

JERSEY / JUDGMENT

Le Claire -v- Brown [2014] JRC 187A (29 September 2014)

[2014] JRC 187A

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judgment

the master:

Introduction

1. This judgment represents my reasons for ordering a split trial for determination of liability and contributory negligence in advance of issues of quantum. Factual background 2. The plaintiff's complaint arises out of injuries sustained following a road accident that occurred on La Grande Route de la Côte, St. Clement late on Saturday, 20 th February, 2011. As a result of the accident the plaintiff's sustained a serious brain injury, fractured his left wrist and a collapsed lung. 3. The nature of the plaintiff's injuries is not in dispute. What is in dispute is the extent of the care the plaintiff will require. There are also complex issues concerning the plaintiff's earning prospects but for the accident and what discount rate should be applied in Jersey to payment of a lump sum by reference to the Privy Council decision of *Simon v Helmot*

[2012] UK PC5 which still at present remains unresolved in Jersey.

Procedural history

4. The order of justice was served on the 28 th January, 2014, towards the end of the applicable limitation period. An answer was filed on 25 th February, 2014. The summons for directions was initially issued on 9 th July, 2014 with a return date of 6 th August, 2014, and was ultimately heard on 29 th September, 2014. Jurisdiction 5. Advocate Benest firstly raised the issue of the court's jurisdiction to order a split trial. By reference to the case of *Baretto v Sanguy* (unreported No. 61A, 2nd May, 1990), he observed that Judicial Greffier Le Marquand had ruled he had the power to order a split trial by reference to Rule 6/19, 6/21(2) and Rule 7/5 of the Royal Court Rules 1982 , as amended, ("the 1982 Rules"). Rule 6/19 was as follows:- "When in any action on the pending list it appears to the Greffier that a question raised by a pleading should be determined before the action is set down for trial or hearing, the Greffier may refer such question to the Court and may give such directions as he or she deems appropriate for securing the attendance of the parties before the Court." 6. Rule 6/21(2) was

as follows:- "On any application under this Rule, the Greffier shall, if he is satisfied that the action is ready for trial, make any order that he deems appropriate for sending the case to proof or for determining the issue to be tried, set it down on a list to be maintained by him and to be known as the "hearing list" and notify the applicant that he has done so." 7. Rule 7/5 was as follows:- "The court may, if it thinks it expedient in the interests of justice, postpone or adjourn a trial or hearing of an action for such time and on such terms, if any, as it thinks fit." 8. The current Royal Court Rules have been in place since 2004 ("the 2004 Rules") albeit subject to amendments from time to time. The equivalent to Rule 6/19 of the 1982 Rules is found in 6/24 of the 2004 Rules which is identical to the former Rule 6/9. 9. The power to make orders on the setting down of a matter for hearing contained in Rule 6/21(1) of the 1982 Rules has now been expanded significantly by virtue of the provisions contained in Rule 6/26 of the 2004 Rules. In particular Rule 6/26(4) provides as follows:- "6/26 Summons for directions (4) On the hearing of a summons for directions, the Court shall consider whether - (a) it is possible to deal then with all matters which must or can be considered on the hearing of the summons for directions; or (b) it is expedient to adjourn the consideration of all or any of those matters." 10. The power to adjourn contained in Rule 7/5 of the 1982 Rules is now set out in Rule 10/5 of the 2004 Rules, Rule 10/5 is identical to Rule 7/5 of the 1982 Rules. 11. I agree with Judicial Greffier Le Marquand that I have the power, in the sense of jurisdiction, to order a split trial. In my judgment, the basis for this jurisdiction is to be found in Rule 6/26(4). However, I also agree with him that in the alternative, I can refer separate issues to the Royal Court before setting a matter down for hearing which would include referring the matter on issues of liability and contributory negligence. I also agree that Rule 10/5 allows me to adjourn part of a trial. The relief in the summons before me sought a direction that the matter of quantum should be adjourned for further directions until after the trial on liability. Exercise of the jurisdiction 12. While I was satisfied that I possess jurisdiction to order a split trial on liability and contributory negligence, I also had to consider whether it was appropriate to exercise that jurisdiction. 13. Advocate Benest again relied on the Barreto case and cited the following:- "There was no dispute between the advocates as to the legal principles involved and these are clearly set out in section 33/4/7 on page 539 of volume 1 of "the White book 1988". I quote from the third paragraph of that section - "while the normal procedure should still be that liability and damages should be tried together, the Court should be ready to order separate trials of the issues of liability and damages whenever it is just and convenient to do so". The criteria for determining when it is just and convenient to do so are set out in the same paragraph and include the following principles which I quote from section 33/4/7:- (a) an order for the separate trials of the issues of liability and damages will only be made if there is a clear line of demarcation between these issues on the pleadings, and not where they interact upon each other; (b) where the issue of liability is separate and distinct for the issue of damages, litigants should take advantage of the facilities which are afforded of having the question of liability decided as a preliminary issue before the issue of damages; (c) this is especially so where the issue of damages is detailed and complicated; (d) in actions for damages for personal damages, the issue of liability may be ordered to be tried before the issue of damages where there is an

element of uncertainty about the plaintiff's future or where no firm prognosis is possible until some years after the accident; (e) in considering whether to order the separate trial of the issue of liability before damages, regard will be had to the benefits that will thereby accrue to the parties, e.g. an earlier determination on the liability while the facts were fresher in everyone's memory, as against the hardship or prejudice that might thereby be occasioned to them. In this case it is clear that there is a clear line of demarcation between the issues of liability and damages in the pleadings and that they do not interact upon each other. It is clear that the issue of liability is separate and distinct from the issue of damages. It is clear that the issue of damages will be detailed and complicated. Advocate White argued that there was no evidence before me as to whether there was an element of uncertainty about the plaintiff's future or as to whether no firm prognosis was possible until some years after the accident. I considered adjourning the hearing in order to obtain medical evidence thereon but decided that the nature of the case and the seriousness of the injuries was evident from the plaintiff's pleadings. The defendant had not denied these pleadings but simply indicated that they were not admitted. I was satisfied that with injuries as serious as those alleged there would certainly remain a great deal of uncertainty about the plaintiff's future and that a firm prognosis would be difficult for some time to come. It appeared to me to be in the interests of justice that the trial of the issue of liability should precede as soon as possible whilst the facts were as fresh as possible in the memory of the witnesses." 14. Advocate Benest also cited examples where the Royal Court had proceeded on the basis of split trials (e.g. *McCann v Bateman & Ors*

[2005] JRC 027A and *Morley v Reed*

[2012] JRC 127A . There are a number of other cases where this has occurred, which it is not necessary to cite. 15. Advocate Ingram drew to my attention to the well-known case of *Maynard v Public Services Committee*

[1996] JLR 343 , where Southwell JA indicated the normal procedure in personal injury cases should be to fix as early a date as possible for a single trial of all

issues.

Maynard was followed in *X v Minister for Health & Social Services*

[2011] JLR 772 . He also drew to my attention the current approach in England where, as part of the English court's general powers of case management, I was informed it was common place to consider whether a case should proceed by way of a single or split trial. 16. I agree, the starting point is that there should be a single trial. Indeed, this was the position taken by Judicial Greffier Le Marquand in *Barreto* . This starting point does not mean however there cannot be a split trial. I also considered it important to bear in mind that in *Maynard* the Court of Appeal was criticizing the reference of a single point of law to the Royal Court and the Court of Appeal. At page 359 of the judgment lines 5-19, Southwell J A stated as follows:- "The decision of this court is purely interlocutory, since it involves no

final decision and the facts relevant to the suspension of prescription (as well as all the other issues of fact arising on the pleading) have yet to be decided. It appears from the order of the Judicial Greffier of September 30th, 1994 that the issue he ordered to be heard as a preliminary issue, "whether the plaintiff's right of action is prescribed," was an issue of both fact and law. In the event, it was argued before the Lieutenant Bailiff and before this court simply as involving points of law. To choose points of law such as these for initial decision seems to us to be within the current practice of the Royal Court of Jersey. However, in our judgment, the Royal Court should consider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues together." 17. The X Children decision was concerned with whether the court should order, as a preliminary issue under Rule 7/8 of the 2004 Rules, the question of whether the Minister for Health and Services owed the children a private law duty of care. At paragraph 10 of the judgment Commissioner Clyde-Smith stated as follows:- "The possibility of taking a discrete issue which might determine the whole case, thus avoiding the costs which the parties would incur in taking the matter further, is attractive at first blush. An appeal against the decision to the Court of Appeal and potentially to the Privy Council, however, can without exaggeration add years to the process. A number of English and Jersey cases have warned against the practice. In the case of Southwark L. B. v. O'Sullivan (6), a case in which the construction of a statute was taken as a preliminary issue, Lewison, J. said this (

[2006] EWCA Civ 124 , at para. 14):- "As Lord Scarman observed in *Tilling v. Whiteman*

[1980] AC 1 , preliminary points of law are too often treacherous shortcuts, their price can be, as here, delay, anxiety and expense. As so often, the decision to try preliminary issues on assumed facts has lead [sic] to an over-complication of the case and puts the court into a position of having to decide questions, without a full picture of the factual background on which the case depends. In this case, as in many others, the decision to have a trial of preliminary issues has turned out to be a false economy. I have therefore reached the conclusion that this court should not embark upon a consideration of the questions of construction in advance of the fact-finding exercise." 18. He then went on to cite the extract from *Maynard* that I have set out above. 19. In the present matter, Advocate Benest is not asking for determination of a discrete point of law such as prescription or whether a party owes a duty of care or not. Rather he is seeking determination of all issues of liability and contributory negligence in advance of issues of quantification of damages, should liability be established in the plaintiff's favour. This is not a case of a single point of law being singled out but rather the court being asked to exercise the powers vested in it so that all issues relating to liability and contributory negligence are determined first. 20. As to how the court should decide whether or not to order a split trial, I consider that the factors listed at paragraphs

- (a) to (e) of Barreto by Judicial Greffier Le Marquand are the questions I should consider. My view in relation to each of these factors is as follows. 21. I consider there is clear line of demarcation between issues of liability and contributory negligence on the one hand and assessment of damages on the other. On this point, Advocate Ingram referred me to the fact that paragraph 8 of his answer had placed in issue the plaintiff's character and reserved the right to refer to such matters once he had seen the plaintiff's medical records before the accident. However, I consider this is not sufficient to alter the conclusion that there is a clear demarcation between liability and quantum. If the defendant, once it has considered the plaintiff's medical records, wishes to rely on medical evidence relating to the character of the plaintiff prior to the accident, he is free to do so. That evidence is likely to be relatively short and discrete. The Royal Court at trial would not be required to review the current prognosis of the plaintiff, or other expert evidence required for an assessment of damages hearing to determine this discrete issue, should it be pursued at trial. 22. Ultimately, what occurred here was a tragic road accident. The evidence in relation to it is relatively straightforward namely, the evidence of the plaintiff (to the extent he is able to give evidence) the defendant, the police and any other witnesses to the accident. Other than the discrete issue I have referred to, the evidence on liability is entirely separate from issues of quantum and is relatively concise. This can be seen by the fact that both counsel agreed that any trial on liability would only take around three days, whereas a trial on quantum could last up to three weeks. 23. There is also an advantage to liability being determined early. Firstly, it may allow the plaintiff to apply for an interim payment. At present, because liability is disputed, he is not able to do so. In this day and age where a plaintiff may require litigation funding in order to pursue a case, a finding of liability may also assist in that regard. Advocate Ingram suggested this was a factor against ordering a split trial because he suggested that the plaintiff was motivated by a desire to strengthen his position in respect of such funding. I disagree. The fact that an early determination on liability may assist a plaintiff who otherwise has limited means to pursue a claim to be able to advance a complex case on quantum because funding for his costs is secured, is a factor in favour of ordering an early determination of a trial on liability. 24. A trial on liability also ultimately depends on oral recollection. Three years have already passed since the accident occurred. While there is documentary evidence by reference to reports of the police who attended at the time of accident and statements given to the police shortly thereafter, there is always a danger of memories fading after a passage of time. This again points in favour of a trial on liability being heard sooner rather than later. 25. This is also a case as I have noted above where the issue of damages is detailed and complicated. 26. I accept that a split trial runs the risk of a trial on quantum being delayed while any appeal in relation to a trial on liability takes place. However, this is the plaintiff's application. The family looking after the plaintiff's interests namely his mother and his English solicitors, who have been involved in the case from the outset, understand this risk. They consider it is outweighed by the other factors I have referred to. In my judgment the risk of an appeal and therefore a possible delay of a trial on quantum is not sufficient to outweigh the factors in favour of a split trial. 27. Advocate Benest also contended that the possibility of an appeal in this case was limited.

This is because no issues of law arise. The Royal Court trial will be solely on the facts. As is well known, the Court of Appeal is reluctant to interfere with the Royal Court's assessment of factual witness evidence unless there is a clear case of something having gone wrong. While the possibility of an appeal can never be ruled out, I consider there is force to the points made by Advocate Benest, which means that the prospect of an appeal on purely factual grounds is less than a case where there are complex points of law to be resolved before liability can be determined. 28. In relation to costs, given the clear demarcation between liability and quantum, as referred to above, the risk of duplication of costs is limited. In addition, if a split trial occurs, costs may be saved. At present both counsel accepted that the parties were too far apart on liability for a settlement to be concluded. A ruling on liability including contributory negligence may assist the parties in discussions on quantum. This may save significant costs. Obviously if the defendant is successful at a trial on liability, significant costs will also be saved. 29. While a split trial in one sense may lead to increased pressure on the court in terms of its time and process, it may also save court time if the matter settles. This is not therefore a factor that assists either party. 30. Advocate Ingram finally raised quite properly the issue of whether separate hearings would cause undue stress on the plaintiff. In relation to this issue, firstly, the plaintiff may not be able to give evidence at all. Advocate Benest informed the court that presently the plaintiff did not have the capacity to give evidence. He also indicated that he was considering making an application for a curator to be appointed. This has not occurred previously as BenestLaw had only relatively recently been appointed. If the plaintiff is able to give evidence, that is a factor those advising him and his mother have taken into account in making this application. If they are prepared to accept the risk of additional stress, this is not a factor that counts against ordering a split trial.

Conclusion

31. My conclusion for the above reasons, in exercise of the discretion vested in me by the provisions of the Rules to which I have referred, was that the interest of justice in this case were best served by ordering split trials. 32. Finally, I would like to thank both counsel for their helpful submissions in relation to both the principle of whether the court can order split trials and how it should approach the exercise of its powers. Authorities Simon v Helmot

[2012] UK PC5 . Baretto v Sanguy (unreported No. 61A, 2nd May, 1990). Royal Court Rules 1982. Royal Court Rules 2004. McCann v Bateman & Ors

[2005] JRC 027A . Morley v Reed

[2012] JRC 127A . Maynard v Public Services Committee

[1996] JLR 343 . X v Minister for Health & Social Services

[2011] JLR 772 . Page Last Updated: 23 Sep 2016 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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