

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2024/0362

BETWEEN:

SHERYL INIGO JOSEPH

Claimant

and

THE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Wendel Alexander, Counsel for the Claimant

Mrs. Carla Brookes-Harris, Deputy Solicitor General, for the Defendant

2025: May 1, 9.

DECISION ON DEFENDANT'S APPLICATION TO STRIKE

- [1] **MICHEL, M.:** The Claimant's son, Cordayro Joseph, died by alleged suicide on 24th September, 2018, in his cell at His Majesty's Prisons, where he had been an inmate serving a prison sentence. By claim form and statement of claim filed on 23rd September 2024, the Claimant commenced the present proceedings against the Defendant in his capacity as principal legal officer of the Crown, seeking damages, including general, aggravated, and exemplary damages, for the tort of negligence; damages for breach of statutory duties; and damages for misfeasance in public office arising from circumstances surrounding the death of her son.
- [2] The Claimant alleges that in the years following the death of her son, she made several attempts to seek clarification and explanations from the Police about the circumstances surrounding her son's death, but to no avail. She further alleges that despite several requests, the Coroner failed to convene a coroner's inquest into her son's death in accordance with section 10 of the **Coroner's Act**¹ and that the Coroner's failure to do so promptly, or as soon as reasonably practicable, constituted a breach of statutory duty, negligence and a deliberate act amounting to misfeasance in public office.

¹ Cap. 105, Laws of Antigua and Barbuda.

- [3] The Claimant alleges that she suffered years of frustration, emotional distress, anxiety, health problems and damage as there was no closure to the traumatic episode. She alleges that the Coroner owed her a duty of care to ensure compliance with the statutory requirements under the **Coroner's Act**, such duty of care being owed to her throughout the years she sought answers.
- [4] The Claimant further alleges that the Commissioner of Police had a duty to periodically keep her updated as to the progress of the investigation or inquiries, and that failure to do so constituted a breach of duty of care, resulting in the Claimant suffering loss, grief, frustration, and a lack of closure regarding the death of her son.
- [5] The Defendant did not file a defence to the Claimant's claim after being served with the claim but instead filed the present application before the Court for an order that the Claimant's claim filed on 23rd September, 2024 be struck out pursuant to rule 26.3(1)(c) of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR 2023").
- [6] The six grounds of the Defendant's strike out applicant can conveniently be crystallised into the following two grounds:-
- (1) that the Claimant's claim is an abuse of process as it is statute barred by virtue of section 2 of the **Public Authorities Protection Act**,² ("**PAPA**") having been brought after the expiration of the six-month limitation period under the act; and;
 - (2) the matter is res judicata following the orders of the Court dated 6th December 2022 and 16th April 2024 in claim no. ANUHCv2022/0159 **Sheryl Inigo Joseph v The Coroner et al** which was brought by the same Claimant against the Defendant and that the claim herein embodies the same issues disposed of in claim ANUHCv2022/0159 and the evidence is virtually identical and that it would be an abuse to relitigate the same issues in the present claim.

Whether the Claimant's Claim should be Struck Out as an Abuse of Process as being Statute Barred pursuant to Section 2 of the Public Authorities Protection Act

- [7] The Defendant contends that the Claimant's claim is an abuse of the process of the Court in that the Claimant commenced the claim after the expiration of the six months limitation mandated by section 2 of **PAPA**. Section 2 of **PAPA** provides:-

² Cap. 352, Laws of Antigua and Barbuda.

“2. Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.”

- [8] The Defendant argues that the matters giving rise to the Claimant’s claim were known to the Claimant since 2018 and she filed the present claim six years later, in 2024, well outside the six-month limitation period under **PAPA**.
- [9] The Defendant submits that the Claimant’s case is premised on the Coroner’s failure to convene a coroner’s inquest in a timely manner in accordance with section 10 of the **Coroner’s Act**. The Defendant submits that an examination of the Claimant’s claim shows that the Coroner had failed to convene a coroner’s inquest in accordance with the **Coroner’s Act**, however, this error was committed in the course of the Coroner carrying out her duty under the said act albeit not in the manner in which the statute required. In other words, the Defendant argues, the acts of the Coroner complained of by the Claimant were acts done in the exercise of a public duty by a public authority. The Defendant submits that the acts complained of therefore fall within the duties of the Coroner under the **Coroner’s Act** and are covered by **PAPA**. In the circumstances, the Defendant contends that the application to strike out the claim on the ground that it is statute barred pursuant to **PAPA** ought to be granted.
- [10] The Claimant on the other hand argues that the Defendant’s application to strike out the claim based on **PAPA** is premature and that the provisions of **PAPA** cannot be used as a strike out weapon this early in the proceedings. The Claimant submits that it is trite that striking out a claim is a power that the Court must exercise sparingly, and it should only be used in the rarest of cases. The Claimant submits that it would not be in keeping with the Court’s overriding objective to strike out her claim in the circumstances.

Discussion on Public Authorities Protection Act

- [11] Both Parties relied on the judgment of the Judicial Committee of the Privy Council in **Daphne Alves v The Attorney General of the Virgin Islands**.³ The

³ [2017] UKPC 42.

Claimant also relied on the Court of Appeal's decision in **Jessy James Khouly et al v Mount St. John's Medical Centre Board**.⁴

- [12] In **Alves**, the Board considered in detail the provisions of section 2 of **PAPA** in the Virgin Islands which is almost identical to that of the Antigua and Barbuda **PAPA**. At paragraphs 35 to 37 of its judgment, the Board discussed the differences between a public duty and private duty of care and the applicability of PAPA where a private duty is owed to a claimant and noted:-

“36. By contrast, where there is a general common law or statutory duty of the kind which is the same for a public authority as it would be for a non-public person or company, there is no reason for a much-abbreviated limitation period, indeed every reason why the period should be no different for a public body defendant as for anyone else. The duties of an employer to his employees, or of a transport undertaker to his passengers, or of any contractor to his contractual counterparty, are classic examples of particular duties. They may of course arise in the course of performing public functions, but they are not public duties owed generally to the world or to a section of the public.

37. Despite the potentially wide words of PAPA, it must, as has consistently been held, be construed restrictively. It only applies to public authorities, and not to all persons acting under statutory authority. It does not apply to all actions performed by public authorities, but only to those where the obligation sued upon is owed generally to the public or to a section of it. Where the obligation sued upon arises simply out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application. The duty of care which the government is admitted to have owed to Mrs. Alves qua employer was accordingly a private obligation exactly the same as is owed by any employer, and not a public obligation for the purposes of PAPA. The six month limitation period did not apply.”

- [13] In the present case, the Claimant not only makes allegations of negligence against the Coroner, she also makes allegations of negligence against the Police. These allegations have been set out in the particulars of negligence and breach of duty pleaded at paragraph 13 a) to e) of the Claimant's statement of claim. Further, the Claimant has also alleges that the action or inaction of the Coroner was a deliberate act amounting to misfeasance in public office.

⁴ ANUHCVP2022/0005 (delivered 8th March 2023, unreported).

- [14] The plea of limitation would be a complete defence for the Defendant if it established on the evidence that the matters complained of by the Claimant were public duties that fall within the ambit of **PAPA**. As the case of **Alves** makes clear, in considering the applicability of **PAPA**, the essential test lies in the difference between a public duty owed to the public generally and a private duty incurred in the course of acting under statutory enabling. The Court would thus have to consider the allegations made by the Claimant and the evidence presented to the Court to determine whether the action or inaction by the public officers as alleged by the Claimant are covered by **PAPA**.
- [15] In my view, having regard to the considerations enunciated by the Board in **Alves**, the applicability of **PAPA** is a fact sensitive issue that having regard to the present case, is not suitable for determination on a strike out application at this stage in the proceedings. Further, I also note that the Defendant's arguments were confined to the actions of the Coroner, however, the Claimant's claim is not solely in relation to the Coroner, but also to a course of action or inaction by the Police. The defence of limitation would therefore have to be decided in the context of all the allegations made by the Claimant and is a matter best left for determination at trial on the evidence.
- [16] I am fortified in my view of the unsuitability of deploying the Court's power to strike at this stage having regard to the clear guidance by the Court of Appeal on the cautious approach the Court should take when a defence of limitation is raised. Of note is the case of **Hazeline Maynard et al v The Saint Christopher and Nevis Solid Waste Management Corporation et al**,⁵ which concerned an appeal against the decision of a master striking out a claim on the basis that it was statute barred under the St. Kitts and Nevis PAPA. The Court of Appeal allowed the appeal and Pereira CJ in the Court's judgment opined:-

“... I make this general observation in respect of the application as was made herein to strike out the claim. While I note the statement of Barrow JA [Ag.] in St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited³¹ [SKBHCVAP2002/0006 (delivered 31st March 2003, unreported)] to the effect that the issuance of a claim after the expiration of a limitation period could amount to an abuse of process as contemplated under CPR 26.3, this certainly should not be taken as suggesting that in every claim where there is an assertion that the claim is statute barred this automatically translates to being an abuse of process in respect of which the nuclear weapon of striking out should be deployed. It is well established that the resort to striking out is a draconian step, ordinarily of last resort and one which should be exercised with caution. Also, I entertain grave doubt as to whether such

⁵ SKBHCVAP2015/0006 (delivered 1st October 2015, unreported).

an application is appropriate where a defence of limitation is raised save in the clearest of cases. The question as to whether a claim is time barred can be in and of itself fact sensitive and thus not at all suitable for this approach but should be left for trial.”

[17] Similar sentiments were expressed by the Court of Appeal in Jessy James Khouly where the Court of Appeal held that this Court erred in striking out a medical negligence claim as being time-barred pursuant to **PAPA** and found that the appropriate course was to remit the issues posed on the Defendant's application to strike out the claim for consideration and determination during the trial of the matter in the Court below.

[18] In the present case, the Defendant has not yet filed a defence and the matter has not reached the stage of case management. The issue of limitation under **PAPA**, a complete defence if made out, should properly be determined by the Court during the trial of the claim. I would therefore refuse to strike out the Claimant's claim on this basis.

Whether the Claimant's Claim should be Struck Out as being Res Judicata or as 'Henderson v Henderson Abuse of Process'

[19] The crux of the second ground of the Defendant's application is that the Claimant previously sought administrative orders in Claim No. ANUHCV2022/0159 (“**the Previous Proceedings**”) against the Coroner, the Commissioner of Police and the Attorney General in relation to her allegation that the Coroner failed to carry out a coroner's inquest and the Commissioner of Police failed to investigate her son's death, which, the Defendant argues, are the identical issues that the Claimant is asking this Court to adjudicate upon in the present case (“**the Present Proceedings**”). In other words, the Defendant contends that the issues and facts in the Previous Proceedings which were adjudicated upon are virtually identical to the issues and facts in the Present Proceedings, in that they both touch and concern the Coroner's failure to carry out a coroner's inquest and the Police's failure to conduct an investigation into the death of the Claimant's son.

[20] The Defendant further contends that the fact that the Present Proceedings is a private law matter whereas the Previous Proceedings was a public law matter, and further that the Claimant did not pursue damages in the Previous Proceedings, is no bar to its application to strike. The Defendant contends that, based on the principles enunciated in Henderson v Henderson⁶ as explained by the Court of Appeal in Levi Maximea v The Chief of Police et al,⁷ the

⁶ (1843) 3 Hare 100.

⁷ DOMHCVAP2020/0009 (delivered 7th December 2023, unreported).

Claimant's claim in the tort of negligence could have been dealt with in the Previous Proceedings as the issues and facts raised in the Previous Proceedings are the very same issues and facts that the Claimant is now relying on to ground her present claim. Therefore, the Defendant argues, the Claimant could have and should have brought her whole case in the Previous Proceedings and the bringing of this claim in subsequent proceedings is an abuse of the Court's process. Further, the fact that the Claimant chose not to pursue seeking damages against the Defendant in the Previous Proceedings does not give her the right to institute new proceedings against the Defendant on issues and facts that have been adjudicated by the Court.

[21] The Claimant on the other hand argues that there are several differences between the Present Proceedings and the Previous Proceedings brought under Part 53 of CPR 2023. Firstly, the Claimant contends that the Present Proceedings are in private law as opposed to public law. Secondly, that the causes of action are different even though they relate to similar facts. Thirdly, damages in the Previous Claim, which was at the discretion of the Court were not pursued in the end and the scope for damages in the Present Proceedings is wider and more all-embracing since the Court will be asked to consider damages for misfeasance in public office as well as damages for negligence in addition to damages for breach of statutory duties.

[22] The Claimant argues that she should be given the opportunity to seek justice at the door of the Court and should not have her claim struck out. She argues that the principle of ensuring the Court's overriding objectives are achieved is sacrosanct.

Discussion on Res Judicata and Henderson v Henderson Abuse of Process

[23] The Defendant filed an affidavit in support of its strike out application exhibiting thereto the fixed date claim form filed by the Claimant in the Previous Proceedings on 16th May, 2022 together with the affidavit of the Claimant and exhibits in support of the fixed date claim form.

[24] In the Previous Proceedings, the Claimant sought several declarations, including:

- "1. A Declaration that a failure by the Chief Magistrate to convene a coroner's inquest touching the Body of the deceased Cordayro Joseph who at the time of death was incarcerated at Her Majesty's Prison, is unlawful.

2. A declaration that a failure on the part of the Chief Magistrate to convene a Coroner's inquest into the circumstances surrounding the death of Cordayro Joseph is in breach of Section 10 of the Coroners Act, Chapter 105 of the Laws of Antigua and Barbuda.
3. A Declaration that a failure by the Commissioner of Police who has Superintendence over the Royal Police Force of Antigua and Barbuda, to submit the police case file with all statements gathered, the Medical Report, Autopsy Report, Photos and all other relevant documentations to the Chief Magistrate as a Coroner, or any other coroner, is unlawful, and a dereliction of duty;
4. A Declaration that the Commissioner of Police and or his agents is duty bound to carry out investigations, inform the Coroner and submit a completed police case file to the Coroner for the purposes of the convening and continuance of a Coroner's Inquest mandated by law where such death is classified as unnatural death within the meaning of section 2 of the Coroners Act, Chapter 105 of the Laws of Antigua and Barbuda."

[25] Additionally, the Claimant also sought damages, inclusive of aggravated and exemplary damages.

[26] Also exhibited to the affidavit in support of the Defendant's strike out application is the order of Drysdale J dated 6th December, 2022 in which it was noted in the recitals to the order that Counsel for the Parties had advised that they had arrived at a partial settlement of the matter but that the issue of damages and costs remained outstanding. By the learned judge's order, judgment was entered for the Claimant on liability and it was further ordered that the coroner's inquest be convened by a magistrate to inquire into the death of the Claimant's son. The order also gave directions for an assessment of damages.

[27] The further exhibits to the affidavit in support of the Defendant's strike out application are the witness statement and written submissions filed by the Claimant in support of the assessment of damages in the Previous Proceedings and the order of Drysdale J dated 16th April, 2024 on the assessment of damages. It was noted in the recitals of the order that Counsel for the Claimant advised that the Claimant's claim for damages was no longer being pursued and that the Parties had agreed on the issue of costs. The learned judge's order stated, *inter alia* that 'the Claimant hereby withdraws the claim for damages' and that the Defendants pay the Claimant's costs in the sum of \$2,000.00 within 45 days.

[28] Having considered the Parties' arguments and the material before the Court in relation to this second ground of the Defendant's strike out application, two legal considerations arise: res judicata in its strict sense and the public policy considerations of abuse of process by way of subsequent litigation.

[29] In its strict sense, the principle of res judicata arises where a decision by a judge or tribunal with jurisdiction over a cause of action and the Parties, disposes with finality of a matter decided, so that it cannot be re-litigated by those bound by the judgment except on appeal. The principle, however, has been extended to cover not only matters actually decided but also to any issue or matter that could have been dealt with in the previous proceedings. The latter is referred to as the rule in **Henderson v Henderson**. The rule in **Henderson v Henderson** is not based on res judicata in its strict sense but is a matter of public policy meant to bring finality to litigation.

[30] In **Isabelle Piquenet et al v The Estate of Enzo Addari et al**,⁸ this Court noted that the rule in **Henderson v Henderson** recognizes that it may be abusive for a party to raise in subsequent proceedings any matter which it ought to have raised in earlier proceedings, but failed to do so. This was further explained by Webster JA [Ag.] in **Levi Maximea v The Commissioner of Police et al**, where His Lordship put it thus;⁹

“it is apparent from these cases that one of the fundamental differences between res judicata in the narrow sense and the rule in Henderson is that a decision on the merits in the first claim is required for res judicata to operate, while a decision of the first court is not required for the rule in Henderson to apply. The rule applies as a matter of public policy to prevent abuse of the court's process whether or not there is a decision on the issues”.

[31] Having carefully considered the two claims, it is quite apparent that the factual basis of the two claims are similar. However, it is undeniable that the Previous Claim was an administrative law action which primarily sought declaratory relief including, compelling the Coroner to conduct a coroner's inquest into the Claimant's son's death and that the present claim is a private law claim in tort and for breach of statutory duty by which the Claimant seeks damages. The causes of action in the two sets of proceedings are therefore different.

[32] In the Previous Proceedings, the issue of liability was essentially determined by way of consent, and judgment was entered on liability for the claimant. The Court did not hear the Claimant's previous claim on its merits, nor did it make

⁸ ANUHCv2023/0123 (delivered 22nd December 2023, unreported).

⁹ ANUHCv2020/0009 (delivered 7th December 2023, unreported) at para. 31.

any declaratory orders. However, based on the relief sought, it appears that by consent the Defendant was adjudged as liable on the Claimant's administrative action where the Claimant challenged the lawfulness of the actions or inaction of the Coroner and the Police.

- [33] There was no determination in the Previous Proceedings of whether the Defendant was liable to the Claimant in negligence in that the Coroner and/or the Police were negligent by breaching an alleged duty owed to the Claimant resulting in loss and damage to the Claimant. Similarly, there was no determination of liability in the Previous Proceedings of misfeasance in public office by the Coroner causing harm to the Claimant.
- [34] Thus, I do not consider that the res judicata in its strict sense arises in the Present Proceedings. The question that properly arises on the Defendant's strike out application therefore is whether the Present Proceedings ought to be struck out as an abuse of process considering the rule in Henderson v Henderson. The Defendant's essential argument on this point is that the Claimants' claim in tort could have and should have been raised in the Previous Proceedings, and having failed to do so, the Claimant should be barred from raising these matters in the Present Proceedings and her claim should therefore be struck out.
- [35] The public policy considerations of "Henderson v Henderson abuse of process" as it is sometimes called, and the approach of the Court to findings of abuse of process were considered in Johnson v Gore Wood & Co (a firm).¹⁰ The dicta of Lord Bingham is instructive:-

"It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual matter " (2000) 19 CLJ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the

¹⁰ [2002] 2 AC 1.

party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. **It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. **While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.** Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice. (Emphasis added).

- [36] Thus, this policy-focused approach to the question of abuse of process calls for a 'broad, merits-based judgment' in considering subsequent litigation. The question for the Court is not just whether a party is estopped from pursuing a cause of action or issue which was determined in previous litigation (res judicata in the strict sense) but whether the conduct of a party bringing a claim or raising a defence in later proceedings that should have or could have formed part of the earlier proceedings, when considering all the factual circumstances, is an abuse of process of the court. Thus, the rule in Henderson v Henderson should not be approached restrictively.

- [37] CPR 26.3(1)(c) empowers the Court to strike out a party's statement of case if it appears to the Court that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings. Even before the CPR, the Court has retained the power to strike out a matter as an abuse of process. In **Hunter v Chief Constable of the West Midlands Police**,¹¹ Lord Diplock described the court's power to strike out a matter as being an abuse of process as:-

"The inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

- [38] In **HMB Holdings Limited v Gaston Browne**,¹² Drysdale J explained that an abuse of process is 'an improper use of the Court's process in a way which differs or is contrary to its intended ordinary use'. The learned judge further adopted the two-stage test set out in **Cable v Liverpool Victoria Insurance Co. Ltd**¹³ that in considering the issue of striking out as an abuse of process, the Court must take a two-step approach in deciding whether to deploy its power to strike. The court must first determine whether a statement of case is an abuse of process and if the court forms this view, it must then decide whether the statement of case should therefore be struck out.

- [39] In the English case of **Mansing Moorjani v Durban Estates Limited**,¹⁴ Pepperal J provided a useful breakdown of matters the court should consider when determining whether there has been an abuse of process in circumstances where subsequent litigation is brought based on the same or similar facts of previous litigation, as is the contention in the present case. The judge opined:-

"Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:-

- a) The onus is upon the applicant to establish abuse.

¹¹ [1981] UKHL 13.

¹² ANUHCv2017/0430 (8th March 2022, unreported) at para. 38.

¹³ [2020] 4 WLR 110.

¹⁴ 7[2019] EWHC 1229 (TCC).

- b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
- c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
- d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
- e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."¹⁵

[40] The Defendant's three main arguments on the issue of the Present Proceedings being an abuse of process is their contention that the issues raise in the Current Proceedings are identical to that of the Previous Proceedings, that the Claimant's cause of action in the tort could have been dealt with in the Previous Proceedings and that the Claimant made a claim for damages in the Previous Proceedings and instead of proceeding with an assessment of damages, she withdrew her claim for damages. As far as I can glean from the application, the Defendant has not pointed to any further basis for a finding that the Claimant's conduct in bringing the Present Proceedings is abusive.

[41] I have already found that the issues in the Previous Proceedings and the Present Proceedings, whilst similar, are not identical and therefore *res judicata* in its strict sense does not arise. Further, the mere fact that the Claimant's present claims could have been raised in the Previous Proceedings, does not of itself make the Present Proceedings abusive. However, the fact that the Claimant withdrew her claim for damages in the Previous Proceedings is, in my view, a circumstance the Court ought to consider in the 'board merits-based approach' in deciding whether the Claimant's conduct is abusive.

[42] When considering the Previous Proceedings, firstly, it is undisputed that it was a public law action. In my view, the thrust of that action was to compel the authorities to convene a Coroner's inquest into the death of the Claimant's son. In her affidavit filed in support of the fixed date claim form in the Previous Proceedings, the Claimant stated that she was bringing the case to the High Court because she was seeking justice for her son, who was now deceased and who could not speak for himself. She stated that he was her first son and that despite being incarcerated he was still a human being.

[43] In the Previous Proceedings, the Claimant was seeking answers as to the circumstances surrounding her son's death and had alleged inaction on the part

¹⁵ Ibid. at para. 17.4.

of the Coroner and the Police to take the steps to have the matter properly investigated. Liability was eventually conceded by the Crown which can be seen from the order entering judgment on liability for the Claimant following agreement by the Parties. The coroner's inquest which the Claimant has been seeking eventually took place following an order of the Court.

- [44] There is no dispute that there was a claim for damages in the Previous Proceedings which was in the end not pursued and this is reflected on the order of Drysdale J dated 16th April, 2024. The Claimant therefore did not recover any damages in the Previous Proceedings despite reaching a settlement on liability with the Crown.
- [45] I agree with the contention of the Claimant that the Present Proceedings and the Previous Proceedings are different because the Present Proceedings is a private law claim in respect of the Claimant and the nature of the relief sought is different from the previous administrative law action. This in my view is an important consideration. The Claimant is alleging in the Present Proceedings that as a result of the actions of officers of the Crown and a lack of closure for the Claimant because of the uncertainty of the circumstances surrounding her son's death, she has suffered emotional stress, frustration, anxiety, and damage. She therefore seeks damages for: negligence by the Coroner and Commissioner of Police; damages for breach of statutory duty under the Coroners Act and damages for misfeasance in public office due to alleged wrongful conduct of the Coroner. These private law issues concerning alleged damage to the Claimant did not feature for determination in the Previous Proceedings. The Claimant is now seeking to bring the present Proceedings to have those issues ventilated.
- [46] Having considered the Defendant's evidence and submissions, I am not satisfied that the Defendant has established that the Current Proceedings are an abuse of the process of the Court. The Claimant is not seeking to relitigate matters on which she did not previously succeed, nor is she making some collateral attack on a previous decision of the Court, or launching a distinct series of litigation against the Defendant. It also does not appear that there is any obvious unjust harassment of the Defendant by way of litigation.
- [47] There is no allegation or evidence at this juncture to demonstrate or conclude that the Present Proceedings are frivolous, vexatious or harassing. Ultimately, the Court will have to decide whether the Claimant has made out her claim for damages (unless, of course, the Parties compromise the matter). Thus, having considered the totality of the circumstances and balancing the rights of the Claimant to bring her claim before the Court and the general right to access justice, against the right of the Defendant not to be unjustly harassed, and the

public interest in having finality to litigation, I believe the scales tip in favour of allowing the Claimant to proceed with her claim.

[48] The rule in **Henderson v Henderson** is meant to combat genuine abuse of the Court, to prevent a party from misusing the Court for an improper purpose. The Court however should not stifle genuine claims unless circumstances warrant a finding of an abuse of the Court's process. To find that the Claimant's claim should be struck out as an abuse of process on the mere fact that she could have brought the claims in the previous proceedings, without more, in my view, would be an unsatisfactory outcome in the circumstances of this case.

[49] In light of the foregoing, I would also refuse the Defendant's application to strike out the Claimant's claim as an abuse of process on this second round advanced by the Defendant.

Costs

[50] As it relates to the issue of costs, the general rule is that costs should follow the event and that the successful party is entitled to costs. There is no reason to depart from the general rule on the present application. The Parties having agreed costs in the sum of \$1,000.00, I would order that the Defendant pay costs on his strike out application to the Claimant in the agreed sum of \$1,000.00.

Disposition

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

1. The Defendant's application to strike out the Claimant's claim as an abuse of process is refused.
2. The Defendant shall pay the Claimant's costs on the strike out application in the agreed sum of \$1,000.00 on or before 10th June, 2025.
3. The Defendant shall file and serve its defence to the Claimant's claim on or before 10th June, 2025.
4. Thereafter the matter shall proceed in accordance with the **Civil Procedure Rules (Revised Edition) 2023**.
5. The matter shall be set down for case management on 22nd July, 2025.

[52] I wish to thank learned Counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court



Registrar