[2017] **JMSC Civ 158**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV04720

BETWEEN	**JIMMY SMALL**	**CLAIMANT**
AND	**JULIUS LAWRENCE**	**1ST DEFENDANT**
AND	**EPHRAIM BURKE**	**2ND DEFENDANT**

IN CHAMBERS

Kristina Exell instructed by Bailey Terrelonge Allen for the claimant

Obiko Gordon instructed by Frater Ennis & Gordon for the 1st defendant

Joanna Muirhead-Thomas instructed by Roach Bernard PLLC for the 2nd defendant

October 18 and 30, 2017

CPR Part 14 – Withdrawal of Admissions – Principles that should guide the exercise of the court's discretion whether or not to permit a defendant to withdraw an admission – Defence of Inevitable Accident – Necessary elements to establish the defence

D. FRASER J

BACKGROUND

[1] On October 26, 2009 at about 6:15 p.m. the claimant Jimmy Small was a passenger in a Toyota Hiace minibus owned by the 1st defendant Julius Lawrence and being driven by the 2nd defendant Ephraim Burke. The vehicle was

travelling along the Walkerswood main road in St. Ann in the direction of Spanish Town when it swerved, and according to Mr. Small, hit a part of the banking and then overturned.

[2] The claimant was injured in the accident and filed a claim against the defendants on October 8, 2014 alleging negligence in the operation and/or management of the 1st defendant's vehicle by the 2nd defendant. The claim was served on the 1st defendant on December 11, 2014 and on the 2nd defendant on January 5, 2015.

[3] On January 12, 2015 the 2nd defendant filed an Acknowledgment of Service in person. On January 28, 2015 the 2nd defendant, was by then represented by Roach Bernard PLLC, Attorneys-at-Law, who filed on his behalf a Defence as to Quantum admitting liability, but putting the claimant to strict proof in respect of the Particulars of Injury and of Special Damages filed by the claimant. A request for entry of Judgment on Admission in respect of the 2nd defendant was filed on March 6, 2015 and granted by a Deputy Registrar on June 11, 2015.

[4] The 1st defendant not having filed an Acknowledgement of Service or a Defence, a request for default judgment against the 1st defendant was also filed on March 6, 2015. Pursuant to a requisition from the Deputy Registrar, the Claim Form and Particulars of Claim were amended only to change the spelling of the 2nd defendant's name from "Ephraime" to "Ephraim" and the amended documents filed on July 27, 2015. As required by the requisition, the amended pleadings were served on the 1st defendant on August 5, 2015 and on the 2nd defendant on August 27, 2015. On August 28, 2015 the 1st defendant served counsel for the claimant with an Acknowledgement of Service and Defence. On September 1, 2015, a Defence to Quantum in Response to Amended Particulars of Claim, was filed by Roach Bernard PLLC on behalf of the 2nd defendant, which was in the exact terms of the previous Defence filed.

[5] On September 11, 2015 the Registrar issued a Judgment in Default of Acknowledgment of Service in respect of the 1st defendant in response to the

request for default judgment filed on March 6, 2015, prior to the amendment, which only concerned the spelling of the 2nd defendant's name.

[6] The matter was set for assessment of damages on April 27, 2016. However prior to this date, an application to set aside the default judgment entered against the 1st defendant was filed on April 19, 2016. The assessment of damages was accordingly adjourned on April 27, 2016 to facilitate the hearing of the application.

[7] On December 9, 2016, the 2nd defendant filed an application seeking the leave of the court to withdraw his Defence admitting liability and to file an Amended Defence. This application and supporting affidavit were served on counsel for the claimant on June 13, 2017.

[8] On January 26, 2017 the claimant filed an application for Summary Judgment against the 1st defendant. All three applications came before this court for hearing on October 18, 2017. After hearing submissions from counsel for the respective parties, the court decided to proceed with the 2nd defendant's application, as its outcome would likely have a significant bearing on the disposition of the other two applications.

THE 2ND DEFENDANT'S APPLICATION

[9] The application of the 2nd defendant for leave to withdraw defence admitting liability and to file an Amended Defence, was on the grounds that the 2nd defendant had been wrongly informed by Ruthann Morrison, Attorney-at-law for the Advantage General Insurance Co, that he had no defence to the claim and could only defend the quantum of damage. Based on this advice, he sought assistance from his Attorneys-at-law in respect to litigation of damages only.

[10] In his supporting affidavit he avers as follows from paragraphs 4 – 9

> 4. I informed Ruthann Morrison Anderson that on the day of the accident. I was driving along Walker's Wood main road when I saw two (2) cars

coming towards my direction at a high speed on the opposite side of the road. I slowed my vehicle and swerved to the left hand side of the road so as to avoid a collision. It was at this time the bus I was driving hit a sharp edged stone on the side of the road, which burst the left front tyre and caused me to lose control of the vehicle subsequently overturned.

5. Ruthann Morrison Anderson after hearing my story told me that I had no defence to the claim and I could only defend the quantum of damages being sought by the Claimant. She also informed me that Advantage General had paid out monies to all the other persons involved in the accident except the Claimant as they had reached their maximum pay-out limit.

6. I did not have an Attorney at the time when I received advice from Ruthann Morrison Anderson.

7. As a result of advice, I sought assistance from my Attorneys-at- Law and instructed them to litigate in respect of the quantum of damages only.

8. I have now informed my Attorneys- at-Law about the advice I received from Ruthann Morrison Anderson.

9. In doing research into this matter my Attorneys were able to obtain an affidavit from the Claimant which was filed in a suit arising from this same incident and have advised me that the advice which I received from Ruthann Morrison Anderson was not good advice as this accident was inevitable and no fault should be attributed to me as I had done my best to avoid an accident.

[11] The application was supported by the 1st defendant and opposed by the claimant. In his affidavit in opposition, Mr. Alando Terrelonge counsel in the firm appearing for the claimant, outlined the history of the claim and averred that it would be grossly prejudicial if the 2nd defendant were permitted to resile from his admissions that were properly made, as the claimant had relied on them in proceeding with his claim, and if leave were granted, it would defeat the provisions made for admissions of liability.

THE ISSUES

[12] What principles should guide the granting of permission by courts for a party to withdraw an admission?

[13] Whether in this case the 2nd defendant should be permitted to withdraw his defence admitting liability and to file an amended defence?

THE SUBMISSIONS

Counsel for the 2nd defendant

[14] Counsel for the 2nd defendant submitted that they had obtained an affidavit from the claimant filed in a suit arising from the same accident and formed the view that the 2nd defendant was entitled to the benefit of the inevitable accident. Counsel sought to rely on that affidavit. However though the court was advised that the affidavit had been filed in court, it had not been exhibited to this application and served on counsel for the claimant who objected to its use on that basis. The objection was upheld.

[15] Subsequently however counsel for the 2nd defendant confirmed that the affidavit disallowed essentially supported the account of the accident given by the 2nd defendant. The court was therefore not deprived of considering a different version of how the accident occurred. The purpose of seeking to rely on the affidavit, it seems, was to show that there was support for the account of the 2nd defendant. Nothing therefore turns on its inadmissibility.

[16] Counsel submitted that the 2nd defendant had received bad advice as a result of which he failed to avail himself of the defence of inevitable accident. Counsel argued that on the account of the accident as outlined by the 2nd defendant, the 2nd defendanthad a real prospect of defending his claim,based on that defence. Consequently they were seeking leave to withdraw his admissions and file an

amended defence. Neither rules nor authorities were cited by counsel in support of her submission.

Counsel for the claimant

[17] Counsel for the claimant set out the history of the matter and pointed out that up to March 18, 2016 when the 2nd defendant file a notice to object to the police report in response to the Notice of Assessment of Damages the 2nd defendant was under no misconception as to the issue of liability

[18] Counsel highlighted that the 2nd defendant was not relying on any new information in seeking to withdraw his defence and therefore ought not to be allowed to resile from his admissions.

[19] Counsel cited CPR Rule 14.1 which governed admissions and pointed out that 14.1(6) provided that, "The court may allow a party to amend or withdraw an admission." She observed however that as there was no specific guidance in the rules concerning the manner in which the court should exercise that discretion, it was necessary to have recourse to case law to ascertain the relevant principles.

[20] Counsel cited a number of cases. She commenced with ***Continental Baking Company Ltd and Ors v Super Plus Food Stores Ltd and Ano.*** [2015] JMSC Civ. 169, in which Sykes J relied on dicta from Sumner J in ***Braybrook v Basildon & Thurrock University NHS Trust*** [2004] EWHC 3352 as outlining the correct approach to deciding whether to permit withdrawal of an admission after an action had commenced and also noted that costs were not the panacea for all ills.

[21] She then turned to a number of cases from outside of the jurisdiction, particularly matters involving motor vehicle accidents, that dealt with the issue of withdrawal of admissions:

i) ***Kristy Miller v Robert Norris*** 2013 BCSC 552, where admissions of liability were sought to be withdrawn as counsel took the view that there was a defence of inevitable accident even though previously, several loss adjusters had not taken that view. This case set out certain considerations that should guide the court in the exercise of its discretion;

ii) ***Manjit Kaur Sidhu and Harpreet Kaur Sidhu v Baljit Kaur Hothi and Ano*** 2013BCSC939, in which the defendant wanted to withdraw admission of liability due to the receipt of information that the claimant was neither the driver nor a passenger in the vehicle hit by the defendant's vehicle.The court relied on the test set out in ***Kristy Miller***;

iii) ***Janice Boyd v Richard Brais*** 2000 BCSC 404 where it was sought to have the defendant's admission withdrawn on the basis that relevant information about the defendant's mental capacity at the time of the event was unknown when the admissions were made;

iv) ***Lloyd Wisdom v Janet Johnson*** Suit No: C.L. 1996/W – 240 jud. Del. June 11, 2002, where the defendant sought unsuccessfully to amend his defence to rely on the said defence of inevitable accident that the 2nd defendant now seeks leave to rely on in the instant case.

[22] Having outlined the *ratio decidendi* of these cases, counsel submitted that in the instant case the 2nd defendant had made his admissions in full knowledge of the relevant facts. He was the driver in the incident and was aware of the police report. The information as to how he alleged the accident occurred was already in his knowledge. No new facts had arisen as to the circumstances of the accident. Counsel argued that the cases showed that trying to place the fault on some other occurrence after the fact was not a sufficient basis on which admissions may be withdrawn.

[23] Counsel further submitted that the 2nd defendant had not distinguished between bad advice on the one hand and on the other hand, a difference of opinion on the strength of the case between two attorneys on the same facts. Counsel relied on cases which establish that merely because a subsequent expert took a different view than a former one is not a basis for withdrawal. Therefore counsel argued that the 2nd defendant should not be able to resile from his admissions simply because there may be a different interpretation for the same set of facts. Counsel also maintained that the facts relied on, in any event, would not avail him of the defence of inevitable accident.

[24] Counsel also bemoaned the fact that with the 2nd defendant having admitted liability from as far back as January 2015, there would be immense prejudice to the claimant and injury to the interests of justice were the 2nd defendant to be allowed to resile from his admissions at this late stage. Counsel cited ***Brenda Rafter v Ian Paterson*** 1997 BCSC 317 056 in support. Counsel further contended that the court ought not lightly to grant permission for a defendant to withdraw admissions as the purpose of part 14 of the CPR was to allow a claimant to rely on admissions and to safely proceed on his claim knowing that one part of the claim was not being challenged. Otherwise a claimant would always have to bear in mind that a defendant could change his mind. All of these considerations counsel submitted, went against the granting of the application.

Counsel for the 1st and 2nd defendants in response

[25] Mr. Gordon for the 1st defendant in seeking to support the application made on behalf of the 2nd defendant, sought to distinguish some of the cases cited by counsel for the claimant. Concerning the case of ***Continental Baking*** he maintained that it could be distinguished from the instant matter as in ***Continental Baking*** it was the irresponsible record keeping of the defendant that had led them to think that amounts were in arrears when they were not. In the instant case there was no such lapse on the part of the 2nd defendant and the issue was a lay person had been given bad legal advice.

[26] Counsel sought to distinguish the case of ***Kristy Miller*** on the basis that the difference of opinion in that case was between a loss adjuster and counsel. This court however observed that the situation was more in favour of the claimant in this case as the variance in opinion was between different legal counsel.

[27] Concerning all the cases from British Columbia, counsel made a general submission that based on their CPR the British Columbia courts seemed to be more constrained than the Jamaican Supreme Court as our CPR simply said in CPR Rule 14 (1) (6), "The court may allow a party to amend or withdraw an admission." He contended therefore that there were no constraints on the court's decision which could be more flexible that the courts in British Columbia.

[28] This point can be addressed immediately. In the British Columbia Rule 7-7(5) a party may not withdraw an admission, "except by consent or with leave of the court". In the Jamaican iteration it is "The court may allow a party to amend or withdraw an admission." So far as the role of the court is concerned it is just a difference in wording. A distinction without a difference. There is no sustainable basis to distinguish the cases as submitted.

[29] Concerning the case of ***Lloyd Wisdom v Janet Johnson*** counsel submitted that the issue of the strength of the defence should be a matter for trial. The 2nd defendant, a lay person, had, based on bad advice, mistakenly not availed himself of the defence of inevitable accident. Counsel argued that once the defence was raised on the facts, there was a triable issue which should have the benefit of determination at a hearing in the interests of justice.

[30] Mrs. Muirhead-Thomas in response referred the court to considerations outlined at paragraph 34 of the case of **Kristy Miller** and submitted that if the 2nddefendant was not allowed to amend his defence it would be of great prejudice to him as he should be allowed to put forward his defence and the matter be tried by the court.

DISCUSSION AND ANALYSIS

[31] It is essential to first of all consider the principles discussed in the cases which have examined the issue of when and under what circumstances it may be appropriate for a court to allow a defendant to withdraw his admission.

[32] In ***Continental Baking Company Ltd and Ors v Super Plus Food Stores Ltd and Ano.***[2015] JMSC Civ. 169,the defendants admitted that they owed money to the 1st and 3rd claimants but then wished to withdraw those admissions. The claimants also applied for summary judgment. His lordship noted that for almost six (6) years into the claim, no one thought that the defendants did not owe any money; it was only a question of which claimant was the correct creditor. Sykes J at paras 33 - 34 accepted the considerations laid down by Sumner J in ***Braybrook v Basildon & Thurrock University NHS Trust*** [2004] EWHC 3352 (at para 45) as the correct approach to deciding whether to permit withdrawal of an admission after an action had commenced.

[33] Sumner J said that,

> From these cases and the CPR I draw the following principles. 1) In exercising its discretion, the court will consider all the circumstances of the case and seek to give effect to the overriding objective. 2) Amongst the matters to be considered will be: a) the reasons and justification for the application which must be made in good faith; b) the balance of prejudice to the parties; c) whether any party has been the author of any prejudice they may suffer; d) the prospects of success of any issue arising from the withdrawal of an admission; e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring. 3) The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing. Above all, the exercise of any discretion will always depend on the facts of the particular case before the court. The words 'will consider all the circumstances of the case' have particular resonance in this context.

[34] Sykes J also found at para. 51 that, "*Costs are no longer seen as the great panacea for all ills. The overriding objective now requires the courts to have regard to impact on other persons waiting to use the court system*." Accordingly Sykes J refused the application to withdraw the admission and granted the application for summary judgment.

[35] Counsel relied on a number of persuasive authorities from the British Columbia Supreme Court. ***Kristy Miller v Robert Norris***, 2013 BCSC 552 was a personal injury claim, in which the defendant admitted liability. He then sought leave to withdraw his admission and to plead the defence of inevitable accident claiming the accident was caused by his having suffered a heart attack whilst driving. Multiple insurance adjusters had taken the view liability should be admitted. The admissions were later sought to be withdrawn based on the opinion of defence counsel. At paragraph 34 Master Bouck outlined that,

> In determining whether an admission ought to be allowed to be withdrawn, the court must take into account the following:
>
> 1. Whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact, and
>
> 2. In applying that test, all of the circumstances surrounding the admission must be considered including whether:
>
>   a. the admission was made inadvertently, hastily or without knowledge of the facts;
>
>   b. the fact admitted was not within the knowledge of the party making the admission;
>
>   c. the fact admitted is not true;
>
>   d. the fact is one of mixed fact and law;
>
>   e. the withdrawal of the admission would not prejudice a party; and

f. there has been no delay in applying to withdraw the admission.

[36] The court found it significant that multiple adjusters had taken the view that liability should be admitted. Further that even though the relevant witnesses with respect to the defence of inevitable accident were known to the parties, the passage of time might have affected those witness' memory. The court adopted the opinion expressed in ***Oostendorp v Sarai*** [1973] B.C.J. No 570 at para 10 that: *"It would be wrong to encourage a practice that enabled parties to admit liability one day and withdraw the admission later on the basis of a different view taken of the same facts by some other person."* The application was accordingly dismissed with costs to the plaintiff.

[37] In ***Manjit Kaur Sidhu and Harpreet Kaur Sidhu v Baljit Kaur Hothi and Ano*****,** 2013 BCSC 939, there was an application by the defendants in a motor vehicle action to withdraw an admission of liability and to amend their response to the civil claim. The defendants claimed that whilst they still admitted liability, in light of unusual evidence which they now possessed, (provided by Mr. Chaudhry), they wished to amend to deny that the plaintiffs were in the non-liable vehicle at the time of the collision and to allege that they had suffered no injury or loss.

[38] The court considered the test outlined in ***Kristy Miller v Robert Norris*** and found, amongst other things that, the admission was not made inadvertently or hastily and even if they did not have actual knowledge of Mr. Chaudhry's evidence at the time of the admission, the information was available for almost two years prior to the admission; that as it related to the requirement that the withdrawal of the admission would not prejudice a party, the onus was placed on the defendant to establish that there is no prejudice to the plaintiff. The court also found that there was delay in bringing the application to withdraw the admission. The application was dismissed with costs to the plaintiff.

[39] In ***Janice Boyd v Richard Brais*** 2000 BCSC 404, the defendant sought leave to withdraw an admission of liability in an action for damages arising out of a motor

vehicle collision which occurred in 1997. In 1999, the defendant's counsel deposed that at the time of the admission, information pertaining to the defendant's delusional state at the scene of the accident was unknown. The court accepted that there is prejudice to a plaintiff anytime an admission of liability extant for a significant length of time is sought to be withdrawn, and concluded at para. 25 that the admission was not made inadvertently, hastily or without knowledge of the facts, but was a case where counsel had taken, *"a different view of the facts than was taken by the adjuster…when the matter was originally considered shortly after the accident."* Consequently it was not in the interests of justice to allow the withdrawal of the admission sought.

[40] In ***Lloyd Wisdom v Janet Johnson*** C.L. 1996/W.-240, there was a collision between the plaintiff's minibus and the defendant's motorcar. The issue for the court was whether the defendant could avail herself of the defence of inevitable accident. The defendant had contended that the collision was inevitable owing to the presence of oil on a particular section of the road. The court held that for the defence to succeed, the defendant had to prove that something happened over which she had no control, the effect of which could not have been avoided by the exercise of care and skill.

[41] Critical evidence given by the defendant was that when she went into the skid she just, "closed her eyes and held onto the steering". She also said that at the time she did not know anything about how to correct a skid." (See pages 5 – 6). The court found that her action took her outside of the criteria of the defence she sought to raise. Also at page 6 Anderson J opined that "*I also find myself in agreement with the submission made by Mr. Frankson and supported by* ***RICHLEY v FAULL (RICHLEY third party) [1965] 3 A.E.R 109*** *that he cited, that "a sudden violent and unexplained skid is itself evidence of negligence". And where that skid leads to the vehicle going out of control as it appears happened here, then a fortiori, there is evidence of negligence*." Accordingly the court found that the defendant was negligent and the defence of inevitable accident failed.

[42] In ***Brenda Rafter v Ian Paterson*** 1997 BCSC 056 a matter arising from a motor vehicle accident, a notice to admit seeking admission of a number of things including liability, was sent to counsel for the defendant and receipt acknowledged. There was no response to the notice and the facts set out in the notice were deemed to be admitted. The defendant applied to have the deemed admission withdrawn. The court, at page 4 para 7, cited with approval Madam Justice Newbury in ***Bank of Montreal v Quality Feeds Alberta Ltd.*** [1994] B.C.J. No. 3058, B.C.S.C. Vancouver Registry No. C908095 and held that it was not enough to show that a triable issue exists that would be negatived by the admission: the applicant must show that in all the circumstances, the interests of justice require the withdrawal of the admission. The court found that there was no evidence of any error, inadvertence or new facts which would lead to the conclusion that the admission should be withdrawn, neither was there any material to indicate that there was a triable issue to be tried in the interest of justice or that there would be an injustice if the admission was not withdrawn.

Response to Issue 1 — The Applicable Principles

[43] From a review of the cases the following are the principles distilled in answer to the question posed by issue 1, outlined in date order of the cases in which the principles were stated.

i) The courts should not encourage a practice that enabled parties to admit liability and then later seek to withdraw the admission on the basis of a different view taken of the same facts by some other person.(***Oostendorp v Sarai*** (1973)).

ii) It was not enough to show that a triable issue exists that would be negatived by the admission: the applicant must show that in all the circumstances, the interests of justice require the withdrawal of the admission. Such circumstances may include evidence of error, inadvertence or new facts that

would lead to the conclusion that the admission should be withdrawn. (***Bank of Montreal v Quality Feeds Alberta Ltd.*** (1994).

iii) There is prejudice to a plaintiff anytime an admission of liability extant for a significant length of time is sought to be withdrawn. (***Janice Boyd v Richard Brais*** *(*2000)).

iv) 1) In exercising its discretion, the court will consider all the circumstances of the case and seek to give effect to the overriding objective. 2) Amongst the matters to be considered will be: a) the reasons and justification for the application which must be made in good faith; b) the balance of prejudice to the parties; c) whether any party has been the author of any prejudice they may suffer; d) the prospects of success of any issue arising from the withdrawal of an admission; e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring. 3) The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing. Above all, the exercise of any discretion will always depend on the facts of the particular case before the court. The words 'will consider all the circumstances of the case' have particular resonance in this context. (***Braybrook v Basildon & Thurrock University NHS Trust*** (2004).

v) The court must take into account the following:

1. Whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact, and

2. In applying that test, all of the circumstances surrounding the admission must be considered including whether:

a. the admission was made inadvertently, hastily or without knowledge of the facts;

b. the fact admitted was not within the knowledge of the party making the admission;

c. the fact admitted is not true;

d. the fact is one of mixed fact and law;

e. the withdrawal of the admission would not prejudice a party; and

f. there has been no delay in applying to withdraw the admission. (***Kristy Miller v Robert Norris*** (2013)).

vi) Costs may not be an adequate remedy to salve the prejudice that would be occasioned by allowing a defendant to withdraw his admission. Based on the overriding objective, courts have to consider not just the prejudice to the claimant but also the impact (prejudice) the withdrawal would have on other persons waiting to use the limited resources of the court system. (***Continental Baking Company Ltd and Ors v Super Plus Food Stores Ltd and Ano.*** (2015).

Response to Issue 2 — Should the 2nd defendant in this case be permitted to withdraw his admission?

[44] Applying the above principles to the instant case a number of factors compel a clear and obvious conclusion. The facts have not changed. The 2nd defendant's knowledge of those facts has not changed. This was confirmed in submissions by counsel for the 2nddefendant in the discussions surrounding the non-admissibility of the affidavit filed by the claimant in a separate matter. All that has changed is the opinion of the 2nd defendant's counsel as to the question of liability.

[45] Though the 2nd defendant was at pains in his affidavit to indicate that based on the advice he received from Ms. Morrison he instructed his attorneys to litigate only in respect of the quantum of damages, a significant fact is that the 2nd defendant was represented by the same firm of attorneys at the time of filing the Defence as to Quantum containing the admissions, as he is now. It is expected that they would have taken details of the facts of the accident on the basis of which they were being instructed to file a defence as to quantum only. The added complication that the 2nd defendant faces in this case is that there is not just a disagreement between two different unconnected counsel, but it also appears there were opposing opinions held within the same firm of attorneys at different points in time.

[46] No affidavit was presented from Ms Morrison outlining the basis on which she came to her conclusion, even assuming that the account of the 2nd defendant as to the fact that she gave him advice and the nature and quality of that advice is accepted and correct. It is also significant that Ms. Morrison was working for an Insurance company. The court takes judicial notice of the fact that attorneys employed to or acting on behalf of Insurance companies are expected to secure the best interests of their insurance clients within the law and also that they would develop considerable expertise over time in determining which claims can reasonably be contested and which cannot.

[47] This court should not be taken as implying that because Ms. Morrison worked for an insurance company her opinion could or likely would not be wrong. The fact is, it is her alleged opinion against that of the present opinion of the 2nd defendant's lawyers who, it cannot be overemphasized, had an opportunity to demur from Ms. Morrison's opinion prior to their filing a defence as to quantum on the 2nd defendant's behalf. To grant this application would be to allow the 2nd defendant and his attorneys-at-law to challenge an opinion they had previously accepted and acted upon, in a context where no new facts have emerged concerning the accident. There is no evidence that the admission was made

inadvertently, hastily or without knowledge of the facts. All that has changed is the opinion of the 2nd defendant's counsel. On those facts alone it would seem the application is misconceived.

[48] There is however a further hurdle that the 2nd defendant has been unable to clear. The purpose of seeking the leave to withdraw his admission is to deploy the defence of inevitable accident. The case of ***Lloyd Wisdom v Janet Johnson*** establishes that for the defence to succeed, the defendant has to prove that something happened over which he had no control, and the effect of which could not have been avoided by the exercise of care and skill. There being no new facts being relied on, beyond those initially considered, it is not clear that that defence if permitted would have a reasonable prospect of success.

[49] In any event, even accepting that the court should not pronounce on the merits of the defence at this stage, and assuming for the sake of conjecture that the defence of inevitable accident would have some hope of success at trial, the court also has to bear in mind the lateness of the application and both the specific and general prejudice that would be occasioned by permitting the defendant to resile from his admissions.

[50] As noted in the 2nd defendant's affidavit, he was advised by Ms. Morrison that the Insurance Company had settled with all other claimants. Is that the real motivation for the 2nd defendant having filed this application given his exposure due to lack of insurance cover? The court has to consider further the fact that allowing the 2nd defendant to resile from admissions would put this claimant's claim in actual or at least potential conflict with the result achieved in other claims arising out of the same facts.

[51] Therefore even if the 2nd defendant had established that there was a triable issue that would be negatived by the admission, which does not appear to be the case, the 2nd defendant would still have to show that in all the circumstances, the interests of justice required the withdrawal of the admission. The court having

found that there was no evidence of any error, inadvertence or new facts which would lead to the conclusion that the admission should be withdrawn, it is manifest that the 2nd defendant's application should not succeed.

DISPOSITION

[52] The application having no adequate factual underpinning, no issue of a "balance of prejudice" between the claimant and the 2nd defendant arises. The court does not therefore have to consider whether or not costs could possibly have salved the specific prejudice that would be occasioned to this claimant or the general prejudice that could accrue to litigants in other cases and the overall interests of justice, should this application be granted.

[53] Accordingly, in the premises the application is refused, with costs to the claimant to be agreed or taxed.

[54] The court having pronounced its ruling, counsel for the 1st defendant conceded that his application to have the default judgment entered against the 1st defendant set aside had no reasonable prospect of success. This concession was appropriate as even if he prevailed in his argument that entry of appearance to the amended claim and particulars placed the 1st defendant within time, the effect of the court's ruling on the 2nd defendant's application, would make a court disinclined to rule in his favour.

[55] The application of the 1st defendant to have the default judgment against him set aside is therefore refused and the default judgment stands. As a consequence there is no basis or necessity for the court to consider the application for summary judgment. Given that the outcomes of these applications were effectively determined by the outcome of the application of the 2nd defendant, there will be no further order as to costs.

[56] Hearing of the assessment of damages is set for May 21, 2018.