COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2019/CLE/gen/01829

BETWEEN

JONTE AUGUSTA

Plaintiff

AND

KRISTEN DUNCOMBE

Defendant

Before: The Honourable Madam Justice Tara Cooper Burnside (Ag)

Appearances: Ryan Brown for the Plaintiff

Nadia Wright for the Defendant

Hearing Date: 3 December 2020

RULING

[1] This is an appeal from the decision of the Assistant Registrar dated 5 October 2020 which set aside the Judgment in Default of Defence entered by the Plaintiff against the Defendant on 11 February 2020.

[2] The procedural background is as follows.

[3] On 27 December 2019, the Plaintiff commenced these proceedings against the Defendant for personal injuries and loss allegedly sustained by him as a result of the Defendant's negligent driving on or about 22 March 2019. By his Writ, the Plaintiff seeks, *inter alia*, (i) special damages and medical expenses in the sum of $6,653.03, (ii) general damages, (iii) interest and (iv) costs.

[4] On 17 January 2020, the Defendant entered an appearance to the Action and on 24 January 2020, the Plaintiff filed her Statement of Claim.

[5] There being no defence filed by the Defendant by 11 February 2020, the Plaintiff on that date entered Judgment against the Defendant in Default of Defence (the "**Judgment**").

[6] The Judgment states as follows:

> **"The Defendant having failed to serve a Defence, IT IS THIS DAY ADJUDGED that:**
>
> **1. FINAL JUDGMENT is entered against the Defendant in the sum of $6,653.03, interest and costs to be taxed and paid to the Plaintiff by the Defendant, if not agreed; and**
>
> **2. INTERLOCUTORY JUDGMENT is entered against the Defendant for damages [to] be assessed, interest and costs [to] be assessed and paid to the Plaintiff by the Defendant, if not agreed."**

[7] On 12 February 2020, a day after the Judgment was entered, the Defendant filed a Notice of Appointment for the assessment of damages.

[8] On 26 June 2020, the Plaintiff filed a Summons (the "**Amendment Application**") for leave to amend his Statement of Claim by adding, *inter alia*, additional claims as follows:

> **"11. ...**
>
> **a. As a result of the accident, the Plaintiff's pastry and cake business suffered loss. Prior to the accident, the Plaintiff made an income on average of approximately $1000 per week. Due to the accident, the Plaintiff had to refund customers due to his inability to function as he did prior to the accident which resulted in a 1/3 decrease in income.**
>
> **b. To mitigate, the Plaintiff, in May 2019, hired an assistant at a cost of $100 a day for 2 days per week on average. Notwithstanding this assistance, the Plaintiff remains the only person who bakes and his business has not fully recovered.**
>
> **PARTICULARS OF LOSS AND EXPENSES**
>
> **...**
>
> **12. The Plaintiff suffered additional financial loss mentioned in paragraph 11(a) as follows:**

Item	**Amount**
Medical Report visit and report from Dr. Magnus Ekedede	**$ 900.00**
Loss of Income (pastry and cake business)	**$36,000.00**
Loss of earning (Atlantis)	**$16,114.80**
Expenses for Assistant	**$12,000.00**
Orthopaedic Bed	**$ 1,140.95"**

[9] On the face of it, the proposed amendments were confusing. They purported to increase the amount of special damages, i.e. earnings actually lost and expenses actually incurred, and therefore departed from the sum of $6,653.03 claimed in the Writ. Additionally, some of the expenses introduced by the proposed amendments seemed to fall within the scope of general damages which *require* assessment by the Court. Generally, in personal injury claims the award of damages is assessed under four main heads: (i) special damages constituting money actually expended (ii) cost of future nursing and attendance and medical expenses (iii) pain and suffering and loss of amenities and (iv) loss of future earnings. Whereas the damages under the first head comprises actual financial loss sustained or incurred, it should be noted that the latter three heads generally comprise prospective losses and are awarded as a part of general damages, which are assessed by the Court. It is useful to keep this in mind when pleading damages in personal injury claims.

[10] In any event, at the hearing of the Amendment Application on 14 July 2020, the Assistant Registrar granted leave to the Plaintiff to file his proposed Amended Statement of Claim. From a review of the Court's file, it appears that the Amendment Application was not strongly opposed and that no consideration had been given at the hearing to the Judgment. However, after the Plaintiff filed his Amended Statement of Claim on 16 July 2020, the Defendant, on 20 July 2020, filed a Summons for an Order that the Judgment be set aside. The specific relief prayed in the Defendant's Summons is as follows:

> **"1) That the Default Judgment filed herein on the 11th day of February A.D. 2020 be set aside pursuant to RSC. Order 2 rule 1 on the grounds of the irregularity that has been created as a result of the Plaintiff's Amended Statement of Claim (filed on the 16th July 2020 and served on the 17th July 2020), which cause the first Statement of Claim on which the Default Judgment was based to fall away. The Defendant herein makes this application in a sufficiently timeous manner in conformity with RSC. Order Rule 2 2(1); Alternatively,**
>
> **2) The Default Judgment is irregular and should be set aside as the same seeks to be enforced as a Final Judgment citing a liquidated amount despite the claim being a personal injuries action for damages which has to be assessed by the Court;**
>
> **3) That further directions be given by the Court for the Defendant to file and serve a Defence as a result of the irregularities cited herein; and**
>
> **4) The Defendant seeks reasonable costs to be fixed by the Court."**

[11] On 5 October 2020, the Assistant Registrar acceded to the Defendant's Summons and set aside Judgment. The Plaintiff now appeals that decision.

[12] In the meantime, pursuant to the directions of the Assistant Registrar, discovery has taken place and the Defendant has filed her Defence.

Rules of the Supreme Court

[13] Set forth below are provisions of the Rules of the Supreme Court which are relevant to this appeal.

> **"ORDER 2**
> **EFFECT OF NON-COMPLIANCE**
>
> "**1.** (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, **there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules,** whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order therein.
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.
>
> 2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity..."
>
> **ORDER 19**
> **DEFAULT OF PLEADINGS**
>
> **2.** (1) Subject to the Order 73, rule 3, where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to

serve a defence on the plaintiff, **the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs**, and proceed with the action against the other defendants, if any.

(2) Order 13, rule 1(2), shall apply for the purposes of this rule as it applies for the purposes of that rule. 3. Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, **the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs**, and proceed with the action against the other defendants, if any.

...

6. Where the plaintiff makes against a defendant two or more of the claims mentioned in rules 2 to 5, and no other claim, then, if that defendant fails to serve a defence on the plaintiff the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, **enter against that defendant such judgment in respect of any such claim as he would be entitled to enter under those Rules if that were the only claim made**, and proceed with the action against the other defendants, if any.

...

9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order." (my emphasis)

[14] Pursuant to Order 2 rule 1, a failure to comply with the requirements of the Rules of the Supreme Court herein shall not nullify the particular proceedings and shall be treated as an irregularity. And when such an irregularity has occurred, the Court has power to set aside the particular proceedings in which the failure occurred, any step taken or any document, judgment or order filed therein. Additionally, the Court has wide powers to permit amendments and make orders as it sees fit to cure an irregularity. However, in order to invoke such powers of the Court, an applicant must not have waived the irregularity and must make his application within a reasonable time.

[15] Order 19 provides for circumstances where there has been a default of pleadings. If a defendant defaults in filing his defence and the plaintiff claims a liquidated demand in addition to unliquidated damages, pursuant to Order 19 rule 6, the plaintiff may enter judgment for an amount not exceeding the sum claimed in the Writ in respect of the liquidated demand and interlocutory judgment for damages to be assessed in respect of the claim for unliquidated damages.

Is the Judgment irregular

[16] In his Writ, the Plaintiff claimed negligence against the Defendant, special damages in the sum of $6,653.03 and general damages. The Defendant failed to file his defence within the time prescribed by the Rules and the Plaintiff entered judgment against him for the said sum of $6,653.03 and general damages to be assessed.

[17] Having considered the Rules above, I agree with Counsel for the Plaintiff that Order 2 has no application to the present case. First, it is clear on the face of the Writ that the Plaintiff has brought what is known as a "mixed claim" within the contemplation of Order 19 rule 6. Second, it is not disputed that the Plaintiff entered the Judgment when no defence had been filed and the time limited for filing a defence had expired. There being no Defence filed by the Defendant within the requisite time, the Plaintiff, as he was entitled to do, entered judgment for the sum claimed in the Writ and for damages to be assessed and costs. In those circumstances, it cannot be said that the Plaintiff failed "to comply with the requirements of the Rules" by entering the Judgment. I therefore agree with the arguments of Counsel for the Plaintiff in this respect.

[18] The Amended Statement of Claim took effect from the date of the initial Statement of Claim but it did not amend the sum claimed by the Plaintiff in the Writ. The Judgment remains for the sum of $6,653.03 claimed in the Writ and the Writ and the Amended Statement of Claim did not vitiate it. In the circumstances, I therefore disagree with the finding of the Assistant Registrar that the Amended Statement of Claim was effective to change the liquidated sum claimed in the Writ.

[19] In my view, the Judgment disposed of the issues of liability and the amount of special damages, neither of which was disputed by the Defendant within the time prescribed by the Rules. Once it was entered, the assessment of the general damages was the only issue outstanding and the Amended Statement of Claim could not and did not change this.

[20] The Defendant's Counsel relied on the case ***Re A Debtor, 478 of 1908*** [1908] 2 KB 684 to support her contention that the Judgment is irregular but I did not find that case helpful in resolving the issue before me. ***Re A Debtor*** is a bankruptcy case where the bankruptcy summons served on the debtor overstated the actual liability of the debtor and the English Court of Appeal held that such error was fatal under the Bankruptcy Act, 1883. The circumstances of the present case are clearly distinguishable. Moreover, as indicated above, the Judgment as it relates to the Plaintiff's liquidated demand is for the exact sum claimed by the Plaintiff in his Writ, which sum was not disputed.

Power of the court under Order 19 rule 9

[21] Notwithstanding this, it is trite law that a court has discretion to set aside a default judgment which has been regularly entered on any terms it thinks fit.

[22] Recently, in ***Hanna and another v Lausten*** [2018] 1 BHS J. No. 172, the Court of Appeal considered the principles to be applied by this Court when considering whether to set aside a default judgment. Madam Justice Crane-Scott JA, in delivering the judgment of the Court of Appeal, noted that the starting point for any discussion on the law and practice relating to the discretionary power of a judge to set aside a default judgment usually begins with the oft-cited 1937 decision of the House of Lords in ***Evans v Bartlam*** [1937] AC 473.

[23] Bearing in mind that each case must be decided according to its own facts, the court in ***Evans v Bartlam*** laid down the following principles upon which the discretionary power to set aside a default judgment should generally be exercised:

(i) A judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;

(ii) The Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms "unconditional" and the Court should not "lay down rigid rules which deprive it of jurisdiction" (per Lord Atkin at p. 486);

(iii) The purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;

(iv) The primary consideration is whether the defendant "has merits to which the Court should pay heed", not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown "merits" the Court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication " (per Lord Wright at p. 489 and per Lord Russell of Killowen at p. 4820);

(v) Again as a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence (per Lord Russell of Killowen at p. 482).

[24] The principle that the "primary consideration" is whether the defendant has merits to which the court should pay heed was considered by the English Court of Appeal in ***The Saudi Eagle*** [1986] 2 Lloyd's Rep 221. Sir Roger Orman J, in delivering the judgment of that Court, stated:

> "...it is important in our judgment to be clear what the "primary consideration really means. In the course of his argument Mr Clarke, Q.C. used the phrase "an arguable case" and it, or an equivalent occurs in some of the reported cases...This phrase is commonly used in relation to R.S.C., O. 14,

> to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their Lordships in *Evans v Bartlam.* All of them clearly contemplated that a defendant who is asking the Court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success...Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable" defence must carry some degree of conviction."

[25] As may be seen, ***The Saudi Eagle*** establishes that the test for permitting leave to defend in a summary judgment application is different from the test applicable to an application to set aside a regular judgment. In the former case, it is sufficient for the defendant to show that there is a "triable issue" between the parties; whereas in the latter case, the defendant must do better than that.

[26] The test applied in ***The Saudi Eagle*** was adopted with approval by Crane Scott JA in ***Hanna v Lausten***. In ***Hanna v Lausten***, the Court of Appeal considered, *inter alia*, the law and practice governing the circumstances in which a default judgment may be set aside under Order 19, rule 9 on the ground that a defendant has a good defence to a plaintiff's claim. The default judgment in that case was irregular yet the judge had declined to exercise her discretion to set it aside. In upholding the judge's refusal, the Court of Appeal considered the appellants' prospects of success in the event the default judgment was set aside and leave to defend was granted. And in doing so, the Court of Appeal considered the appellants' proposed defence and counterclaim vis-à-vis relevant case-law. In delivering the judgment of the Court of appeal, Crane-Scott JA concluded that the appellants' proposed defence and counterclaim carried "no degree of conviction" and "would be doomed to fail".

Does the Defence carry some degree of conviction

[27] The Defence in this Action was filed on 8 October 2020. It was not before the Assistant Registrar when he set aside the Judgment. Nevertheless, as this is a rehearing and I am able to consider new evidence and look at the matter afresh, I shall have regard to it.

[28] As indicated earlier, the Plaintiff is seeking damages for personal injuries and loss allegedly sustained by him as a result of the Defendant's negligent driving. In his Amended Statement of Claim the Plaintiff avers, *inter alia*, as follows:

"3. On or about 22 March 2019 the Plaintiff was in the aforesaid vehicle, in a near stationary position, as traffic was moving at a snail's pace ~~in the front in~~ ahead of the Plaintiff on Sir Milo Butler Highway, on the Island of New Providence, The Bahamas, when the Defendant, driving behind the Plaintiff at a high rate of speed in the circumstances, and in the same direction as the Plaintiff, collided into the rear of the vehicle driven by the Plaintiff. The impact caused the vehicle driven by the Plaintiff to hit a bus that was in front of him.

4. The insurer of the Defendant assessed the vehicle driven by the Plaintiff as an economic loss as a result of the accident and paid to its owner about $2,500.00 on or about 28 March 2019.

5. The said collision was caused as a result of the negligent driving and/or mismanagement of the said motor vehicle driven by the Defendant.

PARTICULARS OF NEGLIGENCE

a. Driving too fast in all the circumstances;
b. Failing to keep any proper look out;
c. Colliding with the vehicle driven by the Plaintiff;
d. Failing to drive within braking distance;
e. Failing to stop or slow down, to swerve or to steer or control the said vehicle so as to avoid the collision; and
f. Failing to heed the presence of the vehicle driven by the Plaintiff"

[29] In response to the Plaintiff's negligence claim, the Defendant says the following in his Defence:

"3. As to paragraph 3 of the Amended Statement of Claim, the Defendant denies that she was driving at "a high rate of speed". The accident occurred on the 22nd of March, 2019 around 10pm. The Defendant was driving at a low rate of speed. However, due to the vehicles ahead, including the Plaintiff's vehicle, stopping suddenly in front of the Defendant, she applied her brakes to avoid the accident but nonetheless the Defendant collided into the rear of the Plaintiff's vehicle resulting in low impact damage to the Plaintiff's car. Notably the Plaintiff's vehicle being a model that is more susceptible to bent at the slightest impact sustained more damage than the Defendant's vehicle.

4. As to paragraph 4 of the Amended Statement of Claim, the Defendant avers that she was not negligent in the full respects as alleged by the Plaintiff for the following reasons:

   i. The Defendant was driving at a low rate of speed and admits that there was a minor rear-end shunt to the Plaintiff's vehicle.

   ii. The Defendant did keep a proper look-out.

   iii. As to the other listed particulars of negligence, the Defendant denies the same and repeats paragraph 3 above."

[30] In considering that Defence, I adopt the approach taken by Crane-Scott JA in ***Hanna v Lausten***.

[31] It is well established that the duty of persons driving in a line of traffic is to drive at such a distance behind the car in front as to be prepared for *reasonable* emergencies which may arise: ***Thompson v Spedding*** [1973] RTR 312, 314. Notwithstanding this, a driver is not bound to foresee that a vehicle travelling ahead of him may stop suddenly without warning or apparent cause: ***Croston v Vaughan*** [1937] 4 All ER 249.

[32] In ***Brown & Lynn v Western S.M.T. Co*** [1945] SC 31, 35, Lord Cooper said:

> "The distance which should separate two vehicles travelling one behind the other must depend upon many variable factors – the speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the following vehicle can be pulled up and many other things. **The following driver is, in my view bound, so far as is reasonably possible, to take up such a position, and to drive in such a fashion, as will enable him to deal with all traffic exigencies reasonably to be anticipated: but whether he has fulfilled this duty must in every case be a question of fact, just as it is a question of fact whether, on any emergency disclosing itself, the following driver acted within the alertness, skill and judgment reasonably to be expected in the circumstances**." (my emphasis)

[33] The facts in ***Brown & Lynn v Western S.M.T. Co*** involved a collision between a truck and a bus. The bus was traveling behind the truck at a distance of 25 to 30 feet and the speed of both vehicles was approximately 15 mph. In order to avoid a pedestrian, the driver of the truck swerved suddenly to the left and pulled up almost instantaneously. When the driver of the bus realised that the truck was stopping, he swerved to the right and applied his brakes but did not succeed in avoiding a collision. The driver of the truck had no time to give any signal to the driver of the bus but the driver of the bus, who had not seen and had no reasonable chance of seeing the pedestrian, acted reasonably promptly. It was held on appeal that the fact that the driver of the bus, although allowing a sufficient space between the vehicles in which to deal with the ordinary exigencies of traffic, had followed the truck so closely that he could not cope with its exceptionally abrupt stop did not amount to negligence upon his part. As a result, the owners of the bus were not liable to the owners of the truck for the damage sustained to their vehicle.

[34] I have considered the Defence to the negligence claim in this Action in light of the principles governing the duty of persons driving in a line of traffic. Essentially, the Defendant's case is that she was driving behind a line of vehicles when the vehicles ahead of her, including the Plaintiff's, stopped suddenly in the middle of the road and as a result, despite her efforts, the Defendant did not have sufficient time to avoid the collision.

[35] In my view, there is some degree of conviction in that defence. The outcome of the Action will ultimately depend on the evidence produced at trial, the credibility of the witnesses and the particular circumstances of the case, including the distance between the two vehicles and whether it was reasonably foreseeable that the Plaintiff's vehicle might suddenly stop. Although, the Defence is not as robust as it might have been, it has some prospects of success and is not one which is doomed to failure. In all the circumstances, I agree with the conclusion of the Assistant Registrar, albeit on different grounds. The Judgment should be set aside entirely and the Defendant should be permitted to prosecute her defence.

[36] I now turn to the question of costs. Given my finding that the Judgment was regularly entered, I reverse the Assistant Registrar's award of costs to the Defendant and award the costs of the proceedings before the Assistant Registrar to the Plaintiff. The costs of this appeal shall be costs in the cause since, in the interests of justice, it appears to me that such costs should depend upon who is ultimately successful at trial.

DATED this 26th day of February, 2021

TARA COOPER BURNSIDE
JUSTICE (AG)