THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-02817

BETWEEN

RICKY RADESH RAGHUNANAN

(Administrator of the Estate of Kelly Ann Raghunanan otherwise Kelly Baptiste otherwise Kelly Ann Baptiste otherwise Kelly Ann Baptiste-Raghunanan)

Claimant

AND

PRAKASHBHAN S. PERSAD

Defendant

Before The Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: November 22, 2018

Appearances:

Messrs. Ravindra Nanga and Neal Bisnath instructed by Ms Lydia Mendonça for the Claimant

Mr. Jonathan Walker instructed by Ms. Debra Thompson

RULING ON CLAIMANT'S APPLICATION TO FILE REPLY

I. Procedural History

[1] On 28th July 2017, the Claimant, Ricky Radesh Raghunanan, filed a Claim Form and Statement of Case against the Defendant, Prakashbhan S. Persad for the following relief:

a. In respect of the Estate of Kelly Ann Raghunanan otherwise Kelly Baptiste otherwise Kelly Ann Baptiste otherwise Kelly Ann Baptiste-Raghunanan pursuant to Supreme Court of Judicature Act, Chap 4:01, damages for personal injuries suffered and wrongful death, loss and damage due to the Defendant's negligence in the performance of an operation on or about 31st July 2013 resulting in the death of Kelly Ann Raghunanan otherwise Kelly Baptiste otherwise Kelly Ann Baptiste otherwise Kelly Ann Baptiste-Raghunanan (hereinafter referred to as "the Deceased")

b. Damages pursuant to the Compensation for Injuries Act, Chap 8:05 in respect of the Dependants of the Deceased.

c. Costs.

d. Interest pursuant to section 25 of the Supreme Court of Judicature Act, Chap 4:01 at such a rate and for such period as the Honourable Court may deem just.

e. Such further or other relief as the Honourable Court may think just in the circumstances.

[2] The Defendant entered his appearance on 14th August 2017 and filed his defence on 16th October, 2017.

[3] On 24th October 2017, a notice of re-assignment was issued assigning the matter to my docket and a hearing was set for 28th November 2017 for the Case Management Conference.

Both parties asked that the first Case Management Conference be re-scheduled to a date convenient to the Court. The Case Management Conference was then re-scheduled to 13th December 2017.

The Claimant at the first Case Management Conference expressed the desire to file a Reply to the Defence whereupon the Court made the following order:

1. **The proposed application for permission to file and serve a Reply to the Defendant's Defence to be filed and served on or before 20th June 2018 with draft Reply attached thereto.**

2. **The Court shall attempt to deal with such application without a hearing but with consultation with the Defendant's attorney via telephone.**

3. **In the event there is any objection then the said Application will be dealt with at the next Case Management Conference fixed for 18th July 2018 at 11:30am in Courtroom POS04.**

[4] The Claimant filed his Notice of Application on 20th June 2018 for permission to file and serve a Reply to the Defendant's Defence filed on 16th October, 2017. A draft Reply was annexed to this Application.

[5] At the next Case Management Conference on 18th July 2018, the Court made the following order:

1. **The Defendant's Attorney to file and serve objections to the proposed Reply attached to the said application on or before 7th September 2018.**

2. **Response submissions to be filed and served on or before 1st October 2018.**

3. **The Case Management Conference and the Notice of Application filed on 20th June 2018 are adjourned to 24th October 2018 at 9:30am in Courtroom POS03.**

[6] The Defendant filed his submissions on his objections to the Reply on 7th September 2018 and the Claimant filed his response to the submission on 1st October, 2018.

[7] Having considered the written submissions of both parties, the Court will now give its decision on the Claimant's Application.

II. Law

[8] **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited**[1] is the locus classicus in local common law in relation to the test for considering an application for permission to reply. The test is set out at paragraph 18 of the judgment of Pemberton J as follows:

> *"What must a reply contain? I wish to associate myself with BLACKSTONE'S statement of the learning on this matter:*
>
> *'... a reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence. ... Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to a defence'."*

[9] An application for permission to put in a Reply cannot therefore succeed if the proposed Reply responds to matters which should have been dealt with in the particulars of claim (i.e. in the statement of case). It should deal with **"new" matters** that are raised by the defence and should not be drafted as a **"defence to a defence"**: **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited (supra), Raymatie Mungroo v Andy Seerattan and Ors**[2] and **Rohit Seekumar (trading as "Copying Express" v McEnearney Business Machines Limited**[3]**.**

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[1] CV2007-002865

[2] CV2013-04801

[3] CV2015-03969

III. Analysis

[10]The draft Reply as attached to the Claimant's Application contains 26 paragraphs. The Defendant has **no** objection to paragraphs 1, 2, 3, 5, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the draft Reply.

The Defendant has objected to 4 paragraphs of the draft Reply as follows: **partly to paragraphs 4 and 10 and paragraphs 6 and 14 in their entirety**.

[11]**Paragraph 4 of the Reply** is stated as being in response to paragraph 6 of the Defence. Paragraph 6 of the Defence stated that the Defendant was not able to delay the operation pending the arrival of the blood from the Blood Bank, given the pain that the Deceased was complaining of (it being later established that her uterus had ruptured) and for fear of losing both the Deceased and her infant.

The Defendant objected to lines 5-7 of paragraph 4, namely, "*There was no objective documentation of an emergency, no fetal heart rate abnormality documented or no bleeding per vagina documented prior to the operation*". The Claimant stated that there was no examination documenting the classic findings of uterine rupture, namely firm, constant tender uterus nor was there any documentation post-operation from the Defendant or Anaesthesiologist's notes relating to uterine rupture.

The Court is of the view that the rupture of the Deceased's uterus *is a new* issue, which the Claimant is permitted to respond to in order to define the issues between the parties. These lines were not pleaded in the Statement of Case nor should they have been as the Claimant would not have been aware that the Defendant would raise this as a defence. Accordingly, the Claimant is permitted to respond to this issue in order to set out his case against the Defendant.

Ruling: **Accordingly, paragraph 4 of the Reply in its entirety is permissible.**

[12]**Paragraph 6 of the Reply** is stated as being in response to paragraph 14(vi) of the Defence where the Defendant averred that the Deceased contacted the Defendant on

30th July 2013 and demanded immediate delivery on account of the lower abdominal pain that she was experiencing.

The Claimant in his reply maintained that even if the Deceased was demanding immediate delivery, the Deceased was not in any immediate danger and the Defendant should have known the dangers associated with this case with no blood available.

The Court is of the view that the demand by the Deceased for an immediate delivery *is a new* issue raised, which the Claimant is permitted to respond to in order to define the issues between the parties.

Ruling: **Accordingly, paragraph 6 of the Reply in its entirety is permissible.**

[13]**Paragraph 10 of the Reply** is in response to paragraph 15 of the Defence. Paragraph 15 of the Defence denies that the Defendant had a duty that overrode the wishes of the Deceased and averred that the Defendant was not entitled to carry out any procedure on the Deceased without the Deceased's consent. The Defendant averred that at all material times, the instructions and/or terms of the consent given by the Deceased were consistent and were to the effect that the Defendant was not to perform a hysterectomy but was to preserve the Deceased's uterus.

The Claimant in his reply maintained that the consent form signed by the Deceased consented to such further or alternative operative measures as may be found necessary. The Claimant added that the Defendant was duty bound to use his better judgment to save the Deceased's life and in any event the Deceased was going to be sterile in any event with the tubal litigation performed.

The Court is of the opinion the issue of consent *is a new* issue raised by the Defendant which warrants a reply by the Claimant. The Claimant in this instance is permitted to respond to such issue in order to set out his case on this point. However, the Court is of the view that lines 3-7 beginning with "*The Claimant further*

maintains" to "*tubal litigation performed*" are facts which should have been pleaded in the Statement of Case and therefore, should be struck out.

<u>Ruling</u>: **Accordingly, lines 3-7 of paragraph 10 beginning with "The Claimant further maintains" to "tubal litigation performed" ought to be struck out.**

[14] **<u>Paragraph 14 of the Reply</u>** is in response to paragraph 20 of the Defence where the Defendant averred that during the operation, he was able to control the Deceased's bleeding and that haemostasis had been secured. The Defendant stated that the anaesthetist and the recovery room staff were responsible for the immediate post-operative care of the Deceased, though the Defendant remained at the hospital so that he could attend to the Deceased, if needed.

The Defendant further averred that he gave instructions to the recovery room staff for the care of the Deceased following her resuscitation (from the effects of the anaesthetic) and return to the ward. He stated that at all material times, these instructions included the taking of vitals at certain routine times, the monitoring of any bleeding and the administration of 2 units of blood as soon as same became available.

The Claimant in his reply maintained that the Defendant was overall responsible for the well-being of the Deceased post-operatively. The Claimant then proceeded to state what the Defendant should have done if the Defendant was recorded to have low blood pressure.

The Court is of the view that the issue of the recovery room staff being responsible for care of the Deceased after the operation and the instructions given to the staff *is a new* issue raised which warrants a reply by the Claimant. The Claimant in this instance is permitted to respond to such issue in order to set out his case against the Defendant.

However, the Court is of the view that lines 2-10 beginning with "*On the basis that*" to "*lead to worsening blood loss*" are facts, which should have been pleaded in the Statement of Case and should, therefore, be struck out.

<u>Ruling</u>: Accordingly, lines 2-10 beginning with "On the basis that" to "lead to worsening blood loss" in paragraph 14 of the Reply ought to be struck out.

IV. Disposition

[15] **Having considered the pleadings, the Draft Reply and the submissions of both parties, the Court orders as follows:**

<u>ORDER</u>:

1. **Lines 3-7 of paragraph 10 of the draft Reply beginning with "The Claimant further maintains" to "tubal litigation performed" be and are hereby struck out.**
2. **Lines 2-10 of paragraph 14 of the draft Reply beginning with "On the basis that" to "lead to worsening blood loss" be and hereby struck out.**
3. **Permission is hereby granted to the Claimant to file and serve a Reply to the Defendant's Defence on or before 3rd December, 2018 in terms of the draft Reply attached to Notice of Application filed on 20th June 2018 excluding the parts thereof to be struck out as ordered in clauses 1 and 2 of this order.**
4. **The Defendant to pay to the Claimant 45% of his costs of the Notice of Application filed on 20th June, 2018, to be assessed pursuant to Part 67.11 CPR 1998, in default of agreement.**

Robin N. Mohammed

Judge