

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Side**

**2007/CLE/gen/FP/00118**

**BETWEEN**

**WENDY WILLIS JOHNSON**

**Plaintiff**

**AND**

**KEITHRELL HANNA**

**Defendant**

**BEFORE:** The Honourable Justice Andrew Forbes

**APPEARANCES:** Mr. Paul Wallace Whitfield for the Plaintiff/Appellant  
Mr. Adrian Hunt for the Defendant/Respondent

**HEARING DATE:** December 2, 2021

**R U L I N G**

## **Forbes, J**

### Appeal of Registrar's Decision to Refusing Plaintiff's Application for Interim Payment

#### **Introduction**

1. The parties are before the Court on an appeal from a decision made by then Assistant Registrar Renaldo Toote on June 17, 2021 whereby he denied the Plaintiff's application for an interim payment.
2. The Plaintiff/Appellant filed her Notice of Appeal on June 24, 2021 for an Order,
  - (i) Allowing the appeal;
  - (ii) Setting aside the entire decision, ruling or judgment of the Assistant Registrar dated June 17, 2021 and made June 21, 2021;
  - (iii) Ordering the Defendant to pay to the Plaintiff by way of interim payment the sum of B\$750,000.00 or such other sum as the Court shall think fit by way of interim payment on account of damages in respect of the Plaintiff's claim herein not later than seven (7) days from the date of the Order.

In support of her appeal the Plaintiff/Appellant relies on the Plaintiff's Skeleton Argument filed December 6<sup>th</sup>, 2021. The Plaintiff also relies on her Affidavits filed on February 5<sup>th</sup>, 2019 and April 8<sup>th</sup>, 2021 respectively.

3. The Defendant/Respondent opposes the Notice of Appeal and relies on the Skeleton Arguments of the Respondent/Defendant dated December 7<sup>th</sup>, 2021 and the Affidavit of Zia A. Lewis-Adams filed October 21<sup>st</sup>, 2020 in support of his opposition.
4. The history of this matter is protracted and long. However, for the purposes of this ruling I will only refer to the relevant facts relating to the appeal before me.
5. By a Generally Indorsed Writ filed April 23<sup>rd</sup>, 2007 the Plaintiff commenced this action against the Defendant for damages arising for personal injuries, loss and damage occasioned by a car accident on November 18<sup>th</sup>, 2004.

The Notice to Insurers was filed on April 30<sup>th</sup>, 2007 and a Memorandum of Appearance was filed July 11<sup>th</sup>, 2007. The Plaintiff subsequently filed her Statement of Claim on October 8<sup>th</sup>, 2009 whereby she provided the particulars of negligence, particulars of special damages in the sum of \$308,504.44 and particulars of injury. A Judgment in Default of Defence was filed April 9<sup>th</sup>, 2010 as the Defendant failed to file his Defence within the time required.

An Order was made on July 21, 2010 setting aside the Statement of Claim filed October 8<sup>th</sup>, 2009 and Judgment in Default entered on April 8<sup>th</sup>, 2010. The Plaintiff was given leave to amend her Statement of Claim on January 21<sup>st</sup>, 2011 and filed her "Amended" Statement of Claim on the same date. A Judgment in Default of Defence was entered on March 28<sup>th</sup>, 2011 as the Defendant failed to file his Defence within the time required. Between 2013 and 2014 the parties appeared before the Deputy Registrar for the Assessment of Damages portion of the Plaintiff's claim. However, a review of the file shows that the last hearing date was February 26<sup>th</sup>, 2014.

6. By Summons filed February 5<sup>th</sup>, 2019 the Plaintiff sought an Order pursuant to **Order 29, Rule 10 of the Rules of the Supreme Court** ("the RSC") that the Defendant pay to her by way of an interim payment the sum of \$750,000.00 or such other sum the Court thought fit as a result of the damages in respect of her claim. The grounds of the application were that the Plaintiff obtained a Judgment in Default on March 28<sup>th</sup>, 2011 against the Defendant for damages to be assessed and that the Defendant via his attorney during the Assessment of Damages hearing on November 14<sup>th</sup>, 2013 admitted liability for the Plaintiff's claim. The Plaintiff in support of her application relied on her Affidavit filed on February 5<sup>th</sup>, 2019. The Plaintiff also filed a Summons on April 17<sup>th</sup>, 2019 for the same Order pursuant to **Order 29, Rule 10 of the RSC** containing the same grounds. The Plaintiff relied on her Affidavits filed February 5<sup>th</sup>, 2019 and April 8<sup>th</sup>, 2021 and her submissions filed April 13, 2021. In opposition to the Plaintiff's application for interim payment the Defendant filed the Affidavit of Zia Lewis-Adams on October 21, 2020 and relied on Skeleton Arguments of the Defendant filed April 26, 2021. Then Assistant Registrar Tooté rendered his Ruling on June 17<sup>th</sup>, 2021 dismissing the Plaintiff's application for an interim payment on the basis that if the Plaintiff is awarded an interim payment

she would not advance the action and if wrong in that finding the Plaintiff's failure to comply with the provisions of **Order 29, Rule 11 of the RSC** precluded him from making such an award.

7. As a result of the decision the Plaintiff/Appellant filed her Notice of Appeal on June 24<sup>th</sup>, 2021 appealing the Assistant Registrar's substantive decision.

### **Affidavit Evidence**

8. The Plaintiff in support of her application relies on her two Affidavits filed February 5<sup>th</sup>, 2019 and April 8<sup>th</sup>, 2021. Her evidence in part is that on March 28<sup>th</sup>, 2011 she obtained Judgment in Default of Defence against the Defendant for damages to be assessed and that the Defendant via his attorney during the Assessment of Damages hearing on November 14<sup>th</sup>, 2013 admitted liability for her claim as contained in the Statement of Claim.

She further states that she has sustained special damages amounting to \$456,914.44 and continuing, particulars which appear in the Statement of Claim. She also states that she intends to rely on the bundle of hospital and medical records in the Plaintiff's Bundle of Documents as she had been advised by her attorney to do so to avoid unnecessary duplication of pleadings and documents.

9. The Plaintiff's second Affidavit contains the same evidence, however the bundle of hospital and medical records that she intends to rely on in support of the application have been exhibited to the Affidavit.
10. The Defendant in response to the Plaintiff's application filed the Affidavit of Zia Lewis-Adams on October 21, 2020. Mrs. Lewis-Adams' evidence in part is that she is an Associate Attorney with the firm that acts on behalf of the Defendant. She states that she was advised by Ms. Shantelle Munroe, the previous attorney who had carriage of the matter that the last hearing date of the Assessment was February 26, 2014 and that the Defendant had not completed his cross-examination of the Plaintiff's witness, Dr. Edward Lazzarin.

She further states that the said Assessment was scheduled to continue on December 12<sup>th</sup>, 2018 but the Plaintiff has been unwilling or unable to proceed with the continuation of the Assessment and as a result the Defendant has been unable to conclude his examination of Dr. Lazzarin.

Additionally, she states that at the instance of the Defendant, the Plaintiff was medically examined by Dr. Jay G. Stein of Florida, USA and as a result of that examination two medical reports were produced dated January 19<sup>th</sup>, 2012 and January 29<sup>th</sup>, 2014 which concluded that the Plaintiff suffered a degenerative condition and that the impairment complained of in this action did not result from the alleged accident. Mrs. Lewis-Adams also states that Plaintiff in her Affidavit filed March 19<sup>th</sup>, 2019 has and continues to do everything necessary to bring this matter to a conclusion, however the Plaintiff has failed to address the failure and/or refusal on her part to produce Dr. Lazzarin to continue the Defendant's cross-examination and/or conclude the Assessment.

Further, she deposes that the Plaintiff now seeks an interim payment of \$750,000.00 but has failed to provide an Affidavit in support of the application as required by **Order 29, Rule 11(1) of the RSC**. Lastly, that the Defendant opposes the application on the basis that the Plaintiff's conduct in seeking an interim payment while the said Assessment is pending is or amounts to an abuse of this Court's process; the amount sought is excessive, unsubstantiated, and/or wholly disproportionate to any sums that could be awarded to the Plaintiff, having regard to the Stein reports; and the Plaintiff failed to comply with the requirements of **Order 29, Rule 11 of the RSC**.

## **Issues**

11. The issues to be determined by the Court on such an application is:
  - a. whether the Plaintiff satisfies the conditions contained in **Order 29, Rule 12 of the RSC**; and
  - b. If so, what is a reasonable proportion of the damages likely to be recovered by the Plaintiff?

12. It is not disputed between the parties that an appeal to a Judge in Chambers from a decision of a Registrar is dealt with by way of an actual rehearing of the application which led to the order/ruling/decision under appeal. While the Court at this juncture gives the weight it deserves to the previous decision of the Assistant Registrar the Court is not bound by his decision. (**Notes to the White Book 1999, 58/1/3, page 967 and Lord Atkin in Evans v Bartlam [1937] A.C. 473 at page 478**). Therefore, there is no need for the Court to address Counsel's submissions on the point and will now refer to the relevant portions of Counsel's submissions that deal with the application for interim payment.

### **Submissions**

13. Counsel for the Plaintiff, Mr. Paul Wallace Whitfield submits in part that in an action for personal injuries, the Plaintiff may at any time after the time limited for the Defendant to enter an Appearance to the action has expired, apply to the Court for an Order for an interim payment and refers the Court to **Order 29, Rule 10 of the RSC**. He further submits that on the hearing of the said application the Court may, if it is satisfied that the Plaintiff has obtained judgment against the Defendant with damages to be assessed, and that the Defendant is insured in respect of the Plaintiff's action, order that the Defendant do make to the Plaintiff an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court, are likely to be recovered. **See Order 29, Rule 12 of the RSC.**

14. Mr. Whitfield submits that the Plaintiff brought an action against the Defendant on April 23<sup>rd</sup>, 2007 for damages for personal injuries and consequential loss sustained in a road traffic collision on Pioneers' Way, Freeport, Grand Bahama on November 18<sup>th</sup>, 2004. Further, he states that the Plaintiff entered Judgment in Default of the Defendant's Defence and that the Defendant was at the material time of the accident insured. He contends that the attorneys currently acting for the Defendant are subrogating on behalf of the Defendant's insurers.

15. It is his submission that the particulars of the Statement of Claim together with the medical reports, receipts, vouchers and the evidence of the Plaintiff to date before the Registrar

in the assessment of damages hearing all show that the Plaintiff suffered very serious injuries as a consequence of the Defendant's negligent driving and has incurred special damages not less than \$456,914.44 and continuing. He contends that the Defendant failed to plead contributory negligence or pre-existing conditions as he failed to enter a Defence and has failed to adduce any evidence of such at trial since there was none.

16. Mr. Whitfield asserts that the Court is obliged to assess the likely amount of final judgment leaving out of account the heads of future loss. He submits that the assessment should comprise only of special damages to date and damages for pain, suffering and loss of amenity with interest on both. In support of his submission Mr. Whitfield refers the Court to **Super Value Food Stores Limited and Francisco Francois v Yvonne Rahming SCCiv App No. 256 of 2017**. He also submits that the figure requested on this application relates only to special damages and makes no reference to pain, suffering and loss of amenities or any other heads of damages. Further, the Plaintiff has expended considerable funds to this point in terms of surgery and attended expenses for \$456,000.00 and that special damages is pleaded in the amount of \$456,919.41.
17. Counsel for the Defendant/Respondent, Mr. Adrian Hunt submits in part that the Plaintiff's application amounts to an abuse of process. He concedes that a party can apply for an interim payment at any time. However, he asserts that the Defendant's opposition is the issue of causation as his position is that the injuries complained of by the Plaintiff were not caused by the accident.

Further he submits that it is well settled principles of tort that a party can only be liable for the injuries that flow from the acts complained of against them. He refers the Court to the case of **Ruffin Crystal Palace Limited v Laniccini Brathwaite [2013] 1 BHS J. No. 65** and submits that the case is instructive on how the said principle works in the context of an Assessment following a default judgment. Mr. Hunt submits that the Plaintiff's failure to continue and conclude the Assessment the Respondent has been prevented from leading its own expert evidence on the issue of causation.

Further, he contends that their own expert Dr. Stein's intended evidence is diametrically opposed to the evidence of Dr. Lazzarrin who supports the Plaintiff's position that the accident caused her injuries and current condition. Additionally, he submits that the Plaintiff has abandoned the Assessment and instead of pursuing the same now seeks an interim payment of a substantial sum without demonstrating any commitment to pursuing and concluding the Assessment which she is obliged to do.

Moreover, he states that the evidence of Dr. Stein if accepted would demonstrate that the Plaintiff at the conclusion of the Assessment would be entitled to a sum far less than the \$750,000.00 claimed. It is his submission that the conduct of the Plaintiff is preventing the Court from its chief duty of adjudicating the issues in dispute between the parties in a fair, just and proper manner.

18. Mr. Hunt submits that there is no evidence to show that the Appellant has taken any steps towards concluding the Assessment. He refers the Court to the case of **Grovit et al v Doctor and Others [1997] 2 All ER 417** and submits that that case shows the courts willingness to find that a long period of inactivity on a part's conduct resulting in a failure to advance their claim can amount to an abuse of process. Additionally, he submits that the instances of "abuse of process" are not exhaustive and the Court retains a discretion as to what conduct can be deemed to be an abuse of conduct. **See the 1999 Supreme Court Practice at paragraph 18/19/18**

19. Mr. Hunt further submits the Plaintiff's failure to conduct and conclude the Assessment prevents the Court from carrying out any proper exercise of its discretion to award an interim payment and refers the Court to the provisions of **Order 29, Rule 12 of the RSC**. He asserts that this provision establishes that regardless of the basis relied upon for an interim payment, the Court can only exercise its jurisdiction to grant the same if it satisfied that the amount to be awarded is a reasonable proportion of the damages which are likely to be recovered by the Plaintiff. He refers the Court to the ruling of Justice Charles in **Rahming v Super Value Food Stores Limited and Another [2017] 2 BHS J. No. 114** in support of his submission. It is his further submission that the said ruling demonstrates that the overriding concern for the Court is to be wary of the risk of



allowing an overpayment to the party while not depriving them of any sums to which they are entitled.

Moreover, he asserts that this balancing exercise conducted by the Court requires an assessment of the amount of the likely final judgment and not merely reaching an arbitrary decision that any sum sought as an interim payment is reasonable. Therefore, he submits that in the instant matter it is difficult to appreciate how the Court can properly exercise its discretion until and unless the issue of causation is resolved and that the Plaintiff's only response to this issue and satisfying any test is making a request for the significant special damages which she claims to have incurred.

Additionally, it is his submission that the Court cannot be satisfied as to the likely amount of the "expired" Judgment as the Court at this point does not have the ability to say how and whether the evidence of Dr. Stein (on behalf of the Defendant) will be accepted and potentially assess and conclude what the final sum of any likely judgment would be.

20. Mr. Hunt also submits that no Affidavit in support was filed with the Summons (filing date February 17, 2019) or cited to the Court. He submits that **Order 29, Rule 11 of the RSC** makes the filing of a supporting affidavit on an interim payment application mandatory. Further, he contends that the said provision makes it clear that the supporting affidavit is critical to attest to the evidence supporting the said application. Moreover, he submits that such a failure is not a technical point that can be easily dismissed but is a material defect which cannot be overlooked and refers to the notes of the **Supreme Court Practice 1979 at paragraph 29/18-21/6**. Therefore, he submits that there was no Affidavit filed with the Summons and the Plaintiff has not complied with the said rule and as such the application should fail. Moreover, he submits that the Plaintiff has not placed any evidence before the Court to suggest that the report of Dr. Stein as exhibited to the Affidavit of Zia Lewis-Adams ought to be disregarded.

21. The Plaintiff in reply to several of the Defendant's submissions contends that:-

- a. **Order 29, Rule 11(2) of the RSC** provides that the Summons and a copy of the Affidavit in Support and any exhibits referred to must be served on the Defendant 10 clear days before the return date and that the Plaintiff complied;
- b. the Defendant's arguments about causation is confusing in that causation and liability are the same thing;
- c. that the Plaintiff's entering of the Default Judgment precludes the Defendant for attempting to adduce evidence as to liability/causation and that an assessment of damages is for the only purpose of assessing damages;
- d. a hearing date for the continuation of the Assessment was scheduled for December 12<sup>th</sup>, 2018, but the Plaintiff's doctor declined to appear as she was unable to pay him his per diem and that Counsel for the Defendant had asked for the date to be rescheduled to accommodate the Defendant to call his foreign doctor to give evidence;
- e. the Plaintiff has been surviving off of recycling bottles, cans, copper, aluminum, and baking and cooking for friends, colleagues and associates and that an interim payment would put her in a position to pay the per diem for her doctor and complete the assessment.

22. Mr. Hunt in response to the Plaintiff's reply objects on the basis that Counsel for the Plaintiff is attempting to put matters before the Court that is not in evidence and should have placed the Plaintiff's inability to secure and/or produce her doctor in an Affidavit before the Court.

## **Analysis & Discussion**

### **The Law**

23. **Order 29, Rule 10 of the RSC** states:-

"In an action for personal injuries the plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to appear has expired, apply to the Court for an order requiring that defendant to make an interim payment."

**24. Order 29, Rule 11 of the RSC states:-**

- “(1) An application under rule 10 must be made by summons, stating the grounds on which the application is made, and be supported by an affidavit, which must —
- (a) Verify the special damages, if any, claimed by the plaintiff up to the date of the application;
  - (b) Exhibit the hospital and medical reports, if any, relied upon by the plaintiff in support of the application; and
  - (c) If the plaintiff’s claim is made under the Fatal Accidents Act, contain the particulars mentioned in section 9 of the Act.
- (2) The summons and a copy of the affidavit in support and any exhibit referred to therein must be served on the defendant against whom the order is sought not less than 10 clear days before the return day.
- (3) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown by reason of a change of circumstances.”

**25. Order 29, Rule 12 of the RSC states:-**

- “(1) If, on the hearing of an application under rule 10, the Court is satisfied —
- (a) That the defendant against whom the order is sought (in this paragraph referred to as “the respondent”) has admitted liability for the plaintiff’s claim; or
  - (b) That the plaintiff has obtained judgment against the respondent for damages to be assessed; or
  - (c) that, if the action proceeded to trial, the plaintiff would succeed in the action on the question of liability without any substantial reduction of the damages for fault on his part or on the part of any person in respect of whose injury or death the plaintiff’s claim arises and would obtain judgment for damages against the respondent or, where there are two or more defendants, against any of them, the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the

damages which in the opinion of the Court are likely to be recovered by the plaintiff.

### **The Supporting Affidavits**

26. In an effort to provide clarity, it is important to note that the Plaintiff filed two Summonses, February 5<sup>th</sup>, 2019 ("First Summons") and April 17<sup>th</sup>, 2019 ("Second Summons") for interim payment. In support of the first Summons, the Affidavit of the Plaintiff was filed on the same date herein. Subsequently, the Second Summons was filed. However, a review of the file shows that the applications were not heard and was rescheduled on several occasions (Notice of Adjourned Hearings filed November 12<sup>th</sup>, 2019; October 15<sup>th</sup>, 2020 and April 8<sup>th</sup>, 2021). It is unclear however as to which Summons these notices were related to. The Plaintiff filed a second Affidavit in support of her application for interim payment on April 8<sup>th</sup>, 2021. Following this, the matter was heard before then Assistant Registrar Renaldo Toote on April 27<sup>th</sup>, 2021.

27. Mr. Hunt's submission as I understand it, is that there was no Affidavit of Support filed with the Second Summons i.e. there is no Affidavit of Support bearing the same filing date as the Second Summons and as such the Plaintiff has failed to comply with the provisions of **Order 29, Rule 11 of the RSC**.

28. It is difficult to conclude in the face of the Plaintiff's Affidavit filed April 8<sup>th</sup>, 2021 that the Plaintiff has not filed her Affidavit in Support in compliance with **Order 29, Rule 11 of the RSC**. The said rule above requires that any application made under rule 10 must be made by summons and be supported by an Affidavit. The Rules are silent as to whether the said Affidavit in Support must be filed or bear the same filing date as the said Summons. To my mind, I am of the opinion that the Rules are not so inflexible that a Plaintiff seeking interim payment especially for an action for damages resulting from personal injuries would be precluded from filing any additional affidavit evidence once a Summons has been filed. Moreover, a Plaintiff may have additional evidence for the Court to consider during the hearing which may not have been available at the time of the filing of the Summons. It is evident that the Defendant is not attacking the contents of the said Affidavit but rather suggests that the Plaintiff did not file the said Affidavit on the same

date as the Summons. Nevertheless, the Defendant has not provided this Court any authority in support to his submission that the Affidavit in Support of the Summons must bear the same filing date as the said Summons.

29. Therefore, I find that the Plaintiff has indeed met the requirement as provided by the provisions of **Order 29, Rule 11 of the RSC** and accepts the submission of Mr. Wallace-Whitfield that the provisions state that the Summons and a copy of the Affidavit in Support should be served on the Defendant ten (10) clear days before the Summons return date to which the Plaintiff complied.

#### **Discretion of the Court? Reasonable Sum?**

30. The power of the Court on an application pursuant to **Order 29, Rule 12(1)** is discretionary as the language contained in the said provision is that the Court "may" make an order.

31. **Order 29, Rule 12 of the RSC** provides that the Court must be satisfied on the hearing of such application that the Defendant against whom the order is sought has admitted liability for the Plaintiff's claim; or the Plaintiff has obtained judgment against the respondent for damages to be assessed; or if the action proceeded to trial, the Plaintiff would succeed on the question of liability without any substantial reduction of the damages for fault on her part.

32. The Plaintiff obtained a Default Judgment in this action on March 28<sup>th</sup>, 2011. A review of the Court file shows that no application was made to set aside the Default Judgment after it being entered. Further, the matter was subsequently set for the assessment of damages hearing whereby the Plaintiff and her witnesses inclusive of Dr. Edward Lazzarin gave evidence and were cross-examined by Defence Counsel.

#### **Causation/Liability?**

33. Mr. Wallace Whitfield has submitted that the Defendant is precluded from attempting to adduce evidence as to liability/causation as the purpose of an assessment of damages is

to assess damages. The Defendant has submitted that while liability has been conceded, the issue of causation remains live. Mr. Hunt referred the Court to **Ruffin Crystal Palace Limited v Laniccini Brathwaite (supra)** and submitted that their Lordships recognized that a Judgment in default was no bar to causation being a live issue on the subsequent assessment of damages and quoted paragraphs 13 to 15 of the judgment.

34. However, in **Ruffin Crystal Palace Limited v Laniccini Brathwaite (supra)** their Lordships determined that the Appellant's negligence which resulted in the Appellant's fall and subsequent treatment by Dr. Barnett was wholly necessitated by the Appellant's negligence.

Moreover, they found that the Appellant did not plead contribution by a third party in its defence nor add Dr. Barnett as a third party to seek a partial indemnity or contribution. Further, they stated that the Appellant admitted liability without reservation, hence the issue of liability in respect of the Respondent's claim was settled by the Appellant's admission and the entry of judgment. They determined that having admitted liability as the appellant did and in the absence of joining Dr. Barnett the Appellant could not go behind the judgment to claim a partial indemnity or contribution by a third party who is not a party to the action. The appeal was subsequently dismissed.

35. In its determination of a grant of an order for interim payment, the Court also takes into account any set-off, cross-claim or counterclaim or any allegation of contributory negligence. As I understand Mr. Hunt's submission, the Defendant while accepting liability disputes causation and seeks to challenge the Plaintiff's injuries. The filing of the Default Judgment and the Defendant's decision not to make an application to set aside the same, I find bars the Defendant from now disputing the issue of causation. The Defendant has already conceded liability and in following the decision of **Ruffin Crystal Palace Limited v Laniccini Brathwaite (supra)** it is no longer open to the Defendant to dispute causation which in essence is an attempt to dispute liability.

36. Considering the above provisions of **Order 29, Rule 10, 11 and 12 of the RSC** and the above case law it is evident that the Plaintiff meets the conditions, I find that the Plaintiff

has satisfied this Court that she is entitled to an interim payment. Therefore, the Court must now consider what a reasonable proportion of the damages likely to be recovered by the Plaintiff after taking into consideration any relevant contributory negligence, set-off, cross-claim or counter-claim on which the Defendant may be entitled to rely.

37. Counsel for the Plaintiff and the Defendant both helpfully referred the Court to the Supreme Court and Court of Appeal rulings of **Yvonne Rahming v Super Value Food Stores Limited and Francisco Francois [2017] 2 BHS J No. 114** and **Super Value Food Stores Limited and Francisco Francois v Yvonne Rahming, SCCivApp No. 56 of 2017** in support of their submissions.

38. The brief facts of the case are that the Plaintiff (Yvonne Rahming) applied for an interim payment following the commencement of her action for personal injuries as a result of the Defendants alleged negligence whilst browsing grocery items and produce for purchase at the First Defendant's supermarket.

The Defendants in their Defence alleged contributory negligence of the Plaintiff resulting in the accident. During the application for interim payment the Defendants argued that in order for the Plaintiff to obtain the said payment under Order 29, Rule 10 she must demonstrate a real need for the interim payment and she failed to meet that threshold requirement.

The Plaintiff brought her application pursuant to several grounds, namely that the Defendants had no defence to the Plaintiff's claim on the issue of liability and the Plaintiff lost significant avenues of revenue as a result of her injuries and was forced to take out a loan to cover her medical expenses, having regard to the nature of the injuries involved, the need for additional physical therapy and medical treatment and in considering the Court's calendar the assessment of damages hearing not likely to be heard and determined in the very near future; in the event the action proceeded to trial on the issue of liability, the Plaintiff would likely obtain Judgment against the Defendants without any substantial reduction of the damages for fault on her part; the Defendants' means and resources are such that they are able to make the interim payment sought by the Plaintiff and that the

Plaintiff is currently experiencing extreme financial and emotional hardships and difficulties as a result of her injuries.

39. Justice Charles, in her ruling stated that the Court when determining the amount of an interim payment, the assessment should comprise only of special damages to date and damages for pain, suffering and loss of amenity, with interest on both.

The Judge considered the injuries alleged by the Plaintiff and referred to the relevant chapters as found in The Judicial College Guidelines, 13<sup>th</sup> Edition to estimate the range of awards applicable to the Plaintiff's injury, that being a range of £10,530 and £17,600 (\$13,303.60 to \$22,235.84).

The Plaintiff also claimed special damages in the amount of \$8,841.55 however Counsel for the Defendants challenged the invoices and submitted that special damages should only be \$5,000 considering the Court found the consumer loan of \$3,000 to be reasonable. Counsel for the Plaintiff submitted that the total expected award of damages was likely to be in the range of \$22,145 and \$31,077.39 and that the Plaintiff should receive 50% of the total damages as an interim payment representing special damages, pain, suffering and loss of amenities. Therefore, she sought the sum of \$11,072.50 to \$15,538.70 as the interim payment.

Justice Charles in exercising her discretion awarded the Plaintiff the sum of \$10,000.00 as an interim payment. Ultimately she held that on an application for interim payment the Plaintiff is not required to demonstrate a particular need beyond the general need to be paid her damages as soon as reasonably possible and the Court should not, when considering whether to order such payment, investigate how the money is to be used.

The Court also held that there is an evidential burden on the defendant to put before the Court material raising the issue of contributory negligence and that in the instant case the Defendants did not discharge that burden as the Affidavit they relied on contained inadmissible evidence.



40. The decision of the Learned Judge was appealed by the Defendants seeking an order to set aside the interim payment and challenging the Judge's order on the ground that she failed to conduct the assessment called for in the case.

The Board dismissed the appeal and subsequently determined that while it would have been useful for the Learned Judge to provide a more definitive figure as to what she considered the likely amount awarded as damages to the Respondent it was not a fatal flaw. Moreover, as an appellate court, the Board does not interfere with the exercise of a Judge's discretion unless it is clearly satisfied that the discretion has been exercised on a wrong principle; should have been exercised in a contrary way or that there has been a miscarriage of justice. Lastly, the Board determined that the Learned Judge having determined that the Respondent would succeed at trial and recover substantial damages was entitled to make an award and the amount awarded was well within the limits of the estimate of the ultimate damages and is very unlikely to exceed a reasonable proportion of damages ultimately to be awarded.

41. As stated by Justice Charles in **Yvette Rahming v Super Value et al (supra)** at paragraph 13 "The word "satisfied" in this context means that the Court, on the evidence currently before it, has formed the view that, on a balance of probabilities, the plaintiff will succeed at trial.

The rule allows an order to be made against the particular defendant in relation to whom the Court is "satisfied". It also applies both to claims in which there is one defendant and in which there is more than one defendant.

The Court must not order interim payment of more than a reasonable proportion of the likely amount of the final judgment. The Court must take into account any contributory negligence."

42. Additionally, the Court must be "satisfied" that the Plaintiff will obtain Judgment for substantial damages or for a substantial sum apart from damages and costs. **See The Supreme Court Practice Volume 1, page 556 at Notes 29/11/2.**

43. The Plaintiff in this application has submitted that she only seeks an interim payment relative to her pleaded special damages. In support of her special damages she has exhibited numerous receipts to her Second Affidavit.

The Plaintiff has also pleaded in her Statement of Claim numerous injuries to which she alleges she sustained as a result of the accident and also exhibited her medical reports to her Second Affidavit. However, the Plaintiff has submitted that the basis of this application is only for special damages.

44. The assessment exercise that must be done by the Court as stated by Justice Charles in **Yvette Rahming v Super Value et al (supra)** comprises of the consideration of special damages to date and damages for pain, suffering and loss of amenities and interest on both.

Additionally, when considering what is reasonable and proportionate, the Court assesses the likely amount to be received or awarded had the matter gone to trial for special damages and pain, suffering and loss of amenities.

Furthermore, another contributing factor the Court must consider is the potential risk of overpaying the Plaintiff in circumstances where there is uncertainty as to the quantum of damages.

45. The Court has reviewed the medical reports as provided by the Plaintiff in her Second Affidavit and the 13<sup>th</sup> Edition of the Judicial College Guidelines for the Assessment of Damages in Personal Injury Cases ("the JSB Guidelines") to determine a possible range for the Plaintiff's general damages.

The Plaintiff in her Statement of Claim lists her particulars of injuries as:-

- a. Spinal stenosis and lumbar spinal instability at L4-5 with a degenerative painful lumbar disc disease at L4-5 and L5-S1;
- b. Cervical Myofascial Syndrome with underlying Radiculopathy;

- c. C5-6 disc bulging and Spondylosis indenting the ventral aspect of the Thecal Sac with right greater than neural narrowing;
- d. C4-5 there is disc bulging indenting the ventral aspect of the Thecal Sac;
- e. C6-7 there is a left Paracentral Disc Protrusion indenting the Ventrolateral aspect of the Thecal Sac with associated Uncovertebral Spondylosis and Foraminal narrowing;
- f. Straightening of the Cervic Lordosis;
- g. Pelvic injury including joint effusions with evidence of Synovitis;
- h. Fractures and trauma to both hips;
- i. Severe Osteoarthritis to both hips;
- j. Scars to back and hips;
- k. Shortening of left leg by ¼ inch.

46. The Plaintiff in her Second Affidavit provides several medical reports which seeks to outline to some extent her medical history and her injuries resulting from the accident. The most recent medical report dated July 25<sup>th</sup>, 2008 is that of Orthopedic Surgeon, Dr. Edward Lazzarin. In the report under the heading "Final Impression" he states that he feels that the patient's medical problems are entirely as a result of her motor vehicle accident and that she was very active and had absolutely no complaints of either hip prior to the accident.

He further states that following the accident she had severe pain in both hips documented by x-rays and notation of pain with limitation of range of motion and lack of strength by Dr. Thompson. Further in the report he continues that the patient required the significant surgery in the form of the bilateral hip replacements. Regarding her lumbar spine, he states that she did have documented scoliosis but there was no evidence of any spondylolisthesis or nerve compression in the lumbar spine and that the accident caused the spondylolisthesis and if it did not cause it, the accident exacerbated it.

Additionally, he states that the patient in May 2007 underwent another operation which included decompression and fusion of her lumbar spine which she subsequently healed from and considering cervical spine surgery. He states that there is no evidence that she

had cervical spine difficulties prior to the accident and if she did have degenerative changes they were asymptomatic prior to the accident and her pre-existing conditions were asymptomatic before the accident and became symptomatic following it. He continues that this patient has sustained a permanent injury as a result of the accident and although she has had surgeries and is better than before them, she is still far from normal and significantly disabled. Dr. Lazzarin then applies the American Medical Association Guidelines for Evaluation of Permanent Impairment and states that she warrants a 17% whole person impairment for the bilateral hips, 9% whole person impairment for the lumbar spine, and 7% whole person impairment for the cervical spine for a total 27% whole person impairment rating. He ends his report stating that these are significant disabilities and that he feels this is entirely as a result of the accident.

47. According to the JSB Guidelines, the bulk of the Plaintiff's injuries as alleged in her Statement of Claim would fall under "Orthopedic Injuries, Back Injuries under Moderate (i)" which are for cases where any residual disability is of less severity than that in the previous bracket and contains a wide variety of injuries such as a case of a compression/crush fracture of the lumbar vertebrae where there is substantial risk of osteoarthritis and constant pain and discomfort; that of a traumatic spondylolisthesis with continuous pain and a probability that spinal fusion will be necessary; a prolapsed intervertebral disc requiring surgery of damage to an intervertebral disc requiring surgery or damage to an intervertebral disc with nerve root irritation and reduced mobility. The range provided for these types of injuries are GBP £23,200 to £32,420 and when converted to BSD \$31,458.47 to \$43,955.04.

In addition to her orthopedic injuries, the Plaintiff alleges pelvic injuries and fractures and trauma to both of her hips. Based on the alleged injuries the JSB Guidelines, under "Injuries to the Pelvis and Hips" the range provided for the injuries alleged would be found under Severe (iii) which states that many injuries fall within that bracket such as a fracture of the acetabulum leading to degenerative changes and leg instability requiring osteotomy and the likelihood of hip replacement surgery in the future; the fracture of an arthritic femur or hip necessitating hip replacement; or a fracture resulting in a hip replacement which is only partially successful so that there is a clear risk of the need for revision

surgery. These types of injuries provide a range of GBP £32,780 to £43,890 and when converted to BSD \$44,334.91 to \$59,361.17. Other injuries as alleged are scarring to the back and hips and would fall under "Scarring to Other Parts of the Body" with a range of GBP £6,550 to £19,000 and when converted to BSD is \$8,858.96 to \$25,697.77.

Lastly the injury of shortening of the left leg by  $\frac{1}{4}$  which would be found under Leg Injuries under the bracket Severe Leg Injuries (ii) Very Serious. This bracket provides for injuries leading to permanent problems with mobility, the need for crutches or mobility aids for the remainder of the injured person's life; injuries where multiple fractures have taken years to heal, required extensive treatment and have led to serious deformity and limitation of movement, or where arthritis has developed in a joint so that further surgical treatment is likely. The range for this bracket is GBP £45,840 to £70,700 and when converted to BSD is \$62,035.72 to \$95,679.01. Therefore based on the ranges provided by the JSB Guidelines the Plaintiff's general damages as alleged in the Statement of Claim could fall between \$129,486.35 to \$212,129.79.

48. Therefore, considering the above, the Plaintiff's claim for general damages can be estimated as between \$129,486.35 to \$212,129.79. The Plaintiff's claim for special damages as at the time of the filing of the Summons is \$456,914.44. Therefore, the Plaintiff's total sum of her claim for general and special damages would range between \$586,400.79 to \$669,044.23. The Court however notes that the Plaintiff asserts at time of its application that special damages amounted to \$750,000.00.

49. The provisions of **Order 29, Rule 12(1) RSC** provide the Court to make an interim payment of such amount as it think just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the Plaintiff. Moreover, the Court also contemplates the risk of over-paying the Plaintiff.

## **Abuse of the Court Process**

50. Mr. Hunt has submitted that the Plaintiff's failure to conclude the assessment of damages hearing and instead seek an interim payment of a substantial sum amounts to an abuse of the court process. He further submitted that the Plaintiff's conduct precludes the Defendant from leading their own evidence on the "live" issue of causation.
51. Having determined above that the Defendant's failure to set aside the Default Judgment and having accepted liability of the Plaintiff's claim, the issue of causation is no longer in dispute between the parties.
52. Mr. Wallace Whitfield has stated that the Plaintiff's inability to pay the per diem rate of Dr. Edward Lazzarin has created difficulty in concluding the assessment and is part of the reason why she now seeks the interim payment.
53. While I accept that there has been some period of inactivity from the last hearing date of the Assessment of Damages on February 26<sup>th</sup>, 2014 to the Plaintiff's first filing of the application for an interim payment on February 5<sup>th</sup>, 2019, it would be an injustice to drive the Plaintiff from the Judgment seat especially for an interim payment to which she is rightly entitled to.

## **Disposition**

54. Therefore, after considering the facts before me, submissions from Counsel and the relevant case law I am of the view, that the Plaintiff does indeed satisfy the conditions as provided by **Order 29, Rule 12 of the RSC**.
55. In exercising its discretionary power, the Court will award the Plaintiff the sum of \$66,904.23 as an interim payment.
56. In an effort to ensure that the Plaintiff continues with the Assessment hearing, the Court will order that the payment of the interim payment is to be made subject to the scheduling

of the assessment hearing; failing which, the parties will be at liberty to make the necessary application to the Court.

57. The ruling of the then Assistant Registrar is hereby set aside.

58. In the circumstances, as the Plaintiff was successful on her appeal, the usual costs order is therefore awarded, costs to follow the event. Costs to be paid by the Defendant to the Plaintiff to be taxed if not agreed.

This 28<sup>th</sup> Day of January, 2022



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Andrew Forbes  
Justice