THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2009-02051

BETWEEN

KAREN TESHEIRA

(The Executrix of the Estate of Russell Tesheira)

Claimant

AND

GULF VIEW MEDICAL CENTRE

First Defendant

CRISEN JENDRA ROOPCHAND

Third Defendant

LESTER GOETZ

Former Second Defendant

Before the Honorable Mr. Justice V. Kokaram

Date of Delivery: 25th July 2013

Appearances:
Mr. Douglas Mendes S.C. led by Mr. Simon de la Bastide instructed by Ms. Marcelle Ferdinand for the Claimant
Mr. Kemrajh Harrikissoon instructed by Mr. Riaz Seecharan for the First and Third Defendants
Mr. Christopher Hamel Smith instructed by Ms. Debra Thompson Bharath for the former Second Defendant

JUDGMENT

1. The settlement of multi-defendant civil litigation, especially in complex personal injury litigation, is to be encouraged. The decision to settle such litigation can be made by parties

for a variety of commercial and non-commercial reasons, which may be wholly unconnected to the issues of liability. Claimants may accept considerably less than their entire claim in full settlement having been worn down by the protracted litigation. Defendants may be willing to pay negotiated sums as a sign of goodwill and to preserve relationships and reputations. In each case parties make realistic assessments of the relative risks and costs inherent in pursuing litigation with the prospect of an early settlement. However, there may be hidden traps for the unwary party who elects to settle a claim in multi-defendant civil litigation. While the Courts have encouraged and will continue to encourage parties to settle their disputes, the parties themselves must exercise care in drafting and effecting their compromise agreements to ensure the degree to which the cause of action is being finally, effectively and satisfactorily compromised for all or limited purposes. In multi-party litigation, issues such as the disclosure of the compromise agreement to non-settling defendants; the participation of settling defendants or making their evidence available to the non-settling defendants in the continuation of proceedings; the release of liability of non-settling defendants as a result of a release of liability of the settling defendant by the Claimant and possible exposure of the settling defendant to claims of contribution and indemnification, all arise when a compromise is effected amongst one of concurrent tortfeasors. In resolving such issues apart from giving effect to the clear words in a compromise agreement, a Court must adopt a logical and common sense approach to determining the liability of the remaining non-settling Defendants. It must avoid any unnecessary metaphysics inherent in the question of joint and several liability and contain the "kaleidoscope nature" of the concept of causation within a rational system of not only compensating innocent persons who suffer injury by reason of other persons wrongdoing but of regulating the standard of care to be exercised between parties in a close proximate relationship for the avoidance of damage and harm. The axis guiding a resolution of the issues of the effect of a compromise agreement with one defendant on remaining non-settling defendants should reflect the foundational principle of tort that every tortfeasor should compensate the injured claimant in respect to that loss and damage for which he should justly be held responsible.[1]

[1] Honoré explains the function of tort in this way: "It requires those who have without justification harmed others by their conduct to put the matter right. This they must do on the basis that the harm doer and harm sufferer are

2. The application before the Court filed by Mr. Crisen Jendra Roopchand and the Gulf View Medical Centre ("the Medical Centre"), who are the remaining Defendants in a multi Defendant medical negligence claim raises, two main issues of liability and contribution as a result of the entering into a compromise agreement between the Claimant, Karen Tesheira and Mr. Goetz a former Defendant in the proceedings. First whether the release of liability and settlement of the claim with Mr. Goetz as one of the former Defendants now debars Mrs. Tesheira from pursuing her claim for damages for medical negligence against the non settling Defendants. Second, whether the non-settling Defendants can now institute ancillary proceedings seeking contribution and an indemnity pursuant to section 26 of the Supreme Court of Judicature (SCJ) Act against Mr. Goetz.

3. The claim was brought against three Defendants, the Medical Centre Mr. Lester Goetz and Mr. Roopchand by Mrs. Tesheira in her capacity as executrix of the estate of Russell Tesheira, her husband, in which she alleged that all three were negligent in their care and medical treatment of Mr. Tesheira in performing a surgical procedure on him known as TURP which resulted in his death on 13th April 2004. Mr. Roopchand was the anaesthetist, Mr. Goetz was the surgeon who performed the surgical procedure and the medical procedure was performed at the Medical Centre which carried out various tests and whose nursing staff monitored the progress of Mr Tesheira and carried out his post surgical care.

4. The settlement agreement made between Mr. Goetz and the Claimant was made against the backdrop of several procedural applications and a history of protracted delay in the pursuit of this claim. During the course of these proceedings on 19th December 2011 the Court granted Mrs. Tesheira relief from sanctions for failing to file her witness statements and list of documents. Time was extended for her to do so, in default the claim would stand dismissed ("the first order"). The three Defendants appealed against this order in their respective appeals that of Mr. Goetz in CA 274 of 2001 and Mr. Roopchand and the Medical Centre in CA 278 of 2011. Mrs. Tesheira again failed to comply with this deadline and her second application for relief from sanctions was dismissed by the Court on 16th May 2012 ("the

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to be treated as equals, neither more deserving than the other. The one is therefore not entitled to become relatively better off by harming the other. The balance must be restored."

second order"). As a result the Claimant's claim stood dismissed. The Claimant appealed against that order in CA 122 of 2012.

5. Prior to the hearing of those appeals the Claimant and Mr. Goetz entered into settlement discussions which culminated with a compromise agreement dated 21st September 2012. That agreement in essence provided for an ex gratia payment to be made to the Claimant without any admission of liability on the part of Mr. Goetz, a release and discharge of Mr. Goetz by the Claimant for all claims and actions she may have against him arising or related in any way to the complaint in this proceedings and a withdrawal by these parties of their respective appeals in relation to Mr. Goetz[2].

6. Mr. Roopchand and the Medical Centre did not participate in these settlement discussions and were not parties to the compromise agreement. At the hearing of the appeal, the appeal by the Claimant in relation to Mr. Goetz against the second order was withdrawn and Mr. Goetz withdrew his appeal against the first order. The action against Mr. Goetz therefore stood dismissed. Mr. Roopchand and the Medical Centre however for their own reasons breathed life into the Claimant's claim by consenting to a withdrawal of their appeal against the first order and allowed the Claimant's appeal against the second order in relation to the claim against them. They also consented to directions made by the Court of Appeal for the extension of time for the service of Mrs. Tesheira's witness statements and a supplemental list of documents. This paved the way for a full blown trial of this action which is now set in December 2013.

7. The question that now arises from the entering into this compromise agreement with Mr. Goetz which released him of liability in this matter is whether the Medical Centre and Mr. Roopchand are equally resolved of liability and whether the cause of action has been

[2] The compromise agreement contains a term that its terms are not to be made public and to that extent this judgment is confined to those aspects of the agreement which the parties agreed can be disclosed publicly.

extinguished. The remaining Defendants contend that as all three have been sued in relation to the same cause of action they are joint tortfeasors. As joint tortfeasors or concurrent tortfeasors they contend that the common law rule applies whereby a release of liability of one tortfeasor releases and discharges the liability of all other joint tortfeasors. This is the logical application of the indivisibility rule. As well it is the application of the principle that as all the tortfeasors have caused the same damage, if there has been a compromise compensating the Claimant for her loss then there is no damage and no cause of action as against the other Defendants. This main issue was couched by these Defendants as an abuse of process issue which made the claim liable to be struck out. They also contend that they are now entitled to drag Mr. Goetz back into the litigation by bringing an ancillary claim for contribution and indemnification against him.

8. In giving effect to the overriding objective in the management of this case, I treated these issues as preliminary issues rather than leave it to be determined at the trial. It would have been a waste of judicial time and a misallocation of the parties' resources if having undergone a full blown medical negligence trial it was then discovered that the remaining Defendants have indeed been released of any liability by virtue of this compromise agreement. It is appropriate at this stage therefore to examine its terms and its effect in the context of the litigation and determine whether this claim can go forward at all and if so in what form. In this context I ordered the disclosure of the compromise agreement with specific safeguards to preserve the confidentiality of its terms.

9. The issues that therefore arise for consideration are:

    (1) On the issue as to whether the claim should be struck out:

        (a) Whether Mr. Goetz, Mr. Roopchand and the Medical Centre are to be treated as joint tortfeasors.

        (b) If they are, does the common law rule that a release of liability of one is effectively a release of all, survive the enactment of section 26 of the Supreme Court of Judicature Act (SCJ).

(c) If the common law rule applies does the settlement agreement properly construed against its factual backdrop give rise to a release of the non settling Defendants in this action?

(2) On the issue of the ancillary claim:

(a) whether these Defendants can now institute an ancillary claim at the Pre Trial Review having regard to rule 18.4 CPR and;

(b) if so has there been a significant change in circumstances which became known after the first case management conference.

10. I am satisfied having examined the nature of the claim against all three Defendants and examining the terms of the agreement that it does not amount to a release of liability of the Medical Centre and Mr. Roopchand from Mrs. Tesheira claim of negligence resulting in the death of Mr. Tesheira. The claim is carefully drafted to plead separate aspects of negligence against the three parties. They are parties who played their distinct roles in the surgical procedure before, during and post the surgery. Each deserves its own special consideration. They are concurrent but several tortfeasors. The terms of the compromise agreement properly construed in no way sought to release these Defendants from liability. Moreover having regard to the evidence of the Claimant and Mr. Goetz as to the background and the reasons for the agreement it is clear that no release was intended nor effected by its terms. It was for all intents and purposes a compromise between two parties to the litigation without any admission of liability and done for bona fide practical and business purposes unconnected with the issue of liability of the other Defendants. Further I can see no prejudice to Mr. Roopchand and the Medical Centre if this claim proceeds against them. Certainly on the issue of quantum the Court would have to revisit the terms of the compromise agreement so that there is no windfall gained by the Claimant but that can certainly be determined at that stage, if indeed liability can be attributed to these Defendants at all for the death of Mr. Tesheira. The claim would not be struck out as an abuse of process.

11. Further I see no merit in the application for permission to issue an ancillary claim. Parties must when they file their clam bring forward all aspects of either claim. If there existed a

claim against Mr. Goetz which would have absolved these Defendants of liability or indemnified them then it must be filed at the outset or at least cogent reasons provided why this was not pursued. I would not accept as a good excuse the fact that strategically there is a change in the wind of the litigation resulting in these Defendants having to face the proverbial firing line without any cover provided by Mr. Goetz. Indeed no such prospect emerges from the pleadings nor witness statements that the care administered by Mr. Goetz was being used as some shield for their actions. These Defendants have armed themselves with their own evidence and from a cursory glance it deals with the denial of negligence, the discharge of their duty of care and certainly can put forward a spirited Defence which has always been their position regardless of the position of Mr. Goetz. There are no significant circumstances which will warrant the filing of an ancillary claim. The application to issue an ancillary claim is refused.

The application

12. On its application these Defendants aver the following material grounds in support of its contention that the claim should be struck out as an abuse:

> "(5) The alleged damage to the Claimant arises out of a single incident in which the Defendants, if held liable, would have caused the same damage. Though different *tortfeasors*, the alleged damage caused was the same. Settlement of the claim against one *tortfeasor* operated as a bar to the claim against the other *tortfeasors*. If there was no monetary compensation, there is the need for the same to be communicated to the First and Third Defendants who will then consider a claim against the Claimant and Second Defendant for conspiracy and/or collusion to make them accountable for damages, if any, a Court would make against them on behalf of the Claimant arising out of a single damage claim. In addition, there will be the issue of indemnity and/or contribution which have to be addressed by way of an ancillary claim against the Second Named Defendant who was the principal *tortfeasor.*
>
> (8) The action now stands dismissed as against the Second Defendant on the basis of the settlement. The Second Defendant will not face a trial of liability and this

Honourable Court would be unable to apportion liability and even continue the matter with the Claimant having settled against the main *tortfeasor.* The issue will then be whether the Claimant can continue the action against the other *tortfeasors* having settled against the main *tortfeasor* in a medical negligence claim arising out of a single incident which caused the same damage."

13. A Court will of course only resort to striking out a claim as an abuse of process if such an order will give effect to the overriding objective of dealing with a case justly bearing in mind the principles of equality, economy and proportionality explicit in Part 1 CPR. It is a power "which any court of justice must possess to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people" **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529 at 536. It is the Defendant's contention that the entering into the compromise agreement effectively operates by common law as a bar to any further action against them. In considering the relevance of this common law rule and the alleged unfairness in having the remaining Defendants subject to the continuation of these proceedings in the face of the compromise agreement I am also equally cognizant of the unfairness to the parties to the compromise. It is they who for their own legitimate purposes having compromised the claim may now be faced with equally unfair results if these Defendants are correct. So that the Claimant having sacrificed her expectations to continue her action against one tortfeasor, now faces the prospect of her entire cause of action being "extinguished" and for Mr. Goetz having extricated himself discretely from continued litigation by entering into a compromise without admission of liability only to be dragged back into the fray by alleged joint tortfeasors in a claim for contribution.

14. Furthermore in considering the proportionality of a Court's response, consideration must be given to the real anxiety in this case which is simply that the Defendants should not be held liable for more than their share of their wrong in that the Claimant should not be unjustly enriched or receive a double compensation if damages are awarded against the remaining Defendants without taking into account ex gratia payments by the settling party.

The compromise agreement

15. The analysis of this question must start and end with a contextual examination of the compromise agreement. The factual backdrop to the parties entering into the compromise agreement is set out in the affidavits of Mrs. Tesheira and Mrs. Thompson. Those facts are not disputed and are uncontroversial. As I am mindful of my own orders guarding the dissemination of these affidavits I shall simply say, with liberty to elucidate in detail in a confidential dossier if required, that the evidence reveals the following:

    15.1 There was neither fraud nor collusion amongst the settling parties in effecting the compromise. The compromise was effected by the parties recognizing the inherent risks and unpredictably associated with litigation and the mounting costs of protracted litigation. Both parties were convinced of the relative strengths of their respective cases and the settlement did not reflect any concession on either part of the weaknesses of their respective cases on liability. It appeared to be a purely practical and commercial solution in the context of the uncertainties and challenges inherent in medical negligence claims in this jurisdiction.

    15.2 The material terms of the compromise revealed that it was a compromise of the claim as between the Claimant and Mr. Goetz alone on terms. Those terms do not expressly reserve the right to proceed as against the other Defendants. Equally those terms do not indicate that it was or intended to be a full and final settlement of Mrs. Tesheira's entire claim as against all three Defendants.

    15.3 Not unusually the agreement also contained a non disclosure clause. Courts have routinely been anxious to preserve the sanctity of compromise agreements and the express provision of privacy. The confidentiality of the terms of the agreement is a cushion which can give comfort to settling parties of a freedom to negotiate and settle terms. Such confidentiality would normally find judicial support and encouragement much along the same principle and philosophy of encouraging settlement as the "without prejudice" rule. In light of that non disclosure clause any allegation of the non settling Defendants of any collusion on the part of the settling

parties on the basis of their failure to communicate the terms or the fact that the matter has been settled to the other Defendants would be obviously unsustainable.

The submissions

16. The remaining Defendants contend that they are joint or concurrent tortfeasors and that the common-law rule that a "release of one is a release of all" applies. They contend that as the remaining Defendants were under the control and direction of Mr. Goetz they are joint tortfeasors all causing the same loss of death. The settlement therefore has the effect of releasing all the Defendants. Further they contend that the parties are guilty of collusion and that Mr. Goetz must be joined as a party in the overall interest of justice. I must say at the outset that I see absolutely no basis for a claim of collusion or fraud nor do I understand the basis for such a claim on the facts either on the affidavits or in the present pleadings. I can only attribute such arguments as a matter to take into account to exercise my discretion to add Mr. Goetz as a party and keep him in the action as an ancillary Defendant which I shall deal with later in this judgment.

17. The Claimant essentially contends that the Defendant's are not joint tortfeasors. That if they were, the indivisibility of the cause of action rule was abolished by the enactment of section 26 of the SCJ. If it does not, the compromise agreement does not in its express or implied terms make any allowances for a release of the remaining Defendants.

18. Mr. Goetz was allowed to file his own evidence and to make submissions. He contends that there is no basis for the commencement of an ancillary claim against him for contribution or indemnification at this stage of the proceedings where no issue of liability in negligence was alleged by these Defendants against him.

The Defendants as Joint or Several tortfeasors

19. The claim for damages was brought against all three Defendants as concurrent tortfeasors. That is to say regardless as to whether they are joint or several tortfeasors their acts had combined to produce the single indivisible damage of death. There was a chain in the factual events in which each participated leading up to the death of Mr. Tesheira. It is the cumulation of their acts which is the basis for this cause of action of negligence. Whether these Defendants are to be treated as several or joint tortfeasors is however an important distinction

due to the application of various common law rules. Joint tortfeasors are responsible for the same tort or the same wrongful act whereas several tortfeasors are responsible only for the same damage and as a consequence there may be different wrongful acts. For these Defendants therefore to be regarded as joint tortfeasors in the sense of being responsible for the same wrongful act, there must be a concurrence in the act or acts causing the damage, not merely a coincidence of separate acts by separate individuals. Such instances of concurrence in the act occurs when one is the principal or is vicariously liable for the other, or where a duty imposed jointly on them is breached or where there is concerted action between them to a common end[3]. As discussed in the **Koursk**[4] the common denominator of this class of tortfeasors that make them jointly liable is that there is one tort committed by one of them on behalf of, or in concert with another.

20. On the other hand several tortfeasors are several persons, not acting in concert, who commit a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tortfeasor is liable for the whole damage.

21. The remaining Defendants contend that they were acting as the agent of Mr. Goetz and therefore in that sense there would be the concurrence in the act causing damage or the same tort or wrong. There may be in certain cases a slim distinction to be made between that person who has committed the same wrong and those persons who have individually contributed to the same damage. The touchstone for joint liability however is a concurrence of action, and an approbation of conduct of all others who are acting in concert. Several examples have been suggested in the course of the judgments referred to me such as where Peter and Paul both shoot at the Claimant they are both responsible for the death of the Claimant but there are individual acts and separate torts. Where Peter and Paul play distinct

[3] The Halsbury Laws summarized the categories of persons who can be classified as joint tortfeasors:
(1) Employer and employee where the employer is vicariously liable for the tort of the employee;
(2) Partners where they are liable for torts committed by any one of them while acting in the partnership's ordinary course of the business, or with the authority of his co-partners;
(3) Principal and agent where the principal is liable for the tort of the agent;
(4) Employer and independent contractor where the employer is liable for the tort of his independent contractor;
(5) A person who instigates another to commit a tort and the person who then commits the tort;
(6) Persons who take concerted action to a common end and in the course of executing that joint purpose commit a tort.

[4] The Koursk [1924] P.140

constituent roles such as driving their different vehicles negligently they are several tortfeasors causing the same damage to the passenger injured in the vehicle. Typically therefore the unity of purpose in the action must be a common denominator for parties to be joint tortfeasors. In contrast Peter the builder executing the work orders of Paul the architect are joint tortfeasors. The New Zealand Court of Appeal in **Allison v KPMG**[5] expressed the feature of joint tortfeasors best in this way:

> "At common law, tortfeasors who are liable in respect of the same damages are either joint tortfeasors or concurrent or several tortfeasors. Joint liability arises where there is a coincidence of acts causing damage. To constitute a joint tort there must be some connection between the actions alleged. Persons are not joint tortfeasors simply because their separate and independent acts have caused the same damage. There must concerted action towards a common end, ***and the concurrence must be such as to show approbation in the doing of the unlawful act.*** See *Eyre v New Zealand Press Association Ltd* [1968] NZLR 736. Joint liability, therefore tends to arise in tree main situations: agency, vicarious liability and common action"

22. This distinction is particularly important when considering the effect of settling a claim with one tortfeasor on the liability of other concurrent tortfeasors. One such common law rule is that a release of one joint tortfeasor releases all others.

"Peter pays for Paul"

23. Tortfeasors are concurrent when their wrongful acts or omissions cause a single indivisible injury. In this case, death. In such a case each tortfeasor will be liable in full to compensate the Claimant for the whole of the damage. The rationale for this rule is that there is a logical impossibility to apportion the damage amongst the tortfeasors due to the nature of the damage. Examples have been given of the two people struggling with a gun which goes off and another is shot. How is the damage to be divided? Similarly if the stream is polluted with oil which is ignited and burns the Claimant's barn, which party is more liable for the destroyed barn? The loss itself is indivisible as amongst all the contributors. As proof of loss is the foundational element of a tort then the cause of action is also indivisible. There is no rational basis for an objective apportionment of causative responsibility for the injury

[5] **Allison v KPMG Peat Marwick** [2000] 1 NZLR 560

between the tortfeasors hence the expression single indivisible injury and indivisible cause of action.

24. The common law rule with respect to joint tortfeasors was explained by Lord Salmon in **Wah Tat Bank Limited v Chan Cheng Kum**[6] as anyone suffering damage committed by a number of persons was deemed to have one cause of action which merged in the first judgment which he might recover. Professor Klar in his work *Tort Law 2nd ed* explained:

> "There were as well procedural consequences flowing from the joint tort relationship. The liability of joint tortfeasors is derived from one cause of action. Therefore at common law, once one joint tortfeasor was sued and judgment was entered, the plaintiff could not institute another action against one of the other joint tortfeasor. This was based on the principle of transit in rem judicatam. If the plaintiff failed to sue all of the joint tortfeasors and could not execute in full against the ones who were sued, the judgment could not be satisfied. This did not apply to several concurrent tortfeasors since the plaintiff's cause of action against each was separate."

25. The rationale for this rule that each concurrent tortfeasor is liable to compensate for the whole of the damage is that as the Claimant cannot prove precisely whether each tortfeasor singly caused the damages or caused a particular part, the rule saves the claim from failing for want of proof of causation. But there was also another injustice:

> "The rule was a potential source of another injustice. A defendant against whom judgment had been given under the rule for the whole of the claimants damages had at common law no cause of action against his fellow concurrent tortfeasor to recover any part of what he had to pay under the judgment so that the second tortfeasor if for whatever reason he was not sued might escape scot free.[7]"

26. For the purposes of affecting a compromise of a claim with one of multi party Defendants a number of rules have developed:

    1. A judgment against a number of joint tortfeasors could be executed in full against any one of them;

[6] [1975] A.C. 507
[7] **Rahaman v Arearose Limited & ors** 62 BMLR 84

2. The judgment bar rule was said to have effect so that judgment against one tortfeasor released all the others; and
3. The release of one tortfeasor, by deed or accord and satisfaction, released all the others (the settlement bar rule). See **Brinsmead v Harrison** (1871) LR 7 CP 547. **Cocke v Jennor** (1614) Hob 66; 80 ER 214, **Duck v Mayeu** [1892] 2 QB 511.

27. Where the Claimant therefore has a claim against both Peter and Paul as joint tortfeasors if Peter compromises the action and pays a paltry sum in settlement of the claim with the intention of a release and not a covenant not to sue it is a discharge of Paul of any liability. Regardless of his contribution to the wrong, he emerges "scot free". In that sense it is similar to the local expression "Peter pays for Paul".

> "A release under seal or a release by way of accord and satisfaction (but not a mere covenant not to sue) in respect of one joint tortfeasor discharges the others, unless the claimant expressly or impliedly reserves his rights against the other tortfeasors, but neither form of release has the same presumptive effect in the case of several tortfeasors. However, acceptance of a settlement from one tortfeasor bars continuance of proceedings against another, whether the liability is joint or several, if the entire sum agreed upon is received and it was intended to be in full satisfaction of the claim. In such a case, the compromise fixes the claim as if judgment had been given, and the claimant cannot subsequently contend that the settlement figure fell short of the claim's full value and thereby justify proceedings against another tortfeasor."[8]

In the case of several wrongdoers the release of one wrongdoer does not necessarily release the others.

28. The Defendants contend that Mr. Goetz and the Defendants are joint tortfeasors and places reliance on the fact that Mr. Roopchand and the Medical Centre were independent contractors providing services for Mr. Goetz pursuant to a contract for services. I accept entirely in principle that if this is borne out on the pleadings and the evidence, that this may satisfy the definition of that relationship and unity of action and purpose necessary for

[8] Halsbury Laws of England para 444

distinguishing the class of person as joint tortfeasors. However the pleadings give no factual support for this proposition. There is no pleaded contractual relationship between Mr. Goetz and the Defendants. Mr. Goetz pleads that he has operating privileges at the Medical Centre. The Claimant pleads that the Medical Centre offered its facilities for use to Mr. Goetz. The evidence already filed by this Defendant also makes it unclear as to the contractual relationship between the parties. The Medical Centre rents the facilities to the medical practitioners including Mr. Goetz and Mr. Roopchand. They are regarded by the Medical Centre as independent practitioners. Mr. Roopchand and Mr. Goetz would attend to their patients at the facility and request payments. The staff of the Medical Centre is hired by the Centre and fall under the supervision of the senior nurse. It is not altogether clear from the evidence whether there is such a relationship where there is concurrence and appropriation of the conduct of others either by contract or in fact.

29. Furthermore in the interplay of the respective roles of each of the parties, the Medical Centre being responsible for the nursing staff and the two specialists for the surgical procedure, it is evident from the pleadings that although all were working generally on the same surgical procedure there is not necessarily the adoption or approbation of all the acts of the others. There are separate acts pleaded that fall within the separate and distinct areas of responsibility of each of the parties in the surgical procedure for which knowledge cannot be attributed to the other. One example is pleaded as the allegation of the failure of the staff to inform the second and third Defendants soon enough after the TURP of the fact that the deceased was experiencing heavy and continuous bleeding. With regard to Mr. Roopchand the statement of case contains the allegation of his failure to communicate with the Medical Centre or Mr. Goetz adequately or at all as to the state of Mr. Tesheira's medical records. That unity of purpose and action described in **Allison v KPMG** is absent.

30. The Defendants are not therefore joint tortfeasors and as a result the common law rule that a release of one is a release of all will not apply. That is the end of the Defendant's application.

31. However even if I examine the case as one of joint tortfeasors broadly as contended by the non settling Defendants I am not satisfied that the common law release rule should be maintained in this jurisdiction. Indeed in my view the common law Release Rule is

eminently commendable if it will eliminate the unfair double recovery by the injured complainant against the wrongdoer as well as promote the finality of litigation. However where the maintenance of a rule that allows persons who would have contributed to a wrong to be released "scot free" or where tortious conduct can go unregulated is an outdated, unnecessary artificiality and entirely inapplicable in our jurisdiction. It is easy to rationalize that it has or should be rendered irrelevant in the wake of the enactment of section 26 of the SCJ.

The effect of section 26 on the common law Release Rule:

32. So far as it is relevant Section 26 of the Supreme Court of Judicature Act makes it clear that a judgment recovered against one tortfeasor is no bar to an action against a joint tortfeasor and tears down the distinction between joint and several tortfeasors. As a result to this section joint tortfeasors now stand in the same position of several tortfeasors:

> **"**26. (1) Where damage is suffered by any person as a result of a tort, whether a crime or not—
>
> *(a)* judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to any action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
>
> *(b)* if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the dependants of that person, against tortfeasors liable in respect of the damage, whether as joint tortfeasors or otherwise, the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action;
>
> *(c)* any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so however, that no person shall be entitled to recover contribution under this section from any person

entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

33. This section duplicates the English *Law Reform (Married Women and Tortfeasors) Act 1935* (Eng).25 The English legislation was the result of a report of the English Law Revision Committee.26 In New South Wales these changes were reproduced in virtually identical terms in the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). The effects of this section is as follows:
    - The judgment bar rule has been abolished so that a judgment recovered against one tortfeasor shall not be a bar to an action against another tortfeasor who would, if sued, have been liable as a joint tortfeasor. This puts joint tortfeasors in the same position as several tortfeasors.[9]
    - The rule that the release of one joint tortfeasor releases all other joint tortfeasors has, in effect, been abrogated.

34. If it is recognized that the basis of the common law rule of concurrent torts was therefore to develop a rule along the axis of the broad principle that every tortfeasor must compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible then it is difficult to now justify "the release of one the release of all" rule in light of sec 26 SCJ.

A matter of policy:

35. As a matter of policy there is no "inexorable march of logic" in the proposition that release of one of two joint and several tortfeasors operates as a release of the other. The "all for one and one for all" approach would lead to unjust results. The development of our common law should dehor any such lingering manifestation of the rule in the face of the clear enactment

[9] Halsbury Laws of England the authors summarized the principles in this way:

> "449. **Effect of judgment against, or release of, joint tortfeasor.** Judgment recovered against any person liable in respect of any debt or damage is not a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage. However, a satisfied judgment, except in the case of a foreign judgment, is a bar to a claim against other tortfeasors, whether joint or several, who are liable for the same damage."

abolishing the fundamental platform of the distinction between joint and several tortfeasors in sec 26 SCJ.

36. As a matter of principle where our Courts have deliberately embraced the encouragement of settlement through the promotion of ADR, the Court should be careful not to create impediments in the path of voluntary and consensual settlement of claims. Indeed finality is one object of settlement but a Claimant who has potential claims against two or more tortfeasors is less likely to settle with one if he knows that in doing so regardless of the level of recovery in the settlement he may lose his right of recovery against other tortfeasors unless he clearly reserves it. Auld LJ questioned the logic of this in **Jameson v Central Electricity Generating Board** [1999] 1 All E.R 193:

> "In any event where there are separate and concurrent claims why should a reservation as between a plaintiff and one settling tortfeasor affect the plaintiff's right to proceed with his separate claim against the other tortfeasor? Neither logic nor policy requires it."

37. Simply accepting a release and full satisfaction of one tortfeasor is a release of all without examining the intention of the parties in the settlement agreement may certainly dampen the movement towards a general culture of settlement before action and the complete exploration of ADR mechanisms before getting a trial date. For medical negligence claims certainly a compromise does not necessarily mean an admission of guilt and the mist in the rationale of releasing other tortfeasors disappears in the harsh reality of commercialism. Legal rights and the opportunity to regulate the conduct of tortfeasors simply should not vanish if that was not the intention of the person who was wronged when he compromised his claim.

38. The principle as espoused recently in **Jameson** that preserves the Release Rule has been the subject of criticism and is not free from controversy this is revealed in the following citations referred to by counsel:

In **Watts v Aldington** [1993] CAT 1578 per Steyn L.J stated:

> "These appeals illustrate the absurdity of the rule that the release of one of two joint and several tortfeasors operates as a release of the other. In Victorian times judges of great distinction reasoned that in a case involving joint and several

liability of joint tortfeasors there is only a single cause of action, and accordingly a release of one of two joint tortfeasors extinguishes that single cause of action, or as it was usually put, releases the other joint tortfeasors. The rule has been relaxed by statute. The fact that joint tortfeasors can be sued successively heavily compromised the perceived rule of logic. But the old rule apparently still survives. In truth there is no inexorable march of logic. In a less formalistic age it is now clear that the question whether the release of a joint tortfeasor should operate to release the other tortfeasor is a policy issue. Either solution is logically defensible. But good sense, fairness and respect for the reasonable expectations of contracting parties suggests that the best solution is that the release of a joint tortfeasor should not release the other tortfeasor. On this basis the consequence that the unreleased tortfeasor may bring an action for contribution against the released tortfeasor must be faced. As far as the unreleased tortfeasor is res inter alios acta. If this solution is not perfect, it at least has the merit of promoting more sensible results than any other solution: see Glanville Williams, Joint Obligations (1949), 99. 137-138. The absurd consequences of applying the rule of logic invariable led judges, in the best common law tradition, to devise ways of escaping the rigours of its application. The first was the invention of the distinction between an agreement operating as a release of one joint tortfeasor from liability (which resulted in the discharge of the other joint tortfeasor from liability) and an agreement not sue one joint tortfeasor (which did not involve a discharge of the other). The second technique was the creation of the rule that, even if the agreement operates as a release of one joint tortfeasor, nevertheless the other tortfeasor was not released if the agreement contained a reservation of the plaintiff's rights against the other tortfeasor. In combination these two subsidiary rules, generously interpreted, have ensured that in the majority of cases satisfactory solutions are achieved. But plainly the law is not in a satisfactory state. It is true that a claimant, who engages sophisticated lawyers, can by suitably drafted contractual stipulations avoid the application of the primary rule. But the rule is undoubtedly a trap for the unwary. And for those who are aware of the problem it is a potential disincentive to entering into bona fide and reasonable compromises. The rule requires re-

examination, notable in the light of the suspect logic on which it was founded and, in any event, on the basis that the rationale of the rule disappeared once the 'one cause of action' theory was undermined by the statute which authorized successive actions against joint tortfeasors. The point is of considerable importance since it potentially affects a large number of transactions. But it seems to me that binding authority compels me to approach the problem in the traditional way."

In **Bryanston Finance v De Vries** [1975] All ER 609 Lord Denning MR commented:

"In the present case the question that arises is this: suppose that the plaintiff settles with one of the wrongdoers before judgment by accepting a sum in settlement: or suppose that by consent an order is made by which the plaintiff accepts an agreed sum from the one tortfeasor and discontinues against him, but goes on against the other. I believe this to be a new point. It should be solved in the same way as the payment into court was solved. If the plaintiff gets judgment against the remaining tortfeasor for a sum which is more than the sum already recovered (by the settlement or the consent order), he is entitled to enforce it for the excess over which he has already recovered. But, if he gets judgment for less than he has already recovered, then he recovers nothing against the remaining tortfeasor and should pay the costs. I do not think that it should depend on whether the sum was paid under a covenant not to sue or a release, such as was discussed in Duck v Mayeu n1 and Cutler v McPhail n2. That is an arid and technical distinction without any merits. It is a trap into which the unwary fall but which the clever avoid. It should be discarded now that we have statutory provision for contribution between joint wrongdoers. The right solution nowadays is for any sum paid by the wrongdoer under the settlement to be taken into account when assessing damages against the other wrongdoer. If the plaintiff recovers more, he gets the extra. If he recovers less, he loses and has to pay the costs. And as between the joint wrongdoers themselves, there can be contribution according to what is just and equitable."

In **XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd** [1985] 155 CLR 448, Gibbs CJ added:

> "Once it is accepted that more than one judgment may be given against joint tortfeasors for damages caused by a joint tort, whether damages are given in the same or in difference proceedings, there can remain no foundation for the rule that only one sum can be awarded by the different judgments. The reason for the rule was that there was only one cause of action against the joint tortfeasors, but that is no longer the position – the statute has abolished, "in its entirety", the old common law principle that a person who suffers damage by a joint tort has only one cause of action which merges in the first judgment recovered in respect of it. Surely the statutory provision was not intended to abolish only the doctrine of merger, for it was not primarily directed to the question of merger, and there is no reason for selecting one aspect of the principle rather than another as that which it was intended to affect: the whole principle should be held to have gone."

In **Thompson v Australian Capital Television Pty Ltd** [1996] AUST HIGHCT LEXIS 75, Brennan CJ, Dawson and Tooney JJ stated:

> "Similarly, under s11(2) of the Act it is no longer the case that the victim of a tort committed by joint tortfeasors has only one cause of action; the cause of action is no longer one and indivisible. The concept of a single wrong and a single cause of action having gone, the rule that a release given by one joint tortfeasor releases any others must have gone with it, for that rule is nothing more than another aspect of the same thing, namely, that there is only one cause of action against all joint tortfeasors in respect of the one tort. In other words, once the cause of action is by statue no longer one and indivisible, there is no conceptual basis for the rule that the release of one joint tortfeasor releases the others. The rule must therefore be taken to have been impliedly abolished by the statute."

In **XL Petroleum**, in delivering the minority judgment Gummow J commented:

> "The rationale identified by Wigmore for the treatment of jointly committed tortuous activity as giving rise to an indivisible cause of action, namely difficulty to the plaintiff in proving to the tribunal of fact the respective contributions to the

injury by the joint wrongdoers, may be conceded. However, that may be met otherwise than by continuing to treat the cause of action as unitary and indivisible in the sense identified above, the modern legislation in issue in this case deals with the subject on the footing that the unity of the cause of action against all joint tortfeasors is severed. That being so, the reason and justification for treating the release of one joint tortfeasor as a release of the others has disappeared."

Finally, Lord Bingham in **Heaton**[10] stated:

"But A may agree to settle with B for £x not because either party regards that sum as the full measure of A's loss but for many other reasons: it may be known that B is uninsured and £x represents the limit of his ability to pay; or A may wish to pocket a small sum in order to finance litigation against other parties; or it may be that A is old and ill and prefers to accept a small sum now rather than a larger sum years later; or it may be that there is a contractual or other limitation on B's liability to A. While it is just that A should be precluded from recovering substantial damages against C in a case where he has accepted a sum representing the full measure of his estimated loss, it is unjust that A should be so precluded where he has not."

39. I am convinced by these persuasive authorities against the backdrop of the nature of settlement and its role in our Courts and the administration of justice that this artificial distinction distracts from the rationale of torts and compensation. Rather than be caught in the mire of causation and liability one must take a common sense approach to the rule and its application in the context of the Act. It is clear that the Act provides for more than one cause of action by permitting more than one claim, the desirability of finality of litigation is only a principle which in reality is a means to ensuring that the Claimant is not overcompensated beyond what is fair as seen above. There is strong judicial criticism of the rule that the settlement of one is a settlement of all.

[10] **Heaton v Axa Equity and Law** [2002] 2 All ER 961

40. Ultimately one must simply examine the compromise struck between the parties and determine the extent to which the Claimant has released other Defendants from liability for their wrongdoing.

41. Another perspective on the issue as to whether the Release Rule survives sec 26 SCJ Act is to recognize the growing exceptions developed by the common law to this Release Rule. One exception is the interpretation of a release as simply a covenant not to sue. Judicial approaches to this question would betray immediately a distinct encouragement for the settlement of cases without extinguishing the right of recovery against other tortfeasors within the limits of the total claim.

42. It is therefore easy to see the emergence of yet another exception that the release rule does not apply if it was plainly not the express or implied intention of the parties by their agreement.

The proper construction of the compromise agreement

43. A proper construction of the agreement made between Mr. Goetz and the Claimant demonstrates that there was no release of the non settling Defendants. Neil LJ in **Watts** commented:

> "When judges speak of the true intention of the parties in the context of implying a term that must be viewed simply as expressions of judicial piety: judges want to make it clear that the court does not rewrite contracts for the parties. The foundation of a term implied in fact is not an inferred true intention but an intention which the law imputes to the parties. The enquiry is generally an objective one. The approach of the common law is that it would be time consuming and unrewarding to hear the self serving evidence of the parties as to their states of mind. On the other hand, evidence of the objective setting of a contract is admissible in aid of the implication of a term the external standard of the reasonable man placed in the position of the parties is applied."

44. In **Jameson**, Lord Hope of Craighead commented:

> "I think that these cases demonstrate the limits of the inquiry which the judge may undertake in the event of a subsequent action being raised against another alleged concurrent tortfeasor. He may examine the statement of claim in the first action and the

terms of the settlement in order to identify the subject matter of the claim and the extent to which the causes of action which were comprised in it have been included within the settlement. The purpose of doing so will be to see that all the plaintiff's claims were included in the settlement and that nothing was excluded from it which could properly form the basis for a further claim for damages against the other tortfeasors. The intention of the parties is to be found in the words of the settlement. The question is one as to the objective meaning of the words used by them in the context of what has been claimed."

45. Further, as the Claimant's Counsel noted, Lord Bingham held that in construing the settlement agreement between a claimant ("A") and one of two concurrent tortfeasors ("B") to which another concurrent tortfeasor ("C") was not a party, the following points had to be borne in mind:

"(i) The release of one concurrent tortfeasor does not have the effect in law of releasing another concurrent tortfeasor and the release of one contract-breaker does not have the effect in law of releasing a successive contract-breaker;

(ii) An agreement made between A and B will not affect A's rights against C unless either (a) A agrees to forego or waive rights which he would otherwise enjoy against C, in which case his agreement is enforceable by B, or (b) the agreement falls within that limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by C as a third party;

(iii) The use of clear and comprehensive language to preclude the pursuit of claims and cross claims as between A and B has little bearing on the question whether the agreement represents the full measure of A's loss. The more inadequate the compensation agreed to be paid by B, the greater the need for B to protect himself against any possibility of further action by A to obtain a full measure of redress;

(iv) While an express reservation by A of his right to sue C will fortify the inference that A is not treating the sum recovered from B as representing the full measure of his loss, the absence of such a reservation is of lesser and perhaps of no significance, since there is no need for A to reserve a right to do that which A is in the ordinary way fully entitled to do without any such reservation;

(v) If B, on compromising A's claim, wishes to protect himself against any claim against him by C claiming contribution, he may achieve that end either (a) by obtaining an enforceable undertaking by A not to pursue any claim against C relating to the subject matter of the compromise, or (b) by obtaining an indemnity from A against any liability to which B may become subject relating to the subject matter of the compromise."

46. The factual matrix of the agreement therefore is of importance in arriving at a proper construction of the agreement to determine if the Claimant intended to release the other Defendants. In this regard it is noted that the affidavit evidence of the nature of the settlement discussion remain uncontroverted. In considering the surrounding circumstances in which the agreement was arrived at, and the terms used, the following observations are made:

(a) The Claimant entered into the agreement for plainly commercial and business purposes.

(b) There was the clear intention to keep alive the Claimant's claim as against the other Defendants. There was no express provision or any provision capable of interpretation that suggests that the Claimant was abandoning all her claims against other parties not privy to the contract.

(c) The Claimant entered into the agreement on the advice of Counsel. It is clear from the evidence therefore that she wanted the other claims to remain in place.

(d) The settlement sum represented a paltry or nominal sum in relation to her claim. The quantum of damages by contrast lay in tens of millions of dollars. It could not be suggested that this settlement would be sufficient to release all the Defendants of liability as the sum provided by the agreement does not represent nor was it intended to represent the full measure of the Claimant's loss. I say so for the following reasons (a) a cursory examination of the pleadings demonstrate the disparity in the figures (b) the evidence of the Claimant in these proceedings puts her prima facie on a footing to prove a loss far beyond that which is the subject of the agreement (c) the evidence is to the effect that the sum represent a paltry percentage of the claim.

(e) The non-settling Defendants had adopted a position and which is accepted by the parties as unwavering to ventilate their defence by trial to protect their reputations.

There was no reason therefore to release them from any liability having regard to that motivation and express declaration.

47. The agreement therefore properly constructed does not operate in law to release the other Defendants from liability.

Ancillary Claim

48. The application to institute an ancillary claim is based principally on the need to claim a contribution or indemnity from the settling Defendant. In their grounds of their application these Defendants state:

> "If there was no monetary compensation, there is the need for the same to be communicated to the First and Third Defendants who will then consider a claim against the Claimant and Second Defendant for conspiracy and/or collusion to make them accountable for damages, if any, a Court would make against them on behalf of the Claimant arising out of a single damage claim. In addition, there will be the issue of indemnity and/or contribution which have to be addressed by way of an ancillary claim against the Second Named Defendant who was the principal *tortfeasor*.
>
> With the settlement between the Claimant and the second Defendant there is a significant change in circumstances. The Claimant had brought the proceedings jointly against the Defendants on behalf of the deceased estate arising out of a single purported alleged act of medical negligence. A trial of liability would have addressed whether it at all any of the Defendants was negligent and the extent to which each Defendant may be held liable."

49. The issues of contribution and indemnity were live issues from the commencement of these proceedings amongst the several tortfeasors. It was entirely open to Mr. Roopchand and the Medical Centre to contend that the damage sustained was as a result of the negligence of Mr. Goetz, if indeed that was their case. In that event they would set up their Defence in such a manner to make it clear that apportionment of liability amongst all the Defendants are live issues. No allegation of negligence was made against Mr. Goetz. To the contrary the

pleadings of these Defendants state in clear terms: "These Defendants made no particulars of negligence of the Second Defendant".

50. Consistent with the duty of a party to set out his case in his pleading, see r 8 CPR, the party must approach litigation with its cards on the table face up. Indeed it would appear that as a consequence of this application there ought to be an application to amend the Defence though that would face the challenge of the conditions imposed by part 20 CPR to effect a change to a statement of case after the CMC.

51. There is no evidence that can support any allegation of conspiracy or collusion as a result of the settlement of the claim between Mrs. Tesheira and Mr. Goetz. The facts stated in their respective affidavits are uncontroversial and quite conventional that is the settlement of disputes for purely practical reasons. In fact it is these Defendants who preferred not to engage in settlement discussions and rather to vindicate their right by a trial. In so doing they perceive that they will ultimately prevail in demonstrating that they were not negligent and so publicly preserve their reputation. This is undoubtedly their right and entitlement to do so. However it is a far leap to now contend that the settling parties surreptitiously brokered a deal to prejudice their rights. The argument is baseless as the settlement in no way affects the pleaded case of the non settling Defendants.

52. Further and in any event the Court is entitled if the claim is proven and damages are to be assessed to make reference to the settlement amounts for the purpose of preventing a double recovery or over compensation for the damage caused by the tortfeasors.

53. Against this backdrop I am not satisfied that there is a significant change in circumstances that became known to these parties after the first CMC, a requirement of rule 18.4 CPR.

54. In any event to further the overriding objective it would not be just at this juncture to give such permission where the claim is now well advanced with a trial date in sight. To now embark upon an ancillary claim would be counterproductive of the case management directions made bringing this matter to a trial. There is no valid reason advanced in any event by these Defendants to apply the brakes on the current litigation to facilitate third party litigation. Moreover it is not a fair nor proportionate response in relation to both the Claimant

and Mr. Goetz both of whom made the calculated decision to settle the claim against him and to remove him from these proceedings. Indeed it is unfair where the settlement discussion would have taken place without the spectre of any action of contribution or indemnity against Mr. Goetz for him to now find himself exactly in the same position where he has no desire to be in the first place. Additionally, to grant permission to issue the ancillary claim would make a mockery of the bona fide and contrite efforts of the parties to compromise their claim. To do so would be an unfair penalty to the settling Defendant when he should be rewarded for his bona fide attempts at having engaged in amicable settlement discussions.

Conclusion

55. In the final analysis the allegations of negligence as against the remaining Defendant and Mr. Goetz are distinct and separate. They are not joint tortfeasors. The release rule has in my view outlived its purpose against the background of creating the atmosphere for litigants to settle their disputes amicably taking such commercial decisions that they may wish in light of the uncertainties of litigation. The Court would remain astute to order the appropriate discovery of settlement documents only in as far as it is necessary to prevent double recovery of damages.

56. The allegations of negligence against the remaining Defendants deserve further investigation, on the one hand to regulate the standard of care expected of medical professionals in this country and on the other of the remaining Defendants to provide the forum for them to publicly clear their name.

57. The Defendant's application is dismissed with costs to be paid to the Claimant and Mr. Goetz to be assessed by this Court.

Vasheist Kokaram

Judge