended Defence on 13 July 2015. Dr. Alexander filed her Defence on 30 July 2013 and her Amended Defence on 10 July 2015. In the Amended Defence the Authority denies that it, its servants or agents were negligent and it withdrew its admission that it owed a duty of care to P by reason of s.12 of the Health Services Law (2003 Revision), as amended by the Health Services Authority (Amendment) Law 2004 ("HSAL 2004")[2]. Dr. Alexander similarly denies that she was negligent or that she owes a duty of care to P.

7. I do not accept the submission contained at paragraph 10 b. of the Third Skeleton Argument filed on behalf of P that the Court should be applying s.12 of the Health Services Authority Law 2012.[3] The Preliminary issue for determination at this hearing, therefore, concerns the Defendants' pleaded Defence that P's claim is barred by s.12 HSAL 2004[4], which provides that:

[2] The Defendants relied upon s.12 HSAL (2010) in their Defence.
[3] 2012 mentioned in Skeleton, but it appears that P meant to say 2010.
[4] The Health Services Law (2003 Revision), as amended by the HSAL 2004 is the applicable version of the HSAL despite the 2010 Law being mentioned in the directions given by Hall J. in November 2014 - this being the version of the law that was in force at the time of P's birth. The change to the current wording of s.12 came about in the HSA (Amendment) Law, 2009 by adding the words "*nor any Committee member*" - which is not a significant change of wording when determining the preliminary issue before me.

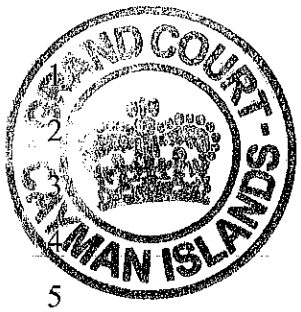


"Neither the Authority, nor any director or employee of the Authority, shall be liable in damages for anything done or omitted in the discharge of their respective functions or duties unless it is shown that the act or omission was in bad faith."

8. On 20 October 2014 P's attorneys wrote to the Attorney General.[5] They informed the Attorney General of their view that a blanket immunity from claims for clinical negligence would amount to a breach of the rights contained in sections 2, 3, 8 and 17 of Part 1, Bill of Rights, Freedoms and Responsibilities, of the Cayman Islands Constitution Order 2009 ("the Bill of Rights"). They also stated that if the Court were to find that s.12 HSAL provided such immunity, then the Court would be asked to make a declaration of incompatibility, not at the upcoming November hearing but at a later hearing. The date of that later hearing would be provided to the Attorney General to allow him to consider his position. The note did not contain any detail about the arguments which would be relied upon and made no reference to there being an issue of retroactive application of the Bill of Rights. A similar letter was sent to each of the Defendants' attorneys and copied into the Attorney General and the Minister for Health.

9. I note that at paragraph 66 in the affidavit sworn by Kim Grandage on 28 October 2014 she referred to the 20 October 2014 letter stating that it contained P's proposal:

[5] This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.



"That in the event that the Plaintiff is not successful in her arguments and the statute is interpreted in line with the Defendants' arguments, the Plaintiff intends to seek a declaration of incompatibility pursuant to Section 23 of the Cayman Islands Constitution Order."

It is not clear from the produced correspondence sent from P's attorneys to the Attorney General whether this affidavit was served on him at that time, but in it Ms. Grandage refers very briefly to five sections containing rights recognised in the Bill of Rights and it set out the interpretive obligation section, s.25.

10. On 3 November 2014 the Attorney General replied to P's attorneys[6] acknowledging receipt of the letter and the indication that at the November hearing no submissions were going to be made on incompatibility. The Attorney General stated that he was considering whether to intervene at the November hearing and requested the urgent provision of copies of the pleadings and submissions filed by both parties to date.

11. On 4 November 2014 P's attorneys wrote to the Attorney General[7] and provided him with *"pleadings and other relevant documents filed to date."*

[6] This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

[7] This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

12. On 17 November 2014 Dr. Alexander's attorneys wrote to P's attorneys[8], copying the letter into the Attorney General and the Minister for Health. Quite appropriately they highlighted the requirement for the Attorney General to be served with the Writ of Summons, the Defendants' Defences, the Summons dated 23 June 2014, the Summons dated 22 October 2014 and a copy of the order from the upcoming hearing. Insightfully, and quite correctly, they commented:

> *"...the Attorney General must be given sufficient information to be able to assess whether he wishes to be joined in this matter. Your client has failed to set out the basis upon which she contends that section 12 of the Health Services Authority Law is incompatible with the Bill of Rights. Accordingly, before the Attorney General is required to make his assessment, your client's skeleton argument must be served on him.*
>
> *".....your client is required to set out the basis upon which she asserts that section 12 is incompatible with the Bill of Rights, as well as the basis upon which she contends that section 12 should be so interpreted. This is so that the Attorney General can assess the merits of joining this matter and also so that the defendant is clear as to the case against them."*

13. On 21 November 2014 P's attorneys wrote again to the Attorney General.[9] They indicated in the letter that the bundle of Court documents, an affidavit of Delia Slater and the bundle of correspondence were attached. In the letter they informed

[8] This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

[9] This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

the Attorney General that if the Court makes a declaration of incompatibility P would seek an award of damages pursuant to s.27 of the Bill of Rights against the Attorney General[10] and/or the Authority. They made clear that the issue in relation to damages would not be dealt with at the incompatibility hearing.

14. On 26 November 2014, at a directions hearing before Hall J., the Court and the parties clearly defined the terms of the preliminary issues to be determined at this hearing[11] as follows:

a) Whether s.12 HSAL provides a defence to claims for damages for personal injuries caused by the negligence of the Defendants, unless it is shown that the acts or omissions of the Defendants were in bad faith; alternatively

b) Whether s.12 must be read and given effect under s.25 of the Bill of Rights in a manner that is compatible, so far as it is possible to do so, with P's rights under the Bill of Rights and if so, how; alternatively

c) Whether a declaration of incompatibility should be made under s.23 of the Bill of Rights.

15. At the same hearing Hall J. gave comprehensive directions, some of which dealt with the requirements under O.77A Grand Court Rules ("O.77A"). Paragraph 2 of the order, required service on the Attorney General pursuant to O.77A r.3 Grand Court Rules ("O.77A r.3"). P was directed to serve on the Attorney General any

[10] My emphasis by underlining.
[11] Paragraph 4 of the Court Order dated 26 November 2014.

amended statement of claim containing claims for breach of rights and freedoms under the Bill of Rights and for a declaration of incompatibility. P was also directed to serve on the Attorney General her skeleton argument on the preliminary issues. The order provided that the matter be relisted for directions after 12 January 2015, with a one-day time estimate, when consideration could be given to the need for further evidence, the timing of skeleton arguments from the Defendants and (if so advised) the Attorney General and any other matters relevant to the determination of the preliminary issues.

16. P's attorneys wrote to the Attorney General on 27 November 2014[12] enclosing pleadings, a core bundle of documents, an affidavit of Delia Slater and an exhibited bundle of correspondence. The letter also stated that also attached were P's and the Defendants' Skeleton Arguments. On 28 January 2016 P's attorneys confirmed to the Court that the Skeleton Arguments had been prepared to address issues at the November 2014 directions hearing.

17. On 20 January 2014 P's attorneys wrote to the Attorney General[13] to provide him with the latest working draft of Hall J.'s Order of 26 November 2014. In the letter, they stated that all of the relevant documents in the matter had been served on the Attorney General. They said that compliance with the direction for service of P's Skeleton Argument on the preliminary issues would be delayed until around 9

[12] This letter was provided to the Court on 26 January 2016 following my request made on 25 January 2016 for documents providing notice to the Attorney General pursuant to O.77A.
[13] This letter was provided to the Court on 26 January 2016 following my request made on 25 January 2016 for documents providing notice to the Attorney General pursuant to O.77A.

February 2015. They informed the Attorney General that a directions hearing was fixed for 15 April 2015, that there was a five day trial scheduled to commence on 29 June 2015 to determine the preliminary issues and they asked for confirmation as to whether the Attorney General wished to appear.

18. On 9 February 2015 P's Amended Statement of Claim[14] was filed. At paragraph 15.2 P plead that in the alternative:

> *"In so far as the Court determines that section 12 applies to the Plaintiff's claim to damages herein (which is denied), the Plaintiff will seek a declaration that the section is incompatible with Part 1, Bill of Rights, Freedoms and Responsibilities, of the Cayman Islands Constitution Order 2009 and in particular:*
>
> *a. Section 2: Life*
>
> *b. Section 3: Torture and inhumane treatment*
>
> *c. Section 7 : Fair trial*
>
> *d. Section 9: Private and family life*
>
> *e. Section 17: Protection of children*
>
> *pursuant to section 23 of the said Order"*

19. In a letter from P's attorney to the Attorney General dated 9 February 2015[15], they enclosed the Amended Statement of Claim, P's Skeleton Argument, List of Authorities and the Third Affidavit of Kim Grandage. That Skeleton Argument is the one dated 7 February 2015 which was filed on 23 June 2015. Although from paragraph 123 to 160 therein submissions are made in relation to incompatibility

[14] Amended pursuant to the Court Order of 26 November 2014.

[15] This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

with the Bill of Rights, there are no submissions in relation to the complex and uncertain issue about whether the Bill of Rights has a retroactive effect.

20. On 26 March 2015 P's attorneys wrote to the Attorney General enclosing a Notice of Hearing. It is unclear from the letter whether this is the Notice for the directions hearing to be held on 15 April 2015 or for the final five day hearing to commence on 29 June 2015, or both. They asked the Attorney General whether it was his intention to attend "*the hearing*." This letter was followed up by an email to the Attorney General's Chambers on 31 March 2015 in which they, having regard to the upcoming directions hearing to be held on 15 April 2015, were seeking confirmation about the stance being taken by the Attorney General. His Chambers replied by email on 1 April 2016 stating that although the Attorney General:

> *"has expressed concerns about the legal proceedings regarding section 12 of the Health Services Authority Law, he is still reviewing the matter and has not yet crystalized his position on the issue."*[16]

21. On 7 April 2015 P's attorneys again wrote to the Attorney General, this time enclosing a sealed copy of Hall J.'s Order dated 26 November 2014. They again sought clarification about what the Attorney General's intention was in relation to these proceedings prior to the April directions hearing. On 30 April 2015 P's

[16] This letter and these emails were provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

attorneys sent a further email[17] to the Attorney General's Chambers seeking clarification about the Attorney General's stance in relation to the proceedings. His Chambers replied by email on the same day, rather unhelpfully stating that:

> *"The Attorney General's position remains the same as last communicated."*

22. On 14 April 2015 Dr. Alexander's attorneys emailed the Attorney General's Chambers and P's attorneys stating:

> *"We have not heard anything from the Attorney General in respect of this matter. Given the fact that there has been no substantive communications between the Attorney General and any of the parties, we assume you do not attend[18] to appear at tomorrow's directions hearing. Please confirm the same by return and we will ask the Court to vacate the hearing."*

The Attorney General's Chambers replied by email on the same day highlighting that they had been in correspondence with P's attorneys, that the Attorney General had not crystallised his position on the issue and that they did not intend to attend the directions hearing. Dr. Alexander's attorneys replied by email[19] stating that they look forward to being updated as to *"any crystallization as and when it occurs"*.

[17] This letter and these emails were provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.
[18] "attend" is written in email, presumably should be "intend".
[19] These emails were provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

23. A Consent Order was agreed by the parties and forwarded Quin J. who approved the same on 15 April 2015. Unfortunately, due to the absence of a declared position from the Attorney General as to whether or not he sought to intervene in the proceedings, it appears that Quin J. was not asked to consider directions relating to his possible involvement. For example, the parties did not request the Learned Judge to order that the Defendants' Skeleton Argument and P's further Skeleton Argument be served on the Attorney General well in advance of the June hearing.

24. On 22 April 2015 P's attorneys provided the Defendants and the Attorney General with a copy of the sealed order resulting from the directions hearing before Quin J.

25. The Defendants' Skeleton Argument was served by letter on the Attorney General on 5 June 2015 and was filed on 8 June 2015.[20] This is the first document sent to the Attorney General that raises the issue as to whether the Bill of Rights has a retroactive effect.

26. P's attorneys wrote to the Attorney General on 16 June 2015 and provided a trial bundle for the hearing of the preliminary issues due to commence on 29 June

[20] This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

2015. On 24 June 2015 P's attorneys again wrote to the Attorney General[21] enclosing bundles of authorities, a supplemental trial bundle, and the bundle of skeleton arguments. It appears that the skeleton arguments bundle file was the one filed at Court on 23 June 2015 which contained P's Skeleton Argument dated 7 February 2015, the Defendants' Skeleton Argument dated 5 June 2014,[22] and possibly P's Supplementary Skeleton Argument. The Court's skeleton argument bundle was updated on 25 June by adding the Defendants' Updated Skeleton Argument and possibly P's Supplementary Skeleton Argument. P's Supplementary Skeleton Argument dealt with the retrospective effect of the Bill of Rights, something which was only mentioned briefly in the Defendants' first Skeleton Argument. The Defendants' Skeleton Argument was updated and I note that at paragraph 95 they added far greater substance to their submissions concerning the retrospective effect of the Bill of Rights. It is significant that the Attorney General was given rather short notice of the detailed submissions in relation to the wider and fundamentally important issue as to whether the Bill of Rights has a retroactive effect. It is clear from the review of the case law that it is a complex issue which has greatly troubled the House of Lords.

27. On 26 June 2015, only two working days prior to the hearing, the Attorney General's Chambers confirmed in writing[23] to P that he had *"taken the position*

[21] The letters referred to in this paragraph were provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.
[22] I believe that the date should be 2015 and not 2014.
[23] This letter was provided to the Court on 26 January 2016 following my request made on 25 January 2016 for documents providing notice to the Attorney General pursuant to O.77A.

not to intervene in the above stated proceedings at this stage.[24]" It is unclear what was meant by "*at this stage*", because to some this might seem to be the most appropriate stage to intervene concerning the incompatibility issue, which is without a doubt one of great public importance. Following the provision of his une indication of non-intervention, the Attorney General has not filed or served any notice on the parties stating his wish to intervene or to make any submissions at the hearing.

28. All the parties confirmed at the outset of the hearing, which was held in Open Court, that they felt there to be no conflict, and had no objection, to a resident Judge hearing this matter. The parties were afforded the opportunity to express their view as health coverage for all resident Judges is through CINICO and their medical treatment would ordinarily be provided at one of the Authority's medical facilities by its employees.[25]

29. On 3 July 2015, at the close of the four day hearing, I gave further directions. I afforded the parties the opportunity to file written submissions. P's 27 page third Skeleton Argument was filed on 31 July 2015 and in it they only addressed in greater detail the Bill of Rights issues. The Defendants' Supplementary Skeleton Argument was filed on 7 August 2015 and therein they also only addressed the by

[24] My emphasis by underlining.
[25] In a letter dated 17 November 2014 from Dr. Alexander's attorney to P it is made clear that, despite the possible conflict, they had no objection to a Grand Court Judge hearing the matter. This letter was provided to the Court on 28 January 2016 following my request made on 27 January 2016 for disclosure of correspondence between the parties and the Attorney General concerning the declaration of incompatibility issue.

then raised Bill of Rights issues. The Attorney General was, of course, not aware of the content of these additional skeleton arguments when deciding whether or not to intervene and he is likely still not appraised of the content.

30. P was given leave to file the Third Affidavit of Norene Thompson sworn on 2 July 2015. The Defendants were given leave to file the Sixth and Seventh Affidavits of Lizzette Yearwood which were both sworn on 2 July 2015. The Defendants were also given leave to file a further affidavit dealing with any issues pertaining to disciplinary procedures for health care professionals in the Cayman Islands by 8 July 2015 and this was later extended by consent to 22 July 2015. Pursuant to that direction, on 15 July 2015 Lizzette Yearwood filed her eighth affidavit, sworn by her on the same day. P was given leave to file an affidavit in reply by 15 July 2015 and by consent this was extended to 22 July 2015 when the Affidavit of Kim Grandage, sworn on the same day, was filed. Some of the above included additional material concerning the Bill of Rights issues which have likely not been shared with the Attorney General.

31. On 3 July 2015, leave was also given to the Defendants to amend their Defence in the form shown to the Court and to file the same by 14 July 2015. The Defendants' duly filed their Amended Defences mentioned in paragraph 6 above.

32. At the close of the hearing the Court indicated that, following receipt of and having the opportunity to review all of the substantial material, including

additional evidence and submissions, the parties would be provided with a reserved written judgment. This is the promised reserved written Judgment.

The Parties' Positions

33. The Defendants submit that s.12 HSAL 2004 should be given a broad construction on the plain meaning of its terms. The Defendants claim that the plain reading of the *"clear and unambiguous words"* of s.12 includes an exclusion of liability for the Defendants in relation to claims of negligence, including medical negligence, arising out of the acts and omissions by the Authority and its employees and that it should be presumed that this was the intention of Parliament. It is contended that this presumption is not displaced when considering the principles of statutory interpretation and that the other presumptions of statutory interpretation must not be given greater weight than the plain meaning of s.12. It is submitted that had it been intended that the exclusion of liability in damages would not apply to medical negligence then that exception would have been specifically referred to in the section. The Defendants submit that another interpretation is not justified having regard to s.25 of the Bill of Rights as there is no removal or conflict with the rights created therein because the words in the Law are clear and unambiguous.

34. P contends that there is nothing unusual about the facts and the case can be characterised as being "*conventional medical negligence proceedings.*" P submits that, on a correct statutory construction of HSAL, s.12 does not provide the

Defendants with complete exclusion from liability in damages arising out of claims for medical negligence on the part of individual practitioners like Dr. Alexander whilst employed by the Authority in its hospitals. P commends a narrow construction to the statutory exemption as the pleaded exclusion takes away the ordinary rights of an individual. It is submitted that only with unambiguous and clear language can a section in the Law be construed as withdrawing common law rights without compensation and that the Court should not infer an exclusion of a right of action in negligence in the absence of express words.

35. It is submitted by P that if the Defendants are right then such actions could not be brought against the Authority and as a consequence no patient who suffered injury due to negligence would be able to seek redress through the courts. It is suggested by P that if the section was read in the wider way suggested by the Defendants that the section would prevent all common law statutory claims for damages unless there was bad faith, something which it is submitted is absurd and could not have been intended by the Legislature. Although P has informed the Attorney General that an action for damages will be brought against him if a declaration of incompatibility is made, the affidavit evidence makes abundantly clear the P's contention about the serious consequences for her and her family of not having an avenue to bring a claim for the alleged negligence.

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36. In the alternative, as a matter of last resort, P submits that if the Court were to determine that s.12 provides the Defendants with immunity as the wording therein is clear and unambiguous, as already mentioned, P seeks the Court to make a declaration of incompatibility pursuant to s.23 of the Bill of Rights.

The Cayman Islands Case Law

37. Before I move on to review the principles of statutory interpretation, I recognise that during the hearing the parties referred to the Cayman Islands Grand Court decisions of ***Charles McCoy v Cayman Islands Health Services Authority & Dr Jha*** Cause no. G2/13 and ***Elliott v Cayman Islands Health Service Authority*** 2007 CILR 163.

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38. In ***Elliott*** the defendant contended that it had an absolute defence to the claim for alleged breach of contract by virtue of s.12. In his ruling Sanderson, Ag. J. stated at paragraphs 11 and 12 that:

> *"11 It may be a good defence. However, the trial judge may easily conclude that it was not intended to apply to an alleged breach of contract and restrict its application to a limitation of liability in respect of the Authority discharging its duties under the legislation*[26] *and may further conclude that performance of an employment contract does not fall within that remit. Accordingly, s.12 does not create a clear defence of the claim.*
>
> *12 However, I have not had the benefit of full argument on this point and I therefore cannot say with confidence whether the plaintiff or defendant is more likely to succeed. The ultimate*

[26] My emphasis by underlining.

conclusion will of course depend upon the evidence at trial, the findings of fact that arise from that evidence and the full submissions from counsel on the interpretation of that section."

39. P relies upon ***Elliott*** as an authority in support of the proposition that s.12 does not provide even a prima facie defence to her claim against the Authority. P also contends that ***Elliott*** supports her contention that s.12 does not provide an immunity to Dr. Alexander as she was not acting pursuant to the HSAL, but under her contract of employment.

40. However, ***Elliott*** can be distinguished as Sanderson J. was considering, and at paragraph 11 of his Judgment had regard to, the version of s.12 that predated the 2004 amendment. Prior to the 2004 amendment the section was specifically limited to the discharge of functions under the HSAL which is not the case in the 2004 Revision. In any event, public officials are employed by a public body under a private law contract of employment when performing public law functions and when discharging public law functions may also be discharging private law contractual obligations to the employer Authority. It is rightly contended that even if Dr. Alexander was acting under her contract of employment with the Authority, she was still discharging the Authority's public function of providing treatment to P pursuant to s.5 HSAL 2004.[27]

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[27] See paragraphs 78-80 herein for further review of arguments relating to the issues arising out of ***Elliott.***

41. In ***McCoy*** the defendants contended that s.12 provided a complete defence against a claim of alleged negligence arising out of the actions of a doctor employed by the Authority. Panton. Ag. J. struck out the plaintiff's action finding that s.12 gave complete immunity to the Authority and its employees. At paragraph 31 of his judgment, Panton J. stated:

> *"31. Although it may not be necessary for me to give an opinion on the matter, I cannot help thinking that if there has been negligence in the care that was given to the Plaintiff, he may not be without a remedy, in view of the overall provisions of the Health Services Authority Law. ... Government also has overall responsibility for the Health Services Authority, seeing that the Minister is empowered to give it general and lawful directions as to the policy to be followed by the Authority in performing its duties and functions. If there has been negligence in the provision of health care to one of its employees, the Government would, it seems to me, be liable and the Attorney General would be the proper Defendant in respect of such negligence.*
>
> *Section 12 protects the Authority, its directors, employees and Committee members from liability - except where there is bad faith. However, this section ought not to be regarded as a hiding place for the Government in respect of negligence on the part of its agencies or employees. Whereas the Authority and its employees may not be sued in their respective individual capacities, the Government may yet be held accountable."*

42. The Defendants contend that the decision in ***McCoy*** is correct and they rely upon Panton J.'s conclusion that the legislation was "*clear*" and as a consequence, in the absence of bad faith, s.12 debarred claims for medical negligence. The

Defendants stated at paragraph 41 of the Updated Skeleton Argument that the Court was bound by the conclusion reached in ***McCoy*** that liability in negligence is excluded for acts and omissions, made in good faith, in the provision of medical care by the Authority's employees. Although submitting that this Court should follow that decision, the Defendants accept that the detailed arguments made before this Court were not aired before Panton J.

43. P contends that ***McCoy*** is "*irrelevant, distinguishable and/or wrongly decided.*" P accepts that the arguments of the plaintiff unsuccessfully made in ***McCoy***, for example about whether bad faith encompasses negligence, are not pursued by her in the matter before me[28], where, unlike in ***McCoy***, her focus has been on:

> "*the correct statutory construction of section 12, within its immediate statutory context in the context of the HSAL as a whole, by reference to the full enactment history, and further by reference to principles of statutory interpretation and consistent with P's fundamental rights under the Bill of Rights.*"[29]

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In any event, the Defendants rightly point out that bad faith involves improper motives and does not include negligence.[30]

44. The parties before me recognise that, as the Authority is the primary health care provider in the Cayman Islands, the interpretation of s.12 gives rise to a fundamental issue of general importance in the jurisdiction. With this in mind, the

[28] See paragraph 4 above.
[29] Paragraph 70 of P's Skeleton Argument.
[30] See paragraph 4 above.

parties accept that this Court must consider the above-mentioned local case precedents, but request that I go on and conduct a full review of the law and applicable principles contained in the substantially greater materials now produced and the more thorough submissions now presented. As a consequence, the interpretation of s.12 HSAL 2004 has required detailed judicial consideration and I am grateful to Counsel for the assistance given to the Court deriving from their prodigious and well-presented oral and written submissions.

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General Principles of Statutory Interpretation

45. Many authorities were cited to the Court on the matter of interpretation, I need not refer to them all. The making of law is a matter for the Legislature and not for the Court. At the outset, I remind myself of the general sentiments expressed by Joseph J. (Ag.) in the Eastern Caribbean Supreme Court (St. Vincent and the Grenadines) case of ***Floral Fantasy v Bethel Brackin*** Claim No. 17 of 2012 who said at paragraphs 12 and 13:

> *"[12] I consider that the main principal of statutory interpretation is that Parliament makes the laws and the Court interprets the laws that have been made by Parliament. If there is a situation that Parliament has not covered, then it is for Parliament to mend the situation.*
>
> *[13] If the legislation is unambiguous then the court must carry out that indention[31] expressed unambiguously, no matter how harsh it may be. If the intention, as expressed in the phrasing of the legislation is not clear then the court's aid is enlisted. The court*

[31] I presume word "indention" that appears in the transcript of the Judgment should be intention.

gives interpretation to the statute that carries out the intention of Parliament as phrased in the legislative provisions."

46. When construing a statute the Court may use internal aids when striving to ascertain the intention of the Legislature as expressed in the statute, by considering it as a whole and in its context. Although not mentioned during the hearing, I also remind myself of the uncontroversial guidance of Sir Vincent Floissac, who is regarded as having been one of the Region's most eminent jurists, when he helpfully summarised the guiding principles to be applied in order to decide on the meaning or effect of a statute in ***Charles Savarin v John Williams*** (1995) 51 W.I.R. 175 paragraph 78 as follows:

"..... I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, a statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."

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47. The Interpretation Law (1995 Revision), although not outlining in any detail the approach to be taken to substantive and varying statutory interpretation principles, provides some guidelines about how to interpret other Laws. S.3(2) the Interpretation Law (1995 Revision) provides that:

"Every local law of the Islands shall be carried out and applied according to the plain reading, and not according to any private construction...."

48. It is agreed that the principles of statutory interpretation applied in England and Wales may also apply in the Cayman Islands. Sections 284 and 285 at page 780 in **Bennion on Statutory Interpretation (6th Edition)** echo a presumption in favour of a literal interpretation of the words of a statute stated in s.3(2) the Interpretation Law.

49. Section 284 provides:

> *"**Presumption that text is primary indication of legal meaning***
> *In construing an enactment, the text of the enactment, in its setting within the Act or other instrument containing it, is to be regarded as the pre-eminent indication of the legislator's intention."*

50. Section 285 provides:

> *"**Presumption that literal meaning to be followed***
> *Prima facie, the meaning of an enactment which was intended by the legislator (in other words its legal meaning) is taken to be that which corresponds to the literal meaning."*

51. The task of the Court in determining the intention of the Legislature from the language of a statute was articulated by Lord Nicholls of Birkenhead in the House of Lords decision in ***R v Secretary of State for the Environment, Transport and the Regions and another, ex parte Spath Holme Ltd*** [2001] 2 AC 349 at 396(f)

("***Spath***"). It is difficult to avoid extensive quotation from this important Judgment. Indicating that he was going back to first principles Lord Nicholls observed:

> *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended," they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810 at 814,[1975] AC 591 at 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.*[32]*"*
>
> *In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be*

[32] My emphasis by underlining.

taken to bear its ordinary meaning in the general context of the statute. Another, recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and fundamental freedoms (see s.3 of the Human Rights Act 1998). The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a mental ingredient is an essential element in every statutory offence unless Parliament has indicated a contrary intention expressly or by necessary implication.

Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, 'the mischief and defect for which the common law did not provide' (see Heydon's Case (1584) 3 Co Rep 7a at 7b, 76 ER 637 at 638). Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids

are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned."

52. Lord Nicholls then, at 397H to 398H, repeated the following observations of Lord Diplock made when he had drawn attention to this aspect of the rule of law in ***Fothergill v Monarch Airlines Ltd*** (1981) AC 251 at 279-280:

> *"The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation."*

53. The case of ***Inco Europe Ltd. v First Choice Distribution Ltd.*** [2000] 1 W.L.R. 586 is instructive when considering the principle that words in a statute, unless specifically defined, are to be given their natural and ordinary meaning. Lord Nicholls stated:

> *"It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, Statutory Interpretation (3rd edn, 1995) pp 93–105. He comments (p 103):*
>
> > *'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'*
>
> *This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the*

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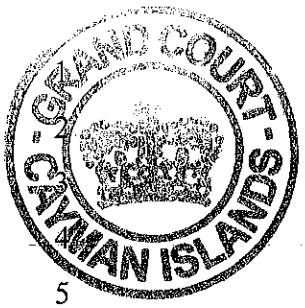

error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation (see per Lord Diplock in Jones v Wrotham Park Settled Estates [1979] 1 All ER 286 at 289."

54. The Defendants contend that the power should not be exercised as the Legislature made no drafting error as it intended s.12 to be given its plain reading as it contains *"clear and unambiguous"* words which do not result in absurdity. It is contended that if P's interpretation of the section was correct there would be a requirement to add a final sentence with wording along the lines of "this section does not apply to claims in respect of clinical negligence." It is submitted that to do so in this case would be an improper approach to statutory interpretation as the Court would be straying away from its permitted role of determining the meaning of the section, especially having regard to the guidance given and the principles enunciated by Lord Nicholls in the ***Inco Europe*** case. For reasons I will elaborate upon, I find force in P's submissions. However, even if the language were ambiguous or not clear in s.12, I am satisfied that the strict threshold set out by Lord Nicholls in ***Inco Europe*** for taking the approach of adding or omitting words has not been met.

55. Lord Hoffman in the Privy Council decision of ***Attorney General of Belize and Others v Belize Telecom Ltd and Another*** (2009) ALL ER 1127 at 1132f-h expressed the view that the objective meaning of an instrument is the meaning which the instrument would convey to a reasonable person having all the

background knowledge which would reasonably be available to the audience to whom the instrument is addressed, stating:

> *"The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute[33] or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors' Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 All ER 98 at 114-115, [1998] WLR 869 at 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of whatever person or body was or is deemed to have been the author of the instrument."*

56. P commends a purposive approach with overlapping consideration being given to the other rules of interpretation. The purposive approach seeks to identify and give effect to the purpose of the legislation when a literal interpretation of the statute produces an outcome which does not accord with the purpose that the Legislature intended to achieve. To do this the Court considers the section within the context of the statute as a whole and will construe the statute in the historical context in which it was enacted. Support of this approach is found in the following words of Lord Bingham in ***R. v Secretary of State for Health***

[33] My emphasis by underlining.

(Respondent Ex parte Quintavalle (on behalf of the Pro-Life Alliance) (Appellant) (2003) 2 WLR 692 at 697d-g:

> *"The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions would be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

57. Lord Griffith enunciated the doctrine of purposive interpretation in the majority House of Lords decision in ***Pepper v Hart (1993)*** AC 593 when he stated:

> *"The days have passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous*

material that bears on the background against which the legislation was adopted."

58. The case of ***Pepper*** concerned the interpretation of the Finance Act 1976 in order to calculate how much tax some teachers who received discounted fees for their children at a fee-paying private school were required to pay. Section 63 of that Act seemed to support the Inspector of Taxes' income tax assessments of the teachers. On the other hand, the court was shown a statement from the Financial Secretary to the Treasury recorded in material from Hansard in which he stated to the House of Commons that there was no intention to impose the tax which a literal reading of the Act appeared to impose. The majority held that there were two possible interpretations of the section and that the material clearly indicated what was intended by Parliament. The House of Lords relaxed the exclusionary rule so that court could examine Hansard as an aid because of the burden that would be placed on a number of tax payers contrary to Parliament's clear intention which was shown in Hansard. The Head Note summarises the House of Lords' decision[34] as being:

"...the rule excluding reference to parliamentary material as an aid to statutory construction should be relaxed so as to permit such reference where (a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect, and (c) the statements relied upon were clear."

[34] See also Lord-Browne Wilkinson page 640B, 631D, 634D.

59. At page 391 in ***Spath*** Lord Bingham stated that the conditions in ***Pepper*** must be strictly adhered to and he repeated what Lord Oliver had said in ***Pepper*** namely that "*as in most cases*" the statute is the complete statement of the law. Lord Bingham commented at 391D, when reviewing the conditions which Browne Wilkinson stated had to be met before reference to parliamentary statements could be made, that "... *each of the conditions is critical to the majority decision*" in ***Pepper***.

60. Lord Mackay dissented in ***Pepper*** for practical and cost-effective reasons feeling that it will introduce into nearly all statutory interpretation cases a submission that the relevant provision was ambiguous, obscure or led to an absurdity. Lord Mackay was concerned that there would now be in most cases resultant time-consuming and costly searches of Hansard to see if whether there are statements fitting the criteria.

61. In ***R (on the application of Westminster City Council) v National Asylum Support Service***[35] (HL) [2002] UKHL38, [2002] 4 All ER 654, Lord Steyn addressed the status of Explanatory Notes to Bills. Lord Steyn clarified that they can be admitted to establish the context of an enactment even if the legislation is not ambiguous. When considering the decision in ***Pepper***, he stated at paragraph 6:

[35] Case referred to at page 587 **Bennion** - page 2536 in the Authorities Bundle 5 of 6, Tab 86.

> *"If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court."*

He went on to say:

> *"What is impermissible is to treat the wishes and desires of the government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."*

62. Although ***Pepper*** is regarded as being a landmark case, despite containing certain provisos for relaxation of the exclusionary rule, it has resulted in ongoing controversy and comment about restricting its scope. Lord Steyn felt that there should be a narrow view, maintaining that ***Pepper*** should be restricted to its facts as it was a case in which taxpayers had relied upon what the Minister responsible for tax had said in Parliament and, as such, the Executive should be estopped from going back on Minister's *"categorical assurances."* Lord Steyn was saying that ***Pepper*** should only be relied upon against the Executive when it had made statements suggesting that the provision will not apply in certain circumstances. He felt that the Executive had created a legitimate expectation which they should honour. Lord Steyn advocated that, apart from this type of estoppel situation, reference to Hansard should be solely to determine the mischief that the

Legislature sought to rectify.[36] This is an approach that Lord Steyn followed in ***R v A (No 2)*** [2002] 1 AC 45.

63. Lord Hoffmann stated in ***Robinson v Secretary of State for Northern Ireland*** [2002] UKHL 32 at paragraph 40[37] that:

> *"In R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 391-392, 398-399, 407-408 and 413, and again in R v A (No. 2) [2002] 1 AC 45, 79 attempts were made by several of your Lordships to reduce the flow by insisting that the conditions for admissibility must be strictly complied with. I am not sure that it is sufficiently understood that it will very rare indeed for an Act of Parliament to be construed by the courts as meaning something different from what it would be understood to mean by a member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including Ministers) during the debates in one or other House of Parliament. And if such a situation should arise, the House may have to consider the conceptual and constitutional difficulties which are discussed by my noble and learned friend Lord Steyn in his Hart Lecture ((2001) 21 Oxford Journal of Legal Studies 59) and were not in my view fully answered in Pepper v Hart."*

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64. In ***Robinson***, Lord Hobhouse[38] shared Lord Hoffman's views and added at paragraph 65:

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[36] **Hart Lecture (2002)** 21 Oxford Journal of Legal Studies 59 - see extract in **Bennion** Authorities Bundle 5 of 6, Tab 86 - page 581 onward.
[37] See extract from **Bennion** in Authorities Bundle 5 of 6, Tab 86 - pages 583-584.

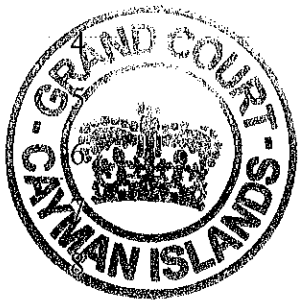
"The task of construing legislation is not assisted by the too ready reference to what has been said during debates without having regard to the very limited authority for the use of such material given by Pepper v Hart [1993] AC 593 and the clear limits laid down in that decision. It is fundamental to our constitution and the proper ascertainment of the law as enacted by Parliament that the law should be found in the text of the statute, not in the unenacted statements or answers of ministers or individual parliamentarians. This requirement is simply an a fortiori application of the rules for the proper recognition of what are and are not sources of law and the construction of written instrument."

65. As already highlighted herein, Lord Nicholls stressed on page 399 in ***Spath*** that clear and unambiguous ministerial statements which satisfy the three conditions are a factor to be taken into account by the Court when construing legislation which is ambiguous, obscure or productive of absurdity, but they are not to be attributed some special status. He stated that they are a *"... part of the legislative background, but they are no more than this"*. This means that it is for the Court when determining the Legislature's intention, having regard to all the circumstances, to decide what weight or importance may be attached to the statement. Lord Nicholls expressed the view that reference to Hansard would rarely arise. The Court should be careful not to treat a ministerial statement as indicative of the objective intention of Parliament and should not give it determinative weight.

[38] See extract from **Bennion** in Authorities Bundle 5 of 6, Tab 86 - pages 583-584.

66. Lord Hope at paragraph 81 in ***R v A (No.2)***[39], when commenting on the exception in ***Pepper***, stated:

> *"..... I consider that the effect of the exception to the rule that resort to Hansard is inadmissible for the purpose of construing an Act which was recognised in* ***Pepper v Hart*** *[1993] AC 593 is that, strictly speaking, this exercise is available for the purpose only of preventing the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in Parliament."*



67. The House of Lords in ***R v the Secretary of State for the Environment, Transport and the Regions*** [2001] 2 AC 349 and ***Wilson v First County Trust Limited (No 2)*** [2004] 1 AC 816 appear to show a retreat from supporting the approach in ***Pepper*** due to the questions and concerns raised by its application. These include whether it is proper to equate intention of the promoter of a piece of legislation with the intention of the Legislature, especially having regard to the unreliable nature of exchanges during parliamentary debates and the fact that each person who votes concerning the statute may have a different reason for doing so. Another issue raised is the difficulty in determining whether there exists an obscurity or ambiguity in the relevant statute. Concern has also been expressed that ***Pepper*** may undermine legal certainty, because a person may not feel able to satisfy himself, without first searching through Hansard, whether he can rely fully on the wording in the statute. A further objection to ***Pepper*** is derived from the view that it is for the courts to interpret statutes and not the executive and by

[39] See extract from **Bennion**, page 588 in Authorities Bundle 5 of 6, Tab 86- page 2537.

placing reliance upon statements made by members of the executive during the passage of the legislation when interpreting the statute may undermine the rule of law.

68. No Cayman Islands case from which guidance about the local approach to ***Pepper*** can be gleaned has been brought to my attention. I am satisfied that the only parliamentary material that is admissible is a statement by the Minister or other promoter of the Bill which clearly answers the point at issue. I am satisfied from my above review that the conditions for admissibility set out in ***Pepper*** should be strictly complied with in order to keep to a manageable level the amount of parliamentary material being relied upon. Recourse to the extrinsic materials, such as parliamentary statements reported in Hansard, will only be allowed if there is either no ambiguity in the statutory provision or an absurdity arising from a literal construction.

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Applying the Principles of Statutory Interpretation

69. I have regard to the above outlined principles. When I consider the whole of the statutory interpretation exercise, including the approach to ***Pepper,*** I first have to look to see if the words in s.12 are clear and unambiguous and do not lead to absurdity. I look at the ordinary meaning of the words in the general context of the Law, relying on internal aids. I look at the entire law and not just s.12. There is no issue between the parties that s.12 should be read consistently with the HSAL as a whole.

70. P highlights sections 3(3)[40], 12A[41] and 32(2)[42] HSAL and contends that s.12 is inconsistent with these sections as well as other sections in the HSAL.

71. Section 3 HSAL 2004, "Part II, Capital and Administration of the Authority",[43] provides:

> *"(1) There is established the Cayman Islands Health Services Authority having the powers and duties conferred or imposed upon it by this Law and any other Law.*
> *(2) The Authority shall be a body corporate having perpetual succession and a common seal and, subject to this Law, shall have power to buy, sell, hold, deal and otherwise acquire and dispose of land and other property of any kind and to enter into contracts and to do all things necessary or desirable for the purposes of its duties and functions.*
> *(3) The Authority may sue and be sued in its corporate name and it shall have exclusive right to use the name "the Cayman Islands Health Services Authority".*
> *(4) ....."*

72. Section 5 HSAL 2004[44] provides:

> *"(1) The Authority shall, subject to this Law and any other law, manage the health care facilities and any property appurtenant thereto.*
> *(2) It shall be the duty of the Authority-*

[40] See paragraph 49 above.
[41] See paragraph 51 above.
[42] See paragraph 52 above.
[43] Same as 2010 Revision.
[44] Same as 2010 Revision.

(a) to provide health care services and facilities in the Islands in accordance with the National Strategic Plan for Health prepared from time to time by the Government;
(b) to administer the health care facilities in an efficient manner and in such a way as to maintain and promote the health and wellness of the patients of those facilities;
(c) to co-ordinate the administration and operation of the health care facilities;
(d) to make recommendations to the Minister on the development of the health care facilities and the health care services in the Islands and on such matters as the Minister may refer to the Authority for advice;
(e) to give effect to any direction given by the Minister or the Governor in Cabinet under this Law;
(f) to provide public health programmes as determined by the Minister acting on the recommendations of the Board; and
(g) to provide health care for employees of the Government, indigent persons and such other persons as may be agreed from time to time with the Minister.

(3) The Government shall pay the Authority fees for the programmes and services specified in subsection (2) (f) and (g)."

73. Section 12A HSAL 2004[45], introduced for the first time an indemnity for directors on the Board of the Authority and provided that:

"The Authority shall indemnify a director against all claims, damages, costs, charges or expenses incurred by that director in the discharge of his functions or duties except claims, damages, costs, charges or expenses caused by the bad faith of that director."

74. Part II HSAL 2004 s.32[46] provides:

"(1) The Minister may, after consultation with the Authority, give such general and lawful directions in written form as to the policy

[45] The indemnity provision is now at s.13 HSAL (2010 Revision) and is the same save for the inclusion of the words *"or a committee member"* after the word director.
[46] Section 33 in HSAL (2010 Revision).

to be followed by the Authority in the performance of its duties and functions as appear to the Minister to be necessary in the public interest.

(2) Neither the Authority nor its directors or employees shall be liable or responsible for any loss or damage resulting from any directions of the Minister.

(3) ..."

75. P contends that s.3(3) HSAL 2004, which permits the Authority to sue and be sued, would serve no purpose unless the Authority can be sued in cases not involving bad faith. The Defendants contend that is not a correct view to hold and rightly highlight that, for example, the Authority can still be sued for remedies in judicial review proceedings that do not impose any liability for damages or for a wrong requiring bad faith such as misfeasance in public office.

76. P argues that if the Defendants are right, then the s.12A HSAL 2004 indemnity serves no purpose, as the directors could never be sued unless acting in bad faith. The Defendants point out that there is nothing novel about an exclusion of liability section being coupled with an indemnity section in Cayman Island legislation, and refer to sections 90(1) and 90(2) of the Electricity Regulatory Authority Law (2010) Revision. Section 12A provides a director with indemnity in relation to the same circumstances outlined in s.12. It is consistent with s.12 and the sections can and should be read together. A good example of the purpose of s.12A is that it would give coverage to a director for the legal costs arising from him defending a claim.

77. I am satisfied that s.32(3) HSAL 2004 is consistent with s.12. The two sections clearly do not address the same thing, the former excludes liability in damages caused by any directions by the minister, the latter excludes liability for the actual acts or omissions of directors and employees of the Authority when discharging their functions and duties.

78. P submits that the relevant sections in HSAL 2004 are related to the setting up of the Authority, the general administration and running of the Authority and are not related to the decision-making of or medical treatment given by Dr. Alexander or other staff at the hospital. Mr. Jones Q.C. argues that s.12 provides a narrow immunity which is only in respect of:

> *"anything done or omitted in the discharge of their respective functions or duties unless it is shown that the act or omission was in bad faith."*

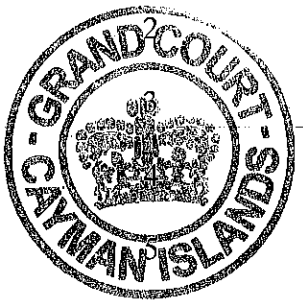
He states that the functions or duties imposed on the Authority are statutorily restricted to those set out in s.5(2) HSAL and having exercised those by providing facilities and medical staff, the individual acts of the medical staff are not covered.

79. It is contended by P that the Authority's servants or agents who attended P's mother were not carrying out any of the statutory duties under s.5 HSAL, but were carrying out duties pursuant to their contracts of employment with the Authority. For example, it is submitted that Dr. Alexander was caring out duties

only pursuant to her contract of employment dated 11 February 2005 which stated at Clause 1 that she "*agrees to undertake the duties of obstetrician/gynaecologists*" and that she is "*considered as a professional employee as defined by the Labour Law (2011 Revision) or subsequent law.*" It is contended that this is important having regard to ***Elliott*** in which Sanderson J., as set out in paragraph 38 above, indicated that, "*after full argument*", a court might "*easily conclude*" that s.12 limitation of liability was intended to apply only to a failure to discharge duties under the legislation and that did not stretch to a breach of an employment contract.

80. The Defendants, on the other hand, contend that providing medical treatment to P amounts to Dr. Alexander discharging one of the Authority's "*core*" public functions under s.5 HSAL 2004 and it also involved the 'discharge of functions or duties' at common law and in contract to which s.12 applies. The Defendants submit that s.5(2)g and s.5(4) impose a duty on the Authority to provide health care for Government employees, indigent persons, other persons as may be agreed with the Minister and also supply goods or services produced by an entity or other person to those set out in s.5(4) and that on the ground this will be provided by employees like Dr. Alexander. The Authority has produced purchase agreements between itself and the Government detailing the outputs to be provided by it under s.5(4). One of these purchase agreements is from the year 2004/5 and is for "*provision of medical care for children and antenatal, postnatal and family planning services beyond insurance coverage.*" The Defendants term the

provision of treatment as being one of the core functions or duties contained in the HSAL and accordingly when providing these medical services the medical employees are discharging functions under HSAL for the purposes of s.12. In any event, importantly, as already mentioned in paragraph 40 above, s.12 HSAL 2004 no longer contained the limitation to the discharge of functions "*under that Law*" but had wider application simply to the discharge of duties and functions.



The Legislative History of HSAL 2004

81. A review of the legislative history of the Authority, the HSAL as well as some external historical materials may in certain circumstances act as a guide to construction by highlighting the setting in which the legislation was enacted. Despite my already expressed reservations about admissibility of some external material, as both parties set out the legislative history in some detail in their submissions, I feel it is appropriate to consider that background at this stage.

82. In 2002, the HSAL 2002 was brought into force and it reincarnated the Authority to "*take over, own and operate Government Health Care Facilities.....*" Section 8 HSAL 2002 provided for the constitution of the Board of the Authority. Although the Law governing the Authority's first life contained no provision excluding liability in damages against the Authority, its Board or employees, s.12 in the HSAL 2002 Law provided:

> *"Neither the Authority, nor any director or employee of the authority shall be liable in damages for anything done or omitted in the discharge or purported discharge of their respective*

functions under this Law unless it is shown that the act or omission result from their dishonesty, fraud or wilful neglect."[47]

83. The Legislature deliberately, by the clear wording used in s.12 HSAL 2002, introduced for the first time immunity in damages to the Authority, its directors and its employees.[48] The immunity had two key features: it required that it could not be shown that the acts or omissions resulted from the Authority's, directors or employees dishonesty, fraud or wilful neglect and it applied to a discharge or purportedly discharge of a function under the Law. The section ensured that not only was there immunity for the abovenamed in relation to their own acts or omissions, but also immunity for the Board and Directors from vicarious liability for the acts or omission of the employees, including clinicians. The section contained the same wording used by Hon. Mclean, the then Minister for Health, at the second reading of the Health Services Authority Bill 2002 on 27 June 2002.[49] At that time the Minister outlined the composition of the Board and the type of individuals who would be recruited to sit on the Board. The Hansard records, even if deemed admissible under the ***Pepper*** rule, do not assist P's submission that the intention was then to grant immunity only to the Directors. The Minister did not go on to state that only the Directors would benefit from the s.12 immunity. In fact, as recorded at page 407 of Hansard, he made it patently it clear that it would apply to the Authority, any director and employees of the Authority.

[47] My emphasis by underlining to highlight the different wording when compared to that found in the HSAL 2003 Revision (as amended) 2004.
[48] My emphasis by underlining.
[49] Recorded in Hansard at page 431.

84. The wording of s.12 was fundamentally changed by the amendments in HSAL 2004.[50] The new wording is of great importance to the issues now before me. I note that at the same time, the s.12A indemnity section was introduced to afford greater protection to the directors. The Court was referred to the minutes of the Board meeting held on 29 October 2003 which record that Mr. T. Ridley expressed, at that time, the concern that the relevant section in the Law did "*not clearly indemnify*" the Directors when they were performing duties imposed on them under the common law and gave examples of what he perceived to be a duty to act prudently and act in good faith. There was also concern about the level of protection for them when they were performing functions under the Public Finance Management Law or the proposed Public Authorities Law.[51] A concern was expressed that if this was not appropriately clarified then the Government may find it hard to find suitably qualified persons to act as directors on the boards of statutory authorities. This was echoed in the Explanatory Forward to the 2004 Amendment Bill which outlined that the Bill would change the s.12 immunity provision for the Directors of the Authority and its employees and also provide an indemnity section for the Directors as the Directors felt that s.12:

> *"... did not fully protect them against legal costs and expenses that may be incurred by them in legal proceedings relating to the exercise of their powers or duties."*

In the minutes for the meeting held on 29 October 2003, when referring to the exclusion of liability and indemnity sections in the HSAL, a concern was raised

[50] There being no amendment to s.12 in the 2003 Revision.
[51] Notes of Authority Board Meeting held on 29 October 2003.

that the then wording did not clearly cover them performing duties under the common law. Even if the notes of the Board meetings could be considered by this Court, they do not assist P as they are more in line with the Defendants' submissions that the Law was changed to take into account the financial liability concerns raised at the meetings.

85. The Minister for Health in Parliament on 13 December 2004[52] at the second reading of the Health Service Authority (Amendment) Bill 2004 said the changes to s.12 and introduction of s.12A[53] were "*vital*" to minimise the risk of personal liability for Board members who were volunteering the time and skill to serve for small remuneration. He said that he felt that the amended s.12 and new s.12A in the Bill ensured that the Board would be held accountable for its activities while at the same time affording protection to Board members. It is not surprising that the Minister was, at the time, primarily commenting upon the concerns in relation to directors because only they were to benefit from the new s.12A. At page 511 in Hansard the Minister, when dealing with the amendments of s.12, made clear that the amended section still applies to employees, although it had been driven by the desires of the directors and was worded in that manner upon the advice of the Attorney General. I find that s.12 expressly and unambiguously applies to the Authority and "*any director and employee.*" If the intention had been for the section to apply only to the directors then the section would not have included the clear and explicit reference to employees.

[52] Recorded in Hansard at page 399.
[53] Section 12A became s.13 in the 2005 Revision and remains as s.13 in 2010 Revision.

86. It is evident that the debate included expressed concerns that what was termed the "*Elliott amendment*" was providing both "*belt and braces*"[54] to the immunity especially at a time when the ***Elliott*** case was before the courts. A concern was expressed that the amended section *"seems to provide or make provision for holding members, directors or employees of the Health Authority harmless."* Page 513 Hansard records Mr. Alden McLaughlin stating his concern that:

> *"the result of providing immunity or indemnity to the directors or employees is essentially saying whatever you have done, as long as it was not in bad faith, the Government will become financially responsible."*

The referred to content in Hansard, even if it could be relied upon by P, does not support P's contention that a review of the legislative history including the parliamentary debates illustrates that the application of s.12 to medical negligence was "*not even contemplated*" and "*went unnoticed in the democratic process.*" The Minister, although understandably indicating his refusal to comment on the ***Elliott*** case, save to state that the Court would make its own determination having regard to what was said in the debate, did not seek in his responses to refute the concerns about the wide applicability of the section which were raised in the debate by stating an intention that the immunity under the amendments did not cover claims for medical negligence.

87. The changes to s.12 in HSAL 2004 were the removal of the words "*purported discharge*" and the words "*under this Law*" and the introduction of the words

[54] Reported on page 512 Hansard.

"*was in bad faith*" in place of the words "*resulted from their dishonesty, fraud or wilful neglect.*" As I have already stated herein, the removal of the words "*under this Law*" is of great significance, as it means that there was an intention to extend the immunity provision in s.12 to the discharge of functions and duties over and above those provided for by the HSAL, including the discharge of common law duties. The restriction previously imposed by the previous key feature requirement that the function and duty was one under the HSAL was specifically removed. Therefore the functions and duties covered under s.12 include Dr. Alexander's duty of care to P and her contractual duties under her contract of employment or any contract with P to provide medical treatment.

88. P's primary submission is that there is no ambiguity in the interpretation of s.12 and that on a plain reading the immunity relied upon by the Defendants does not cover her claim. However, it is argued in the alternative that if there is ambiguity then the Court is entitled to consider the statements set out in Hansard. It is further argued in the alternative that the Defendants' interpretation would lead to an absurdity which also enables the Court to consider the statements in Hansard.

89. For reasons I have already touched upon, when I consider the primary reading of the words in s.12, construed in the context of and with reference to other sections in HSAL 2004, I find the words to be clear and that there is no ambiguity or absurdity which requires the Court to apply any other rules of statutory interpretation, or any external aid, including the highlighted parliamentary

statements. The plain reading is that the section gives the Authority, the Board and its employees this protection from civil liability so long as the actions or admissions are not in bad faith, an immunity not enjoyed by medical practitioners in private practice or employed elsewhere. There is nothing in the legislative history of s.12 that satisfies the conditions set out for admissibility in ***Pepper*** or to justify a strained construction.

90. For completeness sake, at the request of the parties, in case I am wrong, I have reviewed and will herein further comment upon the wider principles of statutory interpretation, including now whether the other criteria in ***Pepper*** have been satisfied.

91. As established in my earlier analysis of ***Pepper*** and its later application by the Courts, the conditions, apart from the first one that legislation has to be ambiguous or obscure or lead to absurdity are, (i) the material relied upon consists of one or more statements by a minister or other promoter of the bill; and (ii) the statements relied upon are clear. I am satisfied that condition (i) has been met in relation to the statements which were made by the Minister of Health. I am not, however, satisfied that the statements clearly reflect the interpretation sought by P. This is not a case where the record of the Minister's statements recorded in Hansard illustrates that the executive had given an indication that it was going to legislate in one way and then went on to legislate in another. The Hansard records do not contain any statements that the immunity section would not apply to

employees. In fact the Minister's statement, although he primarily spoke about the directors, also mentioned that the section covered employees. In addition, there is no statement that the widely expressed immunity from claims for damages would not include actions for negligence. The amendment that removed the restriction that actions and omissions had to be "*under the law*" is consistent with what was said in the debate and with the wide immunity claimed by the Defendants. I do not feel that either the first or the third strict conditions set out in ***Pepper*** have been met. The statements are not admissible, but even if they were, for reasons already expressed herein, they do not assist P. I do not consider that the resolution of this dispute has been assisted by the references to the legislative history of the HSAL, nor by what is recorded in Hansard at various stages of the progress.

Post-Enacting History and other Linked Legislation in the Cayman Islands

92. It is submitted by P that when looking at the intention of the Legislative Assembly in relation to medical negligence one should not consider it in isolation by ignoring other pieces of legislation, for example the Health Practice Law 2002.

93. At the same time as passing the HSAL in 2002, the Health Practice Law 2002 was enacted which required all medical practitioners, whether with the Authority or not, to have malpractice insurance. Section 15(2)(a) required all health care facilities to take out malpractice insurance for itself and its employees and the section provides:

> *"A person who operates a health care facility shall –*

(a) ensure that the registered practitioners practising at the health care facility have malpractice insurance or indemnity cover approved by the Commission;
(b) ensure that the health care facility is covered with adequate liability insurance; and
(c) ensure that persons who work at the facility under a contract of services with the health care facility have adequate malpractice and other relevant insurance.

94. The option for an operator of a health care facility to obtain indemnity coverage as an alternative to malpractice insurance was introduced in the Health Practice Law 2004. On 27 October 2004, during the second Reading of the 2004 Bill, the same Minister of Health stated[55] that the purpose of the 2002 Law was to ensure that the health of the public was protected through the regulation of health professionals and health provider institutions. The Minister stated that the Bill would ensure that insurance for all health care facilities' registered practitioners (including the Authority) would be obtained from an authorised insurer. The Minister highlighted that the objective was to ensure that the public was protected whilst at the same time allowing practitioners to access cost-effective insurance coverage. The Minister went on to state that coverage was a requirement and explain what malpractice insurance was "*supposed to provide,*" saying that it was to ensure that, should a medical practitioner injure a patient by "*misconduct, mistake, or whatever*" he would be in a position to pay for the cost of any damages as a patient should have a right to sue for them. The Minister went on to explain that there was a responsibility on the Authority and other persons

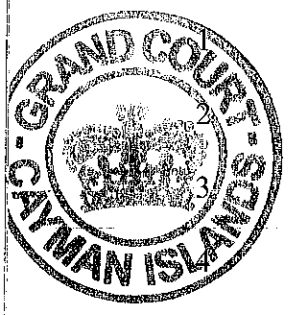
[55] Recorded at pages 490-492 of Hansard.

operating a health facility to put this coverage in place and that the amendment was designed to enable them, for economic reasons, to still obtain coverage from the Medical Protection Society.

95. P contends that the mandatory requirement is inconsistent with the Defendants' contention that at the same time the Legislature was giving immunity to the Authority and to all clinicians employed by the Authority from all claims of medical negligence. The Defendants rightly contend that, although there is a statutory requirement for all medical facilities and practitioners, including them, to take out medical malpractice insurance or indemnity coverage, an inconsistency does not arise where other legislation excludes liability for some medical practitioners because, as in this case, there remains a need for insurance, albeit at a lower premium.

96. Hon. Scotland, the Minister for Health at the time of the second reading of the Medical Negligence (Non-Economic Damages) Bill 2011, commented that the Bill affected claims against practitioners employed by the Authority. He stated that the intention behind the Bill was *"to cap non-economic damages in medical negligence cases, including those arising from Tort and Contract Law."*[56] He commented that the Authority had been affected by a rise in its insurance premiums, especially as insurers were concerned that employed obstetricians were responsible for almost half of the deliveries in the Cayman Islands. P contends that the Minister was of the view that the Authority remained liable for clinical

[56] Page 913 Hansard Thursday, 17 March 2011.



negligence claims and this is why he was commending capping level of damages for such claims. The Medical Negligence (Non-Economic Damages) Law 2012 placed a CI$500,000 limit on the level of non-economic damages in a medical negligence claim.

97. The Medical Negligence (Non- Economic Damages) Law 2011, like the Health Practice Law, does not make reference to medical negligence claims against the Defendants. The purpose of the Law is to lower insurance premiums payable under the Health Practice Law, which is consistent with the debate records in Hansard for 17 March 2011. Although the Authority is mentioned in Hansard by the Minister there was great expressed concern in relation to costs for practitioners in the private sector. Hansard makes clear that an additional significant reason why the Bill came about was as a consequence of the Government's agreement signed in 2010 with Dr. Shetty[57] in which it gave an undertaking to take the necessary steps to limit malpractice medical negligence awards.

98. P contends that if one considers the enactment of legislation at the time of and since the inception of the Authority, as well as the 2004 Amendment to s.12, coupled with a belief that there was no record of any debate in the Legislative Assembly about the abolition of the right of a patient to claim for clinical negligence and the fact that the Authority has annually, since its inception in

[57] This agreement concerned the proposed development by Dr. Shetty of a Health City, a tertiary care hospital.

2002, taken out medical malpractice insurance clearly shows what the intention was. P comments that the letter dated 7 May 2014 from Medical Protection Society, who provide insurance to the Authority, which states:

> *"... in respect of the defence and/or settlement of civil law claims of clinical negligence made against (the Authority) arising from the act or omission of (the Authority) or its employees in the course of work performed by those employees under their contracts of employment with the authority."*

This is the first mention of s.12 by them in disclosed documentation. P also highlights that this letter post-dates the issuing of her Writ and post-dates the ***McCoy*** decision. Reliance is also placed by P upon the fact that s.12 only resulted in a 20% deduction from the total insurance premium which, it is submitted, tends to show that the Authority and the insurers were not confident that the section clearly provided the immunity from malpractice claims.[58] I note that the letter also indicates that the agreed subscription payable was dependent upon there being no more than 350 public births during the year of coverage. It is submitted by P that, having regard to the HSAL's historical context and its background and its interaction with other relevant pieces of legislation, the intention behind the 2004 Amendment was to protect the Board members in respect of their functions and duties under HSAL and what they called their common law duty to act prudently and in good faith, but was not intended to grant immunity for the negligent actions of its clinicians. It is submitted that the Legislature would not have passed

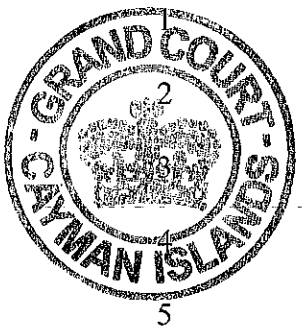
[58] Court informed about the percentage deduction figure by Bowen Q.C. on the first day the hearing.

legislation limiting the level of damages in a claim for clinical negligence if it had intended s.12 to totally exclude such liability.

99. The Defendants submit that there should be no departure from the wider interpretation flowing from the clear meaning of s.12 and, in any event, that interpretation is not inconsistent with or put into question by the legislative history and these other pieces of legislation. It is agreed that Health Practice Law 2002 applies to the Authority as well as to private medical establishments and private practitioners. There is nothing inconsistent between that Law requiring all medical practitioners and health facilities to have more practice insurance and the more restricted exclusion from liability in s.12. The need for insurance or indemnity cover for medical negligence still remains, although the existence of s.12 means that the premiums have been reduced.[59]

100. P argues that the post-enacting history of the Law also indicates that the Authority regarded s.12 as not excluding liability for negligence, or at best it was uncertain as to what the section provided. This is contended not only because, as already mentioned herein, the Authority has taken out insurance for medical negligence claims since 2005 and Dr. Alexander has also been insured for medical negligence since 2005, but also because the Authority has settled a number of claims for medical negligence since 2005. The Defendants highlight that the Authority has disclosed that there have been around 17 claims, and that at least 8

[59] Upon receipt of comments pursuant to Practice Direction No. 1/2004 (GCR O.1, R.12) "Corrections to Judgments", following circulation of draft Judgment, Plaintiff comments that evidence is that first premium reduction was in May 2014.



have involved settlement. These figures are taken from the affidavit evidence of Lizette Yearwood, the Chief Executive Officer of the Authority, who also stated therein that s.12 had been relied upon in seven cases, six of which did not proceed to service of the Defence.

101. The Defendants rightly contend that the post enacting material relied upon is not admissible as evidence of what the Legislature's intention was about the meaning of s.12, as it goes beyond the official statements and delegated legislation which **Bennion** deems to be admissible and appropriate material for that purpose. I accept the Defendants' submission that it would be unfair for reliance to be put on the Authority's responses to each of the aforementioned clinical negligence claims, because to adequately explain the reasons for them in these proceedings would require the authority having to waive legal professional privilege or, if unable or unwilling to do that, be left in the position of being able to only give an incomplete explanation about the claim or the offer of no defence. When reaching a settlement about a claim a number of factors come into play, one being the potential size of damages in relation to the likely legal costs of contested proceedings, and whether if successful any costs awarded in the circumstances would actually be recovered. Even if it were admissible, the material may arguably demonstrate what, at that time, the Authority felt that the legislation meant, which is very different to establishing what the intention of the Legislature was. The Defendants rely upon the evidence of Lizette Yearwood when

highlighting that although some claims have been settled, there has been no admission of liability and that there has been reliance on the s.12 defence.

Consideration of British Cases Dealing with Statutory Immunity

102. P submits that if the Court finds that individual acts or omissions by employees are covered by s.5 and s.12 HSAL 2004, then a negligent act or omission by part of the medical team could not be considered as being a discharge of their respective functions. It is contended that s.12 HSAL does not apply to medical negligence simpliciter, so the Authority would not have discharged its function or duty if its employees acted negligently. P relies upon the majority decision in the Scottish case of ***McGinty v Board of Management for Glasgow Victoria Hospitals*** 1951 SLT 92. When I consider ***McGinty*** I recognise that interpretation given to statutes in *pari materia* may provide helpful guidance. This is where legislation may have been borrowed from England and Wales or Scotland and that Act, if not identical to, must be at least substantially the same, to the relevant Law in the Cayman Islands. I will therefore have to consider whether the provisions considered by the Scottish Outer House bear sufficient similarity to s.12.

103. In ***McGinty*** the Court considered s.116 of the Public Health (Scotland) Act, 1897[60] which provided that a board of management *"shall not be liable in damages..... for anything done by themselves in the bona fide execution"* of the Act. The case involved an application to strike out a claim by an employee for

[60] This section applied to the hospital board of management due to s.70 National Health Service (Scotland) Act, 1947.

damages for injuries received due to an accident in the workplace, at a laundry, which the defendant board had responsibility to manage. The employee claimed that the board had failed in their common law duty to provide a safe system of working. The defendant claimed immunity under the statutory provision. The majority accepted that the running of the laundry formed a part of the board's functions, but found that any failures in their duty in regard to the running of the laundry (in this case the alleged failure to take the necessary precautions for safe working) was not "*a thing done by them in the bona fide execution of the Act.*" Lord Justice-Clerk (Thomson) when commenting upon s.16 stated:

> "*... It seems to me that although the defendants in the execution of the Act carry on the laundry as part of their functions, it cannot be said that any failures in duty in regard to the running of the laundry or anything done by themselves in the execution of the Act.*"

It is contended that the word *'discharge'* which appears in s.12 is even stronger than the word '*exercise*' analysed in ***McGinty*** as it requires one to fulfil an obligation. P contends that one cannot possibly be regarded as discharging a duty of care to a patient when one is actually acting negligently.

104. The Defendants contend that ***McGinty*** can be distinguished and that P's submission that there would not be a discharge of public functions if medical treatment given was negligent does not apply to s.12 HSAL 2004. P highlights that under s.12 any acts or omissions carried out in bad faith would involve the discharge of functions and duties and therefore any negligent acts and omissions

that are merely negligent must also be considered as involving a discharge of functions and duties. It is further highlighted by the Defendants that s.12 relates to actions that result in a liability for damages, one being negligence.

105. The Defendants distinguish **McGinty** on a number of grounds. Firstly, s.166 of the Public Health (Scotland) Act limited the exclusion to acts done in the execution of the Act. That limitation was clearly removed from s.12 HSAL 2004, although it had appeared in earlier versions of the section. It is also contended by the Defendants that the case can be distinguished because the provision of laundry services in ***McGinty*** were ancillary to the defendant's core statutory duties under the NHS (Scotland) Act and arose from its contractual obligations as employers, which was fundamentally different to the provision of core function of medical treatment arising under s.5 HSAL 2004. The Defendants contend that ***McGinty*** can further be distinguished because s.12, as amended in 2004, also included duties owed by defendants arising from common-law under a contract. It is also highlighted by the Defendants that HSAL 2004 does not contain a provision similar to s.13 of the NHS (Scotland) Act 1947 which anticipated that the defendant board could be liable for negligent acts and that had to be taken into account when considering s.166. ***McGinty*** can be distinguished because the provisions considered by the Scottish Outer House are not substantially the same as the wording in s.12 HSAL 2004.

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106. ***Bullard v Croydon Hospital Group Management Committee*** [1953] QB 51 is a case in which the court had a restrictive approach to the interpretation of a statutory immunity clause. The defendant hospital management committee was sued for negligence with regard to the medical care of a patient. The Committee contended that the s.265 Public Health Act 1875 provided that no matter or thing done by the committee bona fide the purpose of carrying out the legislation governing hospitals could subject it to any action, liability, claim or demand whatsoever. Parker J. rejected the construction of s.72 National Health Service Act 1946 and s.265 Public Health Act 1875 which the defendant hospital management committee contended relieved it from tortious liability in the performance of their functions under the 1946 Act. Parker J. held that the committee could still be sued for negligence, interpreting the legislation to only give protection if actions were done bone fide and without negligence. He reached this conclusion after considering the history of the legislation, as well as other sections of the legislation which provided for claims against the committee. He placed reliance upon those sources which clearly favoured a very limited exemption of liability. It is clear that ***Bullard*** depended on the wording in the history of the statutes considered as a whole. The Defendants rightly submit that the case law on s.72 National Health Service Act is not helpful when considering s.12 HSAL 2004 as, unlike in the HSAL, actions in tort were clearly contemplated in the Act. There is also another distinguishing factor, namely that s.12 HSAL 2004 is wider than the statutes in ***McGinty*** and ***Bullard***, as the amendment had removed the restrictive words "*under this Law*" and thereby extended exclusion

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of liability to include acts and omissions in the discharge of functions and duties other than other the HSAL 2004. I am not satisfied that the British legislation referred to in these two cases is sufficiently similar to s.12 HSAL 2004 to be of assistance .

107. P contends that s.12 is required to, but does not, contain clear words expressly **excluding liability for clinical negligence** if the Defendants' Defences are to be upheld. It is submitted that an extended meaning should not be given to the words in the section if it is to relieve the Defendants of the common-law duties and liabilities between a doctor and patient. In support of this contention P refers to s. 10 (2) of the Crown Proceedings Act 1947 which specifically states that no proceedings in tort would lie against the Crown for death or personal injury due to anything suffered by a member of the Armed Forces in certain specified circumstances. P also makes reference to s.76 Civil Aviation Act 1982 where the draughtsman expressly excluded actions for trespass or nuisance in specified circumstances. Reliance is placed upon ***R v Canada SS Lines Ltd*** 1952 AC 192 where it was held that a clause in a contract excluding liability for negligence must expressly state the exclusion or contain words wide enough to cover negligence. Reference is also made to the case of ***Mersey Docks and Harbour Board Trs v Gibbs*** 1886 LR 1 when Lord Blackburn stated at 93:

> *"The proper rule of construction of such statutes is that in the absence of something to show a contrary intention, the legislature intends that the body, the creature of statute, shall have the same duties, and that its funds shall be rendered subject to the same*

liabilities, as the general law would impose on a private person doing the same things."

108. The Defendants' position is that s.12 is deliberately drafted to exclude liability in wide terms and then qualify that by exceptions, for example acts or omissions in bad faith. It is submitted that this meets the requirement of clear words for the exclusion of liability. It is submitted that claims of misfeasance in public office or some claims of breaches of duty/breach of trust would therefore not be covered by the statutory exclusion of liability in s.12. It is contended that if the Legislature had intended negligence to be an exception to the widely drafted exclusion of liability in the section, then words would have been included in the section to that effect. The Defendants highlight that if P is right then, as s.12 does not specifically refer to any cause of action at all, there is nothing that the exclusion of liability to damages would relate to and that would make the section otiose.

109. The Defendants rely upon the United Kingdom statutes which, after the bad faith exception, also include an exception for a "*failure to exercise due care and attention*"[61] or an act "*without reasonable care*"[62] or an act "*carried out without reasonable skill or care*"[63] P seeks to distinguish these cases on the basis that "*the statutory framework and the practical context is very different*" to that in the case before me and in the Mental Health Act proceedings could still be brought with leave of the Court.

[61] Section 54(1)-(3) Anti-social Behaviour, Crime and Policing Act 2104.
[62] Section 139(1) Mental Health Act 1983.
[63] Section 154 Marine (Scotland) Act 2010.

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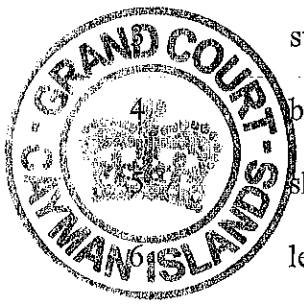
110. The Defendants submit that it is not unusual for statutes, for public policy reasons, to contain immunity from suit for public authorities discharging their statutory functions. The Defendants contend that the relevant public policy is that bodies and individuals discharging public duties for the benefit of the public should feel able to do so without the burden and cost of defending themselves in legal proceedings.



111. The Defendants rely upon the House of Lords decision in ***Everett v Griffiths*** [1921] 1. A.C. The case deals with the liberty of an individual, as the plaintiff in ***Everett*** had been committed to a mental hospital. The question was whether the doctor who signed the certificate to support his committal was liable to him in negligence. The House affirmed the judgment of the Court of Appeal, but without confirming this point. Lord Haldane considered the principle that if an administrative officer performs functions which have some judicial attributes he/she is entitled to a measure of immunity. He thought it:

> *"probable that if the matter were argued out that the doctor would have been found to have been under a duty to the appellant to exercise care, the precise nature of this duty would require consideration before it could be exactly defined."*

The Defendants, in the matter before me, to support their contention about the public policy rely upon the passage in the speech of Lord Moulton at page 695 which set out a principle which was followed in later cases. Lord Moulton stated:

> *"If a man is required in the discharge of a public duty to make a decision which affects by its legal consequences, the liberty or*

property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of the duty to the public and then leave him in peril by reason of the consequences to others of that decision, provided that he has acted honestly in making that decision."

112. When I consider Lord Moulton's words, I feel it important to put them into context. This is helpfully done by Brooke L.J. at paragraphs 65-67 in ***I.D & Others v Home Office*** [2005] EWCA Civ 38:

"65. The editors of the ninth edition of Wade & Forsyth, Administrative Law (2004), quoted the first part of this passage (at p 790) and then commented:

> *"This wide statement ought probably to be confined to decisions made within jurisdiction, since at the time it was made there was undoubtedly liability for interference with personal liberty or property where there was no jurisdiction. It probably means no more than that members of a tribunal which acts within its jurisdiction and in good faith are not personally liable to actions for negligence or for acting on no evidence. In this case the House of Lords were aware of the need to define judicial immunity with reference to the growing adjudicatory powers of administrative authorities, 'a fresh legal problem of far-reaching importance' (see Lord Haldane at p 659) but they did not attempt to do it."*

66. In Everett v Griffiths the defendant Griffiths was the chairman of the Board of Guardians. He had the responsibility of signing orders for the reception of persons in pauper lunatic asylums, and his order when signed had effect as if it had been made by a justice of the peace under the 1890 Act. It was this consideration which

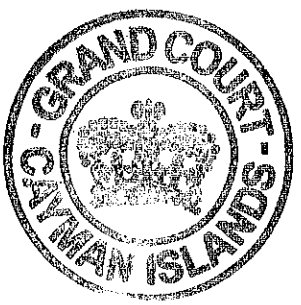
enabled the majority of the House of Lords to equate his position with that of a justice of the peace and afford him equivalent immunity (see pp 658-660, 665-7, 676-8 and 682-7) without attempting to state any wider principle: for Lord Haldane's extreme reluctance to do so in a case in which one side was argued by a litigant in person, see pp 659-660.

67. It is noticeable that in 1921 the House of Lords was more protective of the decision-maker than of those whose right to liberty might have been wrongly infringed. They were left without a remedy. In the later case of Harnett v Bond, reference was made at p 539 to a dictum of Lord Lindley in R v Whitfield (1885) 15 QBD 122, 150 when he said of the Lunatic Asylums Act 1853 that it gave justices of the peace and medical men large powers, and that it was based on the theory that they could be trusted. Reliance on this theory led to many reverses for this country in the European Court of Human Rights between 1965 and 2000, particularly in cases involving the rights of prisoners and detainees in mental hospitals. It would therefore be unsafe to adopt it as a reliable guide in resolving the present appeal now that the 1998 Act is in force."

113. The Defendants submit the courts are reluctant to impose duties of care upon public officials when they are discharging public law functions. In support of this contention the Defendants rely upon the following statement of Lord Hoffman in ***Stovin v Wise*** [1996] AC 923 at 952-3:

"If the policy of the act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of the common law duty of care."

114. P relies upon the case of ***X v Bedfordshire CC*** [1995] 2 AC 633, also referred to by the Defendants, submitting that it is consistent with her contention that the individual acts of clinicians are not covered by the immunity. P argues that, although the s.5 statutory duties may be covered by the immunity, once the Authority has provided the facilities and the staff the clinicians acts are not. The Defendants do not seek the Court to determine the issue which arose in the **Bedfordshire** case and which was also considered in the string of cases set out at footnote 29 on page 26 of their Updated Skeleton Argument, namely whether a common law duty care arises in the context of exercise a statutory powers. The Defendants do not dispute in the Skeleton Argument that a medical practitioner owes a common law duty of care to a patient. The Defendants rightly contend that if there is a duty of care the Legislature is entitled to exclude liability in the public interest. It is clear from the cases referred to by both parties concerning private law claims against public authorities that the courts have had regard to the fact that authorities act to benefit society as a whole in the public interest and exercise powers and discharge duties which private persons do not. One concern is that the liability in negligence may lead to the Authority adopting defensive practices requiring a diversion of its financial resources. The Defendants rightly contend that this is a reason why the statutory provision excluding liability is not absurd or inherently unlikely.



Principle of Legality

115. In addition to the rules and principles mentioned, the Court has been referred to certain presumptions. P draws to the Court's attention the important presumption that Laws which have the effect of encroaching existing rights of an individual or the public at large are to be interpreted strictly to, as far as possible, preserve the existing rights. The immunity should be only as wide as is necessary to achieve the legislative purpose, without unduly diminishing individual rights. The presumption therefore is that the Legislature will not alter the rights, including a right to bring, defend, conduct and compromise legal proceedings without unwarranted obstruction, unless specifically expressed. In other words, it is contended that the presumption is that there should not be an absolute immunity to the Defendants without very clear and express words, as such immunity would take away a patient's rights to bring court proceedings. Reference is made to the case of ***A-G Horner*** (1884) 4 QBD 245 where Brett MRs states:

> *"It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring person's rights without compensation unless one is obliged so to construe it."*

116. However, the presumption does not apply in this case, as I have found that s.12 contains plain and unambiguous wording exempting the Defendants' liability. Lord Phillips in ***HM Treasury v Ahmed*** [2010] 2 A.C. 534 stated at paragraph 117 that he did not *"...consider that the principle of legality permits a Court to disregard an unambiguous expression of Parliament's intention."* If I had found ambiguity or a lack of clarity in the wording of the section when I considered

HSAL 2004 as a whole, then this presumption would have been of great importance to my determination.

117. For completeness sake I note the Defendants' submission that there is a presumption that Parliament does not intend to impose liability in private law for acts done in good faith in the discharge of statutory duties other than by clear words and therefore this should not be a strained construction of the section.

118. Having conducted a greater review of the principles of statutory interpretation when considering s.12 HSAL 2004 than that undertaken by Panton J. in ***McCoy,*** due to the more comprehensive submissions made by the parties before me, I still reach the same conclusion as him, namely that s.12 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 the Estate of B*** [1999] CILR 460 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 at page 467 line 42:

> *"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."

119. Although the unambiguous and clear words in s.12 HSAL 2004 may be consistent with the Legislature's cost cutting and protective public policy prevailing eleven years ago at the time of its enactment, a later Government may feel it appropriate to openly clarify to the voting and wider public, who it is obligated to serve and protect, whether its declared policy is to retain legislation that denies remedies in tort for medical negligence against the Authority, its directors and it employees and to explain the justification for such a policy at this time. In light of the oft expressed view that civil liability can be regarded as an important mechanism to ensure quality of health service, one might ask whether such immunity from claims in damages for the Authority, it Directors and employees inspires or hinders patients' confidence in the Authority and the services it offers.

Human Rights

120. In England and Wales s.3(1) of the Human Rights Act 1998 ("HRA") places a strong interpretive obligation on the Courts. The purpose of that section is to make the Courts strive, if the language of the legislation permitted, to find an interpretation of legislation consistent with the Convention rights. If the Court is unable to do that only then, as a last resort, should the Court go on to conclude

that legislation is incompatible with the European Convention on Human Rights ("the Convention").

121. It has been argued that courts when considering an impugned section, will interpret to ensure consistency with Convention rights even if there is no ambiguity in the wording unless a clear limitation on those rights is stated. Section 3(1) HRA provides:

> *"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."*

122. When considering the case law from England and Wales it is important to note the difference in wording in the interpretive obligation section contained in the Cayman Islands Bill of Rights. Section 25 provides that:

> *"In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous[64], such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part."*

123. I have been greatly assisted by the careful analysis of the law by Henderson J. in his reported decision ***In The Matter of Nairne*** [2013 (1) CILR 345]. At paragraph 22 to 24 in his judgment Henderson J. helpfully explains the approach to be taken by the Courts in the Cayman Islands, but at the same time highlights the difference between the two jurisdictions, as follows:

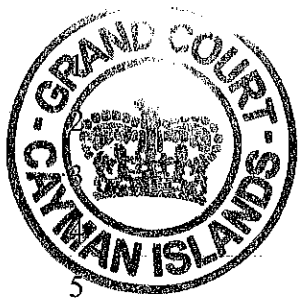
[64] My emphasis by underlining.

"22 ...This section (s.25) ensures that the court will strive to align an impugned legislative provision with what the Legislature may reasonably be taken to have intended and by this process of "reading down" will seek to avoid a formal declaration of incompatibility but the obligation imposed by section 25 arises only in "unclear or ambiguous" cases[65]*. Since the section appears in the Bill of Rights it has the effect of elevating both the rule of construction itself and the limitation upon it to constitutional status. Clear cases of incompatibility are to be left to the Legislature for correction.*

The utility of reading down is not without limit. In de Freitas v Permanent Secretary of Ministry of Agriculture and others [1998] UKPC 30 the Privy Council observed that "an enactment construed by severing, reading down or making implications into what the legislature has actually said should take a form which it could reasonably be supposed that Parliament intended to enact". The Privy Council in de Freitas quoted with approval from Osborne v Canada (Treasury Board) (1991) 82 DLR (4th) 321 (SCC) to the effect that after a "wholesale reading down" a law may "bear little resemblance to the law that Parliament passed" which gives rise to a "strong inference" that it is simply incompatible. In such cases the task of bringing the legislation into conformity with constitutional guarantees is best left to the legislative branch of Government as it will have access to relevant information and expertise not available to the court.

23 The obligation to attempt to read a challenged provision in a manner compatible with the UK Human Rights Act has been described there as a "strong interpretative obligation": see Clayton and Tomlinson, op. cit., page 175 ff. I accept that the courts of the Cayman Islands must approach the interpretative

[65] My underlining for emphasis.



obligation with equal vigour but the occasion is unlikely to occur as often because the Human Rights Act provision is expressed in broader language than section 25; the former sets down an obligation ("as far as it is possible to do so") which is not limited to "unclear or ambiguous" cases.[66]

124. The different wording contained in s.25 is significant in this case, because I have found s.12 HSAL 2004 to be clear and unambiguous. Although, this restricts the scope to read and give the section effect under s.25, the Court may, upon application under s.26(1) Bill of Rights and upon being satisfied about compliance with the procedural requirements set out in O.77A, consider whether it should grant a formal declaration of incompatibility under s.23(1) Bill of Rights.

125. Section 23 provides:

> *"If in any legal proceedings primary legislation*[67]*is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility."*

126. Henderson J., at paragraph 20 in ***Nairne***, under the heading "Consequences of a declaration of incompatibility", succinctly states the effect of a declaration, if made, to be as follows:

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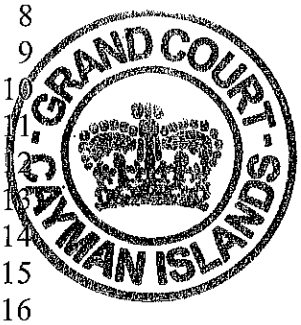
[66] My emphasis by underlining.
[67] Section 28(b) Bill of Rights defines, s.28(b)) "Primary legislation" as being a Law enacted by the Legislature of the Cayman Islands.

"Our new Bill of Rights does not give to any judicial officer at any level the power to set aside any legislative provision. Even after a Declaration of Incompatibility, the impugned provision continues in force. The task of bringing primary legislation into compliance with the Bill of Rights is left to the Legislature and not the courts. Sections 23(2) and (3) and 24 of the Bill of Rights provide:

> *(2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.*
> *(3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility.*
> *"24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorized to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified."*



127. P contends that s.12 as interpreted by the Defendants (and now by this Court) is incompatible with a number of her rights contained within the Bill of Rights. She contends that the consequences are:

(i) she will be unable to bring a civil claim against the Defendants;

(ii) she will not be able to establish civil liability for injuries;

(iii) she will not be able to seek any remedy, including financial remedy;

(iv) she will be denied the financial means to ensure provision for her long-term health, to assist with the management of disabilities which will prolong her life; and

(v) there will be no investigation into what happened at the time of the birth and the causes of her injuries.

As a consequence it is argued that s.12 is incompatible with the following rights contained in the Bill of Rights:

(i) the s.2 right to life;

(ii) the s.3 right not to be subject to inhuman or degrading treatment;

(iii) the s.7 right to a fair trial; and

(iv) the s.17 rights of the child.

128. The parties requested the Court that if, after considering all factors including the application of s.25 of the Bill of Rights, it interprets s.12 in the manner sought by the Defendants', to then go on and consider the impact, if any, of s.23 of the Bill of Rights.

129. During the hearing I received oral submissions about the Bill of Rights issues, these were supplemented by very detailed post-hearing written submissions. I have spent a great deal of time considering all of the submissions and material relating to the Bill of Rights issues before drafting this judgment.

130. At the outset of the hearing I was informed by the parties that notice of the application had been served on the Attorney General and that his Chambers had indicated that he did not wish to intervene. This is not a case in which I had any involvement prior to the first day of the hearing and therefore did not have any input in its case management or a proper opportunity to consider whether the Court would find the Attorney General's input to be of real value even if he was

indicating that he did not wish to intervene. As I did not wish to delay the hearing I was at that time, on the limited information then placed before me about the exchanges between the parties and the Attorney General, content to proceed with the hearing in the absence of the Attorney General.

131. Having had the opportunity following the hearing to carefully review all of the submissions made pre, during and post the hearing, including some of which the Attorney General would not be aware of, my concern has increased about the absence of the Attorney General's views in relation to the Bill of Rights issues. Despite the prodigious submissions made by Mr. Bowen Q.C. and Mr. Jones Q.C. and the parties' compliance with O.77A, r.3, the absence and the lack of input from the Attorney General has adversely impinged on the Court's ability to make a fully informed decision on the extremely important human rights issues. There can be no doubt that the nature of the fuller submissions now made and the nature of the incompatibility issues which the Court is now asked to determine concern the public interest in the Cayman Islands. It would be difficult to comprehend a situation where, if the Attorney General had been fully aware of the significant nature of the incompatibility issues which have now crystallised for determination, he could not have determined that it was in the public interest for him to intervene[68].

132. Due to my concerns which were cemented while working on this Judgment, I requested the parties to provide me with further documentation concerning the

[68] O.77A, r.3 (2) Grand Court Rules.

notice given to the Attorney General, the information provided to the Attorney General and the correspondence concerning intervention. The recently provided information[69] has only had the effect of heightening my concern and fortified my view that I am not able to properly determine the issues in relation to the declaration of incompatibility without input from the Attorney General. The raised human rights issues do not affect my ability to determine the statutory interpretation issues, because I have found the wording in s.12 to be clear and unambiguous.

133. The issue as to whether a statute providing immunity against claims in damages, including for clinical negligence, is incompatible with the Bill of Rights is one of great public importance. The separate issue about the retro-active effect of the Bill of Rights, which emerged shortly before the hearing and was elaborated upon during and after the hearing, is also of great public importance. The Statement of Claim and the Defence provided to the Attorney General did not refer to the HSAL 2004 and as a consequence he may not have put his mind to the retroactive effect issue. I imagine that in the public interest that the Attorney General, if fully informed about the nature of the issues and arguments now made, would have wished to make representations to clarify his position. This is particularly so in this case, where upon reading the extracts from Hansard recording the second reading of the Health Service Amendment Bill 2004 held on 13 December 2004, it appears that Hon. Gilbert McLean, the Minister of Health, was indicating that the Attorney General played a fundamental role in determining the appropriate

[69] The content of which is considered at paragraphs 10-27 herein.

wording use in s.12 HSAL 2004. The Minister stated at page 515 Hansard about s.12 that:

> *"The present wording here is what I have been given as legal advice from the Government's Chief Legal Advisor. I have let the Board understand that the Constitution says that Government's Chief Legal Advisor is the Attorney General and when I am given a wording that he or she thinks is acceptable to meet the wishes of the people who serve on the Board of the Health Services Authority, I am obliged to accept that.*
> *I can say to the Member that there is certain disagreement still with the legal wording but the wording that I have to use or to bring to this Honourable House is that which satisfies the Legal Department of Government and the Attorney General."*

134. My expectation that a fully informed Attorney General would want to intervene at this stage, namely at the incompatibility hearing, also arises because of the consequences that may flow from a declaration being made. In this regard, from the correspondence disclosed to this Court on 28 January 2016, it is evident that P's attorney wrote to the Attorney General on 21 November 2014 to inform him that if the Court made a declaration of incompatibility then P will seek:

> *".... an award of damages pursuant to section 27 of the Cayman Islands Constitution Order 2009, Bill of Rights, Freedoms and Responsibilities, Part 1 against the Attorney General*[70] *and/or the Cayman Islands Health Authority."*

[70] My emphasis by underlining.

135. It is not evident to me why the Attorney General, who had been given notice of the incompatibility proceedings in January 2014, delayed a decision about whether or not to intervene until only two working days prior to the hearing.[71] The parties clearly felt that there was a real possibility that he would still intervene, as it appears that he was provided with the trial bundle on 16 June 2015 and the voluminous bundles of authorities, supplemental trial bundle and bundle of skeleton arguments on 24 June 2015. There would have been a considerable amount of material dealing with the complex issues to digest in a short time by the Attorney General's Chambers to enable proper preparation and an appearance at the five day hearing commencing on 30 June 2015. That may be why the Chambers indicated that he did not seek to intervene "*at this time*".

136. My concern is heightened also because some of the significant submissions in relation to incompatibility issues were made orally during the hearing and in written submissions provided after the hearing. The Attorney General would not be aware of these. I am particularly concerned about the potential wider implications if a declaration were made in relation to the retroactive effect of the Bill of Rights. I have carefully reviewed the case law including ***Wilson v First County Trust Ltd (No 2)*** [2004] 1 AC 816, ***Re McKerr*** [2004] UKHL 12, ***R (on the application of Hurst) (Respondent) v Commissioner of Police of the Metropolist (Appellant)*** [2007] UKHL 13, ***Silih v Slovenia*** (2009) 49 EHRR 996, ***Re McCaughey & Another (Northern Ireland Human Rights Commission***

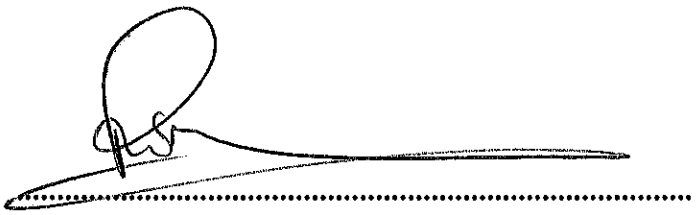
[71] As detailed in the letter emailed from the Attorney General's Chambers on 26 June 2015 and provided to the Court on 26 January 2016.

and other intervening) [2011] UKSC20, (2012) 1 AC 725. Some of these cases were referred to by the parties. I have also considered the post-hearing Supreme Court decision in ***Keyu & Others v Secretary of State for Foreign Affairs and Commonwealth Affairs and Anr [2015] UKSC 69.*** The Court of Appeal decision in the ***Keyu*** case was handed down on 19 March 2014[72] but was not brought to my attention at the hearing. The above line of case authorities illustrates the difficulty that the Supreme Court has had with the issue. Even if I were not to adjourn the matter to seek the input of the Attorney General, I would have to afford the parties the opportunity to submit comment on ***Keyu***, a case which further develops the approach of the Courts to the retro-active effect of the Human Rights Act. The knock on effect of any determination about the retro-active effect issue on other human rights cases in the jurisdiction, means that in the public interest that the Attorney General must also be afforded the opportunity to address the Court. It may well be that due to the more limited written submissions provided to him a short time before the June hearing that he did not recognise that this was going to be such a significant issue.

137. Accordingly, after great thought and with some regret, I adjourn P's application for a declaration of incompatibility to enable the Attorney General's Chambers to attend. The Court would be greatly assisted by the Attorney General's Chambers detailing what the Attorney General's views are in the application for a declaration of incomatability in relation to s.12 HSAL 2004 and the retroactive effect of the Bill of Rights. I direct the parties to provide the Attorney General

[72] Citation [2014] EWCA Civ 312.

with copies of the materials submitted to the Court which have not been provided to him, as well as a copy of this Judgment. I also direct that the parties in consultation with the Attorney General's Chambers fix a mention date to come before me to so that any necessary case management directions required to progress the application for a declaration of incompatibility may be given.



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