COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/01479

B E T W E E N

MIGUEL RUSSELL

Claimant/Respondent

AND

PUBLIC HOSPITAL AUTHORITY

Defendant/Applicant

Before:	Assistant Registrar Akeira Martin
Appearances:	Mrs. Antonia Rolle and Mr. Donard Brown for the Defendant/Applicant
	Mrs. Ramona Farquharson-Seymour and Mr. Samuel Taylor for the Claimant/Respondent
Hearing Date:	18th June 2025
Ruling Date:	2nd April 2026

RULING

Introduction

[1] This ruling is in relation to the Defendant/Applicant, Public Hospital Authority's **("PHA")** Notice of Application filed 26th March 20205 seeking to set aside a default judgment which was entered against it on 19th March 2025 and to allow the PHA an extension of time to file a Defence, pursuant to **Rules 13.3, 10.3(8) and 26.1(k) of the Supreme Court Civil Procedure Rules, 2022 ("CPR")**, as supported by the PHA's Affidavit of Antoinette Glinton, also filed on 26th March 2025 (the "Set Aside Application").

Brief Background

[2] In short, the Claimant/Respondent, Miguel Russell ("Russell") sought damages as a result of the PHA's alleged negligence stemming from his hospitalization at the Princess Margaret Hospital ("PMH") after suffering an injury to his knee during a

rugby game. Russell, a minor at the time, was a member of the Bahamas Rugby Team which was playing a friendly game against Canada International.

[3] Russell, while at PMH, was treated for a dislocated knee but was later admitted to the Intensive Care Unit, placed on a dialysis machine and claimed that his leg began to swell and his leg became infected. Additionally, that doctors at PMH later removed a portion of his leg without consulting his mother, Georgiemae Russell.

[4] As he was also facing amputation of his leg, his mother, Georgiemae, who also noticed his condition deteriorating, made the decision to seek medical assistance in Cuba.

Procedural History

[5] Russell's Generally Endorsed Writ of Summons was filed 15th December 2017 and amended on 23rd February 2018.

[6] The PHA filed its Notice of Appearance and Memorandum of Appearance on 13th April 2018.

[7] There was no further movement on the matter until Russell's Statement of Claim was filed 20th September 2024 ("Statement of Claim").

[8] The Statement of Claim was served on the PHA on 25th September 2024.

[9] On 1st October 2024 the PHA filed an Acknowledgement of Service.

[10] On the 7th January 2025 Russell filed a Notice of Application and Affidavit in support seeking leave to enter default judgment against the PHA for its failure to file a Defence (the "Default Judgment Application").

[11] Russell filed a Notice of Hearing on 10th February 2025 with a hearing date for the Default Judgment Application of 19th March 2025 inserted.

[12] Counsel for the PHA attended the hearing but did not file any evidence in objection to the Default Judgment Application nor was there any formal application made for the extension of time to file a Defence.

[13] The PHA's request to make oral submissions without the formal application was denied as the oral submissions could not be considered by the court without it.

[14] Accordingly, leave was granted to Russell to enter default judgment against the PHA (the "Default Judgment").

The Set Aside Application

[15] By the Set Aside Application, the PHA, in addition to setting out the procedural history of the matter, avers that since service of Russell's Statement of Claim, it encountered logistical challenges with retrieving and reviewing Russell's medical records and reports along with requested reports and options defending Russell's claims. Since the Default Judgment was granted, the PHA overcame those challenges and could now file a viable defence.

[16] The PHA exhibited its draft, unfiled Defence to it Set Aside Application, averring that it had a real prospect of successfully defending Russell's claim against it.

[17] In resistance to the Set Aside Application, Russell relies on the Affidavit of Calvin Seymour ("Seymour") filed 25th April 2025 where he avers that the PHA's draft defence is not in the correct form and that it makes bare denials without offering any explanation in several instances. He adds that the PHA should not have been putting Russell to strict proof as it is the PHA who has access to Russell's medical records.

[18] Seymour rejects the PHA's claim in its defence that Russell's leg was saved due to its skill and care as he was instructed that Russell's leg was only able to be saved because of the medical treatment given to him in Cuba. Moreover, the PHA's ability to access Russell's file after the Default Judgment was obtained was suspicious after years of not being able to access it.

[19] Seymour closes out his affidavit by asserting that the PHA has no merit in defending the action as it has failed to produce a meritorious defence. Therefore, the Default Judgment should stand and the Set Aside Application should be dismissed.

Parties' Submissions

The PHA's Submissions

[20] The Set Aside Application is made pursuant to **Rule 13.3 of the CPR** which provides,

> **"(1) If rule 13.2 does not apply, the Court may set aside a judgment entered under Part 12 only if the defendant —**
>
> **(a) applies to the Court as soon as reasonably practicable after finding out that judgment had been entered;**

(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

(2) In any event the Court may set aside a judgment entered under Part 12 if the defendant satisfies the Court that there are exceptional circumstances.

(3) Where this rule gives the Court power to set aside a judgment, the Court may instead vary it."

[21] It relies on **Thompson v. Thompson [2013] BHS J No 145** where Deputy Registrar Meeres (as she then was) had relied on the findings of the Court of Appeal in **Thorn Plc McDonald (1990) CPLR 600**. The appellate court noted that courts should take a four-step approach when considering whether to set aside a default judgment, namely: (1) whether there was a defence, (2) whether there was a real prospect of success (3) that justice should be done and (4) any prejudice or absence of it to the Plaintiff.

[22] The PHA also relied on **Dean v. Package Delivery Service Ltd. [1985] BHS J No. 9** in which Gonsalves-Sabola J. had quoted from **Evans v. Bartlam (1937) A.C. 473**. In the latter case, Lord Atkin stated the court recognized approach when asked to set aside a default judgment:

"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure."

Lord wright also stated,

"If merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

[23] The PHA submits that it has a good and arguable defence with a real prospect of success. Further, justice should not only be seen to be done but should be done and that there was no prejudice caused to the Plaintiff in setting aside the Default Judgment against the PHA. The PHA also submits that there are merits of the case which necessitates the proper adjudication of the matter.

Russell's Submissions

[24] Russell submits that the Defendant must show that it has a meritorious defence as demonstrated in **Alpha Aviation Limited et al v Randy Larry Butler 2021/CLE/GEN/01128** where Mr. Justice Loren Klein averred at paragraph 58:

> **"As made clear, the primary consideration, as a matter of legal principle and common sense, is whether the defendant has a meritorious defence. If the defendant cannot establish that he could mount a defence with merits, it would be fruitless to set aside a default judgment; but if there were a serious defence, the court would not countenance a judgment on which there had been no adjudication. Naturally, the court would also take into consideration any explanations from the defendant as to the reasons for his failure to file a defence."**

[25] Russell also relies on the British Virgin Islands authority of **Inteco Beteiligungs AG v Sylmord Trade Inc BVIHCM (COM) 120 of 2012** where it was stated that each criterion in Part 13.3 of the BVI Civil Procedure Rules, which he submits is identical to the Bahamian CPR's 13.3, must be satisfied to set aside a Default Judgment. At paragraph 13 the court opined:

> **"It is common ground that, unless sub-rule 13.3 (2) applies, each of the tests in sub-rule 13.3(1) must be met before a default judgment may be set aside. I shall take them in turn."**

The court further stated at paragraph 31:

> **"For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained."**

[26] Russell additionally submits that it is the general principle that a Default Judgment may be set aside in exceptional circumstances as was agreed upon in **Meyer v Baynes [2019] UKPC 3** where Lord Kitchin at paragraph 12 provided:

> **"Pereira CJ turned to the question of exceptional circumstances. She explained at para 26 of her judgment that what amounts to exceptional circumstances must be decided on a case by case basis and expressed her full agreement with the view of Bannister J in Inteco Beteiligungs AG v Sylmord Trade Inc (BVIHCMAP 2013/0003, unreported) (para 31) that there must be something amounting to "a compelling reason why the defendant should be**

permitted to defend the proceedings in which the default judgment has been obtained". She continued that "exceptional circumstances" are not the same as a "realistic prospect of success", and that rule 13.3(2) is reserved for those cases where the circumstances are truly exceptional and warrant depriving a claimant of his judgment where a defendant applicant has failed to satisfy rule 13.3(1). In her view exceptional circumstances would include those cases where it was shown that a claim was not maintainable or a defendant had a "knock out" point, or where a remedy sought by a claimant was not available."

[27] Russell submits that the PHA's argument that it had logistical challenges which prevented it from retrieving and reviewing the Claimant's medical records and reports to file a defence was baseless.

[28] Russell also submits that based on his production of overwhelming evidence against the PHA, there was no real prospect of the PHA successfully defending the claim, adding that there were no exceptional circumstances that would warrant setting aside the Default Judgment. Therefore, the PHA would be unable to satisfy each criterion under Part 13.3

Legal Analysis

Setting aside a Default Judgment

[29] As both parties assert, **Part 13 Rule 13.3 of the CPR** allows the Court to set aside a default judgment where **Part 13.2 of the CPR** does not apply, and they agree that it is not applicable in the instant case.

[30] I also find that **Part 13.2 of the CPR** is not applicable in the instant case.

[31] **Part 13.3 of the CPR**, which is set out at para. 20 of this ruling, has previously been adjudicated on in this jurisdiction by several justices of the Supreme Court.

[32] In **Cordelia Delores Ward and another v FML Group of Companies Limited [2024] 1 BHS J. No. 215**, Fraser SJ (as she then was) ("Fraser SJ") when interpreting **Rule 13.3 of the CPR** considered cases such as **Kenrick Thomas v RBTT Bank Caribbean Civil Appeal No 3 of 2005, Saudi Eagle [1986] 2 Lloyd's Rep 221, Evans v Bartlam [1973] AC 473** and **ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472.**

[33] Fraser SJ held that the three conditions under **Rule 13.3 of the CPR** were homogeneous but that the primary consideration was whether the Defendant had a

real prospect of successfully defending the claim. The Defendant must have a substantive, rather than just an arguable defence for the Court's consideration, there must not be a delay in making the application and the reason for failing to appear to defend the matter must be meritorious.

[34] It follows that all three of the criteria set out at **Rule 13.3 of the CPR** must be addressed satisfactorily by a defendant wishing to set aside a default judgment.

[35] In the instant case, the PHA's application was made without delay. The Default Judgment was entered against it on 19th March 2025, and the Set Aside Application was filed on 26th March 2025.

[36] The PHA's reason for the delay in filing a defence was logistical challenges encountered when attempting to retrieve Russell's medical records and reports which were requested. The PHA noted however, that since the grant of the Default Judgment it overcame the logistical challenges; a reason the Court the Court notes has been proferred by the PHA in this and a few other cases before the Court.

[37] It goes no further to provide to the Court with what efforts were made to obtain the information required to defend the claim.

[38] Despite the claim initially only being generally endorsed, the PHA was aware of the period that Russell claimed he received medical treatment from PMH. Accordingly, the PHA had from 2018 to request Russell's medical records and reports. It is unfathomable that the medical records or reports would not have been made available until 2024 or 2025 if requested from 2018.

[39] As for whether the PHA has a substantive defence rather than just an arguable one, I turn to the pleadings to ascertain the same.

[40] Russell claims that the PHA breached its statutory duty to act with reasonable skill, due diligence and care by its failure to take the proper care, skill and due diligence required of medical professionals, including a failure to perform a proper and standard examination of Russell's condition, a failure to ensure the recovery of Russell which subsequently led to infection of his right ankle, a failure to monitor and treat Russell's infection to prevent it from worsening, failure to make certain that competent medical professions performed operations at its premises, failure to frequently move Russell to prevent bedsores and subsequently a failure to treat the bedsores, a negligent failure to consult Russell's mother with respect to the operation to remove a portion of his leg due to him being a minor at the time and failure to properly diagnose Russell.

[41] Russell additionally claims that as a result of those failures, he was unable to walk due to the damage done to his ankle and knuckles on his left leg preventing flexion and extension, an unidentifiable pulse in his injured leg, sepsis in his left ankle, the development of lesions on his posterior leg face and lateral leg face, the development of scarce granulation tissue and abundant secretions (not fetid), the development of 10 cm lesions spread below the skin, development of bedsores 6 cm in diameter, removal of portion of leg and development of post-traumatic stress.

[42] He seeks aggravated damages due to being misdiagnosed which led to severe complications, as the PHA failed to place him on the appropriate diet, which made his condition worse and led to the suggestion that his leg be amputated.

[43] The PHA for the majority of its Defence either made no admission to the claim or denied it and put Russell to strict proof. What the PHA did plead was a diagnosis in PMH's accident and emergency of a dislocated knee, that Russell was a minor whose mother was notified at every stage of care as she was responsible for consent to treat him, that no portion of his leg was removed, that he was treated with the proper, above standard medical care, that due diligence and skill was undertaken in the care of PHA, that he was thoroughly examined and cared for, that Russell and his family were given medical advice that they did not agree with or was receptive to, choosing to seek alternative medical care, that Russell developed an infection due to dead tissues which was not its fault, that due to its due diligent treatment and skill he still had the use of his leg, that he was obese which limited his movement and that his bed sores once detected were treated.

[44] As for the Particulars of Injuries, the Defendant pled that Russell suffered necrosis of the muscles which resulted in injury to the nerve and loss of muscles, that after surgery a pulse was identified and that a fasciotomy of the leg was performed to prevent swelling and assist with the healing process of the leg.

[45] In response to the aggravated damages portion of Russell's claim, the PHA avers that the treatment Russell received led to him retaining the function and use of his leg, that his failure to move and follow the Physician's advice assisted to his condition, that Dr. Sands gave the family medical advice which was requested by Russell and his family and that it is the right of any patient to seek a second opinion on any medical advice given or procedure needed.

[46] Although a litigant is not required to produce evidence until the discovery process where the Standard Claim originating application has been used to commence an action, Russell produced the medical evidence he intended to rely on.

[47] By PMH's, Radiology and Ultrasound Requisition, Russell's clinical information or diagnosis was that he dislocated his left knee and had a diminished pulse in his left leg, a vascular injury. After conducting the angiogram on Russell, the report dated 14th February 2015 stated that there was a significantly reduced caliber of the left popliteal artery with minimal flow and less than 10% however, the arterior and posterior tibial arteries showed normal course and caliber, compression of the popliteal artery on the left side, significant suprapatellar effusion and joint effusion.

[48] By the Patient's Initial Evaluation letter prepared by Dr. Joe A. Zaya Power ("Dr. Power"), a Second Grade Specialist in Orthopedics and Traumatology and the Vice-Director of Health Care in Havana, Cuba, Dr. Power stated that Russell was admitted 11th April 2015 with cutaneous mucose paleness, inability to wander around, impossibility for the flexion extension of the ankle and knuckles, left foot in equine, light lymphedema in the inferior left member, that Russell could not feel his dorsal pedis pulses neither tibialias and that it did not turn out well when examined by touch popliteal pulse for lesion to alleged level.

[49] Dr. Power added that in the posterior leg face, a lesion in popliteal area with approximately 10 cm with granulation level in the skin, in lateral leg face, a lesion with approximately 25 cm, where the tibial exposition is observed in almost totality, with scarce granulation tissue and abundant secretions, not fetid. In the medial legal face, it showed third part level proximal, a lesion with approximately 20 cm that presents fistulous trajectory that spreads over below the skin four traveces of finger communicating practically with the popliteal fossa, with granulation tissue and scarce secretions. In calcaneal region shows bedsore pressure sores, in excess less 6 cm of diameter, bound in boards and near of this lesion presents a bloody injury where exposes Achilles' Tendon, with signs of necrosis toward your insertion.

[50] The evaluation went on to say that the patient was admitted to bedside with two other injuries, one in the lateral, more posterior face and in distal third present lesion of approximately 3 and 2 cm respectively united for little skin pedicle and that he had exposed splinter bone. In spite of the inferior left member's precarious situation this maintained good coloration and temperature, which motivated them to overturn effort, medications and resources in terms of not amputating the aforementioned limb, as the family had mentioned.

[51] Hospital Ortopedico Docente Fructuose Rodriguez (the "Hospital"), by letter dated 11th August 2015 addressed to the Department of National Insurance Board ("NIB"), stated, *inter alia*, that Russell, who was accompanied by his mother Georgiemae was under surgical medical treatment with a diagnosis of sepsis in the left inferior member.

[52] The Hospital sent another letter to NIB on 11th August 2015, again stating a diagnosis of sepsis in the left inferior member resulting from a school accident.

[53] Thereafter, by referral letter dated 20th March 2015, Dr. Duane Sands ("Dr. Sands"), in his capacity as a Consultant Cardiothoracic Surgeon at PMH, confirms, *inter alia*, that he was the attending surgeon responsible for Russell's care after his leg was severely mangled in a sporting accident six weeks ago. He recommended an above knee amputation ("AKA") of an insensate, non-functional and grossly infected left limb because it posed a serious risk to Russell's health and stated that the recommendation was expectedly traumatic to the family.

[54] Dr. Sands added that the extent of his vascular compromise was not documented until many hours later when vascular surgical consultation was sought, that he was then taken to the OT (operating theatre) where his popliteal artery was reconstructed and a four-compartment fasciotomy was performed. Additionally, Russell subsequently developed profound rhabdomyolysis, acute renal failure and respiratory failure requiring intubation and mechanical ventilation and that he had a very stormy ICU (intensive care unit) course.

[55] Dr. Sands' referral letter went on to state that while Russell recovered his respiratory and renal status, his limb remained non-functional (no movement or discriminatory sensation), that Russell developed extensive sepsis in the anterior and lateral compartments with myonecrosis and probable osteomyelitis. Also, his wounds were draining copious amounts of pus with Acinetobacter, Serratia and Cedecea.

[56] Dr. Sands further stated that while the psychological, emotional and functional impact of an AKA are clearly devastating, it was his opinion that the limb was horribly injured and constituted a real danger to the life and ultimate functional capacity of Russell. Moreover, even if the limb sepsis could be controlled, there were major additional challenges. He went on to highlight the potential cons of not amputating the leg, among other things.

[57] In **Ornal Gilbert v Nassau Flight Services 2019/CLE/gen/01444 dated 31st October 2022**, Charles SJ (as she then was) in applying the findings of **Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018; Glendon Rolle v Scotiabank 2017/CLE/gen/01294; Ralph Gooding v Elizabeth Ellis and National Workers 2020/CLE/gen/00272 and SPI North Ltd v Swiss Post International (UK) Ltd and another [2019] EWCA Civ 7**, made the following finding with respect to pleadings, particularly a defence,

> **"Parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not**

to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are, The Defence must: (a) indicate(i) which parts of the claim the defendant admits; (ii) which parts it denies; (iii) which parts it doubts to be true (and why); (iv) which parts it neither admits nor denies, because it does not know whether they are true, but which it wishes the claimant to prove; (b) give the defendant's version of the facts in so far as they differ from those stated in the claim"

[58] The PHA's defence indicates what part of the Statement of Claim it admits, which part it denies, which part it neither admits nor denies and puts the claimant to proof. In my opinion, where the defence fell short was with respect to the PHA's version of events.

[59] Based on both parties' pleadings there is no doubt that Russell, a minor, was in the care of PMH after his leg was injured, that he developed infection after treatment while still under PMH's care, that he developed bedsores while still in PMH's care, that he had a fasciotomy of the leg, that the portion of the muscle was removed to assist with the healing process, that there was a delay in the surgical team seeing Russell and that Dr. Sands gave medical advice to the family.

[60] The PHA's version of events does not greatly differ from those facts stated by Russell in his Statement of Claim. Moreover, while I acknowledge that I am not a medical practitioner and that the evidence has not been tested, the factual evidence provided by Russell bolsters his claims and places great doubt in the PHA's claim.

[61] In the circumstances, I do not consider that the PHA's defence is an arguable one or a substantive one which would warrant the setting aside of the Default Judgment and I decline to do so.

[62] This does not bring the PHA's fight to an end as it would be able to cross-examine Russell and any witness he may chose to rely on, including medical expert witnesses, when addressing quantum at the assessment of damages hearing.

[63] As I have declined to exercise my discretion to set aside the Default Judgment it is not necessary to consider the PHA's application to extend the time to file a defence.

[64] Accordingly, the Set Aside Application is dismissed in its entirety.

[65] Costs are awarded to Russell to be assessed if not agreed.

[66] The parties are next to appear before the Court for a direction hearing for the Assessment of Damages at the Court and both parties' earliest convenience.

Dated this ~~1st~~ 2nd day of April, 2025

Akeira D. Martin
Assistant Registrar