[2020] JMSC Civ 90

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01429

BETWEEN	**PAULETTE RICHARDS**	**CLAIMANT**
AND	**NORTH EAST REGIONAL HEALTH AUTHORITY**	**1ST DEFENDANT**
AND	**DR. GLENTON STRACHAN**	**2ND DEFENDANT**
AND	**SOUTH EAST REGIONAL HEALTH AUTHORITY**	**3RD DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**4TH DEFENDANT**

Mrs. Helene Coley Nicholson for the Claimant.

Ms. Faith Hall instructed by the Director of State Proceedings for the Defendants.

Heard April 22 and 24, 2020 and May 15, 2020.

Civil procedure – Application by defendants for permission to file defence out of time – Application by claimant for permission to enter judgment in default of defence against the Crown – Whether the draft defence is a bare denial of some of the allegations made in the claimant's statement of case – Whether it is appropriate to enter judgment in default in respect of one or more defendants in the circumstances – Rule 10.3, 12.3(1) and 12.9 of the Civil Procedure Rules, 2002, as amended.

N. HART-HINES, J (Ag.)

[1] On May 15, 2020 I indicated my decision in relation to the applications before the court and promised to put my reasons in writing. I now do so.

BACKGROUND

[2] Ms. Paulette Richards alleges that she has had the great misfortune of being negligently treated by medical staff at four hospitals across Jamaica, and as a result she suffered several injuries including:

1. a perforated uterus and distal ileum following a hysteroscopy;
2. intra-abdominal sepsis;
3. a hysterectomy and subsequent wound infection;
4. fascial dihescence and incisional hernia;
5. a mesh repair of the incisional hernia culminating in an unsightly abdominal scar and disfigurement; and
6. post-traumatic stress disorder.

[3] Her claim is against two health authorities (1st and 3rd defendants), the gynaecologist (2nd defendant) who performed the initial surgical procedure on her and who was a servant and/or agent of the 1st defendant, and the Attorney General of Jamaica (4th defendant), pursuant to the Crown Proceedings Act.

[4] By her claim filed on April 8, 2016 and amended on April 4, 2017, Ms. Paulette Richards alleges that on April 12, 2010, while she was a day-case patient at the Annotto Bay Hospital in the parish of Saint Mary, a hysteroscopy was performed and she suffered severe personal injury and consequential loss and damage. The medical reports relied on indicate that she had been referred to the Annotto Bay Hospital by the Victoria Jubilee Hospital located in the parish of Kingston for a hysteroscopy and polypectomy to be performed to address endometrial polyps. Two polyps were removed at the Annotto Bay Hospital on April 12, 2010. At the time of her discharge from that hospital, the hospital records noted that she complained of pains. The claimant further alleges that following her discharge from the Annotto Bay Hospital, she visited the Spanish Town Hospital in the parish of Saint Catherine on the same day as her pains continued despite medication. She alleges that she was sent

home on April 13, 2010 without being treated. The claimant suffered further injury and loss on April 14, 2010 when she lost child bearing capacity when a hysterectomy was performed at the Victoria Jubilee Hospital, following the discovery of the perforated uterus, perforated distal ileum and intra-abdominal sepsis. She alleges that she suffered further injury and loss on August 8, 2012 when a mesh repair of the incisional hernia was performed at the Kingston Public Hospital in the parish of Kingston.

[5] The 1st and 3rd defendants are corporate bodies established under the National Health Services Act with responsibility for employing medical and non-medical personnel. The 1st defendant is responsible for the delivery of health care services at the Annotto Bay Hospital, while the 3rd defendant has responsibility for the Spanish Town Hospital, Victoria Jubilee Hospital and the Kingston Public Hospital.

[6] Aside from the extensive number of allegations against the respective hospitals, Ms. Richards' claim also seems unique in that she relies almost entirely on the medical reports prepared by the hospitals and medical personnel who treated her, and against whom she has brought this claim. At this time, the only independent medical report that has been disclosed as part of her statement of case is that of a consultant psychiatrist. There is no independent medical report from a gynaecologist or general surgeon, alleging negligence in her treatment and after care by the defendants. The hospitals' medical reports seek to set out the treatment the claimant received but, naturally, do not allege negligence on the part of those who treated her.

THE APPLICATIONS

[7] There are two applications for the consideration of the Court. The first application is that of the defendants, filed on May 26, 2017, to extend the time within which to file their defence, pursuant to rule 10.3 of the Supreme Court of Jamaica Civil Procedure Rules 2002, as amended (hereinafter "CPR"). The application was initially supported by an affidavit sworn by Celia Middleton, indicating that the 4th defendant was awaiting instructions from the Ministry of Health. The application is now supported by an affidavit filed on April 16, 2020,

sworn by Mr. Ricardo Maddan, indicating that instructions were received from the said Ministry and that the delay in filing the defence was due to the investigations that had to be carried out by the health authorities and hospitals. Mr. Maddan further averred that the defendants have a good defence with a reasonable prospect of success. A draft defence is exhibited to his affidavit.

[8] The second application is that of the claimant, filed on January 24, 2020, for permission to enter judgment in default of defence against the Crown pursuant to rule 12.3 of the CPR. The application is supported by an affidavit filed on January 24, 2020, sworn by attorney-at-law Mrs. Helene Coley Nicholson indicating that nearly three years had elapsed since the amended claim form and particulars of claim were served on the 4th defendant and the defendants have failed to file a defence.

[9] It is appropriate to first determine the defendants' application as a decision in respect of that application will affect the outcome of the claimant's application.

THE ISSUES

[10] I have identified the following issues to be determined when considering the defendants' application:

1. Have the defendants proffered a good explanation for the nearly three-year delay in filing the defence?
2. Is there prejudice caused to the claimant by the delay?
3. Have the defendants complied with rule 10.5 of the CPR and set out all the facts on which they rely in their draft defence or is the defence a bare denial of the allegations?
4. Have the defendants demonstrated that they have a good defence with a real prospect of success?
5. Is it possible to enter default judgment against one or more defendants pursuant to rule 12.9 and thereby separate the claims?

THE SUBMISSIONS

[11] I will not repeat the submissions in detail here, but counsel should rest

assured that I have given consideration to all the submissions.

[12] Counsel for the claimant, Mrs. Coley-Nicholson submitted that The affidavit of Mr. Maddan does not adequately explain the delay by the 4th defendant from May 8, 2017 or indicate that any action was taken by counsel for the defendants from that date to the date on which the claimant's application was served, on February 28, 2020. Counsel submitted that as no reason had been proffered for the 2nd defendant's failure to file a defence and, accordingly, there is no material on which the court could exercise its discretion in the 2nd defendant's favour.

[13] Counsel submitted that the draft defence merely denies the claimant's allegations in respect of negligence at the Spanish Town Hospital, and it states no reason for the denial and does not set out another version of those events. In the circumstances, counsel submitted that judgment in default ought to be entered in respect of all defendants, or alternatively in respect of the 2nd and 3rd defendants only. Counsel relied on the case of ***Vincent Green v The Attorney General et al*** (unreported), Supreme Court, Jamaica, Claim No. HCV 21582005, judgment delivered November 27, 2006 where Straw J considered whether there was a good explanation for the failure to file a defence and whether there was a reasonable prospect of success of the defence.

[14] Counsel further submitted that the claimant had been prejudiced by the delay on the part of the defendants and it exacerbated the psychological trauma which the claimant suffered and continues to suffer, as she is unable to get the further surgical treatment and psychotherapy she requires.

[15] Counsel for the defendants, Ms. Hall submitted that the defence was not a bare denial and addressed all the allegations raised by the claimant, save for those pertaining to the Spanish Town Hospital. However, counsel submitted that it was not appropriate to enter judgment against that defendant.

[16] Counsel further submitted that notwithstanding the lengthy delay, the

fundamental principle that governs the court's approach in determining whether to grant an application for extension of time is the criterion of "justice". Ms. Hall stated that even an unjustifiable procedural default should not cause a litigant to be denied access to justice. Ms. Hall relied on the Court of Appeal decision in ***Fiesta Jamaica Limited v National Water Commission*** [2010] JMCA Civ 4 in which guidance was given that a court should give consideration to factors such as the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the case, the effect of the delay on public administration, and the importance of compliance with time limits.

[17] Finally, counsel submitted that the proposed defence has a realistic prospect of success since standard surgical management was applied during the claimant's treatment and the personnel had the required skills and acted in accordance with the accepted practice, as required by the "ordinary skilled man" test in ***Bolam v Friern Hospital Management Committee*** (1957) 2 All ER 118.

THE LAW

[18] Rule 10.3(9) of the CPR provides for applications to be made for an extension of the time in which to file a defence and rule 26.1 provides for the extension or abridgment of time generally. However, these rules do not state the conditions which must be satisfied in order for the court to grant such an application. Regard therefore must be had to the principles enunciated in case law as well as the overriding objective of the CPR.

[19] The enactment of the CPR in January 2003 was expected to herald the end of an era of delay in litigation, through judge-driven case management. In ***Alcan Jamaica Company v Herbert Johnson & Idel Thompson-Clarke*** SCCA 20 of 2003 (unreported) Court of Appeal, Jamaica, judgment delivered July 30, 2004 at pages 15 and 16, Cooke JA cited Panton J.A. in ***Port Services Limited v Mobay Undersea Towns*** SCCA No 18/2001 (unreported) Court of Appeal, Jamaica, judgment delivered March 11, 2002

where he said at pages 9 and 10:

> *"In this country, the behaviour of litigants, and, in many cases, their attorneys-at-laws, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions…. "*
> *For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. …the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."*

[20] Though the CPR is aimed at achieving greater efficiency in the administration of justice, Courts must always bear in mind the overriding objective of achieving fairness. Consequently, it has been repeatedly said in cases both here and in England, that Courts must be reluctant to deprive a litigant of the opportunity of having the case determined on the merits. Blackstone's Civil Procedure 2014: The Commentary at paragraph 1.27 states:

> *"The main concept in the overriding objective (CPR, r. 1.1) is that the primary concern of the court is to do justice. Ultimately the function of the Court is to resolve issues between the parties…. Shutting a litigant out through some technical breach of the rules will not often be consistent with this, because* ***the primary purpose of the civil courts is to decide cases on their merits****, not to reject them for procedural default." (My emphasis)*

[21] In determining whether or not to grant the application to extend the time in which to file a defence, I am guided by the principles distilled in the cases of ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (unreported), Supreme Court, Jamaica, Motion No 12/1999, judgment delivered on December 6, 1999, ***The Attorney General of Jamaica v Roshane Dixon and Attorney General v Sheldon Dockey*** [2013] JMCA Civ. 23, ***The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr by Brooks Snr (his father and next friend)*** [2013] JMCA Civ 16, and ***Peter Haddad v Donald Silvera*** (unreported), Court of Appeal, Jamaica, No. 31/2003, judgment delivered on July 31, 2007.

[22] In the ***Strachan*** case, the Court of Appeal considered the factors relevant to an application for an extension of time to appeal, but at page 20, Panton JA

(as he then was) set out the principles that should guide the Court in considering an application to extend time generally:

> *"The legal position may therefore be summarised thus:*
> *(1) Rules of Court providing a time-table for the conduct of litigation must, prima facie, be obeyed.*
> *(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.*
> *(3) In exercising its discretion, the Court will consider –*
> *(i) the length of the delay;*
> *(ii) the reasons for the delay;*
> *(iii) … and;*
> *(iv) the degree of prejudice to the other parties if time is extended.*
> *(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."*

[23] The cases of ***Roshane Dixon***, ***Rashaka Brooks*** and ***Peter Haddad*** have indicated that a defendant must offer a good explanation for the failure to file his defence within the requisite period, which rule 10.3(1) stipulates is forty-two days of the date of service of the claim form. An applicant ought to demonstrate that there was no wilful intent to delay or default, and needs to proffer some explanation, which is reasonable in the circumstances, for the entire period of the delay. The period of delay should not be protracted or inordinate. The court must consider the prejudice, if any, caused to the claimant by the delay, and whether such prejudice might be appropriately dealt with by an order for costs. The Court must have regard to the overriding objective of ensuring that cases are dealt with justly. The court must also consider the merits of the defence. The primary consideration is whether a defendant has a real prospect of successfully defending the matter. Where a defendant demonstrates that he has a good defence to the claim, the court hearing the application should allow the matter to be tried on its merits.

ANALYSIS

Is there a good explanation for the delay in filing the defence?

[24] The explanation offered is that investigations that had to be carried out by the respective Health Authorities and by different hospitals. No explanation is offered as regards why those investigations took nearly three years or what

those instructed did to try to ensure that the necessary instructions were received in a timely manner. In relation to the allegations made against the Spanish Town Hospital, the draft defence states that the claimant's medical record from that hospital still has not been located and that a more definitive response will be given when further instructions are received.

[25] The claimant is relying on the medical reports prepared by the hospitals and prepared by medical personnel who treated her, and those were disclosed to the defendants as part of her statement of case. There are a total of four reports which seek to set out the events. Perhaps the most detailed report is the one prepared and/or signed by the 2nd defendant himself. This seems to bear two dates, October 10 and November 10, 2010. In addition, the claimant relies on a letter from the Spanish Town Hospital dated February 4, 2014 stating that her file could not be located. As at least two of the medical reports identify the doctors who treated the claimant and briefly set out the treatment she received, it should have been easy for the 1st and 3rd defendants to carry out their investigations swiftly. Indeed, as the reports are addressed to the Supreme Court of Jamaica, the Ministry of Health and relevant health authorities ought to have been aware from at least 2012 that Ms. Richards intended to file a claim and therefore ought to have acted with alacrity once the claim was served. The explanation for the delay is therefore unsatisfactory and is not reasonable having regard to all the circumstances.

[26] I also find that the nearly three-year period of the delay is inordinately long.

Is there prejudice caused to the claimant by the delay?

[27] Counsel Ms. Hall submitted that the claimant has not deponed to any prejudice in his affidavit.

[28] Further submissions were filed on behalf of the claimant, addressing the issue of prejudice. I have been asked by counsel Mrs. Coley Nicholson to give consideration to the prejudice caused to the claimant by the defendants' delay. The claimant requires psychotherapeutic and cosmetic surgical interventions to address the trauma and scarring suffered as a result of the

series of errors by the 1st, 2nd and 3rd defendants, and the delay prolongs her suffering. It is submitted that if the defendants' application is refused, the claimant might be able to commence the required treatment more swiftly.

[29] I am mindful that delay may cause prejudice to the claimant because with the passage of time, memories fade, or it might be difficult to locate witnesses, or a witness might have died. However, I am also mindful that the claimant herself seems to have delayed in bringing her claim.

[30] Notwithstanding the defendants' delay, I am guided by the dictum in ***Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Fredrick Flemmings & Gertrude Flemmings*** [2010] JMCA Civ 19, where Phillips JA said at paragraph 41 that a litigant ought not to be denied access to justice on account of a procedural default, "*even if unjustifiable, and particularly where no prejudice has been deponed to or claimed*".

[31] The claimant did not refer to the prejudice she has suffered and I find that the claimant has failed to show any prejudice flowing from the delay.

[32] The primary consideration is whether the defendants have a real prospect of successfully defending the matter. I will now assess the merits of the defence.

Have the defendants complied with rule 10.5 of the CPR?

[33] Counsel Mrs. Coley Nicholson submitted that save for paragraph 10 of the draft defence, the defendants have merely repeated the contents of the medical reports relied on by the claimant as part of her statement of case. Further, counsel submitted that the alleged signed consent form ought to have been exhibited to the draft defence in keeping with the requirements in rule 10.6(3) of the CPR.

[34] It seems appropriate to examine the defence to see if it meets the requirements of rule rule 10.5 of the CPR that the defence should state the facts relied on to dispute the claim. Rule 10.5 states:

"(1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) Such statement must be as short as practicable.

(3) In the defence the defendant must say –

(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;

(b) which (if any) are denied; and

(c) which (if any) are neither admitted or denied, because the defendant does not know whether they are true, but the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or particulars of claim-

(a) the defendant must state the reasons for doing so; and

(b) If the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –

(a) admit it; or

(b) deny it and put forward a different version of events the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence.

(7) A defendant who defends in a representative capacity must say-

(a) what that capacity is; and

(b) whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12."

[35] In essence, the claimant alleges that the 1st, 2nd and 3rd defendants were negligent in two respects. Firstly, she alleges that they were negligent in carrying out surgical procedures in that they failed to exercise reasonable care and skill in their treatment when performing the hysteroscopy, and this caused perforation to her uterus and distal ileum. They also failed to exercise reasonable care and skill in their treatment when performing mesh repair of incisional hernia, since it was done in such a way as to cause or contribute to

a large unsightly abdominal scar. The claimant alleges that such medical treatment was not in accordance with a responsible body of medical opinion.

[36] Secondly, the claimant alleges that they were negligent in her post-operative care and management. In summary, she alleged that they did the following:

1. failed to promptly take proper measures to diagnose the perforated uterus and distal ileum;
2. in the case of the Annotto Bay Hospital, failed to give timely, adequate and appropriate treatment after perforating her uterus and distal ileum and discharged her from hospital with those injuries;
3. in the case of the Spanish Town Hospital, failed to take proper measures to treat her promptly, appropriately, or at all;
4. exposed her to unnecessary risk of intra-abdominal sepsis;
5. caused or contributed to her developing intra-abdominal sepsis necessitating a subtotal hysterectomy, resection of a part of the ileum and primary anastomosis;
6. caused or contributed to her losing child bearing capacity;
7. caused or contributed to her developing a wound infection and fascial dihescence;
8. caused or contributed to her developing incisional hernia post lumpectomy for intra-abdominal sepsis;
9. in the case of the Victoria Jubilee Hospital, failed to take proper measures to treat her appropriately so as to avoid post-operative wound infection and fascial dihescence;
10. in the case of the Kingston Public Hospital, failed to take proper measures to treat the claimant appropriately so as to avoid a huge, unsightly abdominal scar.

[37] The amended claim form and amended particulars of claim were served on the 4th defendant on April 5, 2017. A draft defence is exhibited to the affidavit of Mr. Maddan filed nearly three years later on April 16, 2020.

[38] The defendants seek to assert that their servants and/or agents were not negligent and did not breach the duty of care owed to the claimant. In response

to the allegation in respect of negligence during the performance of surgical procedures, the defendants state at paragraphs 5(e), 7 and 11 of the draft defence that:

> *"At all material times the standard of care the Claimant received at the Annotto Bay Hospital was appropriate and perforation of the uterus is a recognized complication of hysteroscopy…."*
>
> *"… the 1st Defendant and/or its agents and servants took reasonable care to ensure that the hysteroscopy procedure was administered with the required skill and care which was in accordance with a responsible body of medical opinion."*
>
> *"… the respective medical personnel had the required skills and acted in accordance with the accepted practice and the standard of care required by the medical community in carrying out these procedures."*

[39] In response to the allegation in respect of negligence in the post-operative management of the claimant, the defendants state at paragraphs 5(e) and 9 of the draft defence that:

> *"… Further that appropriate intraoperative and post-operative monitoring was performed and there was no evidence to suggest perforation had occurred."*
>
> *"The Defendants asserts that the Claimant was appropriately managed by the gynaecologist, the general surgeon and psychiatrist [at the Victoria Jubilee Hospital]."*

[40] It is also noted that at paragraph 5 of Mr. Maddan's affidavit he states that "*at all material times standard surgical management was applied and followed*". However, I find that there is little substance in response to the allegations of negligence in the management of the claimant after surgery.

[41] Paragraphs 6 to 7 and 9 to 11 of the draft defence contain statements indicating how the claimant came to be admitted to and/or treated by the Annotto Bay Hospital, Victoria Jubilee Hospital and Kingston Public Hospital. However, it is not stated how "*standard surgical management was applied and followed".* As regards the claim in respect of the omission by the Spanish Town

Hospital to manage the claimant's post-operative care, all that the draft defence has said is that the claimant's file cannot be located, despite the 3rd defendant having had three years to search for the file.

[42] Rule 10.5(4) of the CPR requires that the defence to address each allegation which is denied by stating the reasons for doing so and setting out its own version of events in the defence. I am not satisfied that the defence set outs how it managed the claimant after surgery, for example, to prevent a wound infection or detect same early. There is no indication that arrangements were put in place to follow up and manage a "day case" patient after the patient was released, especially since she complained of pain prior to release. Clearly the claimant needed access to proper management following discharge.

[43] Since the claimant lived in Greater Portmore, St. Catherine, the Spanish Town Hospital would seem to be the closest facility to her to provide management following the hysteroscopy and polypectomy procedure. The claimant says that they did not assist her there, and at this time there is nothing in the draft defence refuting that allegation.

[44] It is the claimant's assertion that early detection of the uterine perforation might have obviated the need for a hysterectomy. I believe that the draft defence ought to have indicated the defendant's position in respect of this. While it is accepted that a wound infection itself cannot be treated as evidence of negligence without more, it seems clear that there was a duty on the hospitals to detect and treat an infection at the earliest possible opportunity. It is acknowledged however, that ultimately the burden of proof in relation to **causation** rests on the claimant. It would seem prudent for the claimant to rely on other expert medical opinion to prove her assertions.

Is there a defence with a real prospect of success?

[45] It is well settled that in determining whether there was a real prospect of success, the court must give consideration to the claim, the nature of the defence, issues of the case, and whether there is a good defence on the merits. In considering the issues of the case while hearing the application, the

court is not to conduct a mini trial. In ***Swain v Hillman*** [2001] 1 All ER 91 at 92, Lord Woolf MR said *"the words '… real prospect of succeeding' ... direct the court to the need to see whether there is a "realistic" as opposed to a fanciful prospect of success*". It must be more than a merely arguable case. It must be a good defence in fact or in law, or both.

[46] For the reasons indicated above, the allegation that the defendants failed to monitor and manage the claimant after the initial and the second surgical procedure has not been adequately addressed by the defendants in their defence. However, I have to look at the case in its totality and all that is contained in the draft defence. I have considered in particular paragraphs 5, 7 and 11 of the draft defence and the assertion that the respective medical personnel had the required skills and that they acted in accordance with the accepted practice and standard of care when conducting the surgical procedures. I find that this aspect of the defence does have a real prospect of success.

Should judgment be entered in default in respect of one or more defendants?

[47] Mrs. Coley Nicholson has submitted that the case involves successive torts and the defendants are jointly and severally liable for the extent of their damage. As the 2nd defendant Dr. Strachan has been sued in his personal capacity and has not filed a defence, counsel submitted that it is appropriate to enter judgment in default against him. Likewise, judgment in default should be entered against the Spanish Town Hospital in light of their inadequate response in relation to the claimant's file or docket.

[48] Ms. Hall has submitted that the claim involves one continuous event and consequently it cannot be severed or separated so that default judgment be entered against the Spanish Town Hospital in relation to its alleged omission to treat the claimant.

[49] Rule 12.9(2)(b) of the CPR provides that if a claim against one defendant cannot be dealt with separately from the claim against other defendants, the

court may not enter judgment against that defendant.

[50] The alleged failure to provide adequate and timely care after a surgical procedure is at the heart of this case. The lack of a response to the allegation from the Spanish Town Hospital ought properly to result in a default judgment being entered against the 3rd defendant. However, as the 3rd defendant also has responsibility for the Victoria Jubilee and the Kingston Public Hospitals, and as there are further allegations of negligence against those hospitals which require a proper assessment at a trial, it is not appropriate to enter judgment in default against the 3rd defendant. The allegations against these three hospitals appear to be inextricably linked even though the allegations relate to negligent after care, then negligent treatment and the further negligent after care. There seems to be merit in Ms. Hall's submission that there was one sequence of events and the individual allegations cannot be severed or separated to permit default judgment be entered against one defendant.

[51] Likewise, the claim against the 2nd defendant is inextricably linked to the claim against the 1st defendant and the failure of the 2nd defendant (or those instructed by him) to file a defence should not result in a default judgment being entered against him, as that would adversely affect the 1st defendant, when there is clearly an issue to be tried as regards whether the hysteroscopy was performed in accordance with accepted practice and the requisite standard of care.

[52] In all the circumstances, it seems appropriate to grant the defendants' application for permission to file their defence out of time.

The overriding objective

[53] The overriding objective of the CPR requires that the court dispense justice by resolving issues between the parties in a manner which saves time and expense. This matter had not progressed for three years. Ms. Hall opined that the Registry took some time to fix the applications for hearing. The speed at which dates are fixed for hearings depends entirely on the Registry and its

resources. However, both counsel for the claimant and the defendants could perhaps have pursued the Registry to ensure that the applications were fixed for hearing more swiftly. Rule 1.3 the CPR provides that it is "*the duty of the parties to help the court to further the overriding objective*" of enabling the court to deal with cases justly and expeditiously. In any event, the draft defence was only exhibited to the affidavit filed on April 16, 2020. In the circumstances, the delay in the progression of this matter is due in large part to the defendants seemingly not pursuing the Ministry for instructions and not being ready to have the matter progressed in a timely manner.

[54] Though the delay is inordinate in this case, it is in the interests of justice that the defendants have their case heard on the merits. In circumstances where there are multiple allegations against multiple hospitals and where causation is in issue and must be proved, it is not appropriate for this matter to be partially resolved by a default judgment being entered against some defendants.

[55] In all the circumstances, as indicated above, it seems appropriate to grant the defendants' application for permission to file their defence out of time and to refuse the claimant's application for permission to enter judgment in default of defence against the defendants.

[56] Any actual prejudice caused by the delay in the progression of this matter might be adequately addressed by an award of costs to the claimant. In contrast, one or more defendants might suffer an injustice if judgment in default is entered. That said, the parties' attorneys-at-law are strongly encouraged to have discussions with a view to settling this matter, looking at the strengths and weaknesses of the case globally.

DISPOSITION

[57] The defendants' application for permission to file their defence out of time is granted and the claimant's application for permission to enter judgment in default of defence against the defendants is refused.

[58] In light of the foregoing, I make the following orders:

1. The defendants are permitted to file and serve their defence within 14 days of the date hereof.
2. The parties must attend mediation by September 30, 2020. Mediation may be conducted by teleconferencing or videoconferencing.
3. Case Management Conference is fixed for hearing on November 23, 2020 at 11:30 a.m. for half hour, if the matter is not resolved.
4. The parties are to attend the Case Management Conference. Permission is granted for the parties to attend the hearing by teleconferencing or videoconferencing.
5. Costs to the claimant to be agreed or taxed.
6. The Attorneys-at-Law for the defendants are to prepare, file and serve this order. Permission is granted for the service of this order on the Attorneys-at-Law for the claimant by electronic means.