JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 111/2005

MOTION # 6/2006

BEFORE: **THE HON. MR. JUSTICE PANTON, J.A.**
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN:	**REXFORD BLAGROVE**	**APPELLANT**
AND:	**METROPOLITAN MANAGEMENT TRANSPORT HOLDINGS LIMITED**	**1ST RESPONDENT**
AND:	**LLOYD HUTCHINSON**	**2ND RESPONDENT**

Richard Reitzin, instructed by Reitzin & Hernandez for Appellant.

Mrs. Andrea Walters-Issacs, instructed by Palmer, Walters and Palmer for the Respondents.

March 6, July 31 and November 10, 2006

PANTON, J.A.

On July 31, 2006, we dismissed this motion, affirmed the order of Smith, J.A., and awarded costs to the Respondents, to be agreed or taxed. At the time of the making of the order, we indicated our intention to put our reasons in writing. This we now do.

I have read the reasons that have been carefully written by my learned colleagues, Karl Harrison and Hazel Harris, JJ.A.. They have, in expressing their own views, expressed mine as well. There being such harmony, I have nothing further to say in this matter.

K. HARRISON, J.A:

1. This is a motion against an order made by Smith, J.A. in Chambers, dismissing a procedural appeal brought by the Appellant pursuant to Rule 2.4 of the Court of Appeal Rules 2002 ("the COAR"). The Appellant has filed a Notice of Motion seeking leave to appeal to this Court and for the matter to be heard *inter partes*. We have now had the opportunity to reconsider the matter afresh with the assistance of much wider argument than was available to the single judge.

2. The issue to be determined in the appeal is a point of some general importance under the Civil Procedure Rules 2002 ("the C.P.R"). It concerns the procedure to be adopted where a Defendant indicates in the Acknowledgment of Service Form that he does not intend to defend the claim but requires documentary proof of special damages and medical reports to evaluate general damages. Two questions call for determination. First, should the Judge who is assessing damages proceed on the basis that there is a judgment on admission. Secondly, is the

situation one in which a defence is required to be filed if the Defendant wishes to be heard on quantum?

3. There is no reported authority in Jamaica on the point to be decided and earlier authorities are no longer generally of any relevance once the C.P.R applies. See ***Biguzzi v Rank Leisure plc*** [1999] 1 WLR 1926. Whatever may have been the position prior to 2002, it is abundantly clear in my judgment, that in 2002 the rule-makers decided to create a new scheme in order to facilitate administrators to enter judgments whether by default or by admission wherever this was appropriate.

The background facts

4. The facts are that on the 17th June, 2003, the Appellant was seriously injured when a bus in which he was travelling swerved to the incorrect side of the road and collided with another vehicle. The first Respondent was at the material time, the owner of the bus and the second Respondent, the driver of the bus.

5. A Claim Form and Particulars of Claim were filed in the Supreme Court on the 31st July, 2003. Service of the Claim Form was acknowledged by the Respondents and the document acknowledging service filed in the Registry of the Supreme Court on the 2nd September, 2003 by the Respondents' Attorney-at-Law. The Respondents indicated in the Acknowledgement of Service Form, that they did not intend to

defend the Claim. Normally, no real issue would turn on the contents of this form but, it does seem that the instant appeal will either stand or fall according to the construction that should be placed on the answers given to the questions asked. I have therefore reproduced the service form in this judgment and it is set out below:

"ACKNOWLEDGEMENT OF SERVICE OF CLAIM FORM

FORM 3 [Rule 8.16(1)(a)]

....

6. **Do you intend to defend the Claim?** **NO**

If so , you must file a Defence within 42 days of the service of this claim on you, See Rule 10.3(1) **[Documentary proof of Special Damages is required. Medical Reports are required to evaluate General Damages.]**

7. **Do you admit the whole of the Claim?**

If so you should consider either:

(a) pay the claim directly to the Claimants or their Attorney-at-Law,

or

b) complete the application form to pay the claim by installments:

If you pay the whole claim together with the costs and interest as shown on the Claim Form within 14 days, you will have no further liability for costs.

8. **Do you admit any part of the Claim?**

[Same as above].

If so you may:

(a) pay the money that you admit directly to the Claimants or their Attorney-at-Law, or

(b) complete the application form to pay him by installments

9. **If so, how much do you admit?**

[Same as above]

If you dispute the balance of the claim you must also file a Defence within 42 days of service of the Claim form on you or judgment may be entered against you for the whole amount claimed.

10. What is your own address? 36 Trafalgar Road".

(Emphasis supplied)

6. No Defence to the Claim was expected to be filed so, the Appellant entered interlocutory judgment on January 30 2004, for damages to be assessed. Costs were fixed at $12,000.00. A Notice of Assessment of Damages was served on the Respondents' Attorney-at-Law on April 20, 2004.

7. On February 7, 2005 the assessment of damages came up for hearing before Dukharan, J. After hearing submissions from both Counsel as to the procedure to be adopted in relation to the assessment, the learned trial judge ordered that the Respondents had the right to cross-

examine the Appellant's witnesses. Counsel for the Appellant sought leave to appeal the judge's order but Dukharan, J. declined the application. The matter was then adjourned.

8. On October 18 2005, P. Harrison, J.A. (as he then was) granted the Appellant permission to appeal the order of Dukharan, J. procedural appeal was filed in the Registry of the Court of Appeal pursuant to Rule 2.4 of the "COAR". Smith, J.A. dealt with the appeal and dismissed it.

The findings by Smith J.A.

9. Smith, J.A. had the benefit of written submissions from the Appellant but there was no response from the Respondents. He made the following crucial findings in his written judgment:

> "i) the Respondents' acknowledgment of service contained an admission of liability;
>
> ii) the provisions of Part 10 of Civil Procedure Rules, 2002 do not apply where the Defendant wishes to be heard on quantum including cross-examining the claimant and his witnesses;
>
> iii) the words "wishes to be heard on quantum" in rule 10.2(4) should be interpreted as meaning "wishes to advance a position on the issue of quantum";
>
> iv) the notion that rule 10.2(4) requires a defence to be filed where the Defendant merely wishes to cross-examine the claimant and/or his witnesses is absurd;
>
> v) the Appellant's position is inconsistent with rule 16.3(6) of Civil Procedure Rules, 2002;

> vi) where a Defendant indicates in the acknowledgment of service that he does not wish to defend the claim (but does not answer the question "Do you admit the whole or any part of the claim?" in the affirmative or at all) that is the equivalent of the Defendant admitting the claim and the claimant must proceed to apply for judgment on admissions pursuant to Part 14 Civil Procedure Rules 2002; and
>
> vii) the claimant had adopted the wrong procedure by applying for, and obtaining, judgment in default of defence".

10. The Appellant filed a Notice of Motion on the 13th February 2006 and Counsel for the Appellant moved this Court to set aside the order of Smith, J.A. He contended that: —

> "1. i) none of the findings (supra) were advanced by the Respondent before the learned judge (the Respondent having filed no submissions); and
>
> ii) the learned judge did not afford the Appellant an opportunity to contest the grounds as required by the Court of Appeal Rules, 2002 and/or the common law; and
>
> iii) each ground is incorrect.
>
> 2. In holding that the acknowledgment of service contained an admission of liability, the learned judge did not expressly advert to any of the several English authorities which –
>
> i) lay down the essential characteristics of an admission; nor

ii) which bear directly upon the question of what constitutes an admission of liability in an action for damages for personal injuries;

and appears not to have taken them into account.

3. Had counsel for the Appellant been afforded the opportunity of drawing the attention of the learned judge to these authorities the decision of the learned judge is likely to have been different.

4. If the dismissal of the Appellant's appeal is not set aside, an injustice will be done to the Appellant.

5. This Honourable Court of Appeal has the jurisdiction to hear and determine this notice of motion."

The grounds of appeal

11. The following grounds of appeal were filed by the Appellant:

"(a) The learned judge failed to appreciate that rules 10.2(1) and 10.2(4) of the Civil Procedure Rules, 2002 (CPR) made it mandatory for the Defendants to file a defence dealing with the issue of quantum, if they wished to be heard on quantum.

(b) The learned judge failed to appreciate that because the Defendants had not filed a defence as to quantum or at all they could not be heard on quantum.

(c) The learned judge erred in holding that the Defendants could cross-examine the claimant and make submissions to the court notwithstanding that the Defendants had not filed a defence dealing with the issue of quantum or at all.

(d) The learned judge erred in holding that the principal factor determining whether the Defendants could be heard on quantum was whether or not any prejudice would, thereby accrue to the claimant."

The relevant rules

12. I now turn to the relevant provisions of the CPR and go straight to Rule 10.2 which states:

> "(1) A Defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5).
>
> (2) However where –
>
> (a) a claim is commenced by a fixed date claim in form 2 and there is served with that claim form an affidavit instead of a particulars of claim; or
>
> (b) where any rule requires the service of an affidavit, the Defendant may file an affidavit in answer instead of a defence.
>
> (3) In this Part the expression "**defence**" includes an affidavit filed under paragraph (2).
>
> (4) In particular, a Defendant who admits liability but wishes to be heard on the issue of quantum must file and serve a defence dealing with that issue.
>
> (Part 14 deals with the procedure to admit all or part of the claim).
>
> (5) Where a Defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered against that Defendant if Part 12 allows it".

13. Rule 12.13 states as follows:

> "Unless the Defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a Defendant against whom a default judgment has been entered may be heard are:
>
> (a) costs;
>
> (b) the time of payment of any judgment debt;
>
> (c) enforcement of the judgment; and
>
> (d) an application under rule 12.10(2)."

14. Part 14 deals with Judgment on Admissions and set out the procedure to be followed in relation to such judgments. Rule 14.1(3) states:

> "(3) A Defendant may admit the whole or part of a claim for money by filing an acknowledgement of service containing the admission."

15. In particular, Rule 14.8 provides for a judgment on admission for an unspecified sum of money. It states:

> "14.8 (1) This rule applies where –
>
> (a) the only remedy the claimant seeks is the payment of money;
>
> (b) the amount of the claim is not specified;
>
> (c) in the acknowledgement of service the Defendant admits liability -
>
> (i) to pay the whole of the claim; and

(ii) does not offer to pay a specified sum of money or a proportion of the claim in satisfaction of the claim; and

(d) the Defendant has not requested time to pay under Rule 14.9.

(2) The claimant may file a request for judgment in Form 7.

(3) The registry must enter judgment in accordance with the request.

(4) Judgment will be for an amount to be decided by the court and costs.

(Rule 16.3 deals with how the court decides the amount of the judgment, Part 65 deals with the quantification of costs)".

16. Part 16 deals specifically with assessment of damages. Part 16.3 in particular, makes provision for the assessment of damages after there is admission of liability on a claim for an unspecified sum of money. It states inter alia:

"16.3 (1) This rule applies where the Defendant has admitted liability for the whole or a specified proportion of a claim for an un-specified sum of money.

(2) An application for judgment to be entered for damages to be assessed on an admission under Part 14 must-

(a) state whether or not the claimant is in a position to prove the amount of damages; and, if so

(b) give an estimate of the time required to deal with the assessment.

...

> (6) The Defendant is entitled to cross-examine any witness called on behalf of the claimant and to make submissions to the court but is not entitled to call any evidence unless the Defendant has filed a defence setting out the facts the Defendant seeks to prove".

The submissions

17. With this background in mind, I now turn to the submissions.

18. Mr. Reitzin submitted that Smith J.A. erred when he held that the acknowledgement of service contained an admission of liability. He submitted that although admissions may be either express or implied, they must be clear. He argued that there were no admissions in the acknowledgment of service that -

i) the Appellant/applicant suffered any loss and damage (which is the gist of an action in negligence); nor that

ii) the Defendant's negligence caused the claimant to suffer any loss or damage.

Mr. Reitzin submitted that the above conditions are essential elements for an admission of liability: See ***Blundell v Rimmer*** [1971] 1 W.L.R. 123; ***Rankine v Garton Sons & Co. Ltd.*** [1979]2 All E.R. 1185 and ***Parrott v Jackson*** Times Law Reports February 14, 1996.

19. He further submitted that when the Respondents stated that documentary proof of special damage was required and that medical

reports were required to evaluate general damages, the Respondents were clearly not admitting that they had caused the Appellant to suffer any damage. This, he said, is because they were effectively putting the Appellant to proof of every aspect of his loss and damage. Furthermore, he submitted that when they were asked if they admitted the whole or any part of the claim, they simply referred to their earlier statement that proof was required. This, he said, was also an indication that they were not admitting that the Appellant suffered any loss or damage.

20. Mr. Reitzin contended that Smith J.A., did not appear to have given any or sufficient consideration to the ***Rimmer*** and ***Rankine*** cases (supra) and that his decision was at odds with the *ratio decidendi* of those cases. He finally submitted that the CPR makes it obligatory for a Defendant who wishes to be heard on quantum to file a defence. He argued that the Rules are crystal clear as to what a Defendant who wishes to contest quantum must do, and as to the consequences of the Defendant not doing so.

21. Mrs. Walters-Isaacs on the other hand, agreed with the findings of Smith, J.A. She submitted that the Defendant's response in the acknowledgement of service was a clear admission that the Defendant did not intend to defend the matter on liability, but intended to avail himself of provisions of Part 16.3(6) of the CPR. She submitted that having

regard to all the circumstances of the case, Smith J.A was correct in the decision he arrived at.

Application of the principles

22. Rule 10.2(4) is very critical in this appeal. It provides that a "Defendant who admits liability but wishes to be heard on the issue of quantum must file and serve a defence dealing with that issue". Then follows the footnote "(Part 14 deals with the procedure to admit all or part of the claim)". (emphasis supplied)

23. As I have said above, the new Rules have provided a new scheme of procedure in relation to the assessment of damages. There is no doubt that under the old regime a Defendant was entitled to contest the assessment without having to file a defence for the purpose of challenging quantum. Accordingly, Mr. Reitzin has submitted that the CPR has made contested assessments of damages fairer by making them more open and more efficient by:

i) requiring the Defendant to file and serve a defence dealing with the issue of quantum; and
ii) permitting the Defendant to cross-examine witnesses called on behalf of the claimant and make submissions to the court if, and only if, that has been done; and by
iii) precluding the Defendant from calling evidence unless he has filed a defence setting out the facts he seeks to prove.

24. Consideration must first be given to whether or not liability has been admitted. In my judgment, that issue could be said to have been clearly resolved when the Respondents responded in the negative to the question, whether they had intended to defend the claim. It was crystal clear that the Respondents were simply saying, yes, we admit liability but, we require proof of special damages and we wish to be supplied with Medical Reports in order to evaluate General Damages. I do agree with Smith J.A. therefore, when he said in his judgment: "...it would be absurd, if pursuant to rule 10.2(4), a Defendant who admits liability but merely desires to cross-examine the (claimant and/or his witnesses on the issue of quantum, must file and serve a defence. One might ask 'defence to what'?" Smith J.A, in my judgment, was also correct when he said:

> "... by virtue of the Rules where a Defendant indicates in the Acknowledgment of Service Form that he does not intend to defend the claim, the claimant must proceed to apply for judgment on admission pursuant to Part 14. The default judgment procedure is not applicable in such a case".

What a Defendant is saying in these circumstances is that liability is admitted in the sense of both breach of duty and damage.

25. The question then is this: what is the relevant procedure when a Defendant admits liability? The answer as Smith J.A, said, is provided by the footnote to Rule 10.2(4) and this refers the reader to Rule 14. Rule 14.8 comes into play immediately. This Rule provides for an admission of

liability to pay the whole claim where there is an un-specified sum of money. The footnote to this Rule then indicates that Rule 16.3 comes into operation. Rule 16.3(6) prescribes that:

> "(6) The Defendant is entitled to cross examine any witness called on behalf of the claimant and to make submissions to the court but is not entitled to call any evidence unless the Defendant has filed a defence setting out the facts the Defendant seeks to prove".
>
> (emphasis mine)

26. Subsection 6, is therefore relevant in the instant case. The Respondents would therefore have the right to cross-examine witnesses called by the Appellant and the Appellant himself but they would not be entitled to call any evidence unless a defence is filed.

27. In my judgment, the position is as follows:

a) The default judgment is conclusive on the issue of liability of the Defendants as pleaded in the Statement of Claim.

b) Where a Defendant indicates in the Acknowledgment of Service Form, that he does not intend to defend the claim, the claimant must proceed to apply for judgment on admission pursuant to Part 14. Part 12 of the CPR is only applicable where there is:

(i) a default in filing an acknowledgement of service;

(ii) the Defendant gives notice of an intention to defend or;

(iii) having filed such an acknowledgment of service he failed to file a defence pursuant to Part 10.

c) Where the Defendant does not intend to defend and has so indicated then, in my judgment, Part 12 does not govern the situation.

28. Smith J.A was therefore correct when he stated as follows in his judgment:

> "The rules in Part 10 of the CPR concern the procedure for disputing a claim whether in whole or in part. The rules in this Part apply where the Defendant wishes or intends to defend the claim or to be heard on an issue. They do not apply where the Defendant does not intend to defend the claim or adduce evidence on any issue, as in the instant case.
>
> Rule 10.2(4) (supra), in my view, speaks to a situation where the Defendant, although he admits liability, wishes to rely on any factual argument on the issue of quantum. The words "wishes to be heard on the issue of quantum" should be interpreted to read "wishes to advance a position on the issue of quantum" and not merely to cross-examine".

30. There is one other matter to consider and it is this: Can a default judgment be replaced with a judgment on admission where the wrong procedure has been applied? Mr. Reitzin submitted that the Appellant did not adopt the wrong procedure by applying for, and obtaining, judgment in default of defence, so, it was wrong for Smith J.A to so find. He submitted that:

1. The Respondents had not argued that the Appellant had adopted the wrong procedure in obtaining default judgment.

2. The learned judge below did not consider or hold that the Appellant had adopted the wrong procedure.

3. The Appellant was never afforded the opportunity of being heard on the question of whether or not he had adopted the wrong procedure and such a holding would have exposed the Appellant's attorneys to an action for negligence.

4. The default judgment was regularly obtained and no attempt was ever made to set it aside.

31. I hold that there is nothing wrong in theory for a claimant without setting aside a default judgment to enter a judgment on admission if he so chooses. He would probably not wish to do so, because all he needs is either a default judgment or a judgment on admission to proceed to an assessment of damages. Furthermore, the court has an inherent jurisdiction to enter judgment on a Defendant's admission of liability on its own motion in the absence of an application by the claimant.

Conclusion

32. In my judgment, Smith, J.A. was correct when he held that Dukharan, J. was entitled to treat the matter as an Application for Judgment on Admission for damages to be assessed. In the

circumstances, the Respondents would be entitled to cross-examine the claimant and his witnesses and to make submissions to the court on the quantum of damages. I would therefore dismiss the Notice of Motion.

HARRIS, J.A.

In this motion the Appellant challenges an order of Smith, J.A., dismissing a procedural appeal brought in respect of an order made by Dukharan, J.

The Appellant, on January 17, 2003, sustained injuries while travelling in a motor bus owned by the 1st Respondent and driven by the 2nd Respondent.

On July 31, 2003 a claim form and particulars of claim, claiming damages for negligence against the Respondents were issued. Acknowledgement of Service of the claim form was filed on September 2, 2003. No defence was filed.

Interlocutory judgment was entered against the Respondents on January 30, 2004. Assessment of damages came on for hearing on February 7, 2005, before Dukharan, J. At that time, the question as to whether the defendants, who acknowledged service but signified an intention not to file defence, was entitled to cross examine the claimant and his witness, was raised. After hearing submissions from counsel for the parties Dukharan, J., ordered that the Respondents had the right to cross examine on the issue of quantum.

An application for leave to appeal the order was made to the learned Judge by Mr. Reitzin, counsel for the Appellant. The application was refused. Leave to appeal the order was subsequently granted by P. Harrison, J.A., as he then was.

The appeal was filed in accordance with Rule 2.4 of the Court of Appeal Rules 2002. Written submissions were filed by the Appellant's attorneys-at-law. The Respondents' attorney-at-law did not file submissions. Smith, J.A. considered the matter. He held that in the present case, the relevant procedure is one which relates to judgment on admissions and not default judgment. He affirmed the order of Dukharan, J.

On February 13, 2006, the Appellant issued a Notice of Motion challenging the decision of Smith, J.A. The grounds outlined in the motion, which are material to the issues raised in the grounds of appeal, were couched in the following terms:

> "i) the Respondents' acknowledgment of service contained an admission of liability;
>
> ii) the provisions of Part 10 of Civil Procedure Rules, 2002 do not apply where the defendant wishes to be heard on quantum including cross-examining the claimant and his witnesses;
>
> iii) the words "wishes to be heard on quantum" in rule 10.2(4) should be interpreted as meaning "wishes to advance a position on the issue of quantum";

iv) the notion that rule 10.2(4) requires a defence to be filed where the defendant merely wishes to cross-examine the claimant and/or his witnesses is absurd;

v) the Appellant's position is inconsistent with rule 16.3(6) of Civil Procedure Rules, 2002;

vi) where a defendant indicates in the acknowledgment of service that he does not wish to defend the claim (but does not answer the question 'Do you admit the whole or any part of the claim?' in the affirmative or at all) that is the equivalent of the defendant admitting the claim and the claimant must proceed to apply for judgment on admissions pursuant to Part 14 Civil Procedure Rules, 2002; and

vii) the claimant had adopted the wrong procedure by applying for, and obtaining, judgment in default of defence.

whereas –

i) none of those grounds were advanced by the Respondent before the learned judge (the Respondent filed no submissions; and

ii) the learned judge did not afford the Appellant an opportunity to contest the grounds as required by the Court of Appeal Rules, 2002 and/or the common law; and

iii) each ground is incorrect.

2. In holding that the acknowledgment of service contained an admission of liability, the learned judge did not expressly advert to any of the several English authorities which -

i) lay down the essential characteristics of an admission; nor

ii) which bear directly upon the question of what constitutes an admission of liability in an action for damages for personal injuries: and appears not to have taken them into account.

3. Had counsel for the Appellant been afforded the opportunity of drawing the attention of the learned judge to these authorities the decision of the learned judge is likely to have been different."

The Appellant relied on the following grounds of appeal:

1) "The learned judge failed to appreciate that rules 10.2(1) and 10.2(4) of the Civil Procedure Rules, 2002 made it mandatory for the defendants to file a defence dealing with the issue of quantum if they wished to be heard on quantum.

2) The learned judge failed to appreciate that because the defendants had not filed a defence as to quantum or at all they could not be heard on quantum.

3) The learned judge erred in holding that the defendants could cross-examine the claimant and make submissions to the court notwithstanding that the defendants had not filed a defence dealing with the issue of quantum or at all.

4) The learned judge erred in holding that the principal factor determining whether the defendants could be heard on quantum was whether or not any prejudice would, thereby, accrue to the claimant."

Two (2) fundamental issues fall for determination. These are:

(i) whether, on a true construction of section 10 of Civil Procedure Rules, a defendant, acknowledging service, expressing an intention not to defend a claim but stipulating that the claimant should

provide documentary evidence to prove damages, is under an obligation to file a defence.

(ii) whether in circumstances where a defendant files an acknowledgement of service indicating an intention not to defend a claim, amounts to an admission of the entire claim, requiring entry of Judgment on admission, thus making cross examination of the claimant and his witnesses permissible.

Mr. Reitzin argued that there was no admission of liability by the Respondents, but that Smith, J.A. incorrectly treated the acknowledgment of service as conveying such admission, and thereby misconstrued rule 10 of the Civil Procedure Rules 2002. He also submitted that the Respondents' assertion that documentary proof is required with respect to the special damages and medical reports are required to evaluate the general damages, was not an admission that the Appellant sustained loss and damage.

It was his further submission that the acknowledgment of service does not admit that the Appellant suffered loss and damage as a result of the Respondents' negligence. In support of this further submission, he cited the cases of **Blundell v. Rimmer** [1971] 1 WLR 123; **Rankine v. Garton Sons** [1979] 2 ALL ER 1185 **and Parrott v. Jackson,** Times Law Report February 14, 1996. These cases demonstrate that where a cause of action

is founded on negligence, admission of negligence is not necessarily admission of damage emanating from the negligence.

I must pause here to state that the principles propounded in the foregoing cases are inapplicable to the circumstances of the present case, as, they were determined within the context of the Rules of the English Supreme Court Order 27. Those decisions were made within the context of the pre – Civil Procedure Rules (CPR). The court is generally no longer guided by authorities made prior to the advent of the Civil Procedure Rules – See **Biguzzi v. Rank Leisure** P.L.C. [1999] WLR 1926; **Purdy v. Cambran** (CAT 17th December 1999); **Walsh v. Misseldine** [2000] EWCA CIV 61.

It follows therefore, that this motion should be considered within the purview of the Civil Procedure Rules 2002.

Rule 10 of the Civil Procedure Rules prescribes the procedural requirements for defending a claim and the consequences for failure to file defence. It will be necessary to allude only to those parts of the rule which are essential to the appeal.

Rule 10.2 provides:

> "(1) A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5).
>
> (2) However where -
>
> (a) a claim is commenced by a fixed date claim in form 2 and

there is served with that claim form an affidavit instead of a particulars of claim; or

(b) where any rule requires the service of an affidavit, the defendant may file an affidavit in answer instead of a defence.

(3) In this Part the expression **"defence"** includes an affidavit filed under paragraph (2)

(4) In particular, a defendant who admits liability but wishes to be heard on the issue of quantum must file and serve a defence dealing with that issue.

(5) Where a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered against that defendant if Part 12 allows it.

It is also of importance to outline the relevant paragraphs of the acknowledgement of service. These are set out hereunder:

"6. Do you intend to defend the Claim? No

If so, you must file a Defence within 42 days of the service of this claim on you, See Rule 10.3(1)

[Documentary proof of Special Damages is required. Medical Reports are required to evaluate General

Damages]

7. Do you admit the whole of the Claim?
If so you should consider either:

(a) pay the claim directly to the Claimants or their Attorney-at-Law, or

(b) complete the application form to pay the claim by instalments:

If you pay the whole claim together with the costs and interest as shown on the Claim Form within 14 days, you will have no further liability for costs.

8. Do you admit any part of the Claim? [Same as above]

If so, you may:

(a) pay the money that you admit directly to the Claimants or their Attorney-at-Law, or

(b) complete the application form to pay him by instalments

9. If you dispute the balance of the claim you must also file a Defence within 42 days of service of the Claim form on you or judgment may be entered against you for the whole amount claimed."

Rule 10 (2)(4) is pivotal to the determination of this case and this Smith, J.A. appreciated. In carrying out an analysis of the rule he said:

" Rule 10.2(4) (supra), in my view, speaks to a situation where the defendant, although he

> admits liability, wishes to rely on any factual argument on the issue of quantum. The words 'wishes to be heard on the issue of quantum' should be interpreted to read 'wishes to advance a position on the issue of quantum' and not merely to cross-examine. An example that comes to mind is where an insurance company is sued by the insured and admits liability but claims that there is a limit on the quantum of damages by virtue of the contract of insurance. In such a situation the insurer must file and serve a defence dealing with that issue. Of course, there may be other circumstances where the defendant may wish to adduce evidence in challenging the quantum. In such cases it seems that he is required to file a 'defence' which may include an affidavit. I would venture to say that, in my view, it would be absurd, if pursuant to rule 10.2(4), a defendant who admits liability but merely desires to cross-examine the claimant and/or his witnesses on the issue of quantum, must file and serve a defence."

The phrase "wishes to be heard on quantum" is of manifest importance in the construction of rule 10.2(4). The rule must be interpreted in obedience to the cardinal rule of construction that words must be given their ordinary and natural meaning. What then is the meaning of the phrase? In my opinion, the meaning to be ascribed to it, is "desires to put forward a case in opposition to the issue of quantum" not simply to cross examine.

The Respondents expressly stated their intention not to defend. Their requisition for documentary evidence in proof of special and general damages, is, simply to have the Appellant produce bills, receipts, invoices and medical reports at the hearing of the Assessment of Damages. Even

if the request had not been made, the necessary documents in support of the damages, as particularized in the claim, would have to be tendered in evidence.

In my judgment, the requirement for documentary proof of damages does not give rise to the need for a defence. Such requirement cannot be interpreted as an intention to defend. It is not a denial on the Respondents' part that the Appellant had not suffered damage and loss. It is perfectly plain that in conceding liability, they admitted the fact of their negligence as well as resultant loss and damage which the Appellant suffered. Their request is merely an endeavour to have the Appellant establish the extent of his loss raised in the claim. The Respondents are entitled to question the quantum being sought through the medium of cross examination and thereafter make submissions, without filing a defence. Consequently, Smith, J.A., was correct in finding as he did.

Mr. Reitzin further contended that, the Appellant, in applying for and obtaining judgment in default of defence, had not adopted the wrong procedure, as found by Smith, J.A.

It was the view of Smith, J.A. that the request for default judgment by the Appellant's attorneys-at-law was an incorrect procedure. He held that in the procedural scheme under the rules, a request for judgment on admission, ought to have been employed.

The question which arises, is, what is the correct procedure in the circumstances of this case?

On the application of the Appellant's attorneys-at-law, interlocutory judgment was signed. The application was made pursuant to Rule 12 of the C.P.R. which provides for the entry of default judgment. The provisions of Rule 12, so far as are relevant, are contained in Rule 12.1 which reads:

> " (1) This Part contains provisions under which a claimant may obtain judgment without trial where a defendant -
>
> (a) has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or
>
> (b) has failed to file a defence in accordance with Part 10.
>
> (2) Such a judgment is called a **"default judgment".**

Rule 12.1(i) contemplates the entry of judgment in default in circumstances where a defendant fails to file an acknowledgment of service giving notice of an intention not to defend, or, he neglects to file a defence in pursuance of Part 10 of the rules. In the present case, there is an admission of liability by the Respondents. They do not intend to contest the right to damages.

How then should the Appellant have proceeded? To discover the method which he ought to have adopted, recourse must be had to Rule

10.2 (4). The footnote thereto makes reference to Part 14 of the rules, which, deals with judgment on admissions.

Rule 14(1) states:

> "(1) A party may admit the truth of the whole or any part of any other party's case.
>
> (2) A party may do this by giving notice in writing (such as in a statement of case or by letter) before or after the issue of proceedings.
>
> (3) A defendant may admit the whole or part of a claim for money by filing an acknowledgment of service containing the admission.
>
> (4) The defendant may do this in accordance with the following rules.
>
> (a) rule 14.6 (admission of whole of claim for specified sum of money);
>
> (b) rule 14.7 (admission of part of claim for money only); or
>
> (c) rule 14.8 (admission of liability to pay whole of claim for unspecified sum of money).

Rule 14.8 states:

> "14.8 (1) This rule applies where –
>
> (a) the only remedy the claimant seeks is the payment of money
>
> (b) the amount of the claim is not specified;

(c) in the acknowledgment of service the defendant admits liability;

(i) to pay the whole of the claim; and

(ii) does not offer to pay a specified sum of money or a proportion of the claim in satisfaction of the claim; and

(d) the defendant has not requested time to pay under rule 14.9.

(2) The claimant may file a request for judgment in form 7.

(3) The registry must enter judgment in accordance with the request.

(4) Judgment will be for an amount to be decided by the court and costs."

The only remedy sought by the Appellant is by way of general and special damages which is monetary. Under Rule 2.4 (5), a claim for a specified sum of money for the purposes of default judgment in part 12 of the CPR and judgment on admission in Part 14, includes a claim for damage "which it is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and copies of receipted bills for the amounts claimed are attached to the claim form or particulars of claim."

No receipted bills were appended to the Appellant's claim as required by rule 2.4 (5). It follows that special damages would rank as an unspecified amount, within the meaning of rule 14 8 (1)(b).

Rule 16.3 outlines the procedure consequent on a defendant's admission of liability for a specified or unspecified sum.

Section 16.3 provides:

> "16.3 (1) This rule applies where the defendant has admitted liability for the whole or a specified proportion of a claim for an unspecified sum of money.
>
> (2) An application for judgment to be entered for damages to be assessed on an admission under Part 14 must –
>
> (a) state whether or not the claimant is in a position to prove the amount of damages; and, if so
>
> (b) give an estimate of the time required to deal with the assessment.
>
> (3) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the parties not less than 14 days notice of the date, time and place fixed for the hearing.
>
> (4) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(5) The registry must then fix either –

(a) (i) a period within which the assessment of damages will take place, and damages will take place, and

(ii) a date by which the listing questionnaire is to be filed at the registry by the claimant; or;

(b) a case management conference, and give notice to the parties.

(6) The defendant is entitled to cross examine any witness called on behalf of the claimant and to make submissions to the court but is not entitled to call any evidence unless the defendant has filed a defence setting out the facts the defendant seeks to prove.

(7) The court must also deal with any request under Part 14 for time to pay."

It cannot be disputed that Rule 16.3 (6) clearly demonstrates that, on an assessment of damages, a defendant, on admission of liability, is endowed with a right to cross-examine a claimant and his witnesses and may also make submissions, but he is precluded from calling evidence unless he has filed a defence disclosing those facts of which he seeks proof.

In the case under review, it is demonstrably clear that the claim was for an unspecified sum. The Respondents admitted the entire claim. The Appellants by virtue of Rules 14.8 (2) and 16.3(2) would have been

obliged to proceed under rule 14.8(2) and request entry of judgment on admission and for damages to be assessed.

Smith, J.A. and Dukharan, J. were correct in holding that the Respondents were entitled to cross examine the claimant and his witnesses and make submissions. It is obvious that they treated the claimant's application for default judgment as one for judgment on admission and were correct in so doing.

I would dismiss the motion with costs to the Respondents to be agreed or taxed.