IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00134

B E T W E E N

BARBARA MELONIE KING-PINTARD

Claimant

AND

M & M VIRGO LTD.

First Defendant

AND

TAMARA JOHNSON

Second Defendant

Before:	Assistant Registrar Jonathan Deal
Appearances:	Carl Bethel KC for the Claimant Raynard Rigby KC for the Defendants
Hearing date(s):	On written submissions (dated 26 November 2024, 29 November 2024 and 1 December 2024)

RULING

ASSISTANT REGISTRAR DEAL

[1.] This is an application by the Claimant by Notice of Application filed on 8 October 2024 supported by the Affidavit of Shelly-Ann Nairn filed on 8 October 2024 (the "Nairn Affidavit"). The application is for an Order pursuant to **Rule 26.3(1)(b)** and **(c)** of the **Supreme Court Civil Procedure Rules, 2022** ("CPR") to strike out the Defendants' Amended Defence filed on 26 July 2024 (the "Amended Defence") on the grounds that the Amended Defence:

(i) raises new claims out of time, based upon the allegation of new facts, without the prior leave of the Court, contrary to the provisions of **Rule 20.1(4)(b)** and **20.2(2)** of the **CPR**; and

(ii) "deletes" an unconditional admission of liability by the Defendants for the causing of the accident which inflicted physical injury to the Claimant, on grounds which are frivolous, vexatious and abusive of the process of the Court, and which cause prejudice to the Claimant.

Background

[2.] This action arises out of a road traffic accident which occurred on 10 February 2014 in the vicinity of the entrance/exit of the Village Road Shopping Centre while the Claimant was a front seat passenger in a 2008 Toyota Tundra Truck being driven by Katrina Burrows which collided with a Toyota Vitz owned by the First Defendant and driven by the Second Defendant ("the RTA").

[3.] Following the commencement of the action by Writ on 9 February 2017, the Claimant filed a Statement of Claim on 9 May 2018 alleging negligence on the part of the Second Defendant by virtue of which she suffered personal injury, loss and damage:

> "1. The Plaintiff is a 59 year old female who was front-seat passenger in a Toyota Tundra Truck in or about the 10th day of February A.D., 2014, when the same was being driven by Katrina L. Hudson-Burrows due west in the Village Road Shopping Centre parking lot when the Second Defendant, Tamara Johnson and or agent of the First Defendant, so negligently drove or controlled a Toyota Vitz, registration No. SD 2707 motor car owned by the First Defendant that she caused the same to collide with the car in which the Plaintiff was a passenger which the Plaintiff suffered personal injury, loss and damage as hereinafter particularized.
>
> PARTICULARS OF NEGLIGENCE
>
> [Particulars omitted]
>
> 2. The Plaintiff will further rely upon the happening of the accident as evidence in itself of the negligence of the Second Defendant.

3.By reason of the matters aforesaid the Plaintiff suffered personal injury, loss and damages as hereinafter particularized.

PARTICULARS OF INJURY

[Particulars omitted]

PARTICULARS OF LOSS

[Particulars omitted]

And the Plaintiff claims against the Defendants and each of them:

1. Damages
2. Such further or other relief as to the Court seems just;
3. Interest
4. Costs."

[4.] The Defendants filed a Defence on 28 May 2018 (the "Original Defence") admitting that the RTA was caused by the negligence of the Second Defendant but alleging that the Claimant had wholly or partially contributed to any injury, loss and damage she may have suffered (none being admitted) by failing to wear a seatbelt. The Original Defence concisely pleaded:

> "1.Save that for the purposes of this action only the Defendants admit that a collision took place on the date and at the place and between the respective vehicles alleged, and that the accident was caused by the negligence of the Second Defendant, no admissions are made as to paragraph 1 of the Statement of Claim.
>
> 2.At all material times, the Plaintiff was a front seat passenger in a motor vehicle and was not secured by a seat belt as mandated by Section 42(C)(2) of the Road Traffic Act.
>
> 3.In the circumstances the Defendants aver that such injury, loss or damage as the Plaintiff may prove (none having been admitted above) was wholly caused by or alternatively was contributed to by the Plaintiff's own negligence.
>
> Particulars of Negligence
>
> i. failed to wear the seatbelt fitted to the vehicle in which she was a passenger;
> ii. continued on the vehicular journey without wearing the said seat belt; and
> iii. in the premises failed to have any or any adequate regard for her own safety.
>
> 4.The Defendants deny paragraphs 3 and 4 of the Statement of Claim save that no admission is made to the particulars of injury as alleged therein.
>
> 5.The Defendants deny each and every allegation and/or statement of fact as is set out in the Statement of Claim, save as is hereinbefore specifically admitted, as if the same were set out individually and traversed in seriatim."

[5.] Nothing on the court file suggests that the Claimant ever sought to take any steps on the admission in paragraph 1 of the Original Defence. Nor is there any evidence that the Claimant took

steps to refer the matter to case management pursuant to **Order 31A, rule 8** of the **RSC**, despite the Defendants having filed a Notice of Referral to Case Management on 2 August 2018.

[6.] No steps were taken by the Claimant in the action between 2 August 2018 and 16 January 2024, when Halsbury Chambers came on record for the Claimant.

[7.] On 26 July 2024, the Defendants filed an amended defence verified by a statement of truth. The Amended Defence provides:

> "1.Save that for the purposes of this action only the Defendants admit that a collision took place on the date and at the place and between the respective vehicles alleged, ~~and that the accident was caused by the negligence of the Second Defendant, no admissions are made as to~~ save for the same paragraphs 1 and 2 of the Statement of Claim are denied and the Plaintiff is put to strict proof thereof.
>
> 2. The Defendants contend that the accident was caused and/or contributed to by the negligence of Katrina Burrows who was the driver of a 2008 Toyota Tundra by her failure to remain in the exit lane of the parking lot of the Village Road Shopping Center.
>
> 3. The Defendants further aver that the collision was a low velocity one and that the Toyota Tundra sustained minor damage.
>
> 4.The Defendants further contend that as the Plaintiff was a passenger in the vehicle driven by Katrina Burrow, Katrina Burrows was (and is) responsible for any loss and damage sustained by the Plaintiff in the accident.
>
> 5. At all material times, the Plaintiff was a front seat passenger in the ~~a~~ motor vehicle driven by Katrina Burrows and was not secured by and wearing a seat belt as mandated by Section 42(C)(2) of the Road Traffic Act.
>
> 6.In the circumstances the Defendants aver that such injury, loss or damage as the Plaintiff may prove (none having been admitted above) was wholly caused by or alternatively was contributed to by the Plaintiff's own negligence and/or that of Katrina Burrows.
>
> Particulars of Negligence
>
> i. failed to wear the seatbelt fitted to the vehicle in which she was a passenger;
> ii. continued on the vehicular journey without wearing the said seat belt;
> iii. in the premises failed to have any or any adequate regard for her own safety.
>
> 7. The Defendants deny paragraphs 3 and 4 of the Statement of Claim ~~save that no admission is made to~~ and the particulars of injury as alleged therein.
>
> 8. The Defendants contend that the Plaintiff failed to mitigate her losses by taking reasonable steps to secure employment or by sourcing alternative labor to continue her business dealings and by failing to follow the treatment and surgical protocols and advice of competent physicians.
>
> 9. The Defendants further aver that the Plaintiff had preexisting injuries for which they should bear no responsibility.

10. It is further averred that the Plaintiff's delay in attending the care of physicians made her injury(ies) worse or exacerbated her injury/pain/condition and thereby she should bear full responsibility for all expenses and losses associated with any such delay and exacerbation.

11. In all the circumstances, the Defendants contend that the post-accident conduct of the Plaintiff was unreasonable and thereby any resulting loss and damage were made worse by the Plaintiff's wanton disregard to act reasonably to mitigate her losses and to ensure her speedy recovery from any injury sustained in the accident.

12. The Defendants aver that by acting in such disregard for her recovery from any loss and injuries sustained in the accident, the Plaintiff became the author of her own loss and damages for which the Defendants should bear no liability.

13. The Defendants deny each and every allegation and/or statement of fact as is set out in the Statement of Claim, save as is hereinbefore specifically admitted, as if the same were set out individually and traversed in seriatim."

[8.] The decision to file the Amended Defence is explained in the Affidavit of Asha Lewis filed by the Defendants on 29 November 2024 (the "Lewis Affidavit") at paragraphs 4 and 8 in this way:

> "4. Around June 2024 the Firm [i.e. Baycourt Chambers] was unable to locate its files in this matter and was provided with a full copy of the files and documents from the Defendants' Insurers. Upon review of the documents provided, it became evident that the Defence required amendment occasioned by the circumstances of how the accident occurred. This was an oversight from the original Defence that was filed. The Claimant was a passenger in a vehicle driven by Katrina Burrows, and it appears from my review of the documents in our possession that Ms. Burrows also owed the Claimant a duty to drive responsibly to prevent any danger to her.
> ...
> 8. The Defendants' Insurers wish for the Court to decide the full issue of liability between the parties at a trial of the matter. This is the best way for the matter to be fully ventilated and determined. The Defendants have a cardinal right to have their day in Court and to advance their best defence."

[9.] The Claimant filed an Amended Statement of Claim clarifying and correcting her original statement of claim on 31 October 2024. The precise clarifications and corrections are not relevant to the application before the Court save that the Claimant clarified that, on her case, the RTA occurred when Katrina Burrows' vehicle was travelling in an easterly direction having entered the Village Road Shopping Centre parking lot from Village Road. The Claimant maintains these amendments had no "causal relationship" with the Amended Defence.

Striking Out

[10.] **Rule 26.3** of the **CPR** empowers the Court to strike out statements of case including a defence. **Rule 26.3(1)** provides:

> "(1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or
> (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

[11.] The jurisdiction of the Court to strike out and dismiss proceedings under the **CPR** has been considered in **Glenard Evans v Airport Authority** 2022/CLE/gen/01521 (23 November 2023) and **S.M. v A.D.** 2023/CLE/gen/00856 (6 November 2024), among other cases. Reference is made to **Glenard Evans** at [53] to [59] and [68] to [73] and **S.M. v A.D.** at [36] to [50] for the general principles that ought to be taken into consideration respecting **Rules 26.3(1)(b)** and **26.3(1)(c)**.

[12.] The Defendants referred to **Rule 26.3(1)(a)** in their submissions opposing the Claimant's application and the Claimant relied upon that rule in her response submissions. **Rule 26.3(1)(a)** enables the Court to strike out a statement of case or part of a statement of case if it appears that there has been a failure to comply with a rule, practice direction, order or other direction. Such a course may be an appropriate response to "serious procedural default": **HRH Duchess of Sussex v Associated Newspapers Ltd** [2021] 1 All ER 336 at [33(5)].

The Claimant's Submissions

[13.] Mr. Bethel KC submits on behalf of the Claimant that, pursuant to **Rule 20.1(4)(b)** and **20.2(2)** of the **CPR**, the Defendants required the prior permission of the Court to delete the "unconditional and unreserved admission of liability" contained in the Original Defence and to raise new allegations of fact which create issues as to the proper parties to the action after the expiration of a relevant limitation period.

[14.] Counsel for the Claimant takes issue with the fact that, in paragraphs 4 and 6 of the Amended Defence, the Defendants positively assert that Katrina Burrows was and is responsible for any loss or damage sustained by the Claimant and that any injury, loss or damage the Claimant may prove was wholly caused or, alternatively, contributed to, by the Claimant's own negligence or that of Katrina Burrows'. Mr. Bethel submits that:

> "6. It is one thing merely to amend a pleading in order to deny liability. It is entirely another to deny liability and then to ascribe liability to a non-Party to the action after the expiration of the Limitation period, by way of a 'new claim'. The Rules clearly require the prior permission of the court."

[15.] Mr. Bethel submits that, on that ground alone, the entire Amended Defence should be struck out, as the same was filed without the prior permission of the Court.

[16.] Counsel for the Claimant further submits that, should paragraphs 4 and 6 of the Amended Defence be permitted to stand, the Claimant would suffer irremediable prejudice because the Claimant would have to apply to join Katrina Burrows as a defendant in order to have recourse to her insurers in the event that the Defendants were to succeed in establishing that she was at fault for the RTA.

[17.] Counsel for the Claimant says this is prejudicial because "the above-referenced provisions" (which is taken to mean those provisions referred to in **Rule 20.1(4)**, namely, **Rule 19.4** and **Rule 20.2**) have "no effect in Bahamian law". Mr. Bethel relies not on any primary authority but on the **Caribbean Civil Court Practice (3rd edition)**, where the text states:

> "See also the Jamaican Court of Appeal case of Tikal Limited et al v Everley Walker [2020] JMCA Civ 33 which confirmed that the substitution of an entirely different party (as opposed to the correction of a name for a misdescription) cannot be done after a limitation period has passed as Jamaica's substantive law did not allow for an extension of time to bring a claim after a limitation period expired. The English equivalent of this rule was premised on the English substantive law which was modified in 1980 (see ss 33 and 35 of the UK Limitation of Actions Act 1980) to give the Court the discretion to allow claims after a limitation period had passed. In Jamaica, there was no such modification and so though the rule exists nominally, the Court of Appeal essentially made it of no practical value as it was not supported by any substantive law."

[18.] Mr. Bethel submits that the Amended Defence raises a "host of new claims" in contravention of **Rule 20.2(2)** as set out in paragraphs 6, 8, 9 and 10 of the Nairn Affidavit. Those argue that:

(i) Paragraph 2 of the Amended Defence raises a new allegation of fact after the end of the relevant limitation period, that: "The Defendants contend that the action was caused and/or contributed to by the negligence of Katrina Burrows who was the driver of a 2008 Toyota Tundra by her failure to remain in the exit lane of the parking lot of the Village Shopping Center".

(ii) Paragraph 3 of the Amended Defence raises a further new allegation of fact, that: "The Defendants further aver that the collision was a low velocity one and that the Toyota Tundra sustained minor damage".

(iii) Paragraph 9 of the Amended Defence now alleges that: "The Defendants further aver that the Plaintiff had preexisting injuries for which they should bear no responsibility".

(iv) Paragraph 10 of the Amended Defence now alleges that: "It is further averred that the Plaintiff's delay in attending the care of physicians made her injury(ies) worse or exacerbated her injury/condition…".

[19.] Counsel for the Claimant submitted that the amendment made to paragraph 1 of the Amended Defence ought to be struck out, as the Defendants' withdrawal of a pleaded "unconditional admission of liability" 8 years after it was made is highly prejudicial to the Claimant. Counsel prayed that judgment be entered on admissions for the assessment of damages.

[20.] Mr. Bethel places reliance on the English case of **Bird v Bird's Eye Walls Ltd** [1987] Lexis Citation 1882 and, in particular, passages from the lead judgment of Gibson LJ suggesting that some explanation is necessary for the withdrawal of an admission and the concurring judgment of Sir George Waller suggesting that it would be hard to visualise any personal injury case where a formal admission of liability could be withdrawn 18 months after it was made without prejudice.

[21.] Mr. Bethel submits that, having regard to the circumstances outlined in the Nairn Affidavit, namely, that the investigating officer said that he could not issue a Road Accident Report based on the RTA occurring on private property; that the Claimant cannot remember the name of the investigating officer; and that the Claimant never received a Road Accident Report or a Notice of Intended Prosecution, it would cause irremediable prejudice to the Claimant if the Defendants were permitted to withdraw a pleaded unconditional admission of liability 8 years later. Had liability been denied in the Original Defence, then the Claimant's Counsel would have been "put on his inquiry" and would have had an opportunity to obtain evidence from the now unknown investigating officer.

[22.] Counsel for the Claimant further argues that the Defendants have raised new claims by way of counterclaim, however the Defence as originally filed already asserted a counterclaim at [3] insofar as it asserted that the Claimant's injury, loss or damage was wholly caused by the Claimant's own negligence with particulars of negligence. Counsel submits that to assert that counterclaim, the Defendants could rely on the "relation back" in **Section 43** of the **Limitation Act**. However, now, 6 years later, and outside of the limitation period, having taken a step in the action, the Defendants are precluded from further reliance upon **Section 43** to assert new counterclaims. In this regard, **Section 44** of the **Limitation Act** preserves the jurisdiction of the Court to refuse relief on the ground of acquiescence or otherwise.

The Defendants' Submissions

[23.] Mr. Rigby KC submits on behalf of the Defendants that the Claimant's application is misconceived because it cannot be successfully argued that the Amended Defence fails to disclose a reasonable defence, is frivolous, vexatious scandalous or an abuse of the process of the Court or is likely to obstruct the just disposal of the case. Mr. Rigby KC relies on **Glenard Evans**, **Nomiki**

Drosos Tsakkos et al v Pantelis Tsakkos et al 2021/CLE/gen/621 and **Cable v Liverpool Victoria Insurance Co Ltd** [2020] EWCA Civ 1015 for the principles governing the jurisdiction to strike out.

[24.] Counsel for the Defendants submits that the effect of **Part 20** of the **CPR** is to allow a statement of case to be amended once, without permission of the Court, before the case management conference. However, if the amendment is intended or designed to add or substitute parties or to add a new claim after the end of the relevant limitation period, the amendments must be made after the case management conference and with Court permission.

[25.] Mr. Rigby submits that the Amended Defence does not on its face add a new party or a new cause of action and that the allegation pleaded in paragraph 2 of the Amended Defence (that the RTA was caused and/or contributed to by the negligence of Katrina Burrows) is not the addition of a new party or a cause of action.

[26.] Counsel for the Defendants submits, in what is understood to be the alternative, that the new allegations or averments in the Amended Defence arise out of the same facts as set out in the claim and therefore do not "offend" the **CPR**. In support this submission, Counsel relies on **Denise Stevens v Luxury Hotels International Management** [2014] ECArSC 277, a decision of the St. Christopher and Nevis High Court, at [14] to [24], and **Abbey National Plc v John Perry & Co** [2001] EWCA Civ 1630, a decision of the English Court of Appeal, at [27].

[27.] Mr. Rigby invites the Court to note that the Original Defence raised the issue of contributory negligence. Mr. Rigby therefore submits that the Amended Defence does not for the first time raise a denial of liability. Mr. Rigby submits that there was no "unconditional admission of liability" in the Original Defence and that, as the Original Defence pleaded contributory negligence, it is not a new claim to enlarge allegations of contributory negligence.

[28.] Counsel for the Defendants submits that, in any event, there is no bar against the Defendants retracting an "unconditional admission of liability" when the Claimant took no steps on the alleged admission for 6 years. Counsel submits that any alleged prejudice caused by the Defendants' actions is "misplaced" but also denies that the Claimant will suffer any prejudice.

[29.] Mr. Rigby submits that, contrary to the contention of the Claimant that she will have to add Katrina Burrows as a party, it is the Defendants who made the allegation that Katrina Burrows was responsible for the RTA and whether she should be added as a party is a matter for them to consider at the case management conference. It is the Defendants who bear the burden of proof at trial.

[30.] Mr. Rigby submits on the issue of limitation, without much elaboration, that a counterclaim is deemed to commence on the same date as the claim pursuant to **Section 43** of the **Limitation Act**. Mr. Rigby further submits that (i) **Part 19** (and in particular **Rule 19.4**) is intended to ensure

that a claim is not defeated by a possible limitation defence and (ii) the Claimant "does not have a possible time-barred defence" and, therefore, any complaint about the timing of the amendment to the Original Defence is without merit. Counsel for the Defendants further contends that the Defendants could make all the amendments the Claimant now complains of in response to the Claimant's amendments to its Statement of Claim on 31 October 2024.

[31.] The Defendants invite the Court to dismiss the Claimant's application, having regard to the overriding objective. The Defendants rely on **Al-Zahra (PVT) Hospital and others v DDM** [2019] EWCA Civ 1103, at [72], where the English Court of Appeal held that the requirement to deal with cases "justly" in accordance with the overriding objective requires a "necessarily objective and even-handed approach", and **Cable v Liverpool Victoria Insurance Co Ltd** [2020] EWCA Civ 1015, tendered as authority for the proposition that the Court must also weigh in the balance the prejudice to the Defendant in the Claimant's delay in taking any steps in the action for more than 6 years from the date of the filing of the Original Defence.

Discussion and analysis

[32.] In considering the merits of the application, it is expedient to consider first whether the Amended Defence irregularly raises new claims out of time, based upon the allegation of new facts, without the prior leave of the Court (the "New Claims Ground"), and then to consider whether the Amended Defence "deletes" an unconditional admission liability for causing the accident in a manner warranting striking out (the "Admission of Liability Ground").

The New Claims Ground

[33.] The New Claims Ground most obviously engages **Rule 26.3(1)(a)**, as the gist of the Claimant's complaint is that the Defendants amended the Original Defence without the prior permission of the Court in breach of **Rule 20.1(4)(b)**, although **Rule 26.3(1)(c)** is also potentially engaged. The Claimant ought to have amended her Notice of Application to make reference to **Rule 26.3(1)(a)** instead of **Rule 26.3(1)(b)**, which appears to be irrelevant, but, in the interest of disposing of the application on its merits, that will not be treated as fatal.

[34.] **Rule 20.1** of the **CPR** deals with changes to statements of case generally. **Rule 20.1(1)** of the **CPR** permits a party to amend a statement of case once without the Court's permission at any time prior to the date fixed by the Court for the first case management conference. **Rule 20.1(2)** empowers the Court to grant permission to amend a statement of case at a case management conference or, if an application is made, at any time. **Rule 20.1(4)** prohibits a statement of case from being amended without the permission of the Court if the change is one to which **Rule 19.4** or **Rule 20.2** applies.

[35.] **Part 19** of the **CPR** addresses specifically the addition, substitution and removal of parties to proceedings. **Rule 19.4** makes special provision for adding or substituting a party after the end

of a relevant limitation period. **Rule 19.4** was considered in **Dom's International Importers Limited v CIBC Bahamas Limited and Havanaturs (Bahamas) Limited** [2024] 1 BHS J. No. 64. The addition or substitution can be made if the addition or substitution is necessary and the relevant limitation period was current when the proceedings were started. An addition or substitution is "necessary" only if the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted; the interest or liability of the former party has passed to the new party; or the new party is to be substituted for a party named by mistake.

[36.] There can in this Court's view be no serious suggestion that **Rule 19.4** has been infringed by the Defendants' amendments to the Original Defence. Katrina Burrows has not been added or joined as a party to the proceedings by the Amended Defence. The Amended Defence does not purport to include Katrina Burrows as a party. The Amended Statement of Claim, filed after the Amended Defence, makes no reference to Katrina Burrows being a party. Katrina Burrows is not, presently, a claimant, defendant, additional claimant or additional defendant in the proceedings. The only substantive issue is therefore whether **Rule 20.2** has been infringed by the Defendants.

[37.] **Rule 20.2** deals with changes to statements of case after the end of the relevant limitation period. **Rule 20.2** was considered at first instance and on appeal in the **MS Amlin** litigation (**2020/COM/adm/00016** and **SCCivApp No. 12 of 2024**). To the extent that the rule is possibly relevant here, it permits the Court to allow an amendment the effect of which will be to add or substitute a new claim if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change their statement of case has already claimed a remedy in the proceedings.

[38.] In **Denise Stevens v Luxury Hotels International Management** [2014] ECArSC 277, an application was made by a claimant in a claim for damages for personal injuries and consequential loss to amend their statement of claim after the expiration of the relevant period of limitation by deleting some heads of damages and adjusting the quantum claimed under others following judgment upon an admission of liability. Master Fidela Corbin-Lincoln held (at [16]) that a "new claim" in **Rule 20.2** of the **Eastern Caribbean Supreme Court Civil Procedure Rules** is a "new cause of action" and held (at [20] to [23]) that the proposed amendments did not amount to a new claim because they retained the bare and essential facts of the original statement of claim.

[39.] In **Abbey National Plc v John Perry & Co** [2001] EWCA Civ 1630, a decision of the English Court of Appeal, Aldous LJ, at [27], considered the test as to what constitutes a "new cause of action". He referred with approval to **Darlington Building Society, Abbey National Plc v O'Rourke James Scourfield & McCarthy** [1999] LR PN 33, where Sir Ian Glidewell said:

> "There are two classic definitions of what constitutes a cause of action. The earlier is derived from the judgment of Brett J in Cooke v Gill (1873) LR 8 CP 107 at 116:

> Cause of action has been held from the earliest times to mean every fact which is material to be proved to entitle a plaintiff to succeed – every fact which the defendant would have a right to traverse.
>
> The second comes from the judgment of Diplock LJ in Letang v Cooper [1965] 1 QB 232at pages 242-243:
>
> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person . . . it is used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person.
>
> Where as in this case the claim is based on a breach of duty, whether arising from contract or in tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended pleading with the amendment proposed in order to determine:
>
> (a) whether a different duty is pleaded;
>
> (b) whether the breaches pleaded differ substantially; and where appropriate
>
> (c) the nature and extent of the damage of which complaint is made."

[40.] No authority was provided by the Claimant to support the application of **Rule 20.2(2)** advocated for in this case. **Rule 20.2(2)** appears only to contemplate a situation where a person who is in the position of claimant, or who wishes to put themselves in the position of claimant, desires to amend their statement of case to add or substitute a new claim for a remedy after the expiration of the relevant period of limitation. The ordinary legal sense of the word "claim" is the equivalent of "demand", which necessarily imports a request for some form of relief: **JFS (UK) Limited v DWR Cymru Cyf** [1999] 1 WLR 231 per Nourse LJ at page 235. No request for relief is made in the Amended Defence.

[41.] The Court holds that the Amended Defence did not add a new party or a new claim outside of the relevant period of limitation. **Rule 20.1(4)** was therefore not engaged when the Defendants amended the Original Defence. There is no basis for exercising the power to strike out conferred by **Rule 26.3(1)(a)** for breach of **Rule 20.1(4)** and **Rule 26.3(1)(c)** is not engaged on the New Claims Ground. The New Claims Ground fails.

Admission of Liability Ground

[42.] The "Admission of Liability Ground" is a misnomer. In the Original Defence, the Defendants admitted that a collision took place and that the RTA was caused by the negligence of the Second Defendant. However, a cause of action in negligence is complete only upon proof of damage. The Defendants never admitted that any injury, loss or damage was suffered by the Claimant as a result of the RTA or the Second Defendant's negligence. The Defendants are therefore correct in their submission that the Original Defence did not contain "unconditional

admission of liability". Nonetheless, the Original Defence did contain a valuable admission that the RTA was caused by the negligence of the Second Defendant.

[43.] Nothing in **Part 14** of the **CPR**, which deals with admissions, expressly stipulates that an admission made in a statement of case can be amended or withdrawn by the party making it only with the permission of the Court. There is no equivalent, for example, to **Rule 14.2(11)** of the United Kingdom's **Civil Procedure Rules 1998**, which stipulates that the Court's permission is required to amend or withdraw an admission. The **Supreme Court Practice Guide 2024** acknowledges, at page 138, that **Part 14** "does not speak to the amendment or withdrawal of an admission". However, it posits that, historically, courts did not permit the withdrawal of an admission consciously made but by mistake without imposing conditions, citing **Hollis v Burton** [1892] 3 Ch 226. It also briefs the decision of the English Court of Appeal in **Gale v Superdrug Stores plc** [1996] 3 All ER 468.

[44.] In **Bird v Bird's Eye Walls Ltd** [1987] Lexis Citation 1882, relied on by the Claimant, the plaintiffs brought proceedings claiming that they contracted tenosynovitis working at the defendant's factory. The defendant's defences contained denials of negligence but the defendant's solicitors confirmed in correspondence that liability was not in dispute. Shortly before the trial of quantum, the defendant's solicitors informed the plaintiffs that liability would be put in issue. The judge allowed this to be done, thinking that the leave of the court was not required. The English Court of Appeal held that the judge had been wrong to do so, because, firstly, leave of the court was required as an order had been made on the basis that liability was no longer in issue and, secondly, because leave ought not to have been granted. The English Court of Appeal held that leave ought not to have been granted because there was risk of damage to the plaintiffs' case due to the fact that the plaintiffs had stopped investigating their claim after the admission was made and the explanation for the withdrawal of the admission, that a decision had earlier been taken not to fight the case on economic grounds without parent company approval, was weak.

[45.] In **Gale v Superdrug Stores plc** [1996] 3 All ER 468, an application was made on 28 July 1994 to strike out a defence on the ground of abuse of process because it denied liability in a manner inconsistent with a pre-action admission made in letter sent in 1991 upon which the defendant had made an interim payment. The parties agreed that the English Court of Appeal should apply the principles relevant to withdrawing an admission under **Order 27, Rule 3**. The English Court of Appeal applied the test in **Bird v Bird's Eye Walls Ltd** that a defendant should be relieved of an admission and allowed to withdraw or amend it if "...in all the circumstances of the case it is just to do so having regard to the interests of both sides and to the extent to which either side may be injured by the change in front". The defendant was relieved from their admission because (per Waite LJ) the plaintiff had not led evidence of any specific matter which rendered it more difficult to prosecute a claim in liability than it would have been if the admission had not been made and (per Millet LJ) the admission had been made by the defendant's insurers before

their solicitors came on the scene and the defendant, who was acting in good faith, had a strongly arguable defence.

[46.] The principles under **Order 27, rule 3** were applied in **Gale v Superdrug Stores plc** by agreement because of the provisions of the **County Court Rules** (see the dissenting judgment of Thorpe LJ at page 479). Inasmuch as the Claimant relies on **Rule 26.3(1)(c)** of the **CPR**, some guidance which is of assistance in the disposal of this matter can be obtained from the decision of the English Court of Appeal in **Walley v Stoke-on-Trent City Council** [2006] 4 All ER 1230. That case demonstrates that the Court will generally allow a party to withdraw an admission provided that they have acted in good faith and the withdrawal will not affect the fairness of trial.

[47.] In **Walley v Stoke-on-Trent City Council** [2006] 4 All ER 1230, a defence was filed denying liability in circumstances where loss adjusters had made an admission of liability prior to the commencement of proceedings. The claimant applied to strike out the defence under **rule 3.4(2)** of the United Kingdom's **Civil Procedure Rules 1998** on the ground that it was an abuse of the process of the court or was otherwise likely to obstruct the just disposal of the proceedings. The application was made under **rule 3.4(2)** because the withdrawal of pre-action admissions was not regulated by the **Civil Procedure Rules 1998** at the time.

[48.] In **Walley**, the English Court of Apepal recognized, *obiter*, that rule **3.4(2)** "presented a much higher threshold for the claimant to cross" than would be the case if the court were exercising the broad discretion it possessed under the **Civil Procedure Rules 1998** in relation to whether to permit the withdrawal of an admission made in the action. The English Court of Appeal held, at [34], that in order for a claimant to show that the withdrawal of an admission would amount to an abuse of process, it would usually be necessary to show that the defendant had acted in bad faith. The Court of Appeal further held, at [35], that, in order to show the withdrawal of a pre-action admission would be likely to obstruct the just disposal of the case, it would usually be necessary to show prejudice affecting the fairness of trial.

[49.] The circumstances of this case are highly unusual and neither party's conduct in the lead up to this application is beyond reproach. The Defendants allowed an admission that the RTA was caused by the negligence of the Second Defendant to stand in their pleaded defence for over 6 years and exploited a fortuitous change in the rules to withdraw that admission without a formal application many after the RTA occurred, shortly after the Claimant resuscitated the action in 2024. In most matters, there would be no question of this situation arising. However, due to the Claimant's inordinate delay in prosecuting her claim, the Defendants have *prima facie* been able to amend their statement of case without leave under **Rule 20.1(1)**, as the amendment has technically been made at an early stage of the proceedings, before the first case management conference.

[50.] The admission at paragraph 1 of the Original Defence withdrawn by the Defendants was a formal admission made in a pleading that was prepared with the assistance of counsel. The only reason that the Defendants have offered for resiling from the admission is that a different view of the matter has been taken after counsel in the same chambers that prepared the Original Defence reviewed the First Defendant's files and documents. That is not a very strong justification for the withdrawal of the admission, as there is no suggestion that the change in position has been prompted by new evidence. However, it would be difficult to describe the change in position as spurious, as it appears that the parties' beliefs about how the RTA occurred are not identical and the Defendants now believe that Katrina Burrows caused or contributed to the RTA by negligently failing to remain in an exit lane. The Defendants' delay and explanation may be open to criticism, but there is no basis for attributing bad faith to them.

[51.] In the absence of a finding that the admission in paragraph 1 of the Original Defence was withdrawn by the Defendants acting in bad faith, it is doubtful whether it is open to the Court to conclude that the withdrawal of that admission amounts to an abuse of process. However, in deciding whether the withdrawal of the admission in paragraph 1 of the Original Defence should stand, it is relevant to consider also whether the withdrawal has caused or will cause prejudice to the Claimant which will affect the fairness of trial.

[52.] The Affidavit of Shelly-Ann Nairn sets out the Claimant's main case on prejudice at paragraphs 13 and 14 thusly:

> "13. The traffic accident occurred on the 10th day of February 2014 in the Village Road Shopping Centre. The Road Traffic Police investigated the scene of the accident. However, as the accident occurred on private property the Police (improperly) did not issue a formal Road Accident Report. Had the pleaded admission not been made by the Defendants in the original Defence, then Counsel for the Claimant would necessarily have made contemporaneous inquiries, identified the investigating Officers, and obtained Witness Statements.
>
> 14. This is no longer possible as the Claimant no longer remembers the name of the investigating Officer."

[53.] The Affidavit of Asha Lewis makes the following response at paragraph 7:

> "7. As far as I am concerned, the issue of whether the Claimant can recall the name of the investigating Officer at the Road Traffic Department is not prejudicial. That information is easily obtainable. In any event, the issue of liability was contested based on the allegation of contributory negligence and hence it was incumbent on the Claimant to ensure that she preserved whatever evidence she required for the trial given her delay in prosecuting the claim."

[54.] The Affidavit of Shelly Ann-Nairn does not provide clear and cogent evidence of prejudice. While it is said in the Claimant's evidence that she "no longer remembers" the name of the officer from the Royal Bahamas Police Force who investigated the RTA, there is no explanation in the evidence about whether his or her name has been documented anywhere (and if not, why not) and

the Claimant's evidence does not positively speak to whether the officer's name can at this point be obtained from any other source. It is also worthy of note that the Original Defence was not filed until 28 May 2018 and that the Defendants did not offer a complete admission of liability in it. The Claimant therefore had 4 years and 3 months to investigate and document her claim on the issue of liability before the Original Defence was filed and, once the Original Defence was filed, the Claimant ought still to have been alive to the possibility that the RTA might come under scrutiny. The Claimant cannot lay failings in the investigation and documentation of her claim at the feet of the Defendants.

[55.] There is the further submission on behalf of the Claimant that she would suffer irremediable prejudice if the withdrawal of the admission is permitted because she would have to apply to join Katrina Burrows as a defendant in order to have recourse to her insurers. The answer to this is that the Claimant, while represented by counsel, chose to commence these proceedings without joining Katrina Burrows as a defendant, despite the possibility that she might have been negligent. That was a strategic decision about who to sue. It was also a decision taken right before the expiration of the limitation period applicable to the Claimant's claim. The limitation period with respect to any claim against Katrina Burrows had already expired by the time the Original Defence was filed. Therefore, there being no suggestion Katrina Burrows has since died or become untraceable, the Claimant would have experienced any difficulty she now faces joining Katrina Burrows then.

[56.] There can be no doubt, and it is right to acknowledge, that the Amended Defence must have come as a tremendous disappointment for the Claimant. But disappointment is not, in and of itself, a relevant form of prejudice. In **Gale v Superdrug Stores plc** [1996] 3 All ER 468, Waite LJ observed at page 476 that "[l]itigation is…a field in which disappointments are liable to occur in the nature of the process, and it cannot be fairly conducted if undue regard is paid to the feelings of the protagonists." There is also the issue of witness' memories potentially fading with the passage of time. But that is a matter for which the Claimant has been the primary author of her prejudice through her delay in issuing and prosecuting the proceedings.

[57.] In the final analysis, the Claimant faced a high burden to demonstrate adequate grounds for striking out the Amended Defence and for depriving the Defendants of their *prima facie* right to resile from the admission that they made in paragraph 1of the Original Defence. Although it is easy to sympathize with the position of the Claimant, the Claimant failed to establish the Defendants acted in bad faith and failed to lead strong evidence of prejudice, or, prejudice for which she does not bear the primary responsibility. In all the circumstances, justice favours giving precedence to the Defendants' *prima facie* right to change their mind. The Admission of Liability Ground fails.

Conclusion

[58.] For the foregoing reasons, the Claimant's application is dismissed. **Rule 72.26(2)** states that, in deciding which party, if any, should pay the costs of the application, the general rule is that the unsuccessful party must pay the costs of the successful party. However, the Court has a wide discretion as to costs and, in accordance with **Rule 72.26(3)**, the Court must take into account all the circumstances in deciding what order to make about costs. As criticism can be made of both parties' delay in this matter, and it was not unreasonable for the Claimant to have made her application, it is ordered that there be no order as to costs.

Dated the 25th day of February, 2025

Jonathan Deal
Assistant Registrar