In The Supreme Court of Bermuda

CIVIL JURISDICTION
2014: No. 119

BETWEEN:

(1) A
(2) B
(3) C
(4) D

Plaintiffs

-and-

JONATHAN JON CUMBERBATCH

Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Ms. Arisha Flood, AAF & Associates, for the Plaintiffs**

Ms. Elizabeth Christopher, Christopher's, for the Defendant

Dates of Hearing: **6-8 October 2020**

Date of Judgment: **10 November 2020**

RULING

Application to set aside a regularly obtained judgment in default of appearance and/or defence; relevant test to be applied; whether the Defendant has a real prospect of establishing a defence on liability

HARGUN CJ

Introduction

1. This is an application by Jonathan Jon Cumberbatch, the Defendant, to set aside a default judgment dated 28 April 2014 whereby Kawaley CJ ordered that *"Interlocutory Judgment in Default of an Appearance and/or Defence is granted to the Plaintiffs with Damages to be assessed*." Despite the fact that the default Judgment was granted in April 2014 the assessment of damages remains outstanding to date.

Background

2. As set out in the Decision of the Court of Appeal dated 9 June 2014, the Defendant, was convicted, on 3 May 2010, on his own confession of four offences, one of serious sexual assault contrary to section 325 (1) (d) of the Criminal Code and the other three of sexual exploitation contrary to section 182B (1) of the Criminal Code. On 16 July 2010, he was sentenced to 12 years imprisonment being made up of 12 years for the serious sexual assault and 10 years concurrent for the other three offences. Simmons J made an order under section 70P of the Criminal Code that he should serve at least half of the sentence before consideration for parole.

3. By an Order made on 29 May 2014, the Court of Appeal set aside the Defendant's conviction on the count of serious sexual assault on A, on the ground that in order to elevate to the offence to serious sexual assault, B and C would have to be active participants in the offence with the Defendant rather than the instruments by which he alone committed the offence. The Court of Appeal therefore quashed the Defendant's conviction on Count 1 and substituted a conviction for sexual assault contrary to section 323 of the Criminal Code. However, the Court of Appeal concluded that an appropriate sentence on Count 1, as substituted, remained 12 years imprisonment.

4. The background facts relating to the conduct of the Defendant and the convictions are summarised in the judgment of Baker JA in the Decision dated 9 June 2014 as follows:

> *"5. It is not necessary to go into the particularly unpleasant facts of the case save in the barest detail. The victims to whom we shall refer as A, B, and C, were respectively 11, 10, and 9 years old at the time of the offences in 2008. They are siblings who resided temporarily with their mother. The appellant acted as surrogate uncle.*
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> *6. Whilst with the appellant, A, B, and C touched each other's private parts with the encouragement of the appellant. He demonstrated how to perform oral sex placing his finger in B's mouth and making a sucking sound. When naked on the appellant's bed he told them to have sexual intercourse with each other. A was lying on the bed on her back with B on top of her. The appellant pushed B on the buttocks forcing his penis to penetrate A. He also instructed C to masturbate. He then told C it was his turn but C did not have a sufficient erection. B was also instructed to lick A's genitalia. There were two other children present in the room at the time.*
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> *7. About 18 months later the appellant was arrested. He made substantial admissions as to what had occurred saying he had set up barriers for himself when dealing with children and that at times those barriers had been broken. He admitted he knew the children and explained his behaviour as the consequence of bad choices."*

5. For purposes of this application Ms Christopher, who appears for the Defendant, accepts the summary of the facts set out in the judgment of Baker JA above and the Summary of Evidence presented to the Supreme Court by Senior Crown Counsel, Cindy E. Clarke, in a document dated 18 June 2010. The facts set out in the Summary of Evidence are incorporated in this Ruling and the document appears as a Confidential Appendix to this Ruling.

6. The Plaintiffs commenced these proceedings by a Specially Endorsed Writ of Summons dated 28 March 2014, claiming personal injury sustained by the Plaintiffs due to the actions of the Defendant.

7. The Statement of Claim alleges that between 1 July 2008 and 31 August 2008, A, B, and C, 3 minor Plaintiffs, whilst in the Defendant's care, the Defendant procured the sexual assault of MSL. The Statement of Claim further alleges that the Defendant, for a sexual purpose, counselled or incited the 3 minor Plaintiffs to commit indecent acts in his presence and sexually abused IH by touching his buttocks directly with his hands.

8. As a result of the minor B, the 2nd Plaintiff, informing his mother, D, the 4th Plaintiff, the Defendant's actions were investigated and led to the Defendant being charged with four offences. The Statement of Claim expressly pleads that on 16 July 2010 the Defendant was convicted of four offences set out in paragraph 2 above and that he was sentenced to a term of 12 years imprisonment. The Plaintiffs rely upon these convictions as evidence of the commission of these offences by the Defendant under section 70A of the Evidence Act 1905.

9. The Plaintiffs assert that as a result of the conduct of the Defendant, which resulted in his conviction of four offences, the Plaintiffs have suffered injury, loss and damage. The Plaintiffs claim that as a result of the Defendant's conduct, the Plaintiffs sustained psychological injury. In particular, each minor Plaintiff was removed from the care of the 4th Plaintiff and institutionalized. Each minor Plaintiff received extensive psychological treatment, with certain psychotropic medications being prescribed, and extensive counselling.

10. In the case of A, it is claimed that as a result of being sexually abused by the Defendant and counselled by the Defendant to engage in sibling abuse, A began exhibiting oppositional behaviours, hyper- sexualised behaviour and self-injury. A was clinically diagnosed with Dysthymic Disorder, Post-traumatic Stress Disorder and Mood Disorder NOS. A was referred to the Pines Residential Treatment Centre in February 2009, and in

August 2009 was transferred to the Foundation School in Hancock, New York. She was admitted to the Jane Addams Treatment Centre at Germaine Lawrence Inc., on April 6, 2010. A was returned to her mother's care on or around July 2011.

11. In the case of B, it is claimed that he was clinically diagnosed with Dysthymic Disorder, Post-traumatic Stress Disorder and Depression. B received psychiatric treatment in order to counteract self-destructive anger and depression. His Post-traumatic Stress Disorder was severe and intensified his feelings of depression, curtailed his ability to concentrate and produced acting out behaviours. In February 2009, B was admitted and received treatment at the Pines Residential Treatment Centre. B was returned to his mother's care in January 2011 and began treatment at the Bermudian treatment centre, Family Centre.

12. C, it is claimed, was clinically diagnosed with Post-traumatic Stress Disorder, Mood Disorder NOS, Bipolar Disorder NOS Intermittent Explosive Disorder, Conduct Disorder, Attention Deficit Hyperactivity Disorder-Combined Type, Sexual Abuse of Child-Perpetrator, Parent-Child Relational Problem and Sibling Relational Problem. As at March 2014, C was still in treatment. C returned home in July 2012 but regressed regarding his psychological state and was sent for further treatment and evaluation to a treatment centre in Utah, US, the Oxbow Academy.

13. In the case of D, it is claimed, that that she was diagnosed with clinical depression. She had to close a lucrative beauty salon which was opened in May 2009, as she was unable to cope with the results of a fractured family life and demands of work.

14. On 2 April 2014, the Defendant was served with the Specially Endorsed Writ of Summons at the Westgate Correctional Facility in Sandys Parish. The Defendant failed to enter an Appearance or a Defence within the required time. As a result, the Plaintiffs issued an ex parte Summons dated 8 August 2014, seeking judgment in default. Ms Flood, Counsel for the Plaintiffs, advised the Chief Justice at the hearing on the 18 April 2014, that the ex parte Summons had been served upon the Defendant at the Westgate Correctional Facility, as a matter of courtesy.

15. As noted above, Chief Justice Kawaley, granted to the Plaintiffs an interlocutory Judgment in default of an Appearance and/or Defence, with damages to be assessed. The default Judgment was not served upon the Defendant whilst he was an inmate at the Westgate Correctional Facility. The Defendant claims that he was unaware that a default Judgment had been entered against him as he had assumed that the civil action would not proceed in his absence.

16. The Defendant was released from the Westgate Correctional Facility on 21 February 2018, and he asserts that it was after his release that he was informed that a default Judgment had been entered against him. By Summons dated 29 March 2018, the Defendant made the present application seeking an order to set aside the default Judgment.

17. Substantial evidence has been filed by the parties in relation to this application. The Defendant has sworn and filed 4 affidavits and an additional affidavit by his sister, Deanna Cumberbatch-Symonds. The Plaintiffs have also filed four affidavits. Both parties also tendered witness statements made by the minor Plaintiffs and the Defendant in the criminal proceedings which led to the Defendant's conviction.

18. The Defendant's evidence is primarily directed to two issues. First, there has been no undue delay in prosecuting this present application since the Defendant was released from the Westgate Correctional Facility in February 2018. Second, the Defendant's wrongful actions which led to his criminal convictions did not cause or materially contributed to the damage which the Plaintiffs have claimed they suffered in the Statement of Claim.

Relevant legal principles

19. In a Judgment delivered earlier this month, *Adam John Gibbons v Sean DeSilva* [2020] SC (Bda) 43 Civ (6 October 2020), I reviewed the legal principles relating to setting aside regularly obtained default judgments. I set out below extracts from that Judgment dealing with the relevant test for setting aside a default judgment:

"17. In the Supreme Court Practice, 1999 the editors state the relevant principles at 13/9/18 in the following terms:

> *"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the Court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle [1986] 2 Lloyd,s Rep. 221 at 223,CA, where the earlier cases are summarised. From that case the following propositions may be derived:*
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> > *(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O. 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.*
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> > *(b) If proceedings are deliberately ignored, this conduct although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside".*

18. The editors of the Supreme Court Practice go on to state that the preferred view is that unless potentially credible affidavit evidence demonstrates a real likelihood

that a defendant will succeed on fact no "real prospect of success" is shown and relief should be refused.

19. In ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, Potter LJ considered the issue of burden of proof in relation to the requirement of showing "realistic prospect of success":

> *8."I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the Saudi Eagle that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under R.S.C. Order 14…*
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> *9. In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under CPR 24.2.*
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> *10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything*

said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England (No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95].”

20. It follows that in order to succeed in setting aside a default judgment, the defendant has the burden of proof of establishing that he has a realistic prospect of success. A realistic prospect of success is one which carries some degree of conviction, and must be one more than merely arguable. That burden is ordinarily discharged by the defendant filing “credible affidavit evidence” demonstrating a real likelihood that he will succeed in his defence. In the circumstances where there is a dispute on the facts, the Court is not bound to accept everything said by a party in his affidavit in support of the application to set aside a default judgment. The Court is entitled to consider whether there is real substance in the assertions being made by the defendant.”

Issue of delay

20. It is accepted on behalf of the Plaintiffs that the default Judgment dated 28 August 2014 was not served upon the Defendant whilst the Defendant was an inmate at the Westgate Correctional Facility until 21 February 2018. In the circumstances, no complaint is made by the Plaintiffs that the Defendant did not make the necessary application to set aside the default Judgment during this period.

21. The Plaintiffs do complain that the application made by Summons dated 8 August 2014 has not been pursued expeditiously. In considering this complaint I should briefly review the procedural history of this application.

22. The application was followed by an appearance before Hellman J on 5 April 2018 which resulted in directions in relation to the filing of the evidence by the parties, the preparation of the hearing bundle and the provision of written submissions.

23. On 25 March 2019, the plaintiffs applied for interim payment of damages pursuant to sections 2 and 3 (b) Of the Law Reform (Miscellaneous Provisions) (No. 2) Act 1977 and an application for an examination of the Defendant's means; and/or any other information required for the default Judgment.

24. There was a further hearing which resulted in an Order of the Court dated 4 April 2019 whereby the Defendant was ordered to serve any further evidence in support of the application to set aside the default Judgment within the next seven days, and the Plaintiffs Summons dated 25 March 2019 was adjourned sine die.

25. The hearing of the application to set aside the default Judgment was scheduled to be heard by Subair Williams J. However, on 5 August 2019, the Defendant made an application that Subair Williams J should recuse herself on the basis that the law firm of Musseden Subair, where Subair Williams had been a partner, had previously acted for the Defendant in the criminal proceedings. The Defendant asserted that he had retained Mr Williams of that firm to represent him in the criminal proceedings.

26. At a further hearing on 7 August 2019, Subair Williams J recused herself from hearing this application and directed that this matter should be heard by another judge.

27. On 8 January 2020, the Plaintiffs issued Summons seeking a determination by the Court whether the Defendant "has defaulted" due to the lack of progress in proceeding with this

application to set aside the default Judgment and whether the Defendant has prejudiced the Plaintiffs in being delayed receiving the money due to them under the Judgment.

28. The Plaintiffs filed a further Summons dated 17 August 2020, seeking an urgent listing for the hearing to determine what action should be taken as a result of potential expiry of the limitation period against any action the Defendant may have against his previous attorneys.

29. At the hearing before the court on 27 August 2020, the Summons dated 17 August 2020 was withdrawn on the basis that the parties will proceed with the pending application to set aside the default Judgment. That application was heard by the Court on 6 October 2020.

30. In all the circumstances, I am of the view that the delay in proceeding with this application is not such that the Court should refuse to set aside the default Judgment on the ground of delay. Further, the delay is largely explained by a number of unnecessary applications made by the Plaintiffs. Finally, delay is only one factor which the Court considers in the overall discretion whether or not to set aside a default Judgment. The dominant factor in considering an application to set aside a default is whether the defendant can show by credible affidavit evidence that he has a realistic prospect of success.

Discussion on realistic prospect of success

31. As noted above, the Defendant was convicted on his own confession of four offences of sexual assault and sexual exploitation set out at paragraph 2 above. Counsel for the Defendant accepts the facts as summarised at paragraphs 5 to 7 of the Decision of the Court of Appeal dated 9 June 2014 together with the Summary of Evidence submitted by Senior Crown Counsel dated 18 June 2010, which appears as a Confidential Annex to this Judgment.

32. In the draft Defence exhibited to the first affidavit of the Defendant, he denies that he caused any injury to the Plaintiffs. In paragraph 11 of the draft Defence, the Defendant denies that the Plaintiff sustained psychological injury as a result of the Defendant's

conduct. The Defendant asserts that if, which he does not admit, that the Plaintiffs have received the treatment alleged in the Statement of Claim, it is not as a result of the Defendant's behavior. He says that the minor Plaintiffs had already engaged in sexual conduct that had nothing to do with the Defendant. In particular he says that C, the 3rd Plaintiff, had previously received treatment and special schooling as a result of sexual misconduct. He also denies that the 3rd Plaintiff was in a treatment facility as a result of sexual abuse by the Defendant. In relation to D, the 4th Plaintiff, the Defendant denies that she has received extensive therapy as a result of being a secondary victim; that the children were removed as a result of these offences and the Defendant's conduct led to her experiencing a traumatising aftermath.

33. The primary argument advanced by the Defendant is that whatever psychological damage the Plaintiffs complain of in the Statement of claim, it was not caused by the Defendant's actions and behavior. Counsel for the Defendant submits that the minor Plaintiffs were already so damaged that the Defendant's actions did not materially contribute to the damage set out in the Statement of Claim. In support of the submission, counsel relies upon a number of facts and observation made in various reports which are exhibited to the Defendant's third affidavit:

    (a) In the Department of Child and Family Services document headed Individual Service Plan, dated 11 October 2012, it is noted in relation to the 3rd Plaintiff that he is a *"14 year old black Bermudian male who transitioned to the care of his father and stepmother in July 2012. He has a history of behavioural problems dating back to age 2 when he began to display symptoms of Attention Deficit Disorder. Records indicated he began to display sexualised behaviours as early as age 3. Client has a history of neglect, physical abuse and sexual abuse. He was placed in a foster home at the age of 3".* Reference to "sexual abuse" in the above passage likely refers to the conduct of the Defendant complained of in the Statement of Claim.

(b) The Discharge Summary in relation to the 1st Plaintiff, from Germaine Lawrence Inc, dated 29 November 2010 states that "*DCFS records indicate that [A] May had been sexually abused at the age of seven while visiting with her mother. It is also indicated in DCFS records that between the ages of 10-12 [A] and our brothers, [C] and [B], were forced to engage in sexual behaviour by their mother's foster uncle, who is currently incarcerated because of these charges."* The reference to *"forced to engage in sexual behaviour"* is a reference to the conduct of the Defendant which was the subject matter of the criminal proceedings.

(c) In the Psychiatric Evaluation by the Pines Residential Treatment Centre dated 20 July 2009 it is noted, in relation to the 1st Plaintiff, that *"Other Family Situations, Specified (early removal from other's care, alleged sexual abuse by mother, sexual activities with other family member, multiple moves within the family)."* The reference to "*sexual activities with other family member*" likely refers to the conduct of the Defendant complained of in the Statement of Claim.

(d) In the Psychological Evaluation by the Pines Residential Treatment Centre dated 11 March 2009 it is noted, in relation to the 2nd Plaintiff that "*Allegations were made, however, that [his father] was mistreating the boys. [The 2nd Plaintiff] presented sexualised behaviour and it was alleged that the children may have been exposed to sexualised behaviour by a male family member. More significantly, has been [3rd Plaintiff's] instability of his mother's attention, spending little time with him or not being available… The older brother has disclosed finding sex toys in his mother's house and, it is reported that [the 3rd Plaintiff] was not to spend weekends at his mother's house as he may have been exposed to them in addition to pornographic magazines and DVDs at [his father's] home. As such, [the 3rd Plaintiff], as reported by his social worker, has been a victim of abandonment and rejection, possibly a victim of sexual abuse and exploitation, has been exposed to domestic violence and has been very inconsistent in his attachment to his biological parents and this has been*

more recently manifested by his poor academic performance, poor social skills and internalisation of his feelings and emotions." The reference to *"sexualised behaviour by a male family member*" likely refers to the conduct of the Defendant.

34. In her affidavit dated 9 March 2018, D, the mother of the minor Plaintiffs, refers to the fact that in August 2012 she made a decision to leave Bermuda and relocate to the UK because of the lack of assistance for the children, disrespect for their privacy and family life and also because of confidentiality issues.

35. D also complains that the children were being teased in Bermuda about the sexual abuse they had experienced. They were unable to attend school in Bermuda. She states that everyone seemed to know they were the victims of this horrendous offence. All three of her children were taken from her care and placed in institutions overseas by the Department Child and Family Services.

36. When her son C returned to Bermuda in or around March 2012, D states that he had been to three institutions in the United States because of the sexual abuse. He was accepted as a pupil at a private school in Bermuda but could not remain at that school as the pupils and staff knew why he was not in a public school. He was also being teased by many of the students, and as a consequence he started to become very angry. He had to leave the private school as he was not allowed to fit in and as a result was then home-schooled.

37. D states that the same problems happened with her daughter, A, and her other son, B. She states that B was on medication at one point that slowed him down so much, he could not play with anyone, and he was not talking with anyone.

38. All three minor Plaintiffs have sworn affidavits in these proceedings in January 2018 and they all confirm that they continue to experience emotional and psychological stress due to the sexual abuse that was the subject of the criminal proceedings.

39. The underlying claims pursued by the 3 minor Plaintiffs are for psychiatric injury resulting from sexual abuse resulting from the conduct of the Defendant. The same conduct was the basis of the criminal proceedings against the Defendant in respect of which he was found guilty of four separate offences. In relation to claims relating to psychiatric injury, it is not uncommon that the plaintiffs may have an underlying vulnerability or that there may be other contributory factors leading to the ultimate injury. This is illustrated by the individual cases dealt with by the English Court of Appeal in *KR v Bryn Alyn Community (Holdings) Limited* [2003] EWCA Civ 85, which dealt with appeals of 14 adults all of whom claimed to have suffered sexual and/or physical and/or emotional abuse between 1973 and 1991 while children in the care of children's home in North Wales. One common feature of all claims noted by the trial judge was that all the claimants had suffered serious trauma before coming to the children's home and even if the care offered to them had been all that it should have been, it was doubtful that any of them would have escaped significant difficulties in coping on a day-to-day basis with adult life (at [11]).

40. The relevance of existing of underlying vulnerable personality and other contributory factors leading to the psychiatric injury is addressed by Smith LJ in an article in the Journal of Personal Injury Law 2009 titled "Causation-the Search for Principle" at p. 103 (cited in *BAE Systems (Operations) Limited v Marion Konczak* [2017] EWCA Civ 1188 at [66]):

> *"I do not think that one can apportion damages for psychiatric injury. It seems to me that it is par excellence an indivisible injury. As a rule, the claimant will have cracked up quite suddenly; tipped over from being under stress into being ill. The claimant will almost always have a vulnerable personality. But a defendant must take the claimant as he finds him, eggshell skull or vulnerable personality included. So having a vulnerable personality should not result in any reduction in damages.*
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> *Besides underlying vulnerability, there may be other potentially harmful factors at play in the claimant's life which may have contributed to the breakdown, and have been nothing to do with the negligence. If the judge comes to the conclusion that the other factors would probably have caused the breakdown in any event,*

regardless of the negligent factor, the claimant will fail. But if the judge concludes that both the negligent and non-negligent factors have contributed and the negligence has had a more than minimal effect, he ought in my view to award full verdict damages. The defendant should not be entitled to a reduction in damages for the chance that the other factor might have caused a breakdown."[1]

41. In the above passage, Smith LJ expresses the view that for purposes of causation it is sufficient that the conduct of the defendant complained of *"contributed"* to the damage; it need not be the sole cause. This view is consistent with the earlier English Court of Appeal decision in *Sutherland v Hatton* [2002] EWCA Civ 76 (referred to in BAE Systems at [59]), where Hale LJ expressed the same view at [35]:

> *"Having shown a breach of duty, it is still necessary to show that the particular breach of duty found caused the harm. It is not enough to show that occupational stress caused the harm. Where there are several different possible causes, as will often be the case with stress related illness of any kind, the claimant may have difficulty proving that the employer's fault was one of them: see Wilsher v Essex Area Health Authority [1988] AC 1074. This will be a particular problem if, as in Garrett, the main cause was a vulnerable personality which the employer knew nothing about. However, the employee does not have to show that the breach of duty was the whole cause of his ill-health: it is enough to show that it made a material contribution: see Bonnington Castings v Wardlaw [1956] AC 613.*

42. The approach of Hale LJ in *Hatton* that "*material contribution*" is sufficient in relation to psychiatric injury, is consistent with the approach taken by the Privy Council in *Williams v Bermuda Hospitals Board* [2016] UKPC, which also applied the House of Lords decision in *Bonnington Castings v Wardlaw* [1956] AC 613 to the facts of that case. At [32] Lord Toulson Stated:

[1] Smith LJ's views on apportionment was subject to further consideration by the Court of Appeal in *BAE Systems* at [67].

"32. In Bonnington, there was no suggestion that the pneumoconiosis was "divisible", meaning that the severity of the disease depended on the quantity of dust inhaled. Lord Reid interpreted the medical evidence as meaning that the particles from the swing grinders were a cause of the entire disease. True, they were only part of the cause, but they were a partial cause of the entire injury, as distinct from being a cause of only part of the injury. Lord Reid's approach was understandable in view of the way in which the case was argued. The Lord Ordinary recorded in his opinion that it was conceded by the employers' counsel that the claimant had contracted pneumoconiosis arising out of and in the course of his employment, although "there was reserved for argument the question of which part of the process was the probable source of infection", and that the employers argued that "on the balance of probabilities the source of the infection was the silica dust which was discharged during the dressing process involving the use of the pneumatic tools, and nothing else": 1955 SC 320, 321, 324. It was not argued by the employers that the dust from the swing grinders could be linked, at most, to only a small part of the severity of his disease and that any damages should reflect the limited injury thereby caused."

"35. The parallel with the present case is obvious. The Board is not persuaded by Ms Harrison's argument that Bonnington is distinguishable because in that case the inhalation from two sources was simultaneous, whereas in the present case the sepsis attributable to the hospital's negligence developed after sepsis had already begun to develop."

43. The appropriateness of apportionment in the context of psychiatric injury has been the subject of differing views. Hale LJ in *Hatton* considered that apportionment was appropriate and distinguish between harm suffered from a number of causes and pre-existing disorder or vulnerability at [43]:

"(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his

wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42)".

44. On the contrary, Smith LJ in *Dickins v O2 plc* [2008] EWCA 1144 (cited in *BAE Systems* at [65]) questioned whether proposition 15 in the judgment of Hale LJ in *Hatton* could ever apply in practice, because psychiatric injury is always indivisible and suggested that justice can be sufficiently achieved by the application of proposition 16:

"46. I respectfully wish (obiter) to express my doubts as to the correctness of Hale LJ's approach to apportionment. My provisional view (given without the benefit of argument) is that, in a case which has had to be decided on the basis that the tort has made a material contribution but it is not scientifically possible to say how much that contribution is (apart from the assessment that it was more than de minimis) and where the injury to which that has led is indivisible, it will be inappropriate simply to apportion the damages across the board. It may well be appropriate to bear in mind that the Claimant was psychiatrically vulnerable and might have suffered a breakdown at some time in the future even without the tort. There may then be a reduction in some heads of damage for future risks of non-tortious loss. But my provisional view is that there should not be any rule that the judge should apportion the damages across the board merely because one non-tortious cause has been in play.

47. Thus I have grave doubts as to the appropriateness of the exercise that was carried out in the instant case, although ultimately the result of a different approach might not have been very different. I can see, for example, that it might well have been appropriate for the judge to discount the future losses to some extent on the basis that the Respondent might well have suffered a breakdown at some time in

the future; alternatively that the flooding of her home in 2006 had prolonged her psychiatric illness so that the Appellant was liable only for a reduced period of suffering and absence from work."

45. In *BAE Systems*, Underhill LJ emphasized at [67] that in practice there may be little difference in the approaches advocated by Hale LJ in *Hatton* and Smith LJ in *Dickins:*

> *"I think that in her criticisms of Hatton, Smith LJ may over-state the difference between her position and what the Court was saying in that case. As regards cases where all that is being said is that the claimant had a pre-existing vulnerability to psychiatric injury, I understand the guidance in Hatton to be that any reduction, or discount, should indeed be made by the application of proposition 16, as Smith LJ herself suggests, rather than by apportionment in accordance with proposition 15. And even in cases where there are "multiple extrinsic causes", the Court in Hatton says only that a "sensible attempt" should be made to apportion the harm between what is and is not attributable to the defendant's wrong. It recognises that there may still be cases where the harm is "truly indivisible" and that in such cases apportionment would be wrong. There is thus no difference as to the applicable principle, which indeed is authoritatively stated in Rahman. The difference is that Smith LJ believes that in the case of psychiatric injury the harm will always be indivisible, whereas the encouragement in Hatton to find a basis for apportionment where possible means that the Court believed that the harm would be divisible at least sometimes."*

46. The above authorities indicate that in relation to the issue of causation in the present case the relevant question to consider is whether the conduct of the Defendant has "*materially contributed"* to the harm complained of in the Statement of Claim.

47. It seems reasonably clear that as a result of the incidents at the Defendant's home in July 2008, which led to the Defendant's convictions for sexual assault and sexual exploitation, there was a complete fracture of the family unit. All three children were removed from the

care of their mother and were sent to separate rehabilitation institutions in the United States. There is no reason to doubt that each minor Plaintiff received extensive psychological treatment with psychotropic medications and counselling. In the circumstances, it is difficult to sustain the argument that the actions of the Defendant complained of did not "*materially contribute"* to the harm suffered by the Plaintiffs as set out in the Statement of Claim.

48. It seems to me that the Defendant's reliance upon any pre-existing vulnerability of the minor Plaintiffs to the harm complained of and the other facts relied upon as set out at paragraph 33 above are relevant, if at all, to the issue of apportionment of damages. Without expressing a concluded view, it may well be open to the Defendant to raise those issues in the context of determination of damages, as indicated by Hale LJ in *Hatton* in the passage referred to in paragraph 43 above.

49. I remind myself that in order to succeed in setting aside a default judgment, the defendant has the burden of proof of establishing that he has a realistic prospect of success. A realistic prospect of success is one which carries some degree of conviction, and must be one more than merely arguable. The burden is ordinarily discharged by the defendant filing "*credible affidavit evidence*" demonstrating a real likelihood that he will succeed in his defence.

50. In all the circumstances, I have come to the view that the Defendant has not discharged the burden of proof of establishing that he has a realistic prospect of success on the issue of liability. Accordingly, I refuse to set aside the default judgment granted by Kawaley CJ on 28 April 2014.

51. In relation to the issue of costs my provisional view is that the Defendant should be the costs of this application to the Plaintiffs on a standard basis. However, if any party considers that I should make some other order in relation to costs, that party must make such an application within the next 21 days.

Dated this 10th day of November 2020

NARINDER K HARGUN

CHIEF JUSTICE