

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2022/CLE/gen/00382

BETWEEN

PATRICE KNOWLES

Claimant

AND

ISLAND HOTEL COMPANY LIMITED

(T/A ATLANTIS PARADISE ISLAND)

Defendant

Before the Honourable Justice Simone I. Fitzcharles

Appearances: Nadia Wright and Eugeina Butler for the Claimant

Camille Cleare and Viola Major for the Defendant

Hearing On the Papers

JUDGMENT ON COSTS

Upon Acceptance of Payment Into Court

FITZCHARLES, J.

Introduction

1. On 18 May 2019, the Claimant, Ms Patrice Knowles, was injured as she was moving laundry bins in the course of her probationary employment with the Defendant, Island Hotel Company Limited (t/a Atlantis Paradise Island). She brought this claim for damages against the Defendant on 22 March 2022, alleging that its negligence and breach of statutory duty caused her injury in two accidents.

2. The Defendant accepted liability for one accident only, alleged contributory negligence on the part of the Claimant and disputed liability for the alleged second accident. In essence, there is no agreement as to the extent of the Claimant's injuries, the details of the incidents which gave rise to the claim or the extent of liability as alleged.

3. On 1 November 2022, the Defendant made a payment into court in the sum of \$64,863.81 pursuant to **Order 22** of the **Rules of the Supreme Court** (the “RSC”).

4. The Claimant now applies to receive the payment into court and to recover costs. The application is brought by a Notice of Application filed on behalf of the Claimant on 17 May 2024 pursuant to **Rule 35.13** of the **Supreme Court Civil Procedure Rules, 2022** (“CPR”).

5. The parties disagree on the issue whether the Claimant is entitled to full or any costs. The Defendant contends that the Claimant’s conduct disentitled her to full or any costs because she presented an exaggerated claim, dishonestly concealed her prior history of injuries, and her conduct was otherwise unreasonable. The Claimant asserts that she accepted the payment into court well before the commencement of the trial, she acted reasonably and it is unconscionable to argue that she is not entitled to her costs up to the date of her acceptance of the payment into court.

Background Facts

6. By letter dated 20 December 2021 which was marked ‘without prejudice save as to costs’, Counsel for the Claimant demanded compensation from the Defendant in the sum of \$588,476.02, which was comprised as follows:

- (1) \$35,832.22 for pain, suffering and loss of amenity,
- (2) \$468,000.00 for future loss of earnings, and
- (3) \$84,643.80 for legal costs of 15% of the claim plus value added tax.

7. On 11 March 2022, the Claimant commenced proceedings against the Defendant seeking damages with interest and costs for the injuries allegedly sustained in the two work-related accidents.

8. The Defendant, in its Defence filed on 13 June 2022, appears to accept that on 18 May 2019 at 11:30 am, the Claimant was pushing a smaller laundry bin while pulling another small laundry bin when the bottom section of one of the bins hit against the back of the Claimant’s right leg (the “First Accident”). Both parties accept that the Claimant continued to work after the First Accident. Liability is disputed by the Defendant in relation to a second incident on the same day which took place around 12:30 pm (the “Second Accident”) and the circumstances of, and extent of alleged injuries sustained in relation to, the First Accident are also disputed.

9. By paragraph 4 of the Affidavit of Nerissa Greene filed on 20 June 2023, the Claimant’s version of events regarding the two work-related accidents was set out. Ms Greene stated that although the First Accident caused injury to the Claimant’s right leg and “excruciating pain”, the Claimant continued to work. Then, the Second Accident occurred involving the same injured right leg. Further, in the Statement of Claim, the Claimant pleaded that the Defendant

breached its statutory duty to maintain the work premises and the safety of its employees. The Claimant particularized her injuries as follows:

- (1) damage to the posteromedial aspect of the Claimant's right leg, which necessitated surgery;
- (2) continual pain in the Claimant's right ankle and foot; and
- (3) extensive loss and damage inclusive of being deemed disabled by the National Board of Insurance (NIB).

10. By paragraph 15 of the Affidavit of Nerissa Greene, it was asserted that "[t]he Claimant remains unemployed with no source of income and has been deemed disabled by the National Insurance Board (NIB) as a result of the accident." The Claimant was assessed by numerous medical practitioners, some of whom recommended she undergo further testing, but primarily, she relied on the following (which the Court has considered) to support her demand letter:

- (1) Medical Reports of Dr Robert Gibson MD (Consultant Orthopaedic Surgeon) dated 12 April 2019, 10 October 2019, 20 April 2020, 8 July 2021 and 28 November 2021;
- (2) Operative Reports of Dr Robert Gibson dated 11 October 2020 and 3 December 2020;
- (3) ECG Report dated 18 July 2019;
- (4) Nerve Conduction Studies dated 18 July 2019, 9 November 2019 and 21 January 2020 with interpretation by Dr Charles Rahming MD;
- (5) Musculoskeletal Ultrasound Report dated 23 May 2019;
- (6) Physical Therapy Report dated 15 July 2019;
- (7) MRI Report of right ankle dated 27 December 2019;
- (8) Medical Report of Dr Kathryn DeSouza dated 8 January 2020;
- (9) Rehabilitation Progress Assessment dated 16 July 2020 and 6 January 2021;
- (10) Radiology Report dated 3 October 2020;
- (11) X-Ray Report of pelvis dated 6 October 2020; and
- (12) MRI of the spine dated 27 July 2021.

11. The Defendant's evidence is set out in the Affidavit of Sandra Fountain filed on 01 July 2023 (the "Fountain Affidavit").

12. On 22 July 2022 the Claimant requested of the Defendant the sum of \$20,000 as an interim payment. On 14 September 2022, the Defendant agreed to pay the requested sum within the next week, but later stated that there was a delay in obtaining a wire transfer of the funds. In the circumstances, by an application before the Duty Judge, the Claimant sought and obtained an Order from *Lewis-Johnson J* on 11 October 2022, that within 7 days the Defendant pay the Claimant an interim payment in the amount of \$20,000 pursuant to Order 29, rule 9 of the Rules of the Supreme Court, 1978 (the "RSC"). The Defendant complied with the Court's Order.

13. On 01 November 2022, the Defendant filed a Notice of Payment into Court for the sum of \$64,863.81, having made the payment in on that date. See the Affidavit of Sandra Fountain filed on 01 July 2023 (the “Fountain Affidavit”) at pages 4 and 106. (It is noted that the Fountain Affidavit pointed out that the letter on page 106 appears to contain a clerical error as to the year of the payment in).

14. On 19 June 2023, the Claimant was heard by *Winder CJ* on another application for an interim payment pending trial, this time for \$60,000. The Claimant stated that she needed the funds to meet the cost of electro-diagnostic studies recommended by one of her physicians and to assist with financial needs.

15. *Winder CJ* dismissed the Claimant’s application for a second interim payment and ordered a speedy trial. The Court reasoned that an order for an interim payment should only be granted if it is the just disposition of the application in the circumstances of the particular case. Further, as an application for an order for an interim payment is an application for interim relief, the Court stated that it must not conduct a ‘mini-trial’ or seek to finally determine issues which are properly left to the trial judge. Ultimately, the Court was of the view that a conservative approach should be adopted. *Winder CJ* therefore refused the further interim payment in the amount of \$60,000 or any lesser sum, reasoning that the Court was not confident that such further interim payment would not take it beyond the constraint on its discretion which is imposed by **CPR 17.15(4)**.

16. On 9 February 2022, the Defendant requested to have the Claimant examined by an independent physician and to release her medical records as it was unclear to the Defendant what causes, contributing factors or accelerating factors affected the Claimant’s injuries. While the Claimant agreed to the examination by 16 February 2022, she did not return the signed medical release to the Defendant’s Counsel to facilitate the examination and release of her prior medical records until 11 October 2023. Apparently, the delay was caused because the Claimant’s Counsel persisted in the request for discovery of any resulting independent medical report.

17. The trial in this matter was fixed to take place on 7 and 8 May 2024. Pursuant to the directions of the Court, the parties provided lists of documents, discovery and inspection by 14 December 2023. As the Claimant did not file the Bundle of Documents by 18 December 2023 as ordered, an adjustment was made to the timelines for filing the Bundle of Documents and Witness Statements.

18. The Defendant filed its Expert Witness Statement and Witness Statements for witnesses of fact by 6 February 2024. The Claimant filed the Trial Bundle of Documents on 28 February 2024. The Claimant failed to file an Expert Report and any Witness Statements in the time ordered by the Court. As such, at the Pre-trial Review hearing on 6 March 2024, the Court made an adjustment for filing and ordered that the Claimant to file all witness statements and

expert reports by 15 March 2024. The trial date and other deadlines had to be adjusted to accommodate the Claimant.

19. On 15 March 2024 the Claimant filed her Witness Statement, and annexed medical reports to the same. She produced no Expert Medical Report or Expert Witness Statement as ordered. On 22 March 2024, the Defendant provided the Claimant with a copy of the Expert Medical Report of Dr David Barnett filed on 31 January 2024. This report was provided as a consequence of the independent medical assessment which had been conducted at the request of the Defendant.

20. Having disclosed the independent medical report to the Claimant, by letter dated 5 April 2024 Counsel for the Defendant wrote to Counsel for the Claimant inviting the Claimant to accept the payment into court (made since 1 November 2022) on specific terms. Those terms were that the payment into court:

- (1) would be accepted within seven (7) days, and
- (2) would cover, in full and final settlement of the matter, all damages and costs incurred.

21. If the deal were accepted, both parties would walk away without any further obligation as to damages and costs. It was not. The 7-day acceptance period expired. Counsel for the Claimant then wrote to Counsel for the Defendant on 17 April 2024 to indicate that the Claimant would accept the payment into court, “save as to costs”, and that “the Claimant’s costs to date” stood at \$75,000.00.

22. The next day, the Claimant filed a Notice of Acceptance of Payment into Court. The question as to whether any further sums are payable for costs of the Claimant upon the acceptance of the payment into court remained unresolved.

23. The matter was considered on the papers by the Court. On 8 May 2025 further issues were canvassed to be dealt with in additional written submissions by the parties.

Independent Medical Opinion

24. The Defendant’s expert medical witness, Dr David Barnett MD (Consultant Orthopaedic Surgeon), examined the Claimant on 28 November 2023 and 2 January 2024. He also conducted a comprehensive review of her medical records and history, including the reports on which the Claimant wished to rely at the trial.

25. In his Expert Report filed on 31 January 2024, Dr David Barnett stated that the Claimant reported that as a result of the First Accident and Second Accident (which he called “the Subject Accidents”) she sustained injury to her lower right extremity and experienced pain, numbness, cramping and swelling which resulted in her suffering loss, an inability to work or to enjoy life. However, Dr Barnett wrote that the Claimant failed to remind and/or disclose to those treating

her that she has a relevant pre-existing history, which provides that she has had a long history of issues, not only with this extremity, but with several other anatomical regions of her body, as well as major psychosocial problems. The doctor opined that the Claimant chose to provide a selective history to the physicians treating her. Therefore, many of the documents generated by them since the Subject Accidents occurred are without relevant information, thus giving the incorrect impression that Ms Knowles right lower extremity symptoms began on 18 May 2019.

26. Dr Barnett stated that he had assessed the Claimant on occasions prior to the Subject Accidents, so he knew her history. He stated that in her consultations for this report, when he referenced her past injuries and assessed impairments, she falsely stated that she was “fully recovered”. However, the doctor stated that he observed that she continued to receive impairment benefits from the National Insurance Board for over 10 years based mainly on her ongoing condition. Dr Barnett opined:

“For the purposes of applying for health insurance, she memorialized that she was fully recovered, but for the purposes of the NIB disablement, she remained 50% impaired / disabled, stances that allowed both situations to proceed. Actions that informed she was gaming the system.”

27. Dr Barnett observed that the Claimant had a trend of having double accidents. Such accidents occurred with three different employers. Specifically: (1) on 22 October 2012 the Claimant had 2 accidents when she was employed with Paper Pak, (2) on 4 and 6 January 2005 the Claimant was involved in 2 accidents when she was employed with Solomon’s Super Centre, and (3) she suffered 2 further accidents on 18 May 2019 while employed with the Defendant. The doctor stated:

“Ms Knowles played the game over the years with her impairment to obtain Disablement Benefits for the NIB, health insurance and by extension would not have disclosed her real health status, similar in action to what occurred when she worked at a supermarket, in 2005, and at Paper Pak in 2012, starting the psychosomatic process all over again.”

28. Dr Barnett opined that although the Claimant stated that her prior injuries were not relevant and/or that she had fully recovered, this was not the case. She had a prior history of Complex Regional Pain Syndrome (“CRPS”) a chronic condition that cannot be cured, just managed. On 29 April 2000, a car ran over the Claimant’s right foot and she suffered a calcaneal fracture in her mid-foot. She experienced pain and episodes of neuritic type pain with swelling and an inability to stand for long periods or run. The medial arch of that foot collapsed. This initial injury was “never supported by a prescribed arch support, meaning the resultant flat foot was at an increased risk of being painful, more so in an obese lady, according to Dr Barnett. She had a history of flat foot, neuritic pain, swelling, obesity and psycho-social issues which also contributed to her CRPS.” The Court sees no disclosure in the pleadings of the Claimant or the reports attached to her Witness Statement of this history or its contribution to the current medical condition of the Claimant.

29. Dr Barnett expressed the view that the Claimant experienced chronic pain and social upheaval before the Subject Accidents. However, he stated that “there has been an over-arching exhibition of “abnormal pain behaviour” by a patient who from the history outlined sustains minor injuries, that then morph into purported major problems. Dr Gibson (the Claimant’s physician) once wrote that her problems were over-arched with *functional overlay*, which Dr Barnett explained as “exaggeration of symptoms, with a picture akin to the *Munchausen Syndrome* with malingering.”

30. As a part of his opinion and prognosis, Dr Barnett stated that the Claimant sustained from the Subject Accidents of 18 May 2019 a minor bruise to her right extremity which had resolved by 5 days later. The doctor opined that the total physical and psychological residual impairment from the Subject Accidents was an assessed 4%, as even that minor trauma would have caused minor enhancement of the already existing medical condition of the Claimant.

31. The doctor concluded that the Claimant should seek out care to address the issues ongoing in her lower back and to correct her chronic anemia, as the primary cause of her right lower extremity deficits, CRPS, is highly likely to be permanent. It had been ongoing for 20 years and unlikely amenable to cure. He reiterated that these aspects of her care have “minor to no relationship” to the Subject Accidents.

32. Roughly one month after the Claimant’s Counsel received Dr Barnett’s Report, the Claimant capitulated in her acceptance of the payment into court. The Claimant did not seek to refute any of the matters stated by Dr Barnett in his independent report. Instead, the Claimant’s Counsel states that the risk of going to trial was reassessed on considering Dr Barnett’s Report and a decision was made to accept the payment into court.

Submissions

Claimant’s Submissions

33. Ms Eugenia T. Butler, Counsel for the Claimant, presses the Court to take into consideration that the Notice of Payment into Court did not specify a deadline for the Claimant to accept the payment in and did not specify that the offer included costs. Counsel further asserts that the payment in was accepted well before the commencement of the trial which had been adjusted to dates in September 2024. She reasons that the Defendant did not have to be “burdened with having to prepare for a trial”.

34. Counsel argues that the Defendant did not respond to her client’s detailed claim letter and medical reports provided since 22 December 2021. Further, Ms Butler contends that the Defendant’s conduct caused the Claimant to continue with the litigation.

35. Counsel asserts that the Claimant is financially needy and cannot afford to bear the Defendant’s costs or any costs. As such, it is suggested she ought not to be found responsible for the same.

36. One of the main planks of the argument of the Claimant is that although the Defendant made its payment into court on 01 November 2022, the Expert Report of Dr Barnett relied upon by the Defendant was not shared with the Claimant until March 2024. Counsel argues that “only after receipt of the Defendant’s medical expert report was the Claimant truly able to give sufficient consideration to the payment that was made into court.” Consequently, the delay in accepting the payment in was primarily due to the Defendant’s “dubious conduct.”

37. Counsel contends that in all the circumstances, the Court should award the Claimant her costs up to 18 April 2024, the date of the filing of her Notice of Acceptance of Payment into Court.

38. Ms Butler submits that the general rule is that the Court must order the Defendant to pay the Claimant’s costs up to the date of acceptance of the payment into court. However, Counsel concedes that the Court retains the discretion to depart from the usual costs consequences if it determines that it is unjust to apply them. Counsel argues that if the Defendant has acted unreasonably, the Court may consider reducing or eliminating the Claimant’s liability for the Defendant’s costs after the relevant period, which, the Claimant submits, is 21 days from “the date of the offer” under **CPR Part 35**.

39. Ms Butler also addressed the Court’s question as to the effect of an exaggerated claim on the Court’s decision. Counsel responded that the Court will consider the extent and nature of an exaggerated claim. It may lead to a reduction in the amount of damages awarded, penalties as to costs or even striking out of the claim in exceptional circumstances. See **Fairclough Homes Ltd v Summers** [2012] 4 All ER 317. Counsel also cited **Alpha Rocks Solicitors v Alade** [2015] 1 WLR 4534 in which the court stated that striking out a claim should be a last resort and that the remedy should be proportionate to the abuse.

40. The arguments for the Claimant did not directly address the Defendant’s contention that the Claimant failed to disclose material prior medical history. The Claimant simply argues that “any exaggeration” is “limited to specific elements of the claim”, “does not undermine” its validity, and “was not intended to deceive.” Ms Butler further states that the claim was legitimate and the Claimant’s acceptance of a fraction of the estimated damages demonstrates her acknowledgement of the true value of the claim.

41. The Claimant also relied on provisions of the CPR, **Straker v Tudor Rose (a firm)** [2007] All ER 224, **SG v Hewitt** [2012] EWCA Civ 1053, **Flynn v Scougall** [2004] 1 WLR 3069, **Capital Bank v Stickland** [2005] 2 All ER 544, **Or Siu Lung v Fu Hong Home for the Elderly Co Ltd** [2018] 1 HKLRD 872.

Defendant’s Submissions

42. Ms Camille A. Cleare, Counsel for the Defendant, highlighted alleged unreasonable conduct of the Claimant in sending a demand letter for \$588,476.02 3 days before Christmas

with 14 days to respond. Further, Counsel criticizes the Claimant's refusal to sign a medical release form to be examined by an independent physician, unless the terms were changed so that the Claimant could get discovery of the resulting medical report. The Defendant argues that if the Claimant had waited to be medically evaluated before filing her action, the case might have been settled early with fewer costs involved.

43. Ms Cleare also pointed out that the Claimant initiated unreasonable applications and failed to reasonably agree certain positions. Counsel stated that of the 4 interlocutory applications brought, the Defendant succeeded in 3 of them and agreed the 4th.

44. Citing the conduct of the Claimant, Counsel argued that the Claimant persisted in stating that two accidents happened in reverse order to what was actually recorded in a contemporaneous report given in relation to the First and Second Accident which took place on 18 May 2019.

45. Counsel for the Defendant also contended that Dr Barnett found that the Claimant failed to disclose significant medical background records, which showed that due to a prior accident unrelated to the Defendant, she had the nerve injury of which she complained. Further, Counsel maintains the Claimant grossly exaggerated her claim. In the circumstances, Ms Cleare contends that it is unjust for the Claimant to recover costs, or the full amount of the same.

46. The Court is urged to find that the Defendant is the true winner of the action and the justice of the case requires that the Defendant is awarded its costs of the action.

47. The Defendant relies on provisions of the **CPR**, **Summit Insurance Limited et al v Bolingbroke Limited** [2024] 1 BHS CA, **Painting v University of Oxford** [2005] EWCA Civ 161, **Young v Kelly's (Freeport) Limited** [2002] BHS J. No 164, **The Caribbean Civil Court Practice**, 3rd Edition p. 445, **Bergan v Evans** [2019] UKPC 33, **Widlake v BAA Ltd.** [2009] EWCA Civ 1256, among other authorities.

Issues

48. The overarching issue to be determined is whether the Claimant is entitled to costs upon acceptance of the payment into Court made by the Defendant, and if so, for what duration and in what amount. The Court must also consider whether the Defendant is entitled to costs of the action. Among other factors enumerated by the parties, the Court must consider:

- (1) the effect, if any, of the timing of (and reasons for) the acceptance of the payment into court by the Claimant;
- (2) whether the Claimant exaggerated her claim for damages, and the effect an inflated claim would have on the issue of costs, if any.

Law and Discussion

Applicable Rules

49. The Claimant's application for costs was filed pursuant to the CPR, which came into force before the application was made. However, the Defendant made the payment into court some three months before the CPR came into force. At that time, the former **Rules of the Supreme Court** (the "RSC") were in effect. **RSC Order 22** then governed payments into court and prescribed the time for acceptance of the same.

50. **RSC Order 22** provides in part:

"3. (1) Where money is paid into court under rule 1, then subject to paragraph (2), within 21 days after receipt of the notice of payment, or, where more than one payment has been made or the notice has been amended, within 21 days after receipt of the notice of the last payment or the amended notice but, in any case, before the trial or hearing of the action begins, the plaintiff may –

(a) where the money was paid in respect of the cause of action or all the causes of action in respect of which he claims, accept the money in satisfaction of that cause of action or those causes of action, as the case may be, ... by giving notice in Form No. 24 in the Appendix A to every defendant to the action.

(Emphasis added).

51. In the rubric under UK Order 22 Rule 3 at paragraph 22/3/1 of the 1982 White Book, the authors helpfully explain in part:

"...If the payment in is made or increased before the beginning of the trial or hearing the plaintiff has the right without the leave of the Court to accept and receive the money paid in within 21 days after the receipt of the notice or the last notice of payment and he is entitled as of right to tax his costs (see O. 62, r. 10 (2) and (3), *infra*), but this right is dependent upon two conditions being fulfilled (1) that notice of acceptance is given within the time allowed and (2) that notice of acceptance is duly given in proper form to every defendant. It would seem to follow that to be effective, a payment into Court made or increased before the trial or hearing of the action begins, must be made or increased not less than 21 days before the beginning of the trial or hearing, otherwise the plaintiff will not have his prescribed period of 21 days within which to accept such payment in...

...

"Time for Acceptance. The plaintiff should be prompt to accept money paid into Court in order to avoid further costs. To be effective, acceptance of money paid into Court before the trial or hearing of the action is begun must be made

within 21 days of the receipt of the notice of payment or last payment in, but before the trial or hearing of the action begins...”.

(Emphasis added).

52. Under the RSC, the timely acceptance of a payment into court by a plaintiff, that is, within 21 days of the receipt of a notice of payment into court, entitled the plaintiff pursuant to **RSC Order 59 r. 10 (2)** (the Bahamian equivalent of the former UK RSC O. 62 r. 10 (2)) to tax his costs incurred to the time of receipt of the notice of payment into court, usually with no liability to pay costs of the defendant.

53. In this action, these are the provisions that governed the Defendant’s payment into court and the required timing of acceptance of the same by the Claimant. The Claimant referred extensively to CPR Part 35 and 36 as relevant. However, the CPR was not in force when the Defendant made its payment into court or when the time for acceptance of the same by the Claimant ran its course. The payment in was neither made in compliance with nor contemplation of the CPR. In the circumstances, I do not find authorities on the proper construction of **CPR Part 35** and **Part 36** to be of assistance.

54. The effect of making the payment into court under the RSC is clearly that after the Claimant was notified of the payment into court on 1 November 2022, she had a prescribed time limit of 21 days within which to accept the payment, that is, on or before 22 November 2022. The Claimant did not do so until roughly 1 year and 5 months later when she served on the Defendant the Notice of Acceptance of Payment into Court which was filed on 18 April 2024.

55. After the CPR came into effect, the Claimant brought this application for costs. The Court’s file reflects that at a case management conference of 6 October 2023, *Winder CJ* first set the trial of this matter to take place on 7 and 8 May 2024. The parties agree that the CPR applies to this application in as much as although the action was commenced before the CPR came into effect, no trial date was fixed until after the CPR came into effect. See the **Preliminary Part** of the CPR at **Rule 2(1)(b)**. Further, **Practice Direction No. 9 of 2023** prescribes that any new application which has to be filed after the commencement of the CPR must be CPR-compliant. The Court recognizes that the general provisions of the CPR as to the Court’s discretion in awarding costs are applicable (such as **CPR Part 71.10**). However, the consequences of not accepting the Defendant’s payment into court within 21 days (that is, by 22 November 2022) had accrued during the period when the RSC was still in effect.

56. In examining whether the Claimant is entitled to tax her costs in these circumstances, the Court must first explore the effect of the failure on the part of the Claimant to accept the payment in within 21 days pursuant to the RSC.

57. Under the RSC Order 22, late acceptance of a payment into court did not entitle a claimant to an automatic payment out. The payment out was made only with the approval of the Court. Further, the Court had a broad discretion regarding the terms upon which payment

out would be made, especially regarding costs. The usual outcome was that the plaintiff would be allowed to take the money in satisfaction of the claim and would receive costs up to the date of the payment into court, but would be ordered to pay the defendant's costs from the date of the payment in, unless the court found it unjust or there were exceptional circumstances. In the English case of **Associated Recordings (Sales) Ltd v Thomson Newspapers Ltd** (1967) 111 S.J. 376 CA, a payment into court by the defendants was not accepted within the then statutorily prescribed time of 14 days, but 4 days later by the plaintiff. The defendants agreed to let the plaintiff take the money out of court, and claimed costs from the date of payment in. Brown J allowed the defendants' claim as to costs. The Court of Appeal upheld this decision.

58. On 23 November 2022, unless there were exceptional circumstances or the Court found it unjust, the Claimant would have been allowed to receive the payment out of court by an order of the Court. However, the Claimant would have had to pay the Defendant's costs from 02 November 2022 (the day after the Defendant made the payment into court). This meant also that the Claimant would have been able to tax her costs up to 1 November 2022. (In this regard, the Defendant argues that there are exceptional circumstances and it is unjust for the Claimant to get costs or a full recovery of the same).

The 7-day Offer

59. In excess of one year later, the Claimant accepted the payment into court, but not upon the terms stated by the Defendant on 5 April 2024, namely that it be done within 7 days (that is, by 14 April 2024) in settlement of all damages and costs ("**the 7-day Offer**"). The Defendant asserts that the 7-day Offer was not made in accordance with CPR Part 35 and that CPR 35.1(2) does not restrict a party from making offers outside of the parameters of the rule.

60. According to **CPR 35.1(2)**, "this Part does not limit a party's right to make an offer to settle otherwise than in accordance with this Part." If the Court encounters an offer which has been made outside of **CPR 35**, such an offer will be given such weight in relation to any issue as to costs which arises as the court thinks appropriate. See the decision of the Grenadian High Court in **Dirk Burkhardt et al v Donald Frederick et al** GDAHCV2009 / 0030. Additionally, according to the Notes under **CPR 35.5**, "there is no provision in this Part that imposes consequences on the party failing to comply with the procedure."

61. Having considered the 7-day Offer, it neither expressly states that the offer is put to the Claimant pursuant to **CPR Part 35**, nor does it strictly conform to the method prescribed by that rule. There is no evidence before the Court that the Defendant wished to avail itself of **CPR Part 35** mechanism. In my view, the 7-day Offer proposed by the Defendant could legitimately be extended to the Claimant by the Defendant as a part of the Defendant's right to make an offer to settle "otherwise than in accordance with" **CPR Part 35**. However, in any event, the 7-day Offer was not accepted by the Claimant.

62. As for timing, it was only after the Claimant saw the Expert Report of Dr David Barnett that the Claimant decided on 17 April 2024 to accept the payment into court. In relation to her

capitulation and acceptance of the payment into court, the Claimant argues that the Defendant's service of Dr Barnett's report on her Counsel on 22 March 2024 was delayed and prejudicial to her position. She argues that the Defendant's "failure to provide the independent medical report was the primary cause of the delay in accepting the payment in and that she should not be penalised for circumstances beyond her control. The Claimant therefore argues that the Court should exercise its discretion to order that the Claimant is not liable for the Defendant's costs incurred after the expiration of the relevant period.

63. The Court accepts that the Claimant's communication of her desire to accept the payment in was late. Even if the CPR regime had governed the payment into court and the deadline for acceptance of the same, the Claimant's acceptance would have been extremely late, as it was outside of 21 days of the payment in.

64. In my view, this put the Claimant at a significant risk as to costs. The 7-day Offer was an opportunity for the Claimant to walk away with the \$20,000 she had earlier received as an interim payment, plus the \$64,863.81 paid into court under the RSC regime. If she had accepted these payments as her damages and costs within the specified time of 7 days, the Claimant would not have risked having to pay any of the Defendant's costs.

65. Both parties accept that the Court retains a discretion in relation to awarding costs, including to consider whether it is unjust to apply the usual costs consequences. The Court's discretion as to costs is anchored in **section 30 of the Supreme Court Act, Chapter 53 of the Statute Laws of The Bahamas** which provides:

"30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court...shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

66. While the Court has a wide discretion as to costs, to guide it in a judicious exercise of the discretion, the **CPR** prescribes that account be taken of certain factors. According to **CPR 71.10**:

"(1) In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including –

- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful;
- (c) any payment into court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not an offer to which costs consequences under Part 35 and 36 apply.

"(2) For the purposes of paragraph (1)(a), the conduct of the parties includes –

- (a) conduct before, as well as during, the proceedings;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
- (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim; and
- (e) unreasonable conduct of any kind by any party in relation to the inclusion or exclusion of documents or authorities in any bundle and whether a joint bundle or otherwise.”

67. Based upon the chronology produced by the Defendant in the Fountain Affidavit, I did not find the Claimant to be unreasonable or unduly aggressive in the timing of her demand letter or in the filing of her Writ. The Claimant gave an extension of time to allow the Defendant to respond to her demand letter. I do not find the filing of the Writ to be excessively early. The incidents which gave rise to the claim occurred on 18 May 2019. The Writ was filed just about 2 months shy of the expiry of the 3-year limitation period for bringing a personal injury claim. This is not aggressive or unreasonable on the part of the Claimant.

68. There was significant delay, however, in the Claimant’s signing of a release to agree to be medically assessed by an independent medical doctor and to release her medical records pursuant to such independent evaluation. To the Defendant’s request that the Claimant be medically assessed by an independent doctor on 9 February 2022, the Defendant’s Counsel readily agreed on 16 February 2022. However, there apparently followed a disagreement over the wording of the medical release form which was furnished to the Claimant on 7 March 2022. The doctor was not able to examine her until she proffered the signed release for her medical records to him. Her signed agreement came more than 1 ½ years later. According to the evidence given to the Court, the time-lag occurred because Counsel for the Claimant argued that the Defendant must agree to disclose any resulting independent medical report. This premise upon which the release was not promptly signed by the Claimant was untenable. The Defendant’s Counsel in answer took the position that the report would not be discoverable per se. The position of the Defendant was correct. In civil litigation, the law is clear that medical reports prepared for the purpose of litigation are privileged and not subject to disclosure unless the party at whose behest the report has been prepared chooses to rely on that report at trial, thereby waiving privilege. See **Jackson v Marley Davenport Limited** [2004] EWCA Civ 1225.

69. Another criticism made by the Defendant pertaining to unreasonable conduct related to the 4 interlocutory applications in this action. I accept that some of the interlocutory applications brought, or positions adopted, by the Claimant seem to have been ill-considered, for example, the application to set aside the Defendant’s Defence, the application for a second interim payment and the failure to agree the setting aside of the Claimant’s irregular default judgment (entered after serving process on the wrong office).

70. The Claimant criticized the Defendant for making no offer to counter her Calderbank letter. I do not think it is sustainable to assert that the Defendant made no offer in this matter. Clearly, the payment into court was in the nature of an offer. At no time before receipt of the independent medical report did the Claimant counter and adjust her initial demand of \$503,832.22 for general damages and future loss of earnings. Secondly, the 7-day Offer as to acceptance of the payment to cover damages and costs was another offer by the Defendant.

Other factors

71. Three further factors are of paramount significance in exercising the discretion of the Court on costs. The first is the issue of the inflation of the Claimant's claim. The second issue (linked to the first) is that of non-disclosure or late disclosure of her past medical history and condition, which the Claimant has not denied or otherwise refuted. The third relates to dilatoriness of the parties and the timing of the acceptance of the payment into court.

72. In weighing up the manner in which this Court ought to approach the issues, I considered the guidance of the Court of Appeal in **Summit Insurance Limited et al v Bolingbroke Limited** [2024] 1 BHS CA. In that case, Evans JA (as he then was) stated that a court must begin by determining who the successful party was. Further, in relation to the factors which must be considered the Court opined:

“60. This point is evidenced from the decision in the English Court of Appeal case of **Painting v University of Oxford** [2005] EWCA Civ 161 which related to a claim for damages for personal injuries. The Defendant made a payment into court and, even though the Plaintiff beat the payment into court, the Court of Appeal still held that the Defendant was the true winner of the action, and the Plaintiff only got her costs up to the date of the payment in and the Defendant got its costs thereafter. The court was of the view that the Plaintiff had greatly exaggerated her claim and there was the strong likelihood that, but for exaggeration, the claim would have been settled at an early stage and with modest costs.

“61. In my view, a trial Judge in considering the proper order for costs must give consideration to all of the circumstances of the case including the conduct of the parties. It is clear that there are guiding principles to which a judge must give consideration. Yet, after the judge has taken all the factors into consideration as a guide, he must arrive at an Order which in his view properly meets the justice of the case. This in my view is the ultimate principle which he is bound by. He must be fair to the parties.

...

“63. I am further satisfied that on the totality of the evidence the Insurers were the successful parties at trial...From our own review, the evidence shows that the Insurers did everything possible to settle the claim. Offers of settlements were made beginning prior to trial and a payment was made into court. Liability was not contested paving the way for a speedy resolution.

“64. In considering the payment into court and the offers to settle, I have taken them into consideration only to the extent that they show the Insurers good faith efforts to settle the claim and avoid a trial. I am satisfied that although Bolingbroke may have had a genuine belief that they were entitled to a greater compensation that does not provide a valid reason for depriving the Insurers of their costs due to them as the successful party.”

(Emphasis added).

73. Where parties argue that the normal costs rule should not apply, the Court has to consider the reasonableness of the payment into court. In doing so, the Court recognizes that costs decisions are highly fact-sensitive and it is not helpful to compare one case with another. (See **Or Sui Lung appointed to represent the estate of Lam Choi Ching, deceased v Fu Hoong Home for the Elderly Co Ltd** [2018] 1 HKLRD 872). From the First Accident and the Second Accident, Dr Barnett opined that the Claimant had “a minor contusion in the area just above the right posterior heel region, which was superimposed on a limb with chronic longstanding CRPS, enhanced by an ongoing radiculopathy from the disc herniations in her lumbar spine.” The doctor stated with clarity that the accidents of 18 May 2019 were unrelated to all but a minor contusion just above the Claimant’s right heel, which resolved in 5 days.

74. The demand made by the Claimant’s attorneys was \$503,832.22 comprised of \$35,832.22 for pain, suffering and loss of amenities and \$468,000 for future loss of earnings. It was clear that the Defendant needed to examine the Claimant due to the lack of clarity of her condition and her relatively large claim. The amount of the demand was questionable as it did not seem commensurate with the events of 18 May 2019. After seeing Dr Barnett’s admittedly scathing report, the Claimant ended up accepting \$84,863.81, which is comprised of \$20,000 (the interim payment) and the \$64,863.81 paid into court by the Defendant. Remarkably, the Claimant accepted less than 17% of her demand.

75. The amount demanded for pain, suffering and loss of amenities (\$35,832.22) was in excess of a fair award for the Claimant’s injuries. The figure had been proposed by Counsel for the Claimant based on the 1998 award in the case of **Dow v Dow** (Kemp & Kemp, Vol 4, para 14-008). In that case, the claimant had suffered a comminuted fracture of the lower end of the left tibia which extended into the ankle joint, a flake fracture of the lateral malleolus, arthrodesis of the ankle 6 years after the accident.

76. Dr. Barnett opined that the minor contusion sustained by the Claimant residually impacted the limb which had longstanding CRPS by 2% and impacted her psychologically by 2%. The injury the Plaintiff sustained from the accidents on the Defendant’s premises on 18 May 2019, seem to fall most appropriately in category (g) - the ‘Modest Foot Injuries’ category - as described in the **Judicial College Guidelines for the Assessment of General Damages in Personal Injury**, Seventeenth Ed., November 2023. The authors describe the category as follows:

“(g) Modest

“Simple metatarsal fractures, ruptured ligaments, puncture wounds and the like. Where there are continuing symptoms, such as a permanent limp, pain, or aching, awards between £8560 and £16,770 would be appropriate. Straightforward foot injuries such as fractures, lacerations, contusions, etc. from which complete or near complete recovery is made would justify awards of £8560 or less. Modest injuries that resolve within a short space of time will attract lower awards. Awards for minor foot injuries resolving within a few months, with little impact on lifestyle or day-to-day activities, are unlikely to exceed £2,990.”

77. Based on this range, an award of \$15,000 to \$22,000 seems appropriate to compensate the Claimant for the actual pain, suffering and loss of amenities she sustained as a result of her accidents on 18 May 2019. Moving on, the claim of \$468,000 was to compensate the Claimant for not being able to work for the rest of her life. However, Dr Barnett observed that, based upon her National Insurance contributions, the Claimant never worked save for very short periods in her entire life. Further, Dr Barnett did not accept that the incidents of 18 May 2019 caused the Claimant to be disabled. He opined that the Claimant had longstanding health issues, which were completely unrelated to the bruise above her right heel sustained on 18 May 2019.

78. On any just scale, her claim was grossly overstated. The claim of \$503,832.22 put forward by the Claimant was nearly 6 times greater than the sum she accepted, and even on a broadbrush analysis, an amount to which she was clearly not entitled from the Defendant.

79. Moreover, I accept the Defendant’s submission that the Claimant refused the Defendant’s request to have its expert examine her medical records at an early stage of the proceedings to discover any pre-existing history of foot injury. The fact is that the Defendant proposed having her independently examined and the Claimant’s written authorization for this exercise and to release her medical records was dilatory as discussed in paragraph 68.

80. The Claimant capitulated in her acceptance of the payment in when she saw Dr Barnett’s Expert Report. However, I am not satisfied that the Claimant was enlightened by any of the views expressed by the doctor as to her prior medical history and existing condition as a result of that history. This is something she knew quite well, but did not promptly disclose to the Defendant or take into consideration when she formulated her claim and demanded \$503,832.22 from the Defendant. Her claim that she was “fully recovered” from her past injuries was not truthful. This was the opinion of Dr Barnett which the Claimant did not controvert. It would not have put her in a good light at trial, especially since the Claimant produced no Expert Report to support her case at trial as ordered by the Court. This is the context of the reassessment of the Claimant’s risk upon seeing the independent medical report.

81. The Court must take into consideration the guidance of the CPR. The authors of *The Caribbean Civil Court Practice*, 3rd Edition, p. 445, state:

“NOTE 29.9

“An overriding dynamic of the CPR is the use by the court of the costs provisions as a management tool to achieve the overriding objective, eg to deter through the award of costs orders, any conduct of a party which is considered by the court to interfere for instance with the expeditious disposal of the claim or the identification of issues at an early stage. The court has always been able to take into account a party’s conduct when considering costs and has done so.”

82. The Defendant, having filed Dr Barnett’s Report and Witness Statement on 31 January 2024, waited to comply with the Court’s direction that there be an exchange of such Reports between the parties by 15 March 2024. The Defendant did not know until 15 March 2024 that the Claimant would not have an expert report to exchange. It appears the Claimant said nothing as to her inability to produce the same up to the time of the scheduled exchange. Seven days thereafter, the Defendant shared Dr Barnett’s Report with the Claimant. I consider that having decided on 31 January 2024 that it would waive the privilege attached to the independent medical report, the Defendant could have shared Dr Barnett’s Report with the Claimant at that time. The Court has weighed these factors.

83. In relation to the 7-day Offer, the proposal of the Defendant was decidedly reasonable. The Claimant did not accept it and instead put forth a bid for the payment into court as damages plus a further \$75,000 in costs. In doing so, the Claimant refused the offer of the Defendants that she would not have to pay its costs.

84. In the Court’s view, the conduct of the Claimant during the course of this case, marred at times by unreasonableness and a lack of forthrightness, overshadows any delay on the part of the Defendant in furnishing a copy of Dr Barnett’s Report to the Claimant. Had the Claimant been reasonable in her demand for compensation, more prompt in her agreement to the independent medical examination, fully forthright in her disclosure concerning her prior and ongoing medical problems which did not generate from the accidents of 18 May 2019, and more prompt in her acceptance of the payment into court, it is quite possible the matter would have been resolved earlier and costs would have been saved.

85. The Court takes into consideration the impecuniosity of a party where it is relevant, for example, it is a factor which may have affected the Claimant’s preparation for her case. However, the Claimant’s Counsel submitted that she ought not to be made to bear any costs due to her financial need. In these circumstances, this argument cannot avail the Claimant as she cannot use her impecuniosity as a shield to block the consequences of her own unreasonable actions.

86. In my judgment, the Claimant would have received, had she taken the 7-day Offer, ample compensation for her injury sustained in the accidents of 18 May 2019 and for her costs up to the date of the payment into court. In comparison, the conduct of the Defendant, the party whom I consider to be the victor in all the circumstances, was more reasonable. It is within the

Court's discretion to reduce or deprive a party of costs on the basis of an exaggerated claim which hampered the speed in the disposition of the matter, as is the case here. In **Painting v University of Oxford** [2005] 3 Costs LR 394, the English Court of Appeal (Civil Division) stated:

“Where a claimant has clearly exaggerated her claim and had made no effort to negotiate or to respond to offers made by the defendant, the court must take such conduct into account. Where on the particular circumstances of the case a trial judge had failed to take such matters into account when exercising his discretion as to costs, he might have exceeded “the generous ambit within which reasonable disagreement is possible” (per Brooke LJ in **Tanfern v Cameron McDonald** [2000] 2 Costs LR 260).

87. It is understood that persons who sustain injuries as a result of the whole or partial fault of others will seek to maximise their claim for compensation to ensure fairness to themselves. However, far too often courts are faced with inflated claims which bear no resemblance to just compensation. Such claims go beyond the bounds of reasonableness and, in some cases, honesty. These are to be discouraged. The CPR provides the framework such that costs are a mechanism by which the Court may do so.

Disposition

88. In the circumstances and based upon my conclusions thus far, while the Court is of the opinion that leave should be granted to the Claimant to accept the payment into court, I am of the view that the payment in of \$64,863.81, together with the interim payment of \$20,000 the Claimant has received, adequately compensates the Claimant for her claim and her costs up to and including 1 November 2022, the date upon which the payment into court was made. Therefore, no further costs will be awarded to the Claimant.

89. On the other hand, it is just that the Defendant receive its costs from the day following the payment into court (02 November 2022). Additionally, the Defendant should receive the costs of 3 interlocutory applications for which costs were ordered to be in the cause by *Lewis-Johnson J* and *Registrar Constance Delancy* (as she then was), respectively, namely: (1) the application to set aside a judgment in default of defence heard on 21 July 2022, (2) the first interim payment hearing of 11 October 2022, and (3) the application heard on 28 February 2023 to set aside the Defence and re-enter judgment in default of defence. In relation to the first interim payment hearing, although *Lewis-Johnson J*. reckoned that the application was appropriate and the granting of the relief sought was a fair disposition, the Court saw fit to order that costs be in the cause. Therefore, as the Defendant is the successful party in the action, the costs of those interlocutory applications are to be paid to the Defendant by the Claimant. As for the second interim payment application, the costs order of Winder CJ of 6 October 2023 was made in favour of the Defendant in the amount of \$8,000.

90. The Court therefore makes the following order:

(1) The Claimant is granted leave to accept the payment into court in the amount of \$64,863.81 to satisfy her claim and costs up to 1 November 2022;

(2) The Defendant is awarded:

(i) its costs of this action from 2 November 2022 through the date of service of the Notice of Acceptance of Payment into Court on the Defendant; and

(ii) costs of and occasioned by the application:

(a) brought by the Defendant to set aside the Judgment in Default of Defence heard on 21 July 2022;

(b) brought by the Claimant for an interim payment in the amount of \$20,000 heard on 11 October 2022; and

(c) brought by the Claimant to set aside the Defence and re-enter Judgment in Default heard on 28 February 2023.

(3) The costs of and occasioned by this application shall be paid by the Claimant to the Defendant. If the parties cannot sooner agree on the quantum of costs, the Court shall hear the parties on this issue.

Dated 18 March 2026



Simone I. Fitzcharles

Justice