IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 111/2005

BETWEEN	**REXFORD BLAGROVE**	**APPELLANT**
A N D	**METROPOLITAN MANAGEMENT TRANSPORT HOLDINGS LTD.**	**FIRST RESPONDENT**
A N D	**LLOYD HUTCHINSON**	**SECOND RESPONDENT**

Written submissions filed by **Reitzin & Hernandez** for the appellant

PROCEDURAL APPEAL

10th January, 2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.

This is an appeal, pursuant to Rule 2.4(3) of the Court of Appeal Rules, from an order of Dukharan J, made on February 7, 2005.

Background facts

On the 17th June, 2003, the appellant was injured when the bus in which he was traveling as a fare paying passenger 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. The second respondent was the driver of the bus.

A Claim Form and Particulars of Claim were filed in the Supreme Court on the 31st July, 2003.

An Acknowledgment of Service of Claim Form was filed 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. In answer to the question as to whether or not they admit the whole of the claim the respondents state:

> "Documentary proof of Special Damages is required. Medical Reports are required to evaluate general Damages."

It is fair to say that they admitted liability but required proof of damages. The appellant entered an interlocutory judgment in default of defence on January 30, 2004 for damages to be assessed and costs of $12,000.00.

A Notice of Assessment of Damages was served on the respondents' attorney-at-law on April 20, 2004. The hearing was scheduled for June 25, 2004.

On April 30, 2004 a Notice of Intention to Tender Hearsay Statements contained in six documents was served on the respondents.

On June 25, the assessment of damages was adjourned. On October 4, 2004 a Notice of Intention to tender in evidence a further medical report from Dr. Wong was served on the respondents.

On February 7, 2005 the assessment of damages came up before Dukharan, J. After hearing submissions from counsel the learned judge ordered that the assessment should proceed and that the respondents be given the right to cross-examine the claimant/appellant. Leave to appeal was refused and the matter was adjourned.

On February 16, 2005, the respondents filed and served a Counter Notice objecting to the tendering of the medical report of Dr. Jacqueline

Gayle and requiring the attendance of the said doctor at the assessment hearing.

On October 18, 2005, P. Harrison, JA (as he then was) granted leave to the appellant to appeal against the Order of Dukharan, J.

On October 31, 2005, the appellant filed and served on the respondents Notice of Appeal and his Written Submissions. The respondents have not filed any submissions in reply.

The grounds of appeal are as follows:

"(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."

It is necessary to set out the provisions relied on by the Mr. Reitzin counsel, for the appellant.

Rule 10.2 reads:

> "(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."

Mr. Reitzin referred to the above and other rules of CPR in comparing what he labelled "the new scheme of procedure for

assessment of damages" with the "old scheme". He submitted that the introduction of the CPR 2002 has made contested assessment of damages fairer by:

"(i) requiring the defendant to file and serve a defence dealing with the issue of quantum; and

(i) 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

(ii) precluding the defendant from calling evidence unless he has filed a defence setting out the facts he seeks to prove."

The other Rules on which Mr. Reitzin relied are 9.4(2), 12.13, 14.1(3), 14.1(4), 14.1(5), 16.3(1) and 16.3(6). These rules, he said, confer a right on the claimant to early notification of the issues on quantum and to early disclosure of the facts to be proved by the defendant's witnesses.

The learned judge, he submitted, in ruling that the defendant should be permitted to cross-examine the claimant's witnesses and make submissions, was in effect depriving the claimant of the said right. The learned judge, he contended, had no discretion to do so.

I am unable to agree with Mr. Reitzin that Dukharan J erred in ordering that the defendant be permitted to cross-examine the claimant and his witnesses at the assessment of damages.

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. 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. One might ask 'defence to

what?' Indeed the contention of Mr. Reitzin is inconsistent with Rule 16.3(6) to which I will return.

It seems to me 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.

Part 12 of the CPR deals with default judgment. Rule 12.1 states what a default judgment is. It reads:

> "12.1 (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."

Thus, where a defendant admits liability but requires proof of damages the claimant is not entitled to obtain default judgment. Part 12 is only applicable where there is a default in filing an acknowledgement of service, the Defendant giving notice of an intention to defend or, having filed such an acknowledgment of service he failed to file a defence pursuant to Part 10. Where the Defendant does not intend to

defend and has so indicated then, in my judgment, Part 12 does not govern the situation. In other words, the procedure relating to default judgments is not applicable when liability is admitted and the defendant does not intend to adduce evidence on the issue of quantum.

The question then is: what is the relevant procedure when a defendant admits liability? The answer is provided by the footnote to Rule 10.2(4) which refers the reader to Part 14. The rules in Part 14 concern the procedure for judgment on admission. Rule 14.1 sets out the procedure for making an admission. In particular 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."

The relevant rule, where liability to a claim such as the instant one, is admitted, is Rule 14.8. This rule applies where there is an admission to pay the whole of a claim for an unspecified sum of money. It reads:

> "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."

It is necessary to examine whether or not the requirements of subsection (1) are satisfied:

(a) There can be no dispute that the only remedy sought is a payment of money (for special and general damages);

(b) Although the claim includes special damages the fact that an amount for general damages is also sought would, in my view, make the claim one for an unspecified amount.

Further, Rule 2.4(b)(iii) provides that a "claim for a specified sum of money " means –

"(a)...

(b) for the purposes of Parts 12 (default judgment) and 14 (judgment on admissions), a claim for –

(ii)...(repairs to vehicle)

(ii)... (repairs to property)

(iii) any other actual financial loss other than loss of wages or other income, claimed as a result of damage which 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..."

Thus, in a claim such as the instant one, the fact that copies of receipted bills for the amounts claimed were not attached to the claim would make it one for an unspecified sum of money. Judgment will be for an amount to be decided by the Court and costs – Rule 14.8(4).

As the footnote to Rule 14.8 indicates, Rule 16.3 deals with how the Court decides the amount of judgment after admission of liability on a claim for unspecified sum of money.

Rule 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

(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. (emphasis mine)

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

Subsection (6) is consistent with my interpretation of Rule 10.2(4). Where a defendant admits liability he is entitled, at the assessment of damages, to cross examine any witness called on behalf of the claimant and to make submission to the court on the issue of quantum. However,

he is not entitled to call any evidence unless he has filed a defence setting out the facts he seeks to prove.

It is interesting to compare the procedure in respect of the assessment of damages after default judgment (Rule 11.2) with that after admission of liability (Rule 16.3). The following differences are noteworthy.

(1) In respect of assessment after admission of liability both parties must be given notice of the date, time and place of the hearing, whereas in respect of an assessment after default judgment notice must be given to the claimant only and not the defendant.

(2) A case management conference may be fixed in the case of an assessment after admission (Rule 16.3(5). There is no such provision in respect of assessment after default.

(3) At the assessment of damages after admission the defendant is entitled to cross-examine the claimant's witnesses and make submissions. There is no corresponding entitlement in respect of a defendant against whom default judgment is entered.

As I have earlier stated, I am of the view that in the instant case, the relevant procedure is that which pertains to judgment on admission pursuant to Part 14. The request for the entry of a default judgment was not the correct procedure.

In sum where the defendant admits the whole of the claim for a specified sum of money, the claimant must file a Request for Entry of Judgment on Admission pursuant to Rule 14.6(2) –see Form 9.

In the instant case where the claim is for an unspecified sum the claimant ought to have filed an Application for Judgment to be entered for damages to be assessed on admission pursuant to Rules 14.8(2) and 16.3(2) - see Form 7.

In my judgment Dukharan, J was entitled to treat the matter as an Application for Judgment on Admission to be entered for damages to be assessed. Accordingly the learned judge was correct in holding that the defendants/respondents were entitled to cross-examine the claimant and his witnesses to make submissions to the court on quantum.

The appeal is, therefore , dismissed.