Judgment 7/2004 **Butt v Brannan – Royal Court (Civil Action file 415), 31 March 2004**

Law Reform (Tort) (Guernsey) Law, 1979 – Civil Action – medical negligence claim – application for leave to amend pleadings – finding by Jurats on when the Plaintiff had acquired the relevant knowledge – subject to Section 8 of the 1979 Law, prescription took effect on 26 or 27 October 1999 – principles to be applied on application to amend – conditional leave granted to amend cause.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 31st day of March, 2004 before Patrick John Talbot, Esquire, QC, Lieutenant Bailiff.

In the matter of

HELEN BUTT

Plaintiff

and

MARTIN BRANNAN

Defendant

Whereas on the 26th and 27th November, 2003, The Lieutenant Bailiff considered an application by the Plaintiff pursuant to Section 8 of The Law Reform (Tort) (Guernsey) Law 1979 for the Court to apply its discretion for the amended Cause to proceed notwithstanding the expiration of the prescription period and heard thereon Advocates C.A. Tee and R.J. Collas, Counsel for the Plaintiff and Defendant respectively; The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and GRANTED the Plaintiff leave to amend her Cause in a form to be lodged with the Court within 14 days upon the Lines of the draft Amended Cause to which the original application for leave to amend dated 16th August, 2002 related.

S.M.D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY (ORDINARY DIVISION)

B E T W E E N:

HELEN BUTT

Plaintiff

and

MARTIN BRANNAN

Defendant

J U D G M E N T

of

Lieutenant Bailiff Patrick John Talbot QC

Advocate Clare Tee for the Plaintiff
Advocate Richard Collas for the Second Defendant

[After summarising the allegations and the course of proceedings up to the present application, the Lieutenant Bailiff continued as follows:-]

26. Since the parties did not agree, an application was issued on 16 August 2002 by Carey Langlois on behalf of Mrs. Butt, in which the thrust of the proceedings changed considerably. First, the claim against Mr. Haskins was dropped entirely. Secondly, the claim against Mr. Brannan for negligent failure to advise Mrs. Butt adequately prior to the operation was also dropped. Thirdly, a new claim was made against Mr. Brannan alleging negligence by him during the [surgical procedures].

27. On 12 November 2002 a further application was issued by Carey Langlois on behalf of Mrs. Butt for permission to pursue her cause pursuant to Section 8 of the Law Reform (Tort) (Guernsey) Law 1979 ("the 1979 Law"). After a procedural false start or two, once affidavit evidence had

been filed on behalf Mrs. Butt and Mr. Brannan, the matter came on again for hearing just under a year later, on Monday 10 November 2003, for directions as to how the substantive hearing should proceed. After hearing argument from Counsel, I ruled that the application for leave to amend should be heard well before any trial of the action. Fortunately the parties and their Advocates were able to proceed with the application on Wednesday 12 November 2003 and Mrs. Butt was made available to give oral evidence on Thursday 13 November 2003.

28. Advocate Tee argued on behalf of Mrs. Butt that the proposed amended cause did not raise any new cause of action against Mr. Brannan and that, in the exercise of my discretion, I should give leave to amend. She referred me to the decision of the Court of Appeal in ***Ogier v Grande Havre Holdings Limited*** (1999), *per* Sumption J.A. at p.2B/E. I was also referred to volume 37 of Halsburys Laws of England at paragraph 18 and footnote 2, to the decision of the Divisional Court of the Queen's Bench Division in ***Clarapede & Co v Commercial Union Association*** (1884) 32 W.R. 262, the judgment in the Royal Court of Lieutenant Bailiff Hancox in ***Collas v Peet*** (2 February 2001) and the well-known decision of the House of Lords in ***Ketterman v Hansel Properties Limited*** [1987] AC 189, per Lord Griffiths at p.220, where he said:

> "There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.
>
> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties caused by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of proceedings. …"

29. In ***Ogier v Grande Havre Holdings Limited*** (2000) 27 September 2000 the case related to an application by the Plaintiff for leave to amend her pleadings to substitute "for the existing cause a considerably expanded cause in a subsequent action against the same Defendant and an additional party" – *per* Sumption J.A. The learned Judge also said, inter alia, that analogies with English practice must be treated with caution. At p. 2B/E he gave the following guidance:

> "Whether a litigant (represented to unrepresented) should be allowed to amend his pleadings depends on what justice requires in the particular case. Over elaborate definition is probably undesirable. It is enough for present purposes to make three points, which broadly reflect the existing practice of the Courts of this Island. The first is that in the ordinary course it will not be just to allow an amendment if it would defeat a plea of prescription that would otherwise be available to a Defendant. This is a principle upon which the English Courts acted for many years at a stage when their rules were no more elaborate than those of Guernsey are now. Secondly, an amendment should not be allowed if the case introduced by it can be seen to have no realistic prospect of success. The test for this purpose is the same as the test for striking out an existing pleading under Rule 36 of the [Royal Court Civil Rules 1989]. Thirdly, apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend, provided that the change can be made without inflicting injustice on the other parties of a kind incapable of being compensated by an order for costs."

30. Advocate Collas contended that whilst the first cause of action pleaded in the original cause only concerned what had happened *before* the [operation] and emergency procedure had taken place, the proposed second claim only concerned what had happened *during* the operation and the emergency procedure. He advanced the argument, with which I agree, that there were substantial factual differences between the two sets of circumstances. But some of the evidence at any trial on either basis would obviously overlap. He also argued, again, I think correctly, that the loss claimed by Mrs. Butt would be different. Under the original cause damages were sought for psychological loss whereas under the proposed second claim there might well be damages under different heads, including damages resulting from the operative procedures.

31. Equally, whereas under the first claim the relevant witnesses for the defence would have been Mr. Haskins and Mr. Brannan and possibly a nurse attending the consultations, under the proposed new pleading the evidence of Mr. Haskins might, I suppose, just be relevant, (but would perhaps not be), that of Mr. Brannan would be of central relevance and of a more expanded nature, the evidence of the anaesthetist Mr. Cooper might be relevant and the evidence of Mr. Allsop, (who

conducted an operation in mid-August 1996 [.....]), might well also be relevant. It might also, I suppose, be necessary for Mr. Brannan to call evidence from a ward sister or from theatre nurses or, indeed, from nurses from the intensive care unit or the recovery ward.

32. On about 12 November 2003 I decided that Mrs. Butt's proposed amended cause would raise a new cause of action against Mr. Brannan alone and that, unless section 5 or section 8 of the 1979 Law could be applied in her favour, the new cause of action would be statute-barred since, of course, over three years had passed since 30/31 July 1996, when the cause of action accrued, before the application for leave to amend was issued on 16 August 2002.

33. Argument then proceeded on 12 November 2003 and continued on 13 and 18 November 2003, on section 5 of the 1979 Law together with oral evidence, on 13 November 2003, from Mrs. Butt herself, upon the question of fact for the Jurats to decide as the tribunal of fact. The legal issues under section 5, and the factual issues for the Jurats, were set out in detail in my summing up to the Jurats delivered on Tuesday 18 November and Wednesday 19 November 2003. I consider that it is unnecessary for me to repeat my summing up or any part of it for the purpose of this Judgment or to deal with the argument and factual issues on section 5.

34. In the mid-morning of 19 November 2003, the Jurats returned to Court to answer the questions raised of them. They decided that Mrs. Butt had, within the meaning of Section 5(4)(b) and (6) of the 1979 Law, knowledge on 26 October 1996, (the date of a letter from Mr. and Mrs. Butt to Advocate Greenfield if Carey Langlois (documents 28-31 in the agreed bundle)). This conclusion on the part of Jurats meant that, whereas the cause of action in the proposed amended Cause accrued by no later than 31 July 1996, the limitation period of three years under the Section 5 of the 1979 Law was three years from 26 October 1996.

35. Accordingly, the period of limitation or prescription relevant to any new cause of action, upon which Mrs. Butt might wish to rely in replacement for that comprised in the original cause, expired, subject only to the operation of Section 8 of the 1979 Law, on about 26 or 27 October 1999.

36. The first of the three principles in the judgment of the Court of Appeal in ***Ogier v Grande Havre Holdings Limited*** , at p.2B/E, would therefore, "in the ordinary course, render it unjust to allow the proposed amendment since "it would defeat a plea of prescription that would otherwise be available to" Mr. Brannan. But Mrs. Butt, by Advocate Tee, next argued that the Court's

discretion under Section 8 of the 1979 Law should be exercised in her favour since it was equitable to allow the action to proceed against Mr. Brannan on the basis of the proposed amended cause.

37. The parts of Section 8 material to these proceedings provide as follows:

> "8(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree which –
>
> (a) the provisions of Section 5 … of this Law prejudice the plaintiff …, and
>
> (b) any decision of the court under this sub-section would prejudice the defendant or any person whom he represents,
>
> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
> …
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought in the time allowed by section 5 … of this Law;
>
> (c) the conduct of the defendant after the cause of action arose, …;
> …
>
> (e) the extent to which the plaintiff promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

38. Whereas there is a substantial body of legal authority in England relating to the provisions of the comparable statutory provision, (section 33 of the Limitation Act 1980,) there is, understandably much less in Guernsey. But I have found it helpful and clearly established. I have carefully taken into account the Judgment of Deputy Bailiff Carey in ***Camacho v Stan Brouard Limited*** (1995) 5

January 1995 at pp.5-11 and the further decision of Deputy Bailiff Carey in ***Mann v St. Pierre Park Hotel Limited and others*** (1999) 28 January 1999. Like the learned Deputy Bailiff, I have found some assistance in the approach of the English courts on comparable questions under the English statute in a long line of recent cases, most of which were cited to me. But I do not find it necessary to overburden this Judgment with any reference these cases; in my judgment, the approach which the Royal Court should take on questions relating to the exercise of the Court's discretion under Section 8 of the 1979 Law is made clear in the two cases of the current Bailiff to which I have referred, whilst remembering, as I do, that all cases of this nature must turn on their own facts.

39. I, therefore, turn to the facts which I have found particularly relevant for me to take into account for the purpose of deciding whether or not I should exercise my discretion under Section 8 in favour of Mrs. Butt so as to allow her to amend the cause and to continue the action against Mr. Brannan.

Prima facie case

40. First, I am satisfied that Mrs. Butt has a prima facie case for compensation for the injuries which she suffered during the course of the [surgical procedures] on 30/31 July 1996 against the surgeon who conducted the procedures, namely, Mr. Brannan. In other words, I do not consider that the case against Mr. Brannan is so inherently weak that the second principle in the Court of Appeal's approach to amendments in ***Ogier v Grande Havre Holdings Limited*** comes into play in this case.

The position of Mr. Brannan

41. I, therefore, turn to consider the position of Mrs. Butt and Mr. Brannan. I start with Mr. Brannan.

42. His conduct within the context of these proceedings has not been criticised, and, in my judgment, Advocate Tee was right to make it clear that no such criticism could properly be made. Accordingly, Section 8(3)(c) of the 1979 Law need not further be addressed.

43. Secondly, I think it is important that Mr. Brannan recorded his immediate memory of the events of 30/31 July 1996 in the letter dictated by him on 8 August 1996 and sent on 12 August 1996 to Mrs. Butt's GP. In this letter Mr. Brannan dealt both with the [original procedure], which he

described as having been "performed without any problems", and with the post-operative emergency [operation], of which he gave a fairly full summary. This letter, (which was, of course, almost as contemporaneous as the operation notes themselves,) would, I think, be likely to assist Mr. Brannan considerably at a trial in recalling the events of 30/31 July 1996.

44. Thirdly, Carey Langlois wrote to Mr. Brannan on 13 January 1997 and, in very general terms, put him on notice that they had been instructed by Mrs. Butt in relation to "treatment she has recently received [.....] … carried out on or around the 30 July 1996". This letter would, in my judgment, have put Mr. Brannan on notice, and ought to have encouraged him to inform his insurers, of the possibility of a claim being brought by Mrs. Butt against him. It is also possible that at that stage, maybe in very general terms, his insurers would have used the good practice of obtaining general instructions from Mr. Brannan of what he could recall of the events in question. In any event, the hospital notes, including post-operative notes, are still available to refresh the memory of any witness called by Mr. Brannan at a trial who attended either operation on 30/31 July 1996.

45. Fourthly, the proposed amendment to the cause would introduce a new claim against Mr. Brannan, almost three years after the "new" cause of action would otherwise have become statute-barred under Section 5 of the 1979 Law, and, if the amendment were permitted, the protection he would otherwise have enjoyed between 27 October 1999 and the date of the application for permission to amend, namely, 12 August 2002, would, in the words of Deputy Bailiff Carey, "be at a stroke set aside" - see ***Mann v St. Pierre Park Hotel*** at p.5. It is fair to say, in my judgment, that whereas Mr. Brannan might have been reasonably confident of disposing of Mrs. Butt's claim based on lack of informed consent when a trial arose, the challenge to his professional expertise raised by the proposed amendment could well be regarded by him as a more serious matter altogether.

46. Fifthly, whilst it was suggested on his behalf by Advocate Collas that the memory of witnesses, including the anaesthetist and any nurses, would be pretty stale, I consider that as far as Mr. Brannan is concerned the contemporaneous documents, or the documents created very soon after 30/31 July 1996, would stand to remind Mr. Brannan and others with sufficient clarity what had happened during the [original procedure and the emergency operation].

47. I conclude that, on an evidential basis, Mr. Brannan would not be unfairly prejudiced by the proposed amendment.

The cogency of Mrs. Butt's evidence at trial

48. I am convinced, having heard Mrs. Butt give oral evidence to the Court, including the Jurats, on 13 November 2003, that it would be hard to contend that her evidence was or was likely to be less cogent than if the action had been brought by about 27 October 1999. Her memory of the events which she could herself recall appeared to me to be reasonably clear and I, therefore, consider, in the context of Section 8(3)(b) of the 1979 Law, that there is no reason to be further concerned that the passing of the years since that date has adversely affected her cogency as a potential witness. In other words, I conclude that she will be, or is likely to be, as cogent at a trial later in 2004 or in 2005 as she would have been at a trial on the proposed "new" cause of action before about 27 October 1999.

49. This factor may not, however, be all that strong since she accepted in her oral evidence that at the time of the emergency [operation] she "was very groggy, but the commotion around me was enough for me to know that there was something seriously wrong but that there was nothing I could do about it." This suggests, I think, that her evidence about the events of 30/31 July 1996, *i.e.* on the issue of liability, is unlikely to be of central importance at any trial.

Delay on the part of Mrs. Butt's legal and medical advisers

50. If the matters which I have already addressed were the only matters upon which Mr. Collas relied in defending the application for leave to amend, I would have granted the application readily. But other serious matters were also relied upon by Mr. Collas.

51. Difficult questions arise in this case relating to the exercise of the Court's discretion under Section 8(3)(a), (e) and (f) of the 1979 Law, which can, I believe, largely be dealt with together. In doing so, I must consider the length of, and reasons given for, the delay on the part of Mrs. Butt and her legal and medical advisers in attempting at this stage of the action to bring before the Court a claim against Mr. Brannan based on alleged negligence in the operating theatre on 30/31 July 1996.

52. Section 8(3)(e) of the 1979 Law specifically requires me to consider the extent to which Mrs. Butt acted promptly and reasonably after 26 October 1996, the date of her knowledge within the context of Section 5(4)(b). Thus, any culpable delay attributable to either Professor Stanton or Carey Langlois has to be taken into account as part of the circumstances of the case.

53. First, I have concluded on the basis of her own oral evidence on 13 November 2003 and the contemporaneous correspondence that Mrs. Butt was not personally responsible for Professor Stanton's changes of mind in relation to her possible claims against Mr. Brannan and Mr. Haskins. Nor do I ascribe any personal responsibility to her for the long delay which occurred between Professor Stanton's letter dated 12 January 2000 and the telephone meeting of medical experts, Professor Stanton and Mr. Jarvis, which led to their agreed statement dated 31 January 2002, under which Professor Stanton's first opinion was, in effect, jettisoned by him.

54. I turn to deal specifically with the very long delays which occurred as a direct result of Professor Stanton's failure to produce a report until 27 November 1997 or to deal with Carey Langlois' questions about it until about 8 December 1998 or to deal with Mr. Jarvis' report until 19 December 2000 or to contact Mr. Jarvis with a view to reaching any agreement on the issues in the medical experts' reports until early 2002. Taken singly and in the aggregate, the delays were, in my judgment, unreasonable and, within the context of this litigation, culpable.

55. A further question relates to the way in which Mrs. Butt's Advocates, Carey Langlois, have conducted the litigation on her behalf between, say, about mid-1997 and mid-May 2002, when they informed Collas Day, for the first time, of the instruction of a second medical expert, upon whose evidence Mrs. Butt then wished to rely in support of a contention that Mr. Brannan had been negligent in carrying out both the [original procedure and the emergency operation].

56. On any view, bearing in mind that the limitation period for claims for personal injury under the 1979 Law is, generally, three years, it has taken Mrs. Butt and her Advocates an extremely long time to bring the application for leave to amend before the Court. This was not done until 16 August 2002.

57. Several factors seem to be to be relevant. First, the cause itself was issued on 19 February 1999, when just over eight months were left of the three years limitation period running from about 26 October 1996. This is, of course, permissible but it does, in my judgment, mean that Mrs. Butt and her advisers ought thereafter to have conducted the action as speedily as possible. Whereas litigants are permitted to take as long as they wish to commence proceedings, so long as they do so within the relevant limitation prescription period, the length of time actually taken is, in my judgment, relevant under Section 8(3)(e) of the 1979 Law. I have decided that it would not be just to hold against Mrs. Butt personally the length of time which was taken between obtaining

advice from her medical expert and starting proceedings. But it is also to be noted that no date for a trial was fixed and I have to conclude that the proceedings have not been prosecuted by Mrs. Butt with any obvious eagerness to have a trial as soon as possible.

58. Secondly, in her affidavit sworn on 12 November 2002 (paragraphs 6 & ff.) Advocate Tee explained that Mrs. Butt had chosen not to rely on Professor Stanton's letter of 12 January 2000 when it was first received, and the correspondence between Carey Langlois and Professor Stanton, (or more accurately mostly on the part of Carey Langlois, who had to chase Professor Stanton on a very large number of occasions for any reaction at all to occur,) certainly shows that it took Carey Langlois until at least 28 December 2000 to get any further opinion out of him and until 23 February 2001 to get a further report out of him, which was in due course disclosed to Collas Day by letter dated 20 March 2001.

59. In my judgment, although Professor Stanton was primarily responsible for this long period of delay in prosecuting the proceedings, this does not fully absolve Carey Langlois from possible responsibility for not applying for leave to amend the cause to add a further cause of action soon after receiving Professor Stanton's letter dated 12 January 2000 alleging further negligence on the part of Mr. Brannan in the operative procedures on 30/31 July 1996. For, whatever the other defects in the letter dated 12 January 2000 perceived by Advocate Tee at the time, Professor Stanton did indicate in that letter his conclusion that Mr. Brannan had been negligent in the operative procedures.

60. I do not, therefore, accept that the need to clarify other matters with Professor Stanton justified a decision on the part of Carey Langlois, to wait until other questions were answered by Professor Stanton before applying to the Court for leave to amend the cause. I doubt whether the fact that, when he finally advised further on 28 December 2000 Professor Stanton seemed to have changed his mind again on the question of such alleged negligence adds very much to the matter, save, perhaps, that it may indicate the difficulty of Carey Langlois' position in seeking to represent their client in difficult circumstances.

61. In my judgment, it is material to the exercise of my discretion whether Mrs. Butt may have an arguable case against Carey Langlois for damages for breach of their duty of care to her in taking so long to apply to the Court, (first having given notice to Collas Day,) for leave to amend the cause. I have not been able to assess with any certainty the chances of such a claim succeeding. Whereas I recognise there *might* be an arguable case available to Mrs. Butt against Carey

Langlois in relation to the very considerable delays in the case, I also see difficulties in her way and I conclude that such difficulties might be serious ones.

62. So far as I am able, I conclude that her chances of pursuing Carey Langlois for damages are neither good nor reasonably good. I shall, therefore, largely discount the possibility that Mrs. Butt would retain a valuable right against her Advocates if I were to decline to exercise my discretion in her favour.

63. In the period between 23 February 2001 and 31 January 2002 Mrs. Butt's claim proceeded on the basis of Professor Stanton's view which prevailed during that period, (which was apparently a continuing view up to his conversation with Mr. Jarvis on 31 January 2002,) that Mr. Brannan had been negligent in failing fully to inform Mrs. Butt about her operation so that she could give informed consent, but not negligent in the performance of either of the operations on 30/31 July 1996. During this period Carey Langlois made many attempts to get Professor Stanton to contact Mr. Jarvis and I consider that they took all reasonable steps to arrange such contact; the real reason for the delay seems to me that Professor Stanton did not make himself available to discuss matters with Mr. Jarvis, despite all attempts by Carey Langlois to get him to do so.

64. The next period of time which I must consider is also relevant. As I have already said, the agreement of Professor Stanton and Mr. Jarvis comprised in their joint letter dated 31 January 2002 effectively scuppered Mrs. Butt's then pleaded cause against Both Mr. Haskins and Mr. Brannan. I do not consider that Mrs. Butt and her Advocates delayed unreasonably in instructing Professor Morris; nor, in my judgment, did he delay unduly in producing his two reports. Nor did Carey Langlois unreasonably delay further once they had received the two reports, in sending the operative one to Collas Day and drafting an amended cause to give effect to the conclusions of Professor Morris. The fact that it took Carey Langlois a further period of just under three months to apply to the Court for leave to amend the Cause is regrettable, but Collas Day had to be chased for their response and the response only came on 2 July 2002.

65. Before I reach my conclusion as to the exercise of the Court's discretion under Section 8 of the 1979 Law I record, in relation to Section 8(3)(f), that, in my judgment, the steps taken by Mrs. Butt *to obtain* medical and legal expert advice were taken both promptly and reasonably. As must be clear from this Judgment, I have carefully considered also the nature of the medical advice and the legal advice that she received. These matters are reflected in my summary of the facts earlier in this Judgment.

Decision

66. Whilst it cannot be Mrs. Butt's fault that her chosen medical expert changed his mind and pulled the rug from under her feet at a time when over two years and three months had passed since the expiry of the limitation period under Section 5(4)(b) of the 1979 Law, the delay in the case, when taken in separate periods and in the aggregate, is very serious indeed. But I have decided that this delay alone would not make it equitable for me to refuse to apply Section 8 in her favour if there were other matters which weighed heavily in the balance in her favour. I consider that such other matters do come into play in this case.

67. Primarily, I consider that it is more likely than not that the main issues at any trial will turn largely on the evidence of Mr. Brannan, backed up, if thought appropriate, by Mr. Cooper, the anaesthetist, and nurses, and upon the opinions of the two medical experts, Mr. Jarvis for Mr. Brannan and Professor Morris for Mrs. Butt. The medical experts and probably Mr. Brannan himself, will, I think, depend for their understanding of the relevant facts largely upon the contemporaneous medical and hospital notes and upon the letter from Mr. Brannan to Mrs. Butt's GP dated 12 August 1996 and it is clear from Mr. Jarvis' expert's report delivered on 21 November 1999 that he had at that time considered the possibility of an allegation being made against Mr. Brannan that he had been negligent during the operations on 30/31 July 1996 and had also felt able to express a clear view as a medical expert that Mr. Brannan had not acted in negligent breach of his duty of care to Mrs. Butt.

68. In weighing the material before the Court I conclude, in the exercise of my discretion, that the answer to the question, Would it be equitable to allow the action to proceed against Mr. Brannan on the new cause of action pleaded in the proposed amended Cause is "Yes". I have not found this an easy decision to reach. But I have concluded that it would be fair and just to allow the action to proceed. I, therefore, grant Mrs. Butt leave to amend her Cause in a form to be lodged in Court within 14 days largely upon the lines of the draft Amended Cause to which the original application for leave to amend dated 16 August 2002 related.

69. I shall be available to hear any applications which may result from the delivery of this Judgment, including any directions hearing, in the near future. I would, therefore, ask the Advocates to the parties to contact the Royal Court to arrange for such a hearing.

PATRICK TALBOT QC

LIEUTENANT BAILIFF

31 March 2004