

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE NO. 190 OF 2013**

4
5 **BETWEEN:**

6 **DONETTE THOMPSON**

7 **(A minor, suing by her mother and next friend, NORENE THOMPSON)**

8 **Plaintiff**

9
10 **AND**

11 **(1) THE CAYMAN ISLANDS HEALTH SERVICES**
12 **AUTHORITY**

13
14 **(2) DR. GILBERTHA ALEXANDER**

15 **Defendants**

16 **Appearances:** Mr. Jonathan A.D. Jones Q.C. instructed by Ms. Kim Grandage of
17 Samson & McGrath for the Plaintiff
18 Mr. Paul Bowen Q.C. instructed by Mr. Stephen Symons and Mrs.
19 Peta-Gaye Golaub-Symons of Bodden Litigation for the First
20 Defendant
21 Mr. Paul Bowen Q.C. instructed by Mr. Simon Dickson and Mrs.
22 Alexandra Coe of Mourant Ozannes for the Second Defendant
23

24 **Before:** Hon. Justice Richard Williams

25
26 **Heard:** 30 June 2015, 1 - 3 July 2015

27
28 **Additional written submissions** 31 July 2015 & 7 August 2015

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30 **Draft Judgment circulated:** 12 February 2016

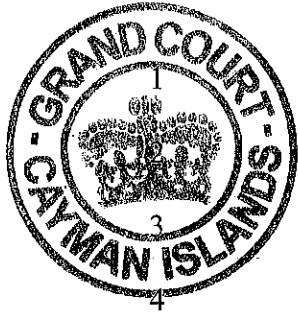
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32 **Date of Judgment:** 19 February 2016
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34



35 **JUDGMENT**

36 **Background**

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

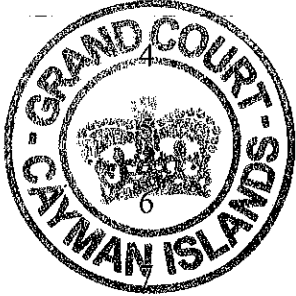


privately paid obstetrician may be the patient's doctor. At the time of the birth, and thereafter, the Authority had and has in place insurance for medical malpractice.

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

10
11 3. Norene Thompson, P's mother and next friend, states that at no point during her
12 ante-natal care or during the labour was she advised or warned that she would not
13 be able to sue Dr. Alexander or the Authority if she received negligent medical
14 treatment. She stated that she did not see signs on any notice board at the Hospital
15 concerning indemnity and/or immunity. The consent to surgery, anaesthesia or
16 other invasive procedure form was signed by P's mother just prior to her
17 operation. The said form did not contain any notice concerning immunity from
18 suing for any negligent treatment.

19
20 4. This is a sad and troubling case as it is submitted that P, who attended the earlier
21 stages of the hearing with her mother, suffers from spastic quadriplegia, hypoxic
22 ischemic encephalopathy, seizures, microcephaly, cortical blindness, bilateral
23 brachial plexus injury and global developmental delay. It is claimed that P's



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

16
17 5. These proceedings were commenced by P's Writ of Summons and Statement of
18 Claim filed on 7 June 2013. P, pursuant to a Court Order dated 26 November
19 2014, filed her Amended Statement of Claim on 9 February 2015. P sues in
20 respect of her injuries suffered at her birth¹ which she alleges were caused by the
21 negligence of staff employed by the Authority, including Dr. Alexander who all
22 owed her a "*duty of care to provide reasonably competent medical care.*" It is
23 alleged that the Authority is either vicariously liable for the negligent acts and

¹ Briefly outlined in paragraph 4 above.



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.

5

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

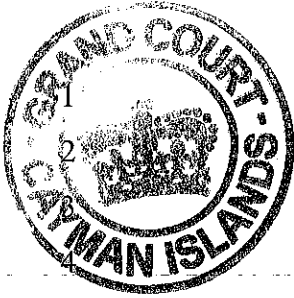
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15 7. I do not accept the submission contained at paragraph 10 b. of the Third Skeleton
16 Argument filed on behalf of P that the Court should be applying s.12 of the Health
17 Services Authority Law 2012.³ The Preliminary issue for determination at this
18 hearing, therefore, concerns the Defendants' pleaded Defence that P's claim is
19 barred by s.12 HSAL 2004⁴, 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."

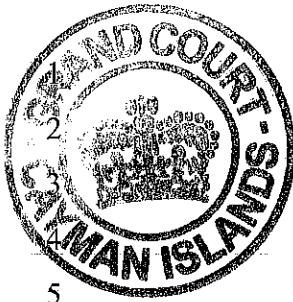
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6 8. On 20 October 2014 P's attorneys wrote to the Attorney General.⁵ They informed
7 the Attorney General of their view that a blanket immunity from claims for
8 clinical negligence would amount to a breach of the rights contained in sections 2,
9 3, 8 and 17 of Part 1, Bill of Rights, Freedoms and Responsibilities, of the
10 Cayman Islands Constitution Order 2009 ("the Bill of Rights"). They also stated
11 that if the Court were to find that s.12 HSAL provided such immunity, then the
12 Court would be asked to make a declaration of incompatibility, not at the
13 upcoming November hearing but at a later hearing. The date of that later hearing
14 would be provided to the Attorney General to allow him to consider his position.
15 The note did not contain any detail about the arguments which would be relied
16 upon and made no reference to there being an issue of retroactive application of
17 the Bill of Rights. A similar letter was sent to each of the Defendants' attorneys
18 and copied into the Attorney General and the Minister for Health.

19

20 9. I note that at paragraph 66 in the affidavit sworn by Kim Grandage on 28 October
21 2014 she referred to the 20 October 2014 letter stating that it contained P's
22 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 attorneys⁶ 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 General⁷ 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.

1 12. On 17 November 2014 Dr. Alexander's attorneys wrote to P's attorneys⁸, copying
2 the letter into the Attorney General and the Minister for Health. Quite
3 appropriately they highlighted the requirement for the Attorney General to be
4 served with the Writ of Summons, the Defendants' Defences, the Summons dated
5 23 June 2014, the Summons dated 22 October 2014 and a copy of the order from
6 the upcoming hearing. Insightfully, and quite correctly, they commented:



7 *"...the Attorney General must be given sufficient information to be*
8 *able to assess whether he wishes to be joined in this matter. Your*
9 *client has failed to set out the basis upon which she contends that*
10 *section 12 of the Health Services Authority Law is incompatible with*
11 *the Bill of Rights. Accordingly, before the Attorney General is required*
12 *to make his assessment, your client's skeleton argument must be*
13 *served on him.*

14 *".....your client is required to set out the basis upon which she asserts*
15 *that section 12 is incompatible with the Bill of Rights, as well as the*
16 *basis upon which she contends that section 12 should be so*
17 *interpreted. This is so that the Attorney General can assess the merits*
18 *of joining this matter and also so that the defendant is clear as to the*
19 *case against them."*
20

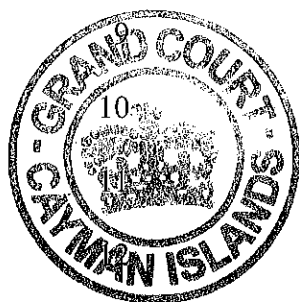
21 13. On 21 November 2014 P's attorneys wrote again to the Attorney General.⁹ They
22 indicated in the letter that the bundle of Court documents, an affidavit of Delia
23 Slater and the bundle of correspondence were attached. In the letter they informed

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.

1 the Attorney General that if the Court makes a declaration of incompatibility P
2 would seek an award of damages pursuant to s.27 of the Bill of Rights against the
3 Attorney General¹⁰ and/or the Authority. They made clear that the issue in
4 relation to damages would not be dealt with at the incompatibility hearing.

5
6 14. On 26 November 2014, at a directions hearing before Hall J., the Court and the
7 parties clearly defined the terms of the preliminary issues to be determined at this
8 hearing¹¹ 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

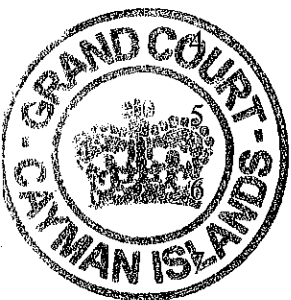
13 b) Whether s.12 must be read and given effect under s.25 of the Bill of
14 Rights in a manner that is compatible, so far as it is possible to do so, with
15 P's rights under the Bill of Rights and if so, how; alternatively

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

18
19 15. At the same hearing Hall J. gave comprehensive directions, some of which dealt
20 with the requirements under O.77A Grand Court Rules ("O.77A"). Paragraph 2 of
21 the order, required service on the Attorney General pursuant to O.77A r.3 Grand
22 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.



1 amended statement of claim containing claims for breach of rights and freedoms
2 under the Bill of Rights and for a declaration of incompatibility. P was also
3 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.

8
9
10 16. P's attorneys wrote to the Attorney General on 27 November 2014¹² enclosing
11 pleadings, a core bundle of documents, an affidavit of Delia Slater and an
12 exhibited bundle of correspondence. The letter also stated that also attached were
13 P's and the Defendants' Skeleton Arguments. On 28 January 2016 P's attorneys
14 confirmed to the Court that the Skeleton Arguments had been prepared to address
15 issues at the November 2014 directions hearing.

16
17 17. On 20 January 2014 P's attorneys wrote to the Attorney General¹³ to provide him
18 with the latest working draft of Hall J.'s Order of 26 November 2014. In the letter,
19 they stated that all of the relevant documents in the matter had been served on the
20 Attorney General. They said that compliance with the direction for service of P's
21 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.

1 February 2015. They informed the Attorney General that a directions hearing was
2 fixed for 15 April 2015, that there was a five day trial scheduled to commence on
3 29 June 2015 to determine the preliminary issues and they asked for confirmation
4 as to whether the Attorney General wished to appear.

5
6 18. On 9 February 2015 P's Amended Statement of Claim¹⁴ was filed. At paragraph
7 15.2 P plead that in the alternative:

8
9 *"In so far as the Court determines that section 12 applies to the*
10 *Plaintiff's claim to damages herein (which is denied), the Plaintiff*
11 *will seek a declaration that the section is incompatible with Part 1,*
12 *Bill of Rights, Freedoms and Responsibilities, of the Cayman*
13 *Islands Constitution Order 2009 and in particular:*

- 14 a. *Section 2: Life*
15 b. *Section 3: Torture and inhumane treatment*
16 c. *Section 7 : Fair trial*
17 d. *Section 9: Private and family life*
18 e. *Section 17: Protection of children*
19 *pursuant to section 23 of the said Order"*
20



21 19. In a letter from P's attorney to the Attorney General dated 9 February 2015¹⁵, they
22 enclosed the Amended Statement of Claim, P's Skeleton Argument, List of
23 Authorities and the Third Affidavit of Kim Grandage. That Skeleton Argument is
24 the one dated 7 February 2015 which was filed on 23 June 2015. Although from
25 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.

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

3
4 20. On 26 March 2015 P's attorneys wrote to the Attorney General enclosing a Notice
5 of Hearing. It is unclear from the letter whether this is the Notice for the
6 directions hearing to be held on 15 April 2015 or for the final five day hearing to
7 commence on 29 June 2015, or both. They asked the Attorney General whether it
8 was his intention to attend "*the hearing*." This letter was followed up by an email
9 to the Attorney General's Chambers on 31 March 2015 in which they, having
10 regard to the upcoming directions hearing to be held on 15 April 2015, were
11 seeking confirmation about the stance being taken by the Attorney General. His
12 Chambers replied by email on 1 April 2016 stating that although the Attorney

13 General:

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

18
19 21. On 7 April 2015 P's attorneys again wrote to the Attorney General, this time
20 enclosing a sealed copy of Hall J.'s Order dated 26 November 2014. They again
21 sought clarification about what the Attorney General's intention was in relation to
22 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.

1 attorneys sent a further email¹⁷ to the Attorney General's Chambers seeking
2 clarification about the Attorney General's stance in relation to the proceedings.

3 His Chambers replied by email on the same day, rather unhelpfully stating that:

4 *"The Attorney General's position remains the same as last*
5 *communicated."*
6

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

9 *"We have not heard anything from the Attorney General in respect*
10 *of this matter. Given the fact that there has been no substantive*
11 *communications between the Attorney General and any of the*
12 *parties, we assume you do not attend¹⁸ to appear at tomorrow's*
13 *directions hearing. Please confirm the same by return and we will*
14 *ask the Court to vacate the hearing."*
15

16 The Attorney General's Chambers replied by email on the same day highlighting
17 that they had been in correspondence with P's attorneys, that the Attorney
18 General had not crystallised his position on the issue and that they did not intend
19 to attend the directions hearing. Dr. Alexander's attorneys replied by email¹⁹
20 stating that they look forward to being updated as to *"any crystallization as and*
21 *when it occurs"*.
22

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.



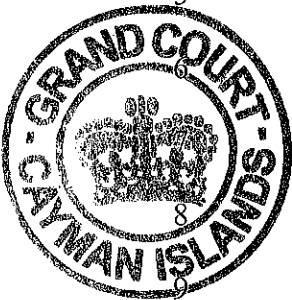
1 23. A Consent Order was agreed by the parties and forwarded Quin J. who approved
2 the same on 15 April 2015. Unfortunately, due to the absence of a declared
3 position from the Attorney General as to whether or not he sought to intervene in
4 the proceedings, it appears that Quin J. was not asked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

9
10 24. On 22 April 2015 P's attorneys provided the Defendants and the Attorney General
11 with a copy of the sealed order resulting from the directions hearing before Quin
12 J.

13
14 25. The Defendants' Skeleton Argument was served by letter on the Attorney General
15 on 5 June 2015 and was filed on 8 June 2015.²⁰ This is the first document sent to
16 the Attorney General that raises the issue as to whether the Bill of Rights has a
17 retroactive effect.

18
19 26. P's attorneys wrote to the Attorney General on 16 June 2015 and provided a trial
20 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.



1 2015. On 24 June 2015 P's attorneys again wrote to the Attorney General²¹
2 enclosing bundles of authorities, a supplemental trial bundle, and the bundle of
3 skeleton arguments. It appears that the skeleton arguments bundle file was the one
4 filed at Court on 23 June 2015 which contained P's Skeleton Argument dated 7
5 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
10 of Rights, something which was only mentioned briefly in the Defendants' first
11 Skeleton Argument. The Defendants' Skeleton Argument was updated and I note
12 that at paragraph 95 they added far greater substance to their submissions
13 concerning the retrospective effect of the Bill of Rights. It is significant that the
14 Attorney General was given rather short notice of the detailed submissions in
15 relation to the wider and fundamentally important issue as to whether the Bill of
16 Rights has a retroactive effect. It is clear from the review of the case law that it is
17 a complex issue which has greatly troubled the House of Lords.

18
19 27. On 26 June 2015, only two working days prior to the hearing, the Attorney
20 General's Chambers confirmed in writing²³ 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.



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

8
9 28. All the parties confirmed at the outset of the hearing, which was held in Open
10 Court, that they felt there to be no conflict, and had no objection, to a resident
11 Judge hearing this matter. The parties were afforded the opportunity to express
12 their view as health coverage for all resident Judges is through CINICO and their
13 medical treatment would ordinarily be provided at one of the Authority's medical
14 facilities by its employees.²⁵

15
16 29. On 3 July 2015, at the close of the four day hearing, I gave further directions. I
17 afforded the parties the opportunity to file written submissions. P's 27 page third
18 Skeleton Argument was filed on 31 July 2015 and in it they only addressed in
19 greater detail the Bill of Rights issues. The Defendants' Supplementary Skeleton
20 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.

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

17
18 31. On 3 July 2015, leave was also given to the Defendants to amend their Defence in
19 the form shown to the Court and to file the same by 14 July 2015. The
20 Defendants' duly filed their Amended Defences mentioned in paragraph 6 above.

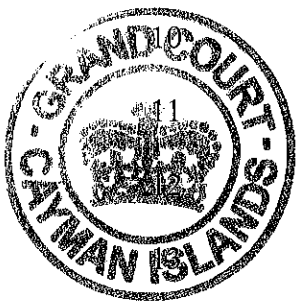
21
22 32. At the close of the hearing the Court indicated that, following receipt of and
23 having the opportunity to review all of the substantial material, including

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

3
4 **The Parties' Positions**

5 33. The Defendants submit that s.12 HSAL 2004 should be given a broad
6 construction on the plain meaning of its terms. The Defendants claim that the
7 plain reading of the "*clear and unambiguous words*" of s.12 includes an
8 exclusion of liability for the Defendants in relation to claims of negligence,
9 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.

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15
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20
21 34. P contends that there is nothing unusual about the facts and the case can be
22 characterised as being "*conventional medical negligence proceedings*." P submits
23 that, on a correct statutory construction of HSAL, s.12 does not provide the



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

10

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

22



1 36. In the alternative, as a matter of last resort, P submits that if the Court were to
2 determine that s.12 provides the Defendants with immunity as the wording therein
3 is clear and unambiguous, as already mentioned, P seeks the Court to make a
4 declaration of incompatibility pursuant to s.23 of the Bill of Rights.
5

6 The Cayman Islands Case Law

7 37. Before I move on to review the principles of statutory interpretation, I recognise
8 that during the hearing the parties referred to the Cayman Islands Grand Court
9 decisions of *Charles McCoy v Cayman Islands Health Services Authority & Dr*
10 *Ma* Cause no. G2/13 and *Elliott v Cayman Islands Health Service Authority*
11 2007 CILR 163.
12



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

16 *"11 It may be a good defence. However, the trial judge may easily*
17 *conclude that it was not intended to apply to an alleged breach of*
18 *contract and restrict its application to a limitation of liability in*
19 *respect of the Authority discharging its duties under the*
20 *legislation²⁶ and may further conclude that performance of an*
21 *employment contract does not fall within that remit. Accordingly,*
22 *s.12 does not create a clear defence of the claim.*

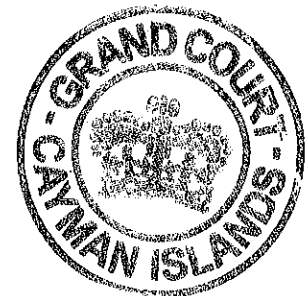
23 *12 However, I have not had the benefit of full argument on this*
24 *point and I therefore cannot say with confidence whether the*
25 *plaintiff or defendant is more likely to succeed. The ultimate*

²⁶ My emphasis by underlining.

1 *conclusion will of course depend upon the evidence at trial, the*
2 *findings of fact that arise from that evidence and the full*
3 *submissions from counsel on the interpretation of that section."*
4

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

10
11 40. However, *Elliott* can be distinguished as Sanderson J. was considering, and at
12 paragraph 11 of his Judgment had regard to, the version of s.12 that predated the
13 2004 amendment. Prior to the 2004 amendment the section was specifically
14 limited to the discharge of functions under the HSAL which is not the case in the
15 2004 Revision. In any event, public officials are employed by a public body under
16 a private law contract of employment when performing public law functions and
17 when discharging public law functions may also be discharging private law
18 contractual obligations to the employer Authority. It is rightly contended that even
19 if Dr. Alexander was acting under her contract of employment with the Authority,
20 she was still discharging the Authority's public function of providing treatment to
21 P pursuant to s.5 HSAL 2004.²⁷



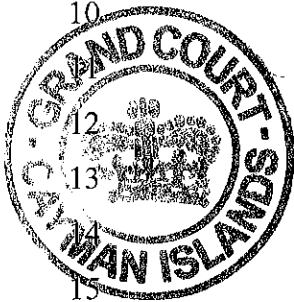
²⁷ See paragraphs 78-80 herein for further review of arguments relating to the issues arising out of *Elliott*.

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

6 "31. Although it may not be necessary for me to give an opinion
7 on the matter, I cannot help thinking that if there has been
8 negligence in the care that was given to the Plaintiff, he may not be
9 without a remedy, in view of the overall provisions of the Health
10 Services Authority Law. ... Government also has overall
11 responsibility for the Health Services Authority, seeing that the
12 Minister is empowered to give it general and lawful directions as
13 to the policy to be followed by the Authority in performing its
14 duties and functions. If there has been negligence in the provision
15 of health care to one of its employees, the Government would, it
16 seems to me, be liable and the Attorney General would be the
17 proper Defendant in respect of such negligence.

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

25
26 42. The Defendants contend that the decision in *McCoy* is correct and they rely upon
27 Panton J.'s conclusion that the legislation was "clear" and as a consequence, in
28 the absence of bad faith, s.12 debarred claims for medical negligence. The



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

7
8 43. P contends that *McCoy* is "irrelevant, distinguishable and/or wrongly decided." P
9 accepts that the arguments of the plaintiff unsuccessfully made in *McCoy*, for
10 example about whether bad faith encompasses negligence, are not pursued by her
11 in the matter before me²⁸, where, unlike in *McCoy*, her focus has been on:

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

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

20
21 44. The parties before me recognise that, as the Authority is the primary health care
22 provider in the Cayman Islands, the interpretation of s.12 gives rise to a
23 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.



1 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
6 and I am grateful to Counsel for the assistance given to the Court deriving from
7 their prodigious and well-presented oral and written submissions.
8

9 **General Principles of Statutory Interpretation**

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

16 *"[12] I consider that the main principal of statutory interpretation*
17 *is that Parliament makes the laws and the Court interprets the*
18 *laws that have been made by Parliament. If there is a situation that*
19 *Parliament has not covered, then it is for Parliament to mend the*
20 *situation.*

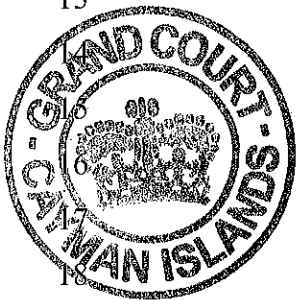
21 *[13] If the legislation is unambiguous then the court must carry*
22 *out that indention³¹ expressed unambiguously, no matter how*
23 *harsh it may be. If the intention, as expressed in the phrasing of the*
24 *legislation is not clear then the court's aid is enlisted. The court*

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

1 *gives interpretation to the statute that carries out the intention of*
2 *Parliament as phrased in the legislative provisions.”*
3

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

12 *“..... I start with the basic principle that the interpretation of*
13 *every word or phrase of a statutory provision is derived from the*
14 *legislative intention in regard to the meaning which that word or*
15 *phrase should bear. That legislative intention is an inference*
16 *drawn from the primary meaning of the word or phrase with such*
17 *modifications to that meaning as may be necessary to make it*
18 *concordant with the statutory context. In this regard, a statutory*
19 *context comprises every other word or phrase used in the statute,*
20 *all implications therefrom and all relevant surrounding*
21 *circumstances which may properly be regarded as indications of*
22 *the legislative intention.”*
23



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

1 *“Every local law of the Islands shall be carried out and applied*
2 *according to the plain reading, and not according to any private*
3 *construction....”*
4

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



10
11 49. Section 284 provides:

12 *“Presumption that text is primary indication of legal meaning*
13 *In construing an enactment, the text of the enactment, in its setting*
14 *within the Act or other instrument containing it, is to be regarded*
15 *as the pre-eminent indication of the legislator’s intention.”*
16

17 50. Section 285 provides:

18 *“Presumption that literal meaning to be followed*
19 *Prima facie, the meaning of an enactment which was intended by*
20 *the legislator (in other words its legal meaning) is taken to be that*
21 *which corresponds to the literal meaning.”*
22

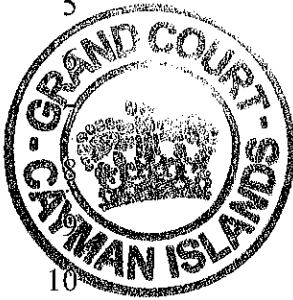
23 51. The task of the Court in determining the intention of the Legislature from the
24 language of a statute was articulated by Lord Nicholls of Birkenhead in the House
25 of Lords decision in *R v Secretary of State for the Environment, Transport and*
26 *the Regions and another, ex parte Spath Holme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

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

4 *"Statutory interpretation is an exercise which requires the court to*
5 *identify the meaning borne by the words in question in the*
6 *particular context. The task of the court is often said to be to*
7 *ascertain the intention of Parliament expressed in the language*
8 *under consideration. This is correct and may be helpful, so long as*
9 *it is remembered that the "intention of Parliament" is an objective*
10 *concept, not subjective. The phrase is a shorthand reference to the*
11 *intention which the court reasonably imputes to Parliament in*
12 *respect of the language used. It is not the subjective intention of*
13 *the minister or other persons who promoted the legislation. Nor is*
14 *it the subjective intention of the draftsman, or of individual*
15 *members or even of a majority of individual members of either*
16 *House. These individuals will often have widely varying intentions.*
17 *Their understanding of the legislation and the words used may be*
18 *impressively complete or woefully inadequate. Thus, when courts*
19 *say that such-and-such a meaning "cannot be what Parliament*
20 *intended," they are saying only that the words under consideration*
21 *cannot reasonably be taken as used by Parliament with that*
22 *meaning. As Lord Reid said in Black-Clawson International Ltd v*
23 *Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810 at*
24 *814,[1975] AC 591 at 613: "We often say that we are looking for*
25 *the intention of Parliament, but that is not quite accurate. We are*
26 *seeking the meaning of the words which Parliament used."*³²
27 *In identifying the meaning of the words used, the courts employ*
28 *accepted principles of interpretation as useful guides. For*
29 *instance, an appropriate starting point is that language is to be*



³² My emphasis by underlining.

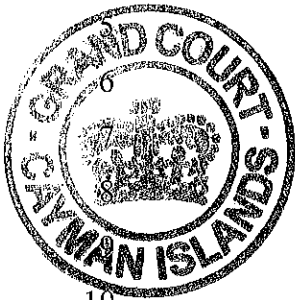


1 *taken to bear its ordinary meaning in the general context of the*
2 *statute. Another, recently enacted, principle is that so far as*
3 *possible legislation must be read in a way which is compatible*
4 *with human rights and fundamental freedoms (see s.3 of the*
5 *Human Rights Act 1998). The principles 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.

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

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

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



1 are not found within the statute in which Parliament has expressed
2 its intention in the words in question. This difference is of
3 constitutional importance. Citizens, with the assistance of their
4 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."

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

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

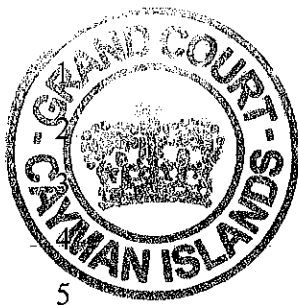
1 53. The case of *Inco Europe Ltd. v First Choice Distribution Ltd.* [2000] 1 W.L.R.
2 586 is instructive when considering the principle that words in a statute, unless
3 specifically defined, are to be given their natural and ordinary meaning. Lord
4 Nicholls stated:

5 *"It has long been established that the role of the courts in*
6 *construing legislation is not confined to resolving ambiguities in*
7 *statutory language. The court must be able to correct obvious*
8 *drafting errors. In suitable cases, in discharging its interpretative*
9 *function the court will add words, or omit words or substitute*
10 *words. Some notable instances are given in Professor Sir Rupert*
11 *Cross' admirable opuscul, Statutory Interpretation (3rd edn,*
12 *1995) pp 93-105. He comments (p 103):*



13 *'In omitting or inserting words the judge is not*
14 *really engaged in a hypothetical reconstruction of*
15 *the intentions of the drafter or the legislature, but is*
16 *simply making as much sense as he can of the text*
17 *of the statutory provision read in its appropriate*
18 *context and within the limits of the judicial role.'*

19
20 *This power is confined to plain cases of drafting mistakes. The*
21 *courts are ever mindful that their constitutional role in this field is*
22 *interpretative. They must abstain from any course which might*
23 *have the appearance of judicial legislation. A statute is expressed*
24 *in language approved and enacted by the legislature. So the courts*
25 *exercise considerable caution before adding or omitting or*
26 *substituting words. Before interpreting a statute in this way the*
27 *court must be abundantly sure of three matters: (1) the intended*
28 *purpose of the statute or provision in question; (2) that by*
29 *inadvertence the draftsman and Parliament failed to give effect to*
30 *that purpose in the provision in question; and (3) the substance of*
31 *the provision Parliament would have made, although not*
32 *necessarily the precise words Parliament would have used, had the*



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.)

5
6

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

21

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



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

3 *"The court has no power to improve upon the instrument which it*
4 *is called upon to construe, whether it be a contract, a statute³³ or*
5 *articles of association. It cannot introduce terms to make it fairer*
6 *or more reasonable. It is concerned only to discover what the*
7 *instrument means. However, that meaning is not necessarily or*
8 *always what the authors or parties to the document would have*
9 *intended. It is the meaning which the instrument would convey to a*
10 *reasonable person having all the background knowledge which*
11 *would reasonably be available to the audience to whom the*
12 *instrument is addressed: see Investors' Compensation Scheme Ltd.*
13 *v West Bromwich Building Society [1998] 1 All ER 98 at 114-115,*
14 *[1998] WLR 869 at 912-913. It is this objective meaning which is*
15 *conventionally called the intention of the parties, or the intention*
16 *of whatever person or body was or is deemed to have been the*
17 *author of the instrument."*
18

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

³³ My emphasis by underlining.

1 *material that bears on the background against which the*
2 *legislation was adopted."*
3

4 58. The case of *Pepper* concerned the interpretation of the Finance Act 1976 in order
5 to calculate how much tax some teachers who received discounted fees for their
6 children at a fee-paying private school were required to pay. Section 63 of that
7 Act seemed to support the Inspector of Taxes' income tax assessments of the
8 teachers. On the other hand, the court was shown a statement from the Financial
9 Secretary to the Treasury recorded in material from Hansard in which he stated to
10 the House of Commons that there was no intention to impose the tax which a
11 literal reading of the Act appeared to impose. The majority held that there were
12 two possible interpretations of the section and that the material clearly indicated
13 what was intended by Parliament. The House of Lords relaxed the exclusionary
14 rule so that court could examine Hansard as an aid because of the burden that
15 would be placed on a number of tax payers contrary to Parliament's clear
16 intention which was shown in Hansard. The Head Note summarises the House of
17 Lords' decision³⁴ as being:



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

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

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

8
9 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.



15
16 61. In *R (on the application of Westminster City Council) v National Asylum*
17 *Support Service*³⁵ (HL) [2002] UKHL38, [2002] 4 All ER 654, Lord Steyn
18 addressed the status of Explanatory Notes to Bills. Lord Steyn clarified that they
19 can be admitted to establish the context of an enactment even if the legislation is
20 not ambiguous. When considering the decision in *Pepper*, he stated at paragraph
21 6:

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

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

7
8 He went on to say:



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

20
21 62. Although **Pepper** is regarded as being a landmark case, despite containing certain
22 provisos for relaxation of the exclusionary rule, it has resulted in ongoing
23 controversy and comment about restricting its scope. Lord Steyn felt that there
24 should be a narrow view, maintaining that **Pepper** should be restricted to its facts
25 as it was a case in which taxpayers had relied upon what the Minister responsible
26 for tax had said in Parliament and, as such, the Executive should be estopped from
27 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

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

3
4 63. Lord Hoffmann stated in *Robinson v Secretary of State for Northern Ireland*
5 [2002] UKHL 32 at paragraph 40³⁷ that:

6 *"In R v Secretary of State for the Environment, Transport and the*
7 *Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 391-392, 398-*
8 *399, 407-408 and 413, and again in R v A (No. 2) [2002] 1 AC 45,*
9 *79 attempts were made by several of your Lordships to reduce the*
10 *flow by insisting that the conditions for admissibility must be*
11 *strictly complied with. I am not sure that it is sufficiently*
12 *understood that it will very rare indeed for an Act of Parliament to*
13 *be construed by the courts as meaning something different from*
14 *what it would be understood to mean by a member of the public*
15 *who was aware of all the material forming the background to its*
16 *enactment but who was not privy to what had been said by*
17 *individual members (including Ministers) during the debates in*
18 *one or other House of Parliament. And if such a situation should*
19 *arise, the House may have to consider the conceptual and*
20 *constitutional difficulties which are discussed by my noble and*
21 *learned friend Lord Steyn in his Hart Lecture ((2001) 21 Oxford*
22 *Journal of Legal Studies 59) and were not in my view fully*
23 *answered in Pepper v Hart."*

24
25 64. In *Robinson*, Lord Hobhouse³⁸ shared Lord Hoffman's views and added at
26 paragraph 65:

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.



1 *"The task of construing legislation is not assisted by the too ready*
2 *reference to what has been said during debates without having*
3 *regard to the very limited authority for the use of such material*
4 *given by Pepper v Hart [1993] AC 593 and the clear limits laid*
5 *down in that decision. It is fundamental to our constitution and the*
6 *proper ascertainment of the law as enacted by Parliament that the*
7 *law should be found in the text of the statute, not in the unenacted*
8 *statements or answers of ministers or individual parliamentarians.*
9 *This requirement is simply an a fortiori application of the rules for*
10 *the proper recognition of what are and are not sources of law and*
11 *the construction of written instrument."*
12

13 65. As already highlighted herein, Lord Nicholls stressed on page 399 in *Spath* that
14 clear and unambiguous ministerial statements which satisfy the three conditions
15 are a factor to be taken into account by the Court when construing legislation
16 which is ambiguous, obscure or productive of absurdity, but they are not to be
17 attributed some special status. He stated that they are a "... *part of the legislative*
18 *background, but they are no more than this*". This means that it is for the Court
19 when determining the Legislature's intention, having regard to all the
20 circumstances, to decide what weight or importance may be attached to the
21 statement. Lord Nicholls expressed the view that reference to Hansard would
22 rarely arise. The Court should be careful not to treat a ministerial statement as
23 indicative of the objective intention of Parliament and should not give it
24 determinative weight.
25

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

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



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

10

11 67. The House of Lords in *R v the Secretary of State for the Environment,*
12 *Transport and the Regions* [2001] 2 AC 349 and *Wilson v First County Trust*
13 *Limited (No 2)* [2004] 1 AC 816 appear to show a retreat from supporting the
14 approach in *Pepper* due to the questions and concerns raised by its application.
15 These include whether it is proper to equate intention of the promoter of a piece
16 of legislation with the intention of the Legislature, especially having regard to the
17 unreliable nature of exchanges during parliamentary debates and the fact that each
18 person who votes concerning the statute may have a different reason for doing so.
19 Another issue raised is the difficulty in determining whether there exists an
20 obscurity or ambiguity in the relevant statute. Concern has also been expressed
21 that *Pepper* may undermine legal certainty, because a person may not feel able to
22 satisfy himself, without first searching through Hansard, whether he can rely fully
23 on the wording in the statute. A further objection to *Pepper* is derived from the
24 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.

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

4
5 68. No Cayman Islands case from which guidance about the local approach to *Pepper*
6 can be gleaned has been brought to my attention. I am satisfied that the only
7 parliamentary material that is admissible is a statement by the Minister or other
8 promoter of the Bill which clearly answers the point at issue. I am satisfied from
9 my above review that the conditions for admissibility set out in *Pepper* should be
10 strictly complied with in order to keep to a manageable level the amount of
11 parliamentary material being relied upon. Recourse to the extrinsic materials, such
12 as parliamentary statements reported in Hansard, will only be allowed if there is
13 either no ambiguity in the statutory provision or an absurdity arising from a literal
14 construction.



15
16 **Applying the Principles of Statutory Interpretation**

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

1 70. P highlights sections 3(3)⁴⁰, 12A⁴¹ and 32(2)⁴² HSAL and contends that s.12 is
2 inconsistent with these sections as well as other sections in the HSAL.

3

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

6 *"(1) There is established the Cayman Islands Health Services*
7 *Authority having the powers and duties conferred or imposed upon*
8 *it by this Law and any other Law.*

9 *(2) The Authority shall be a body corporate having perpetual*
10 *succession and a common seal and, subject to this Law, shall have*
11 *power to buy, sell, hold, deal and otherwise acquire and dispose of*
12 *land and other property of any kind and to enter into contracts and*
13 *to do all things necessary or desirable for the purposes of its duties*
14 *and functions.*

15 *(3) The Authority may sue and be sued in its corporate name and it*
16 *shall have exclusive right to use the name "the Cayman Islands*
17 *Health Services Authority".*

18 *(4) "*
19

20 72. Section 5 HSAL 2004⁴⁴ provides:

21 *"(1) The Authority shall, subject to this Law and any other law,*
22 *manage the health care facilities and any property appurtenant*
23 *thereto.*

24 *(2) It shall be the duty of the Authority-*

⁴⁰ See paragraph 49 above.

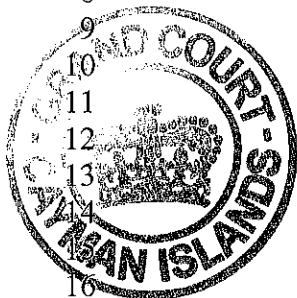
⁴¹ See paragraph 51 above.

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 2004⁴⁵, 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.32⁴⁶ 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).



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

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

7 *(3) ..."*

8
9 75. P contends that s.3(3) HSAL 2004, which permits the Authority to sue and be
10 sued, would serve no purpose unless the Authority can be sued in cases not
11 involving bad faith. The Defendants contend that is not a correct view to hold and
12 rightly highlight that, for example, the Authority can still be sued for remedies in
13 judicial review proceedings that do not impose any liability for damages or for a
14 wrong requiring bad faith such as misfeasance in public office.

15
16 76. P argues that if the Defendants are right, then the s.12A HSAL 2004 indemnity
17 serves no purpose, as the directors could never be sued unless acting in bad faith.
18 The Defendants point out that there is nothing novel about an exclusion of
19 liability section being coupled with an indemnity section in Cayman Island
20 legislation, and refer to sections 90(1) and 90(2) of the Electricity Regulatory
21 Authority Law (2010) Revision. Section 12A provides a director with indemnity
22 in relation to the same circumstances outlined in s.12. It is consistent with s.12
23 and the sections can and should be read together. A good example of the purpose
24 of s.12A is that it would give coverage to a director for the legal costs arising
25 from him defending a claim.

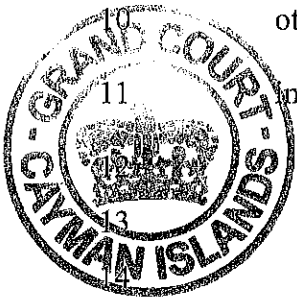
1 77. I am satisfied that s.32(3) HSAL 2004 is consistent with s.12. The two sections
2 clearly do not address the same thing, the former excludes liability in damages
3 caused by any directions by the minister, the latter excludes liability for the actual
4 acts or omissions of directors and employees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

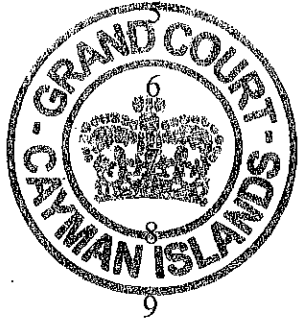
6
7 78. P submits that the relevant sections in HSAL 2004 are related to the setting up of
8 the Authority, the general administration and running of the Authority and are not
9 related to the decision-making of or medical treatment given by Dr. Alexander or
10 other staff at the hospital. Mr. Jones Q.C. argues that s.12 provides a narrow
11 immunity which is only in respect of:

12 *“anything done or omitted in the discharge of their respective*
13 *functions or duties unless it is shown that the act or omission was*
14 *in bad faith.”*

15
16 He states that the functions or duties imposed on the Authority are statutorily
17 restricted to those set out in s.5(2) HSAL and having exercised those by providing
18 facilities and medical staff, the individual acts of the medical staff are not
19 covered.

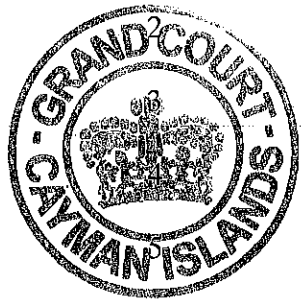
20
21 79. It is contended by P that the Authority’s servants or agents who attended P’s
22 mother were not carrying out any of the statutory duties under s.5 HSAL, but
23 were carrying out duties pursuant to their contracts of employment with the
24 Authority. For example, it is submitted that Dr. Alexander was carrying out duties





1 only pursuant to her contract of employment dated 11 February 2005 which stated
2 at Clause 1 that she *"agrees to undertake the duties of*
3 *obstetrician/gynaecologists"* and that she is *"considered as a professional*
4 *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.

10
11 80. The Defendants, on the other hand, contend that providing medical treatment to P
12 amounts to Dr. Alexander discharging one of the Authority's *"core"* public
13 functions under s.5 HSAL 2004 and it also involved the 'discharge of functions
14 or duties' at common law and in contract to which s.12 applies. The Defendants
15 submit that s.5(2)g and s.5(4) impose a duty on the Authority to provide health
16 care for Government employees, indigent persons, other persons as may be agreed
17 with the Minister and also supply goods or services produced by an entity or other
18 person to those set out in s.5(4) and that on the ground this will be provided by
19 employees like Dr. Alexander. The Authority has produced purchase agreements
20 between itself and the Government detailing the outputs to be provided by it
21 under s.5(4). One of these purchase agreements is from the year 2004/5 and is for
22 *"provision of medical care for children and antenatal, postnatal and family*
23 *planning services beyond insurance coverage."* The Defendants term the



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

7 8 **The Legislative History of HSAL 2004**

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

15
16 82. In 2002, the HSAL 2002 was brought into force and it reincarnated the Authority
17 to “*take over, own and operate Government Health Care Facilities.....*” Section 8
18 HSAL 2002 provided for the constitution of the Board of the Authority. Although
19 the Law governing the Authority’s first life contained no provision excluding
20 liability in damages against the Authority, its Board or employees, s.12 in the
21 HSAL 2002 Law provided:

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

1 *functions under this Law unless it is shown that the act or omission*
2 *result from their dishonesty, fraud or wilful neglect.*⁴⁷
3



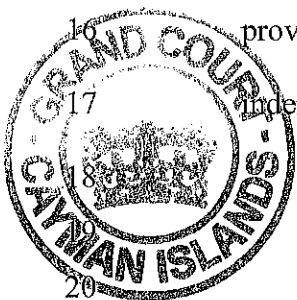
4 83. The Legislature deliberately, by the clear wording used in s.12 HSAL 2002, ---
5 introduced for the first time immunity in damages to the Authority, its directors
6 and its employees.⁴⁸ The immunity had two key features: it required that it could
7 not be shown that the acts or omissions resulted 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
12 for the acts or omission of the employees, including clinicians. The section
13 contained the same wording used by Hon. Mclean, the then Minister for Health, at
14 the second reading of the Health Services Authority Bill 2002 on 27 June 2002.⁴⁹
15 At that time the Minister outlined the composition of the Board and the type of
16 individuals who would be recruited to sit on the Board. The Hansard records,
17 even if deemed admissible under the *Pepper* rule, do not assist P's submission
18 that the intention was then to grant immunity only to the Directors. The Minister
19 did not go on to state that only the Directors would benefit from the s.12
20 immunity. In fact, as recorded at page 407 of Hansard, he made it patently clear
21 that it would apply to the Authority, any director and employees of the Authority.
22

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.

1 84. The wording of s.12 was fundamentally changed by the amendments in HSAL
2 2004.⁵⁰ The new wording is of great importance to the issues now before me. I
3 note that at the same time, the s.12A indemnity section was introduced to afford
4 greater protection to the directors. The Court was referred to the minutes of the
5 Board meeting held on 29 October 2003 which record that Mr. T. Ridley
6 expressed, at that time, the concern that the relevant section in the Law did “not
7 clearly indemnify” the Directors when they were performing duties imposed on
8 them under the common law and gave examples of what he perceived to be a duty
9 to act prudently and act in good faith. There was also concern about the level of
10 protection for them when they were performing functions under the Public
11 Finance Management Law or the proposed Public Authorities Law.⁵¹ A concern
12 was expressed that if this was not appropriately clarified then the Government
13 may find it hard to find suitably qualified persons to act as directors on the boards
14 of statutory authorities. This was echoed in the Explanatory Forward to the 2004
15 Amendment Bill which outlined that the Bill would change the s.12 immunity
16 provision for the Directors of the Authority and its employees and also provide an
17 indemnity section for the Directors as the Directors felt that s.12:



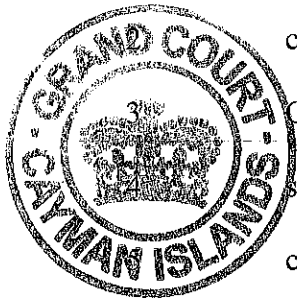
18 “... did not fully protect them against legal costs and expenses that
19 may be incurred by them in legal proceedings relating to the
20 exercise of their powers or duties.”

21

22 In the minutes for the meeting held on 29 October 2003, when referring to the
23 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.



1 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.

6

7 85. The Minister for Health in Parliament on 13 December 2004⁵² at the second
8 reading of the Health Service Authority (Amendment) Bill 2004 said the changes
9 to s.12 and introduction of s.12A⁵³ were "vital" to minimise the risk of personal
10 liability for Board members who were volunteering the time and skill to serve for
11 small remuneration. He said that he felt that the amended s.12 and new s.12A in
12 the Bill ensured that the Board would be held accountable for its activities while
13 at the same time affording protection to Board members. It is not surprising that
14 the Minister was, at the time, primarily commenting upon the concerns in relation
15 to directors because only they were to benefit from the new s.12A. At page 511 in
16 Hansard the Minister, when dealing with the amendments of s.12, made clear that
17 the amended section still applies to employees, although it had been driven by the
18 desires of the directors and was worded in that manner upon the advice of the
19 Attorney General. I find that s.12 expressly and unambiguously applies to the
20 Authority and "*any director and employee.*" If the intention had been for the
21 section to apply only to the directors then the section would not have included the
22 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.

1 86. It is evident that the debate included expressed concerns that what was termed the
2 “*Elliott amendment*” was providing both “*belt and braces*”⁵⁴ to the immunity
3 especially at a time when the *Elliott* case was before the courts. A concern was
4 expressed that the amended section “*seems to provide or make provision for*
5 *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.*”

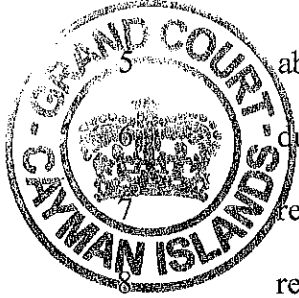
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12 The referred to content in Hansard, even if it could be relied upon by P, does not
13 support P’s contention that a review of the legislative history including the
14 parliamentary debates illustrates that the application of s.12 to medical negligence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

22

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

⁵⁴ Reported on page 512 Hansard.



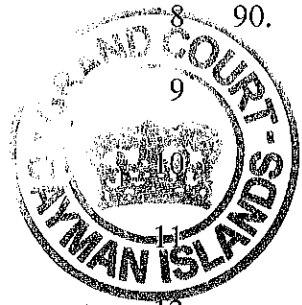
1 *"was in bad faith"* in place of the words *"resulted from their dishonesty, fraud or*
2 *wilful neglect."* As I have already stated herein, the removal of the words *"under*
3 *this Law"* is of great significance, as it means that there was an intention to extend
4 the immunity provision in s.12 to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

11
12 88. P's primary submission is that there is no ambiguity in the interpretation of s.12
13 and that on a plain reading the immunity relied upon by the Defendants does not
14 cover her claim. However, it is argued in the alternative that if there is ambiguity
15 then the Court is entitled to consider the statements set out in Hansard. It is further
16 argued in the alternative that the Defendants' interpretation would lead to an
17 absurdity which also enables the Court to consider the statements in Hansard.

18
19 89. For reasons I have already touched upon, when I consider the primary reading of
20 the words in s.12, construed in the context of and with reference to other sections
21 in HSAL 2004, I find the words to be clear and that there is no ambiguity or
22 absurdity which requires the Court to apply any other rules of statutory
23 interpretation, or any external aid, including the highlighted parliamentary

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

7



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

12
13 91. As established in my earlier analysis of *Pepper* and its later application by the
14 Courts, the conditions, apart from the first one that legislation has to be
15 ambiguous or obscure or lead to absurdity are, (i) the material relied upon consists
16 of one or more statements by a minister or other promoter of the bill; and (ii) the
17 statements relied upon are clear. I am satisfied that condition (i) has been met in
18 relation to the statements which were made by the Minister of Health. I am not,
19 however, satisfied that the statements clearly reflect the interpretation sought by
20 P. This is not a case where the record of the Minister's statements recorded in
21 Hansard illustrates that the executive had given an indication that it was going to
22 legislate in one way and then went on to legislate in another. The Hansard records
23 do not contain any statements that the immunity section would not apply to



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

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

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

17
18 93. At the same time as passing the HSAL in 2002, the Health Practice Law 2002 was
19 enacted which required all medical practitioners, whether with the Authority or
20 not, to have malpractice insurance. Section 15(2)(a) required all health care
21 facilities to take out malpractice insurance for itself and its employees and the
22 section provides:

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



1 (a) ensure that the registered practitioners practising at the
2 health care facility have malpractice insurance or
indemnity cover approved by the Commission;

3 (b) ensure that the health care facility is covered with
adequate liability insurance; and

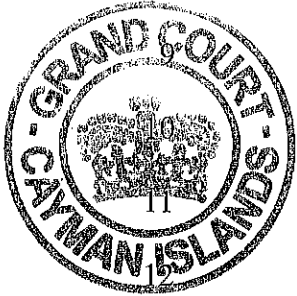
4 (c) ensure that persons who work at the facility under a
5 contract of services with the health care facility have
6 adequate malpractice and other relevant insurance.
7
8
9

10 94. The option for an operator of a health care facility to obtain indemnity coverage
11 as an alternative to malpractice insurance was introduced in the Health Practice
12 Law 2004. On 27 October 2004, during the second Reading of the 2004 Bill, the
13 same Minister of Health stated⁵⁵ that the purpose of the 2002 Law was to ensure
14 that the health of the public was protected through the regulation of health
15 professionals and health provider institutions. The Minister stated that the Bill
16 would ensure that insurance for all health care facilities' registered practitioners
17 (including the Authority) would be obtained from an authorised insurer. The
18 Minister highlighted that the objective was to ensure that the public was protected
19 whilst at the same time allowing practitioners to access cost-effective insurance
20 coverage. The Minister went on to state that coverage was a requirement and
21 explain what malpractice insurance was "*supposed to provide*," saying that it was
22 to ensure that, should a medical practitioner injure a patient by "*misconduct,*
23 "*mistake, or whatever*" he would be in a position to pay for the cost of any
24 damages as a patient should have a right to sue for them. The Minister went on to
25 explain that there was a responsibility on the Authority and other persons

⁵⁵ Recorded at pages 490-492 of Hansard.

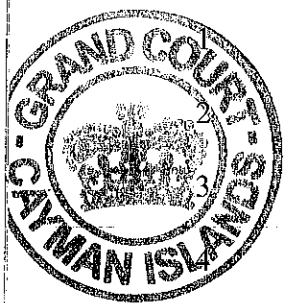
1 operating a health facility to put this coverage in place and that the amendment
2 was designed to enable them, for economic reasons, to still obtain coverage from
3 the Medical Protection Society.

4
5 95. P contends that the mandatory requirement is inconsistent with the Defendants'
6 contention that at the same time the Legislature was giving immunity to the
7 Authority and to all clinicians employed by the Authority from all claims of
8 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.



13
14
15 96. Hon. Scotland, the Minister for Health at the time of the second reading of the
16 Medical Negligence (Non-Economic Damages) Bill 2011, commented that the
17 Bill affected claims against practitioners employed by the Authority. He stated
18 that the intention behind the Bill was "*to cap non-economic damages in medical*
19 *negligence cases, including those arising from Tort and Contract Law.*"⁵⁶ He
20 commented that the Authority had been affected by a rise in its insurance
21 premiums, especially as insurers were concerned that employed obstetricians were
22 responsible for almost half of the deliveries in the Cayman Islands. P contends
23 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.

5

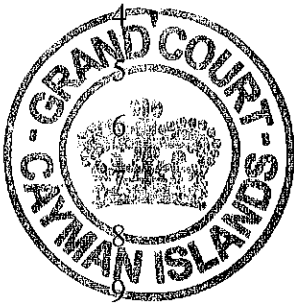
6 97. The Medical Negligence (Non- Economic Damages) Law 2011, like the Health
7 Practice Law, does not make reference to medical negligence claims against the
8 Defendants. The purpose of the Law is to lower insurance premiums payable
9 under the Health Practice Law, which is consistent with the debate records in
10 Hansard for 17 March 2011. Although the Authority is mentioned in Hansard by
11 the Minister there was great expressed concern in relation to costs for
12 practitioners in the private sector. Hansard makes clear that an additional
13 significant reason why the Bill came about was as a consequence of the
14 Government's agreement signed in 2010 with Dr. Shetty⁵⁷ in which it gave an
15 undertaking to take the necessary steps to limit malpractice medical negligence
16 awards.

17

18 98. P contends that if one considers the enactment of legislation at the time of and
19 since the inception of the Authority, as well as the 2004 Amendment to s.12,
20 coupled with a belief that there was no record of any debate in the Legislative
21 Assembly about the abolition of the right of a patient to claim for clinical
22 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.

1 2002, taken out medical malpractice insurance clearly shows what the intention
2 was. P comments that the letter dated 7 May 2014 from Medical Protection
3 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."

10 This is the first mention of s.12 by them in disclosed documentation. P also
11 highlights that this letter post-dates the issuing of her Writ and post-dates the
12 **McCoy** decision. Reliance is also placed by P upon the fact that s.12 only resulted
13 in a 20% deduction from the total insurance premium which, it is submitted, tends
14 to show that the Authority and the insurers were not confident that the section
15 clearly provided the immunity from malpractice claims.⁵⁸ I note that the letter also
16 indicates that the agreed subscription payable was dependent upon there being no
17 more than 350 public births during the year of coverage. It is submitted by P that,
18 having regard to the HSAL's historical context and its background and its
19 interaction with other relevant pieces of legislation, the intention behind the 2004
20 Amendment was to protect the Board members in respect of their functions and
21 duties under HSAL and what they called their common law duty to act prudently
22 and in good faith, but was not intended to grant immunity for the negligent
23 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.

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

3
4 99. The Defendants submit that there should be no departure from the wider
5 interpretation flowing from the clear meaning of s.12 and, in any event, that
6 interpretation is not inconsistent with or put into question by the legislative
7 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

12
13
14
15 100. P argues that the post-enacting history of the Law also indicates that the Authority
16 regarded s.12 as not excluding liability for negligence, or at best it was uncertain
17 as to what the section provided. This is contended not only because, as already
18 mentioned herein, the Authority has taken out insurance for medical negligence
19 claims since 2005 and Dr. Alexander has also been insured for medical
20 negligence since 2005, but also because the Authority has settled a number of
21 claims for medical negligence since 2005. The Defendants highlight that the
22 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.

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

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

3
4 **Consideration of British Cases Dealing with Statutory Immunity**

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

18
19 103. In *McGinty* the Court considered s.116 of the Public Health (Scotland) Act,
20 1897⁶⁰ which provided that a board of management “*shall not be liable in*
21 *damages..... for anything done by themselves in the bona fide execution*” of the
22 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.

1 damages for injuries received due to an accident in the workplace, at a laundry,
2 which the defendant board had responsibility to manage. The employee claimed
3 that the board had failed in their common law duty to provide a safe system of
4 working. The defendant claimed immunity under the statutory provision. The
5 majority accepted that the running of the laundry formed a part of the board's
6 functions, but found that any failures in their duty in regard to the running of the
7 laundry (in this case the alleged failure to take the necessary precautions for safe
8 working) was not "*a thing done by them in the bona fide execution of the Act.*"

9 Lord Justice-Clerk (Thomson) when commenting upon s.16 stated:



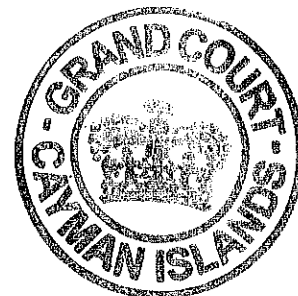
14 "*... It seems to me that although the defendants in the execution of
the Act carry on the laundry as part of their functions, it cannot be
said that any failures in duty in regard to the running of the
laundry or anything done by themselves in the execution of the
Act.*"

15
16 It is contended that the word '*discharge*' which appears in s.12 is even stronger
17 than the word '*exercise*' analysed in *McGinty* as it requires one to fulfil an
18 obligation. P contends that one cannot possibly be regarded as discharging a duty
19 of care to a patient when one is actually acting negligently.

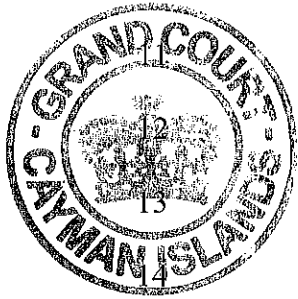
20
21 104. The Defendants contend that *McGinty* can be distinguished and that P's
22 submission that there would not be a discharge of public functions if medical
23 treatment given was negligent does not apply to s.12 HSAL 2004. P highlights
24 that under s.12 any acts or omissions carried out in bad faith would involve the
25 discharge of functions and duties and therefore any negligent acts and omissions

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

4
5 105. The Defendants distinguish **McGinty** on a number of grounds. Firstly, s.166 of
6 the Public Health (Scotland) Act limited the exclusion to acts done in the
7 execution of the Act. That limitation was clearly removed from s.12 HSAL 2004,
8 although it had appeared in earlier versions of the section. It is also contended by
9 the Defendants that the case can be distinguished because the provision of laundry
10 services in **McGinty** were ancillary to the defendant's core statutory duties under
11 the NHS (Scotland) Act and arose from its contractual obligations as employers,
12 which was fundamentally different to the provision of core function of medical
13 treatment arising under s.5 HSAL 2004. The Defendants contend that **McGinty**
14 can further be distinguished because s.12, as amended in 2004, also included
15 duties owed by defendants arising from common-law under a contract. It is also
16 highlighted by the Defendants that HSAL 2004 does not contain a provision
17 similar to s.13 of the NHS (Scotland) Act 1947 which anticipated that the
18 defendant board could be liable for negligent acts and that had to be taken into
19 account when considering s.166. **McGinty** can be distinguished because the
20 provisions considered by the Scottish Outer House are not substantially the same
21 as the wording in s.12 HSAL 2004.
22



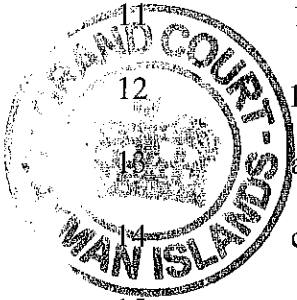
1 106. *Bullard v Croydon Hospital Group Management Committee* [1953] QB 51 is a
2 case in which the court had a restrictive approach to the interpretation of a
3 statutory immunity clause. The defendant hospital management committee was
4 sued for negligence with regard to the medical care of a patient. The Committee
5 contended that the s.265 Public Health Act 1875 provided that no matter or thing
6 done by the committee bona fide the purpose of carrying out the legislation
7 governing hospitals could subject it to any action, liability, claim or demand
8 whatsoever. Parker J. rejected the construction of s.72 National Health Service
9 Act 1946 and s.265 Public Health Act 1875 which the defendant hospital
10 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



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

5
6 107. P contends that s.12 is required to, but does not, contain clear words expressly
7 **excluding liability for clinical negligence** if the Defendants' Defences are to be
8 upheld. It is submitted that an extended meaning should not be given to the words
9 in the section if it is to relieve the Defendants of the common-law duties and
10 liabilities between a doctor and patient. In support of this contention P refers to s.
11 10 (2) of the Crown Proceedings Act 1947 which specifically states that no
12 proceedings in tort would lie against the Crown for death or personal injury due to
13 anything suffered by a member of the Armed Forces in certain specified
14 circumstances. P also makes reference to s.76 Civil Aviation Act 1982 where the
15 draughtsman expressly excluded actions for trespass or nuisance in specified
16 circumstances. Reliance is placed upon *R v Canada SS Lines Ltd* 1952 AC 192
17 where it was held that a clause in a contract excluding liability for negligence
18 must expressly state the exclusion or contain words wide enough to cover
19 negligence. Reference is also made to the case of *Mersey Docks and Harbour*
20 *Board Trs v Gibbs* 1886 LR 1 when Lord Blackburn stated at 93:

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



1 *liabilities, as the general law would impose on a private person*
2 *doing the same things."*
3

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

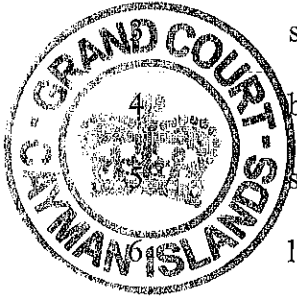
15
16 109. The Defendants rely upon the United Kingdom statutes which, after the bad faith
17 exception, also include an exception for a "*failure to exercise due care and*
18 *attention*"⁶¹ or an act "*without reasonable care*"⁶² or an act "*carried out without*
19 *reasonable skill or care*"⁶³ P seeks to distinguish these cases on the basis that "*the*
20 *statutory framework and the practical context is very different*" to that in the case
21 before me and in the Mental Health Act proceedings could still be brought with
22 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.





1 110. The Defendants submit that it is not unusual for statutes, for public policy
2 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.

7
8 111. The Defendants rely upon the House of Lords decision in *Everett v Griffiths*
9 [1921] 1. A.C. The case deals with the liberty of an individual, as the plaintiff in
10 *Everett* had been committed to a mental hospital. The question was whether the
11 doctor who signed the certificate to support his committal was liable to him in
12 negligence. The House affirmed the judgment of the Court of Appeal, but without
13 confirming this point. Lord Haldane considered the principle that if an
14 administrative officer performs functions which have some judicial attributes
15 he/she is entitled to a measure of immunity. He thought it:

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

20
21 The Defendants, in the matter before me, to support their contention about the
22 public policy rely upon the passage in the speech of Lord Moulton at page 695
23 which set out a principle which was followed in later cases. Lord Moulton stated:

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

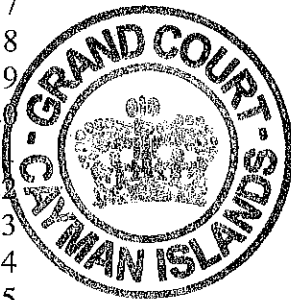
1 *property of others, and he performs that duty and makes that*
2 *decision honestly and in good faith, it is, in my opinion, a*
3 *fundamental principle of our law that he is protected. It is not*
4 *consonant with the principles of our law to require a man to make*
5 *such a decision in the discharge of the duty to the public and then*
6 *leave him in peril by reason of the consequences to others of that*
7 *decision, provided that he has acted honestly in making that*
8 *decision.”*
9

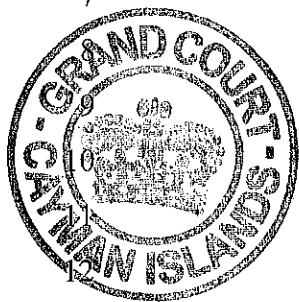
10 112. When I consider Lord Moulton’s words, I feel it important to put them into
11 context. This is helpfully done by Brooke L.J. at paragraphs 65-67 in *I.D &*
12 *Others v Home Office* [2005] EWCA Civ 38:

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

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

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





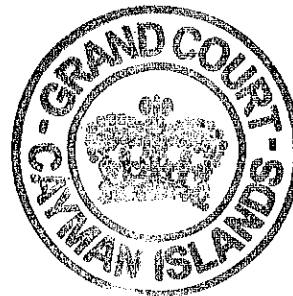
1 *enabled the majority of the House of Lords to equate his position*
2 *with that of a justice of the peace and afford him equivalent*
3 *immunity (see pp 658-660, 665-7, 676-8 and 682-7) without*
4 *attempting to state any wider principle: for Lord Haldane's*
5 *extreme reluctance to do so in a case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

7 67. It is noticeable that in 1921 the House of Lords was more
8 *protective of the decision-maker than of those whose right to*
9 *liberty might have been wrongly infringed. They were left without*
10 *a remedy. In the later case of Harnett v Bond, reference was made*
11 *at p 539 to a dictum of Lord Lindley in R v Whitfield (1885) 15*
12 *QBD 122, 150 when he said of the Lunatic Asylums Act 1853 that*
13 *it gave justices of the peace and medical men large powers, and*
14 *that it was based on the theory that they could be trusted. Reliance*
15 *on this theory led to many reverses for this country in the*
16 *European Court of Human Rights between 1965 and 2000,*
17 *particularly in cases involving the rights of prisoners and*
18 *detainees in mental hospitals. It would therefore be unsafe to adopt*
19 *it as a reliable guide in resolving the present appeal now that the*
20 *1998 Act is in force."*

21
22 113. The Defendants submit the courts are reluctant to impose duties of care upon
23 public officials when they are discharging public law functions. In support of this
24 contention the Defendants rely upon the following statement of Lord Hoffman in
25 *Stovin v Wise* [1996] AC 923 at 952-3:

26 *"If the policy of the act is not to create a statutory liability to pay*
27 *compensation, the same policy should ordinarily exclude the*
28 *existence of the common law duty of care."*
29

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



1 **Principle of Legality**

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



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

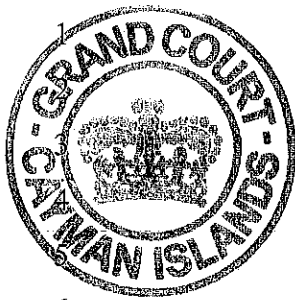
18
19 116. However, the presumption does not apply in this case, as I have found that s.12
20 contains plain and unambiguous wording exempting the Defendants' liability.
21 Lord Phillips in *HM Treasury v Ahmed* [2010] 2 A.C. 534 stated at paragraph
22 117 that he did not "...consider that the principle of legality permits a Court to
23 disregard an unambiguous expression of Parliament's intention." If I had found
24 ambiguity or a lack of clarity in the wording of the section when I considered

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

3
4 117. For completeness sake I note the Defendants' submission that there is a
5 presumption that Parliament does not intend to impose liability in private law for
6 acts done in good faith in the discharge of statutory duties other than by clear
7 words and therefore this should not be a strained construction of the section.

8
9 118. Having conducted a greater review of the principles of statutory interpretation
10 when considering s.12 HSAL 2004 than that undertaken by Panton J. in *McCoy*,
11 due to the more comprehensive submissions made by the parties before me, I still
12 reach the same conclusion as him, namely that s.12 HSAL 2004 is clear and, in
13 the absence of bad faith, the section debars claims in medical negligence. As
14 already stated, although I feel uncomfortable with such immunity and although
15 the consequences of the Defendants' interpretation are troubling I do not find that
16 they would lead to an absurdity. When I reach this conclusion I endorse the
17 observations of Murphy J. *In the Estate of B* [1999] CILR 460 in which he found
18 that the relevant section of the Succession Law was clear and unambiguous and
19 that the Court was bound to accord to its plain reading despite it unfortunately
20 resulting in two illegitimate children being unable to claim rights arising upon the
21 intestacy of their deceased father. Murphy J. stated at page 467 line 42:

22 *"That result may not be fair, It may point to a lacuna in our law. It*
23 *may not accord with the values and mores of our society in the 21st*
24 *century. Those are not my direct concerns as a judge. I may have*



1 *my own views and they may not accord with what I have decided.*
2 *That is irrelevant. My function is to apply what I perceive the law*
3 *to be and I have done that. My function is not that of a social*
4 *engineer or to impose my own values by creative judicial*
5 *interpretation. If there is to be reform in this area that is for the*
6 *legislature, not for me."*

7

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

19

20 **Human Rights**

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

1 that legislation is incompatible with the European Convention on Human Rights
2 (“the Convention”).
3

4 121. It has been argued that courts when considering an impugned section, will
5 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.”*



11
12 122. When considering the case law from England and Wales it is important to note the
13 difference in wording in the interpretive obligation section contained in the
14 Cayman Islands Bill of Rights. Section 25 provides that:

15 *“In any case where the compatibility of primary or subordinate*
16 *legislation with the Bill of Rights is unclear or ambiguous⁶⁴, such*
17 *legislation must, so far as it is possible to do so, be read and given*
18 *effect in a way which is compatible with the rights set out in this*
19 *Part.”*
20

21 123. I have been greatly assisted by the careful analysis of the law by Henderson J. in
22 his reported decision *In The Matter of Nairne* [2013 (1) CILR 345]. At paragraph
23 22 to 24 in his judgment Henderson J. helpfully explains the approach to be taken
24 by the Courts in the Cayman Islands, but at the same time highlights the
25 difference between the two jurisdictions, as follows:

⁶⁴ My emphasis by underlining.

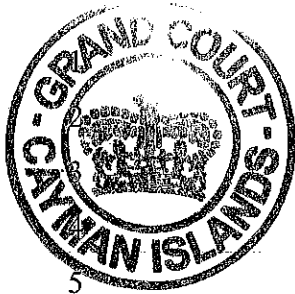


1 “22 ...This section (s.25) ensures that the court will strive to align
2 an impugned legislative provision with what the Legislature may
3 reasonably be taken to have intended and by this process of
4 “reading down” will seek to avoid a formal declaration of
 incompatibility but the obligation imposed by section 25 arises
 only in “unclear or ambiguous” cases⁶⁵. 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
10 Legislature for correction.

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

26 23 The obligation to attempt to read a challenged provision in a
27 manner compatible with the UK Human Rights Act has been
28 described there as a “strong interpretative obligation”: see
29 *Clayton and Tomlinson, op. cit.*, page 175 ff. I accept that the
30 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

5

6

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

14

15 125. Section 23 provides:

16 *"If in any legal proceedings primary legislation⁶⁷ is found to be*
17 *incompatible with this Part, the court must make a declaration*
18 *recording that the legislation is incompatible with the relevant*
19 *section or sections of the Bill of Rights and the nature of that*
20 *incompatibility."*

21

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

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.

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

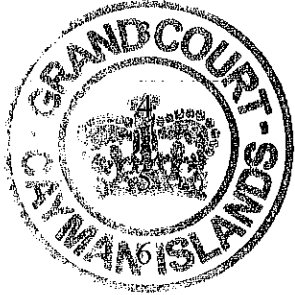
7 (2) *A declaration of incompatibility made under*
8 *subsection (1) shall not constitute repugnancy to this*
9 *Order and shall not affect the continuation in force and*
10 *operation of the legislation or section or sections in*
11 *question.*

12 (3) *In the event of a declaration of incompatibility made*
13 *under subsection (1), the Legislature shall decide how*
14 *to remedy the incompatibility.*

15 *"24. It is unlawful for a public official to make a decision or to*
16 *act in a way that is incompatible with the Bill of Rights unless*
17 *the public official is required or authorized to do so by primary*
18 *legislation, in which case the legislation shall be declared*
19 *incompatible with the Bill of Rights and the nature of that*
20 *incompatibility shall be specified."*
21

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

- 25 (i) she will be unable to bring a civil claim against the Defendants;
26 (ii) she will not be able to establish civil liability for injuries;
27 (iii) she will not be able to seek any remedy, including financial remedy;
28 (iv) she will be denied the financial means to ensure provision for her
29 long-term health, to assist with the management of disabilities which
30 will prolong her life; and
31 (v) there will be no investigation into what happened at the time of the
32 birth and the causes of her injuries.



1 As a consequence it is argued that s.12 is incompatible with the following rights
2 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.

7
8 128. The parties requested the Court that if, after considering all factors including the
9 application of s.25 of the Bill of Rights, it interprets s.12 in the manner sought by
10 the Defendants', to then go on and consider the impact, if any, of s.23 of the Bill
11 of Rights.

12
13 129. During the hearing I received oral submissions about the Bill of Rights issues,
14 these were supplemented by very detailed post-hearing written submissions. I
15 have spent a great deal of time considering all of the submissions and material
16 relating to the Bill of Rights issues before drafting this judgment.

17
18 130. At the outset of the hearing I was informed by the parties that notice of the
19 application had been served on the Attorney General and that his Chambers had
20 indicated that he did not wish to intervene. This is not a case in which I had any
21 involvement prior to the first day of the hearing and therefore did not have any
22 input in its case management or a proper opportunity to consider whether the
23 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.

5

6 131. Having had the opportunity following the hearing to carefully review all of the
7 submissions made pre, during and post the hearing, including some of which the
8 Attorney General would not be aware of, my concern has increased about the
9 absence of the Attorney General's views in relation to the Bill of Rights issues.
10 Despite the prodigious submissions made by Mr. Bowen Q.C. and Mr. Jones Q.C.
11 and the parties' compliance with O.77A, r.3, the absence and the lack of input
12 from the Attorney General has adversely impinged on the Court's ability to make
13 a fully informed decision on the extremely important human rights issues. There
14 can be no doubt that the nature of the fuller submissions now made and the nature
15 of the incompatibility issues which the Court is now asked to determine concern
16 the public interest in the Cayman Islands. It would be difficult to comprehend a
17 situation where, if the Attorney General had been fully aware of the significant
18 nature of the incompatibility issues which have now crystallised for
19 determination, he could not have determined that it was in the public interest for
20 him to intervene⁶⁸.

21

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

⁶⁸ O.77A, r.3 (2) Grand Court Rules.



1 notice given to the Attorney General, the information provided to the Attorney
2 General and the correspondence concerning intervention. The recently provided
3 information⁶⁹ has only had the effect of heightening my concern and fortified my
4 view that I am not able to properly determine the issues in relation to the
5 declaration of incompatibility without input from the Attorney General. The
6 raised human rights issues do not affect my ability to determine the statutory
7 interpretation issues, because I have found the wording in s.12 to be clear and
8 unambiguous.

9
10 133. The issue as to whether a statute providing immunity against claims in damages,
11 including for clinical negligence, is incompatible with the Bill of Rights is one of
12 great public importance. The separate issue about the retro-active effect of the Bill
13 of Rights, which emerged shortly before the hearing and was elaborated upon
14 during and after the hearing, is also of great public importance. The Statement of
15 Claim and the Defence provided to the Attorney General did not refer to the
16 HSAL 2004 and as a consequence he may not have put his mind to the retroactive
17 effect issue. I imagine that in the public interest that the Attorney General, if fully
18 informed about the nature of the issues and arguments now made, would have
19 wished to make representations to clarify his position. This is particularly so in
20 this case, where upon reading the extracts from Hansard recording the second
21 reading of the Health Service Amendment Bill 2004 held on 13 December 2004,
22 it appears that Hon. Gilbert McLean, the Minister of Health, was indicating that
23 the Attorney General played a fundamental role in determining the appropriate

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

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

3 *"The present wording here is what I have been given as legal*
4 *advice from the Government's Chief Legal Advisor. I have let the*
5 *Board understand that the Constitution says that Government's*
6 *Chief Legal Advisor is the Attorney General and when I am given a*
7 *wording that he or she thinks is acceptable to meet the wishes of*
8 *the people who serve on the Board of the Health Services*
9 *Authority, I am obliged to accept that.*

10 *I can say to the Member that there is certain disagreement still*
11 *with the legal wording but the wording that I have to use or to*
12 *bring to this Honourable House is that which satisfies the Legal*
13 *Department of Government and the Attorney General."*
14

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

21 *".... an award of damages pursuant to section 27 of the Cayman*
22 *Islands Constitution Order 2009, Bill of Rights, Freedoms and*
23 *Responsibilities, Part 1 against the Attorney General⁷⁰ and/or the*
24 *Cayman Islands Health Authority."*
25

⁷⁰ My emphasis by underlining.

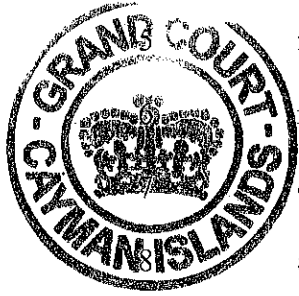




1 135. It is not evident to me why the Attorney General, who had been given notice of
2 the incompatibility proceedings in January 2014, delayed a decision about
3 whether or not to intervene until only two working days prior to the hearing.⁷¹
4 The parties clearly felt that there was a real possibility that he would still
5 intervene, as it appears that he was provided with the trial bundle on 16 June 2015
6 and the voluminous bundles of authorities, supplemental trial bundle and bundle
7 of skeleton arguments on 24 June 2015. There would have been a considerable
8 amount of material dealing with the complex issues to digest in a short time by
9 the Attorney General's Chambers to enable proper preparation and an appearance
10 at the five day hearing commencing on 30 June 2015. That may be why the
11 Chambers indicated that he did not seek to intervene "*at this time*".
12

13 136. My concern is heightened also because some of the significant submissions in
14 relation to incompatibility issues were made orally during the hearing and in
15 written submissions provided after the hearing. The Attorney General would not
16 be aware of these. I am particularly concerned about the potential wider
17 implications if a declaration were made in relation to the retroactive effect of the
18 Bill of Rights. I have carefully reviewed the case law including *Wilson v First*
19 *County Trust Ltd (No 2)* [2004] 1 AC 816, *Re McKerr* [2004] UKHL 12, *R (on*
20 *the application of Hurst) (Respondent) v Commissioner of Police of the*
21 *Metropolist (Appellant)* [2007] UKHL 13, *Silih v Slovenia* (2009) 49 EHRR
22 996, *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.

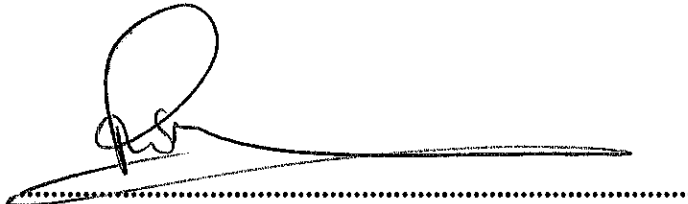


1 *and other intervening*) [2011] UKSC20, (2012) 1 AC 725. Some of these cases
2 were referred to by the parties. I have also considered the post-hearing Supreme
3 Court decision in *Keyu & Others v Secretary of State for Foreign Affairs and*
4 *Commonwealth Affairs and Anr [2015] UKSC 69*. The Court of Appeal decision
5 in the *Keyu* case was handed down on 19 March 2014⁷² but was not brought to
6 my attention at the hearing. The above line of case authorities illustrates the
7 difficulty that the Supreme Court has had with the issue. Even if I were not to
8 adjourn the matter to seek the input of the Attorney General, I would have to
9 afford the parties the opportunity to submit comment on *Keyu*, a case which
10 further develops the approach of the Courts to the retro-active effect of the
11 Human Rights Act. The knock on effect of any determination about the retro-
12 active effect issue on other human rights cases in the jurisdiction, means that in
13 the public interest that the Attorney General must also be afforded the opportunity
14 to address the Court. It may well be that due to the more limited written
15 submissions provided to him a short time before the June hearing that he did not
16 recognise that this was going to be such a significant issue.

17
18 137. Accordingly, after great thought and with some regret, I adjourn P's application
19 for a declaration of incompatibility to enable the Attorney General's Chambers to
20 attend. The Court would be greatly assisted by the Attorney General's Chambers
21 detailing what the Attorney General's views are in the application for a
22 declaration of incompatibility in relation to s.12 HSAL 2004 and the retroactive
23 effect of the Bill of Rights. I direct the parties to provide the Attorney General

⁷² Citation [2014] EWCA Civ 312.

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

6
7
8
9
10 

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

