



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 18

BETWEEN:

ABC (MINOR)
(Through his parents and legal guardians ABC -F and ABC-M)

Plaintiff

and

MINISTRY OF EDUCATION

Defendant

RULING

(On Plaintiff's application to set aside the Stay Order dated 3 July 2025)

Claim for damages for personal and emotional injury, Special circumstances of a vulnerable child, Application to set aside an order of the Court staying proceedings unless medical examination undertaken

Date of Hearing: 2 December 2025

Date of Ruling: 11 May 2026

Appearances: ABC-F, in person, for Plaintiff

Richard Horseman, Wakefield Quin, for Defendant

RULING of Mussenden CJ

Introduction

1. This matter appears before me by the Plaintiff's¹ Summons dated 7 July 2025 ("**Set Aside Application**") for an application to set aside an Order ("**Stay Order**") that I made dated 3 July 2025 where upon hearing the Defendant's application for a stay (the "**Stay Application**") I stayed these proceedings unless the Plaintiff submitted to a medical examination by the Defendant's expert, Dr. Oleksak within 21 days of the Order. The Plaintiff also seeks an order that the matter proceed without requiring further medical examinations and for a declaration that any future applications for coercive relief be formally filed, listed and determined only after the Plaintiff has had a reasonable opportunity to respond.
2. The Set Aside Application is supported by three affidavits of the Plaintiff affirmed 7 July 2025 ("**ABC-F1**"), affirmed 18 July 2025 ("**ABC-F2**") and affirmed 18 September 2025 ("**ABC-F3**") along with several exhibits respectively.
3. The Defendant objected to the Set Aside Application but alternatively suggested the procedure of re-hearing the Plaintiff.

Background

4. The Plaintiff (through his parents) caused a Writ of Summons to be issued on 13 September 2023. The Amended Statement of Claim (the "**ASOC**") set out that the Child was a student at the School attending the Autism Spectrum Disorder ("**ASD**") class. The child suffered injuries in a playground accident whilst attending the School on 5 February 2021. The Plaintiff has claimed Special Damages and General Damages which include fair compensation for the loss of enjoyment of life, that is, participation in life's activities to the quality and extent normally enjoyed before the injury based on the Plaintiff's pain, discomfort, suffering, disability, and anxiety already experienced and reasonably probable to be experienced in the future as a result of the accident.

¹ References to the Plaintiff are to the father, unless otherwise stated to be the mother or both parents

5. On 25 November 2024 the Defendant admitted liability only on the basis that the playground equipment at the School posed a foreseeable risk of injury to the Plaintiff and the Defendant breached its duty of care to the Plaintiff which caused the plaintiff injury. The Plaintiff took issue with the claim for damages and requested the Court to assess damages.
6. On 5 December 2024 the Court awarded judgment on liability with damages to be assessed. By a Consent Order dated 23 December 2024 (the “**Consent Order**”) the parties agreed various directions for the assessment of damages including the filing of witness statements and calling two expert witnesses each as to the nature of the injuries and the effect of those injuries on the Plaintiff. The experts would prepare their reports, including a joint report, and would be made available for cross-examination at a hearing for the assessment of damages. It will be important to note here particular sections of the Consent Order as follows:

“5. The parties are at liberty to call two medical experts each in relation to the nature of the injuries suffered by the Plaintiff and the effect of those injuries on the Plaintiff for the purpose of assessing damages.

6. The Plaintiff will serve his expert reports on or before 31 March 2025.

7. The Defendant will serve its expert reports in reply to the Plaintiff’s expert reports on before the 9th May 2025.”

8...

9. The expert witnesses will be tendered for cross-examination unless the opposing party deems it unnecessary for the other party’s expert witness to be called to testify.

7. The second affidavit of the Acting Principal of the School sworn on 21 January 2025 (“**AP2**”) set out that the Plaintiff indicated in an earlier stage of proceedings that he was seeking damages in the approximate amount of \$670,000. At the hearing on 3 July 2025, the Plaintiff indicated that he seeks damages in excess of \$1 million dollars.
8. On 3 July 2025, for the Stay Application, I heard submissions from Mr. Horseman for the Defendant and I also heard submissions from the Plaintiff. At that same hearing, in respect of the application for a stay, I gave a ruling as follows:

“In this matter involving an injury to the child, the Minister has admitted liability and proceedings have moved onto quantum for which there will be a trial. The claim for

damages is nearly \$2 million. In a Consent Order dated 23 December 2024, I gave directions for the trial. It included at paragraph 5 that parties were at liberty to call two medical experts each in relation to the nature of injuries suffered by the Plaintiff and the effect of those injuries on the Plaintiff.

The Minister's counsel has taken some steps to have medical experts, by starting with Dr. Peckett, who produced a report. Correspondent shows that Dr. Peckett has not examined the child recently. Thus, with concurrence by Dr. Peckett, the Minister wants to have the child examined by Dr. Oleksak, an orthopedic surgeon. In my view, the Order allows for an expert on the injuries and I am not prepared to restrict the efforts of the Minister to obtain a report from an expert of its choice. Thus, the child should submit to examination by Dr. Oleksak in order to best assist the Court in assessing damages. Thus, I reject the points raised by [the Plaintiff] objecting to the examination.

Re disclosure of TV invoices, [the Plaintiff] says that he has already disclosed the invoices of Tomorrow's Voices for the period before, after and since the accident. Me Horseman does not recall such disclosure. I now order that such invoices of Tomorrow's Voices before the accident be disclosed, since May 2019 to February 2021.

Re disclosure of bank statements – I am not satisfied that a blanket disclosure of bank statements will provide the specific support for the treatment of the child. [The Plaintiff] agreed that he could get invoices from the treatment [of] services providers. Thus, I order that the Plaintiff disclose all invoices for treatment of the child from all the service providers.

Re the stay, I am satisfied that I should grant a stay of these proceedings unless the child is examined by Dr. Oleksak within 21 days. In respect of the Overriding Objectives, I encourage the parties to cooperate in assisting each other and the Court in bringing this matter to trial.”

Re agreed dates for trial, I order that agreed dates be submitted for trial within 14 days of this order for a 5 day trial.

In respect of costs, I grant costs of 50% of these applications to the Minister, discounted due to the issue of bank statements.

Plaintiff's Evidence

9. ABC-F1, which include facts and legal submissions, is set out in the following paragraphs.

10. The Plaintiff had not served formal expert reports, instead relying on comprehensive, objective medical evidence that is already before the Court and uncontested by the Defence.
 - a. Orthopaedic evidence – Dr. Peckett’s report;
 - b. Psychiatric and psychological evidence – Dr. Yates’ psychiatric report;
 - c. Functional Assessment evidence – Occupational Therapy report;
 - d. Specialist Autism Assessment – Tomorrow’s Voices report; and
 - e. Hospital and Educational records.

11. The Defendant’s Summons filed 2 June 2025 and issued 11 June 2025 for the Stay Application expressly acknowledged that paragraph 7 of the Consent Order did not entitle the Defendant to serve expert reports unless and until the Plaintiff serves theirs, and accordingly seeks to vary the order. The Plaintiff stated that the Stay Application was not listed for hearing and he received no notice or directions from the Court to file any response or evidence in opposition to the application. I should state here that upon review of the said Summons, it was issued by the Acting Registrar on 11 June 2025 for hearing on 3 July 2025.

12. The Plaintiff had filed a Form31D on 3 June 2025 requesting a directions hearing to advance the case to trial. On 12 June 2025 the Registry issued a hearing notice confirming the matter was listed for 3 July 2025. There was no mention that the Defendant’s Summons would be heard on that date. He relied on the listing notice and the long standing court practice to assume that the hearing would be a directions hearing. On 13 June 2025 he wrote to Mr. Horseman about the Plaintiff’s Directions Summons with no mention of the Defendant’s summons, thus showing he had no knowledge of the Stay Application. He states that he had no knowledge or expectation that the Stay Application would be argued or determined. Thus, he attended the Court under the reasonable assumption that the Court would address the case management issues and trial scheduling – not a contested hearing.

13. At the hearing of the 3 July 2025, the Court expressly advised the parties that the hearing was a directions hearing as there were other unrelated matters to be heard also. However,

he was ambushed when the Court opened with the Defendant's Summons, which Defence Counsel argued whilst he was given no opportunity to file written submissions or evidence in opposition, eventually being given only 5 – 10 minutes to improvise and address an application he was not prepared for, then a short break followed by another 5 – 10 minutes to address the Summons.

14. At the hearing he argued that the case was trial ready based on comprehensive objective medical evidence already available and that the Defendant had no procedural right under the Consent Order to serve expert reports since no Plaintiff expert reports had been filed. Further he argued that granting the Defendant's application would create an unfair imbalance between objective neutral records and partisan expert reports, particularly prejudicial given the power imbalance between a disabled child and a Government defendant.
15. At the hearing the Defendant argued that the Consent Order permitted the Defendant to file expert reports, a submission which was inconsistent with the Summons dated 2 June 2025 which specifically sought to vacate that Order. The Court granted a stay and allowed for compelled medical examinations when there was no right under the Consent Order to have such examinations.
16. No leave was sought to amend the Summons and no opportunity was given to the Plaintiff to respond to the change in argument, which was a procedural irregularity.
17. The Court gave its decision. No reasons were given. I should state here that I made a Ruling with reasons as set out above.
18. ABC-F2 set out a number of positions including that the Stay Order was procedurally impermissible, substantially unnecessary and legally void for the following reasons:
 - a. The Stay Order directly contravened the Consent Order which expressly barred the Defendant from serving expert reports unless and until the Plaintiff first served their

own expert reports. No such expert reports were filed by the Plaintiff, and thus the Defendant's request was procedurally barred from the outset.

- b. The Defendant had admitted this limitation in its own Summons dated 2 June 2025, acknowledging that the Consent Order required variation before any expert evidence could be filed. Thus, the Defence's subsequent reversal at the 3 July hearing constituted a material ambush and abuse of process.
 - c. Compelling a vulnerable minor who relies on neutral treating clinicians, to undergo intrusive examination by partisan Defence experts without reciprocal expert disclosure is fundamentally unjust as it violates the principle of equality of arms and cause irreparable prejudice to a child with autism and trauma.
 - d. The Stay Order is *ultra vires*. The Court itself accepted that it had no legal power to compel a medical examination. Yet the Stay Order stayed the proceedings unless such an examination occurred - an indirect compulsion that exceeds judicial authority and violates the principle established in *Secretary of State for the Home Department, Ex Parte Salem* [1999] 1 AC 450 (House of Lords) and *R (on the application of Imam) v London Borough of Croydon* [2023] UKSC 45. The Stay Order is therefore void *ab initio*.
19. ABC-F3, set out a number of positions including the following:
- a. The Stay Order was procedurally impermissible because the Defendant was not entitled to serve expert reports unless and until the Plaintiff first served its own. As the Plaintiff had not served any expert reports, the Defendant lacked procedural entitlement to pursue further medical examinations or to obtain the Stay Order.
 - b. The Stay Order was substantively unnecessary because even if the procedural entitlement existed, the stay was still unnecessary in substance. On 28 July 2025, counsel for the defendant had transmitted to the Plaintiff the psychiatric report of Dr. Andrew Clark. The report, on its face, contained no reference to photographs or videos of the Plaintiff, nor does it appear to rely upon any such material. It was completed without the very conditions the Defendant previously insisted were essential for its preparation.

- c. Thus, Dr. Clark’s report, without reliance on the disputed materials, confirms that the Defendant’s experts are able to prepare opinions without the intrusive conditions upon which successive stays have been granted. Thus, the Stay Order was substantively unnecessary and operates only to delay and prejudice the Plaintiff.

Defendant’s Evidence

20. The Defendant did not file evidence in support of its objections to the Plaintiff’s application to set aside the stay.

The Plaintiff’s Submissions

21. The Plaintiff submitted that the Stay Order was made without proper jurisdiction, in breach of natural justice, and following fundamental procedural irregularities that denied the Plaintiff a fair hearing. The thrust of the submission was that the 3 July 2025 hearing was listed as a directions hearing for the Form 31D case management hearing, yet was used to determine a contested interlocutory summons without proper notice or listing. Thus, the Plaintiff was ambushed with an undisclosed bundle of legal authorities during the hearing and given no opportunity to file written submissions or respond meaningfully. Then the Court issued its decision without reasons and imposed a cost order without hearing from the parties.
22. The Plaintiff complained that Defence Counsel was permitted to have his personal guests remain throughout the hearing involving a minor, while the Plaintiff’s father was excluded from an unrelated case in the same courtroom that day – demonstrating apparent bias and unequal treatment, such actions which breached well-established principles of fairness and natural justice. I should note here that Mr. Horseman had two students, one related to him, accompanying him who he introduced as aspiring law students. I had a brief exchange with the students about the stage of their law studies, and as I would do for any law student, I gave them encouragement in their aspirations to be lawyers and informed them that I

looked forward to them being admitted to the Bermuda Bar. The Plaintiff did not raise any objection to the law students remaining in the courtroom during the application. I will state here that there has been a long tradition in Bermuda of law students accompanying counsel to Court to gain exposure to proceedings as they continue on their journeys to be lawyers. I fully support the tradition although I note that there may be occasions where it may not be appropriate for students to be present during sensitive proceedings. That would be a matter for the Court to determine when any objection is raised or if the Court takes that view on its own volition.

23. The Plaintiff made submissions in respect of the following points:

- a. There was a fundamental misinterpretation of the Consent Order;
- b. The Court had no jurisdiction to impose a compulsory medical examination by proxy;
- c. Comprehensive medical evidence already existed;
- d. There was disproportionality and prejudice; and
- e. The Defendant maintained adequate means to defend.

24. The Plaintiff submitted that the Stay Order should be set aside for several reasons:

- a. There was no clear risk of harm to the defence;
- b. There was serious harm to the Plaintiff;
- c. There was procedural unfairness and lack of legal basis;
- d. There was adequate existing evidence; and
- e. There was a public interest in timely resolution.

25. The Plaintiff requested the following of the Court:

- a. To set aside the Stay Order;
- b. To direct that the proceedings continue to trial without requirement for further medical examination of the Plaintiff;
- c. To set aside the costs order made on 3 July 2025;
- d. To award the Plaintiff costs of this application; and
- e. To grant such further or other relief as the Court deems just and appropriate.

The Defendant's Submissions

26. Mr. Horseman submitted that the Plaintiff's application should be denied for several reasons.

- a. The Plaintiff, in his affidavit dated 3 June 2025, made detailed submissions in reply to the Defendant's application to stay the matter until the Plaintiff allowed Dr. Oleksak to examine the child. He drew the Court's attention to the various paragraphs of the affidavit, including where the Plaintiff requested the Court to dismiss the Defendant's Stay Application. Thus, it could not be credibly argued that the Plaintiff did not have a fair opportunity to put his case before the Court, and it was also unsustainable that the Plaintiff was ambushed and that there was a breach of natural justice.
- b. The Plaintiff placed before the Court substantial correspondence and made fulsome submissions, noting that at no time did he object to the hearing proceeding. He demanded that his application proceed, which could only be heard in tandem with the Defendant's Stay Application. He never requested an adjournment, and he mounted a strenuous defence, despite it being bound to fail.
- c. The Plaintiff seeks to repeat much of the same substantive submissions he already made to the Court. This was an abuse of process of the Court. He relied on the case of *Mirchandani v Gheewala and another* [2020] EWHC 1742 (QB) [at paras 37 and 38] citing well known principles in the Court of Appeal's judgment in *Chanel Limited v FW Woolworth* [1981] 1 WLR 485.
- d. The Plaintiff participated fully in the hearing and made verbose written and oral submissions in opposition to the Stay Application.
- e. If the Court had any concerns regarding the complaint of natural justice, the Court could simply affirm the Order again after hearing the Plaintiff, noting that there was nothing in the Plaintiff's submissions that could possibly dissuade the Court to make any different decision than it has already made. He noted that any complaint of natural justice could be cured by a rehearing or an appeal, citing the case of *Boden v The Governor et al* [2019] Bda LR 62.

- f. In respect of Dr. Clark's report, it preceded the Order dated 15 August 2025, so Dr. Clark was unable to refer to the photos and videos until the Court ruled on their admissibility. Dr. Clark will file an amended report which will refer to the photos and videos.
- g. The Plaintiff has not applied to set aside the Order dated 15 August 2025 which relates to admissibility of photographs and videos and psychiatric evidence. The Stay Order has nothing to do with the Order dated 15 August 2025.

Analysis of the Defendant's Applications

27. In my view, I shall grant the application to set aside the Stay Order dated 3 July 2025, in particular paragraphs 1, 2, 5 and 6. I do so for the reason that the Plaintiff's position is that he was unaware that the Defendant's Stay Application was going to be adjudicated by the Court conducting a full hearing on 3 July 2025.
28. However, I do not agree with the Plaintiff that he had no opportunity to file a written response. Also, I do not agree with him that he had only a limited time to respond orally when he was ambushed and had to improvise on the go. To those points, I do take note that the Plaintiff himself had submitted a Form 31D dated 3 June 2025 seeking directions to have the matter set for trial on quantum. In his cover letter dated 3 June 2025 to the Form 31D, he stated that at the case management hearing, he would ask the Court to dismiss the Defendant's interlocutory application, that is, the Stay Application. In his affidavit sworn 3 June 2025, he had a section [at pages 11 -13] entitled "Addressing Defence's Application dated 2 June 2025 – Plaintiff's Opposition to Defendant's Improper and Tactical Application for Further Medical Examinations" which did as the title indicates. In the penultimate paragraph of his affidavit, he stated that he sought the relief of the Court dismissing the Defendant's application dated 2 June 2025 in its entirety. Thus, the Plaintiff did have and did take the opportunity to file a written response in the form of his affidavit. Further, at the hearing of 3 July 2025, he did as he said he would do in his cover letter, he asked the Court to dismiss the Defendant's interlocutory application.

29. I agree with Mr. Horseman that it did make sense at that time to hear the two applications together, the Defendant's application for a stay of the matter and the Plaintiff's case management hearing for direction for the matter to proceed to trial, doubling as an objection to the Stay Application.
30. As it turns out, the hearing of Thursday, 3 July 2025 morphed from a directions hearing of the Form 31D into a substantive hearing because the issues started to be fleshed out and then substantive arguments took place. I have listened to the Court Smart hearing for the two sessions in this matter that took that day. When this matter came on before me, it turned out to be a 32 minute session when I heard submissions from Mr. Horseman and then from the Plaintiff. When I called upon the Plaintiff, he did not ask for an adjournment, rather he commenced his submissions. After some time, I then stood the matter down because I had two other unrelated Chambers matters to deal with stating that I would resume this matter thereafter. Once those unrelated matters were completed, I resumed the present matter when the Plaintiff continued his submissions without objection followed by a reply from Mr. Horseman. That second session took 52 minutes, when near the end I took some time to write the Ruling as set out above, which I then read to the Court.
31. In my view, it is important to the administration of justice, the Court and for all parties, that there be a fair hearing of each application before the Court. What appeared to me at the time to be a fair hearing is now being challenged. Although it appeared to me that the Plaintiff was adequately addressing the Court on the Stay Application, I cannot disregard his submission that he was improvising as he was not expecting a substantive hearing on it, despite his earlier preparations. Thus, as Mr. Horseman submitted, the Court can re-hear the Plaintiff or the Plaintiff can pursue an appeal against the Stay Order. The Plaintiff has chosen to file an application to set aside the Stay Order. In my view, the fair way to proceed is to provide the opportunity for the Plaintiff, as a litigant in person, to make his full submissions to resist the application to stay the matter. At this stage, there is no need for further affidavit evidence from either party in order for me to hear any submissions on the Defendant's Stay Application. Since the date of the Stay Order, the Plaintiff has filed three

affidavits in support of setting aside the Stay Order and he can have leave to refer to them without filing any further affidavit evidence.

Conclusion

32. In summary:

- a. I grant the Plaintiff's application to set aside the Stay Order dated 3 July 2025, in particular, paragraphs 1, 2, 5 and 6 of the Stay Order.
- b. In respect of the Plaintiff's application (in the Set Aside Application dated 7 July 2025) for an order for the matter to proceed without requiring further medical examinations and for a declaration that any future applications for coercive relief be formally filed, listed and determined only after the Plaintiff has had a reasonable opportunity to respond, I adjourn those applications until after I issue a Ruling on the application to set aside the Stay Order.

33. The Court's directions for a re-hearing of the Defendant's Stay Application are as follows:

- i. The Parties are directed to submit within 7 days of the date of this Ruling, agreed dates in the months of June and July for a one half-day hearing of the Defendant's Stay Application;
- ii. The Defendant to file an agreed Hearing Bundle 10 days before the hearing;
- iii. The Defendant has leave to file and serve written submissions and case authorities (but not affidavit evidence) 10 days before the hearing;
- iv. The Plaintiff has leave to file and serve written submissions and case authorities (but not affidavit evidence) 5 days before the hearing;
- v. At the hearing:
 1. The Defendant has leave to make his application on the full Summons;
 2. The Plaintiff has leave to reply to the application; and
 3. The Defendant has leave to respond to the Plaintiff's submissions.
- vi. There be liberty to apply.

34. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that there be no order as to costs for this Set Aside Application.

Dated 11 May 2026



HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE