

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2021/0350

BETWEEN:

BRADLEY TITRE

Claimant

and

MOUNT ST. JOHN'S MEDICAL CENTRE BOARD

Defendant

Appearances:

Ms. Jacqueline Walwyn and Mr. Wesley George, Counsel for the Claimant
Ms. Safiya Roberts, Counsel for the Defendant

2023: October 19th;
December 20th.

DECISION

- [1] **MICHEL, M.:** The Claimant was struck by a car whilst riding his motorcycle and suffered personal injuries including a crush injury to his left foot. He was taken to the Mount St. John's Medical Centre ("**the Hospital**") which is administered and operated by the defendant, Mount St. John's Medical Centre Board ("**the Defendant**"), for treatment of the injuries he sustained. He later developed an infection in his left foot which was subsequently amputated.
- [2] The Claimant commenced proceedings against the Defendant alleging negligent treatment by the Defendant, and or its employees and or its servants and or its agents and claiming damages for loss and damage he allegedly suffered. He later commenced separate proceedings against the Driver of the vehicle that struck him ("**the Driver**"). The Defendant filed a defence to the claim against it. No defence was filed by the Driver to the claim against her and the claimant requested and obtained judgment in default of defence against the Driver for an amount to be decided by the Court. Damages have since been assessed by the Court.

- [3] The Defendant now seeks an order striking out the Claimant's claim form and statement of claimant in the proceedings brought against it as an abuse of process pursuant to rule 26.3(1) of the Civil Procedure Rules 2000 ("CPR"). The Defendant contends that the Claimant has brought proceedings in negligence against it and against the Driver that cannot consistently be maintained, and that by seeking and obtaining a default judgment against the Driver, the Claimant has elected to pursue the alternate liability of the Driver. In the circumstances, the Defendant contends that the Claimant is precluded from maintaining this claim against it and the claim should be struck out.
- [4] The Claimant argues on the other hand that based on the circumstances of this case, no question of election arises as both the Defendant and the Driver are liable in negligence for his injuries, and that while both claims are for loss he sustained based on negligence, the claims are for different types of negligence, based on different facts. Alternatively, the Claimant argues that in the circumstances of this case, obtaining a default judgment and assessing damages does not amount to an election of liability of the Driver as opposed to the Defendant as there has been no enforcement and satisfaction of the judgment obtained against the Driver.
- [5] For the reasons set out below, I am of the view that the doctrine of election does not arise in relation to the Claimant's two claims and further, that there is no basis upon which to find that the Claimant's claim against the Defendant is an abuse of process. I would therefore dismiss the Defendant's application to strike out the Claimant's claim form and statement of claim as an abuse of process and order that the Defendant pay the Claimant's costs of this application.

The Defendant's Application to Strike

- [6] I will first consider the Defendant's strike out application and the Claimant's response.
- [7] The Defendant has advanced eight grounds for its strike out application which I shall set out in full:
- "1. A Claim Form and Statement of Claim was filed against the Mount St. John's Medical Centre Board on September 13, 2021.
 2. The Claimant claims against the Defendant damages for injuries sustained as a result of negligent medical care provided to the Claimant by the agent, servant and/or employee of the Defendant, interest and costs. The Claimant was treated by the

Defendant after he was involved in a collision with another driver.

3. The Claimant claims in his Statement of Claim the following particulars of injury and loss:

Particulars of Injury

- I. Osteomyelitis, left foot;
- II. Ulcer, left foot, with necrosis of bone.

Particulars of Loss

- i. Amputation of left foot, specifically a trans metatarsal amputation with integra graft
 - ii. Loss of earnings
 - iii. Loss of future earnings
 - iv. Pain and suffering
 - v. Loss of amenities
 - vi. Mental distress
 - vii. Permanent partial disability
4. The Claimant has also initiated proceedings against the driver of the other vehicle in the collision, Shecore Simon, on March 25, 2022 claiming special and general damages for injuries sustained as a result of the negligence of the Defendant ("Concurrent Claim").
5. The Claimant in the Concurrent Claim claims the following particulars of loss:

The Claimant as a result of the injuries suffered osteomyelitis, left foot and ulcer, left foot, with necrosis of bone and subsequently sustained loss:

- i. Amputation of left foot, specifically a trans metatarsal amputation with integra graft
 - ii. Loss of earnings
 - iii. Loss of future earnings
 - iv. Future medical expenses
 - v. Pain and suffering
 - vi. Loss of amenities
 - vii. Mental distress
 - viii. Permanent partial disability of 20%.

6. On the 28th day of April, 2022 the Claimant obtained judgment against the Defendant in the Concurrent Claim for an amount to be decided by the Court and for damages to be assessed.
7. The Claimant is effectively claiming damages against two different defendants in two different cases for the same losses, of which the Claimant has already obtained judgment in one claim. This will result in a double recovery and unjust enrichment should the subject claim be allowed to continue and the Court subsequently find in favour of the Claimant in this case.
8. Rule 26.3(1)(c) provides that a statement of case may be struck out if it is an abuse of the Court and the Defendant therefore seeks an order that the claim be struck out pursuant to Rule 26.3(1)(c)."

[8] The Defendant's strike out application was accompanied by the affidavit of the Chairman of the Defendant Board. The Chairman's affidavit essentially mirrors the Defendant's notice of application. The Claimant filed an affidavit on 14th April 2023 in response to the Defendant's strike out application setting out the circumstances giving rise to his two claims and his reasoning for bringing the claims. He deposed that he had not obtained a quantum of damages on his claim against the driver which sets out an amount which would be due to him by the driver and has not recovered from her nor is he yet in a position to enforce a decision against her.

[9] Before this application was heard on 19th October, 2023, on 2nd October, 2023 the Defendant filed a supplemental affidavit exhibiting thereto a decision on the assessment of damages in relation to the default judgment obtained by the claimant against the Driver. However, no evidence has been placed before the court to show that the claimant has taken any steps to enforce the judgment or that it has been satisfied.

[10] In my view, two broad issues arise based on the grounds of the defendant's application. Firstly, whether the doctrine of election is applicable to the circumstances of this case, and if so, secondly, whether by obtaining a default judgment as against one alleged tortfeasor, the Driver, and subsequently pursuing an assessment of damages in respect of that judgment against her, the Claimant is barred from continuing the claim against the Defendant.

[11] I will now consider the Court's power to strike out a claim as being an abuse of process.

Abuse of Process

- [12] In **Hunter v Chief Constable of West Midlands**,¹ Lord Diplock, discussing abuse of process explained that:

“there is an 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. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.’

- [13] CPR 26.3(1) empowers the court to strike out a statement of case where it appears that it is an abuse of process of the court. The Defendant argues that this is an apt case for the exercise of that power as the Claimant should not be allowed to maintain the claim against it when he has already pursued the liability of the Driver.
- [14] Although CPR enables the court to exercise the power to strike, in approaching this application, I am also mindful of the principles that have been stated and restated in several decisions of the Court of Appeal, that the striking out of a party’s statement of case is a drastic step, ordinarily of last resort, which should only be exercised in the clearest and most obvious cases.

Alternative Liability and the Doctrine of Election

- [15] The Defendant’s main contention is that the Claimant has brought two claims seeking the same relief by way of two causes of action: a medical negligence claim against the Defendant and a negligence claim against the Driver. Learned counsel for the Defendant has referred to the claim against the Driver as the “concurrent claim”. The Defendant argues that the institution of these two claims gives rise to a genuine alternative liability and the two proceedings should not be allowed to be maintained. The Defendant, relying heavily on the decision of the Judicial Committee of the Privy Council (“the Board”) in **Balgobin v South**

¹ [1981] 3 All ER 727 at 729.

West Regional Health Authority,² argues that both claims as filed cannot be consistently advanced as they give rise to alternative liability and that the Claimant has elected to pursue the liability of the Driver.

[16] In **Balgobin**, the Board explained the concept of alternative liability as follows:

“In this context, the “adoption” of liability by a claimant means the decision to choose one possible defendant over another as the one against whom the case is to be made. This presupposes that an election is genuinely feasible, in other words, that a case against either defendant could properly be made and that a decision as to which is to be selected has been consciously taken. **As a matter of principle, where a claim against two possible defendants can be made and the espousal of a case against one defendant is necessarily inconsistent with the maintenance of a claim against a second defendant, a deliberate choice of one should preclude the continuance of a claim against the other.**” (Emphasis added).

[17] In **Scarf v Jardine**³ three defendants were potentially liable to the claimant in the case. The claimant could have pursued A and B in equity or B and C as ordinary debtors. The House of Lords found that either claim was viable but could not be pursued at the same time. Lord Selborne LC stated:

“I am unable to understand how there could have been a joint liability of three. The two principles are not capable of being brought into play together: you cannot at once rely upon estoppel and set up the facts; and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combination of the two can possibly make A, B, C all liable jointly.”

[18] Lord Blackburn further explained in **Scarf v Jardine**⁴ the doctrine of election and its effect as follows:

“The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or indicated it in some other way, that alone will not bind him; but as soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election, and can go no further; and, whether he

² [2012] 4 All ER 655.

³ [1881-85] All ER Rep 651 at p 654.

⁴ [1881-85] All ER Rep 651 at p. 658.

intended it or not, if he has done an unequivocal act – I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way – the fact of his having done that unequivocal act to the knowledge of the person concerned is an election.”

[19] The Privy Council in **Balgobin** explained that in **Scarf**, there was an example of a genuine alternative liability choice as the claimant could have opted for either of two possible causes of action in making its claim, each being independently feasible, but they could not have been pursued concurrently ‘because the legal basis for each was antithetical to the order.’⁵

[20] In **Morel Brothers & Co Ltd v Earl of Westmorland**,⁶ the appellants had taken an action out against the Earl and Countess of Westmoreland for the price of goods supplied at the request of the Countess. The appellants had obtained judgment in default of appearance against the Countess which was worthless and sought to proceed against the Earl. The Court of Appeal found,⁷ the appellants having made the case that the Earl and Countess were jointly liable, they could not then allege, in conflict with that case that the Earl was liable as the Countess’ principal.

[21] After reviewing the decisions in **Scarf v Jardine and Morel**, the Board in **Balgobin** explained what would give rise to a claimant’s adopting liability of a defendant:

In this context, the “adoption” of liability by a claimant means the decision to choose one possible defendant over another as the one against whom the case is to be made. This presupposes that an election is genuinely feasible, in other words, that a case against either defendant could properly be made and that a decision as to which is to be selected has been consciously taken. As a matter of principle, where a claim against two possible defendants can be made and the espousal of a case against one defendant is necessarily inconsistent with the maintenance of a claim against a second defendant, a deliberate choice of one should preclude the continuance of a claim against the other.

[22] The authorities make it clear therefore that where a claimant makes an unequivocal election to pursue one of two or more alternative remedies that unequivocal election operates as a bar to commencing or continuing proceedings against another party. However, the doctrine of election will not arise in every situation where a claimant has brought proceedings against more

⁵ At para. 20.

⁶ [1904] AC 11/

⁷ The Court of Appeal’s decision was affirmed by the House of Lords.

than one defendant. This was explained by the Board in Balgobin and restated by the Court of Appeal in the case of Stephen McBurnie v Irma Marryshow.⁸ In Balgobin, the Board stated:⁹

It appears, therefore, that where a claim against more than one defendant cannot be pursued either because the factual basis of the suit against one is incompatible with the factual foundation necessary to establish liability against the other or the legal bases of both claims cannot be consistently advanced, an election to pursue one basis of claim will preclude reliance on the other. **By contrast, where there is no joint contract or relationship of principal and agent and the obligations are several, a judgment in an action against one is no bar to an action against another:** *Isaacs & Sons v Salbstein* [1916] 2 KB 139, 152, per Swinfen Eady LJ. Furthermore, as Lush J, sitting in the Divisional Court in that case, said at p 143, there is no foundation for the contention that because A obtains a judgment against B (who in fact was never a party to the contract at all) he cannot afterwards obtain judgment on that contract against C, who was the real contracting party. (Emphasis added).

[23] In Stephen McBurnie v Irma Marryshow, Thom JA stated:¹⁰

“The principles that emerge from these cases is that where the issue of unequivocal election is raised, the court is required to consider firstly whether the case is one to which the doctrine of election is applicable, and if the doctrine is applicable, whether the claimant made an unequivocal election. Whether the doctrine of election is applicable is a matter of law. In making this determination, the court is required to examine the pleadings. While whether the claimant made an unequivocal election is a question of fact, in determining whether the claimant made an unequivocal election, the court will consider all of the circumstances of the case.”

[24] Thom JA further stated that in Balgobin:

“The Board identified the following as instances where the doctrine would be inapplicable and judgment obtained against one defendant would not serve as a bar against another defendant, being, **where there is no joint liability or relationship of principal and agent or where there is several liability.**” (Emphasis added).

⁸ GDAHCV2016/0021 (delivered 12th March 2018, unreported).

⁹ At para. 21.

¹⁰ At para. 42.

[25] In the High Court decision of **Development Bank of St. Kitts and Nevis v Brian Browne et al**, Ramdhani J [Ag.] put it as follows:

“[18] The principle of election of course is only applicable where it is genuinely feasible. It is properly applicable where there is a genuinely alternative liability situation.⁶ [Morel Brothers; Scarf v Jardine (1881-82) L.R. 7 App. Cas. 345] It is also relevant in cases of joint liability between two or more debtors and cases in which the cause of action against one is inconsistent with the cause of action against the other.

[19] It is in these cases that the question of an unequivocal election will have significant consequences and will have the effect that a claimant will be barred from proceeding against any other person with regards to the same cause of action which was the subject of the election.”

[26] It is clear from the authorities that the circumstances of a case must give rise to a situation whereby a claimant can genuinely make an election. The doctrine of election does not arise where there is only joint liability as between two or more defendants, where the liability of both defendants would be dependent on the negligence of any one of the defendants. In such circumstances, where judgment is obtained as against one defendant, the issue of the merger of the cause of action into a judgment will arise. For different reasons, the doctrine of election does not arise where there is joint and several liability giving rise to (in the context of contract) ‘one joint obligation and to as many several obligations as there are joint and several promisors.’¹¹

[27] I will now examine the Claimant’s pleadings more closely to determine whether the doctrine of election is applicable.

The Claimant’s Pleadings

Claim against the Defendant

[28] In his claim against the Defendant, the Claimant pleaded that he was struck by the Driver whilst riding his motorcycle and suffered the following injuries:

¹¹ See St. Kitts Development Bank v Browne et al and Chitty on Contracts Volume 1, at paragraph 1201 page 651.

- i. Crush injury to the left foot and open fractures to the left 2nd to 5th metatarsals (gustilo-and erson type 3c) with severe bone loss, vascular injury, tendon injury and contamination.
- ii. Skin abrasions to the left side.
- iii. Laceration to the left middle and ring finger PIP joint resulting in joint flexion contractures and inability to make a full composite fist
- iv. Traverse fracture through left patella (left knee)

[29] He pleaded that his injuries were subsequently treated by employees and or servants and or agents of the Defendant and that the employees and or servants and or agents of the Defendant were negligent in their treatment of him during his stay at the Hospital. The Claimant pleaded the following particulars of negligence against the Defendant:

- i. Failure to properly assess and examine the Claimant upon his admission
- ii. Failure to provide competent and sufficiently experienced staff on duty capable of managing and controlling the Claimant's condition appropriately or properly. Failure to monitor the Claimant's injuries appropriately, timeously, with sufficient frequency or at all
- iii. Failure to observe the minimum protocol for initial treatment of patients presenting symptoms of tendon injury and laceration
- iv. Failure to take preventative measures to protect the Claimant's left foot from infection
- v. Failure to detect or suspect that the Claimant was developing an infection in his left foot
- vi. failure to give or procure any treatment for same or any investigation which would have discovered same
- vii. Failure to observe or heed or take any reasonable steps to treat the Claimant's infection including:
 - a) Not exposing the Claimant's bone to open air for prolonged period of time.
 - b) Adequately cleaning the Claimant's injury from debris and or dirt which entered the Claimant's foot as a result of the accident.
 - c) Dispensing appropriate antibiotic medication to treat with infection.
 - d) Discharging the Claimant when it was unsafe to do so.
- viii. Failure to investigate the complaints of the Claimant as to his condition;

- ix. Failure to observe or act upon or investigate properly or at all the steady, serious and obvious deterioration of the Claimant's condition while under the care of the Defendant's employees and or servants and or agents
- x. Exposing the claimant to a risk of further damage or injury which the Defendant ought to have known, and;
- xi. Failing to act in a timely manner when dealing with the Claimant.

[30] The Claimant pleaded that as a result of the negligent care provided by the Defendant, its employees and or servants and or agents, he suffered further injury: osteomyelitis, left foot; ulcer, left foot, with necrosis of bone. He further pleaded that as a result of the negligent care provided by the Defendant, its employees and or servants and or agents, he suffered further loss:

- i. amputation of left foot, specifically a trans metatarsal amputation with integra graft
- ii. loss of earnings
- iii. loss of future earnings
- iv. pain and suffering
- v. loss of amenities
- vi. mental distress
- vii. Permanent partial disability

[31] By reason of the forgoing, the Claimant claimed against the Defendant special damages in the sum of \$217,061.51 and damages for injuries sustained as a result of negligent medical care provided to the Claimant by the agent, servant and or employee of the Defendant.

The Claimant's Claim against the Driver

[32] In his claim against the Driver, the claimant alleged that he was riding his motorbike when he was struck by the Driver and the accident was caused by the Driver's negligence. He stated that as a result of the Driver's negligence, he suffered pain, injury loss and damage:

- i. Crush injury to the left foot and open fractures .to the left 2nd to 5th metatarsals (gustilo-and erson type 3c) with severe bone loss, vascular injury, tendon injury and contamination.
- ii. Skin abrasions to the left side.
- iii. Laceration to the left middle and ring finger PIP joint resulting in joint flexion contractures and inability to make a full composite fist
- iv. Traverse fracture through left patella (left knee)

[33] The claimant pleaded that as a result of the injuries sustained in the accident he suffered osteomyelitis, left foot and ulcer, left foot, with necrosis of bone and subsequently sustained loss:

- i. amputation of left foot, specifically a trans metatarsal amputation with integra graft
- ii. loss of earnings
- iii. loss of future earnings
- iv. Future medical expenses
- v. Pain and suffering
- vi. Loss of amenities
- vii. Mental distress
- viii. Permanent partial disability of 20%

[34] By reason of the forgoing, the Claimant claimed against the Driver, special and general damages for injuries sustained as a result of the negligence of the Driver.

[35] It should be noted in his claim against the Defendant, the claimant alleged that because of the negligent care provided by the Defendant and or its employees and or servants and or agents, he suffered further injury being osteomyelitis, left foot; ulcer, left foot, with necrosis of bone and further loss. Whilst in respect of the Driver, he alleged that because of the injuries he sustained as result of the accident caused by her negligent driving, he suffered osteomyelitis, left foot; and ulcer, left foot, with necrosis of bone and subsequently sustained the pleaded loss. The Claimant has therefore pleaded separate facts to ground two separate causes of action against the Defendant and the Driver. The pleadings suggest that the alleged independent negligent acts of the Driver and the Defendant both contributed to the injury and loss suffered by the Claimant.

[36] Based on the facts and circumstances of the case, I do not believe that there is any question of joint liability between the Defendant and the Driver; accordingly, it cannot be concluded that the two defendants are joint tortfeasors. The learned authors of The Law of Tort (Common Law Series) have identified the following categories of persons as joint tortfeasors:

- (1) where one person expressly authorises another to commit a wrongful act;
- (2) where the situation is that of principal and agent;
- (3) where there is vicarious liability;
- (4) where an employer is liable for the torts of an independent contractor because the duty of care was non-delegable;
- (5) where there is a partnership, and one partner is liable for the torts of another;

- (6) where a duty is imposed on two or more tortfeasors jointly and they breach it;
- (7) where two or more tortfeasors pursue a common goal or design, or engage in a joint venture; and
- (8) where one person procures another to commit a tort

[37] The above categories were also identified and discussed by Thom JA in **Stephen McBurnie v Irma Marryshow**.¹² Scenarios (1) to (6) and (8) are wholly inapplicable to the present matter. In relation to scenario (7), for there to be a joint tort there must be some connection, or some common purpose by the alleged tortfeasors for the commission of the alleged act.¹³ There is no basis to make any finding of such connection or common purpose in this case.

[38] Having examined the Claimant's pleadings in his two claims, I am of the view that the alleged negligence or wrongful acts of the Defendant and the Driver were two separate, consecutive, independent acts creating two distinct causes of action. Therefore, the Claimant has separate causes of action against the Defendant and the Driver. In the circumstances, I am of the view that the obligations of the two defendants give rise to several liability and based on the allegations made against them by the Claimant, they would be several tortfeasors.

[39] Halsbury's Laws of England¹⁴ describes several tortfeasors as follow:

"47. Several tortfeasors.

If each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tortfeasor is liable for the whole damage. If each of several persons commits an independent tort consecutively against the same person, each is liable for the damage caused by his tortious act, assuming the damage proximately caused by each tort to be distinct. Thus, if the second tortfeasor's act caused no further damage or merely duplicated damage caused by the first tort, the second tortfeasor will not be liable; but, if his act aggravated the damage caused by the first tort, each tortfeasor will be liable only in respect of the part of the damage which his tort caused, assuming that it is possible to separate and quantify the aggravation of damage."

[40] Where the consecutive negligent acts of two tortfeasors results in indivisible damage to the injured party, the two tortfeasors are said to be concurrent

¹² GDAHCV2016/0021 (delivered 12th March 2018, unreported) at para. 20.

¹³ See *The Kursk* [1924] All ER Rep 168 per Banke LJ at p. 172.

¹⁴ Vol. 97A (2021).

tortfeasors. Laws LJ in the English Court of Appeal case of **Rahman v Arearose Ltd and another**¹⁵ explained it as thus:

"Tortfeasors are concurrent when their wrongful acts or omissions cause a single indivisible injury. In such a case each tortfeasor is liable in full to compensate the claimant for the whole of the damage. (The concept is quite different from that of joint tortfeasors, with which I need not take time. Concurrent tortfeasors may be joint or several.) Glanville Williams, Joint Torts and Contributory Negligence (1951), p 17 describes the matter thus:

"Several concurrent torts are of two kinds. There are those ... where each of the two causes is necessary in order to effect the consequence. And there are those where either cause would be sufficient of itself to produce the consequence, as where two persons independently shoot at another at the same time, both shots being fatal. No legal consequences follow from the distinction, which is made here merely in order to indicate the scope of the concept of several concurrent torts."

The characteristic of such torts is the logical impossibility of apportioning the damage among the different tortfeasors. As a leading American textbook, Prosser & Keeton on Torts, 5th ed (1984), pp 345-346 puts it:

"If two defendants, struggling for a single gun, succeed in shooting the plaintiff, there is no reasonable basis for dividing the injury between them, and each will be liable for all of it. If they shoot the plaintiff independently, with separate guns, and the plaintiff dies from the effect of both wounds, there can still be no division, for death cannot be divided or apportioned except by an arbitrary rule ... If they merely inflict separate wounds, and the plaintiff survives, a basis for division exists, because it is possible to regard the two wounds as separate injuries ... There will be obvious difficulties of proof as to the apportionment of certain elements of damages, such as physical and mental suffering and medical expenses, but such difficulties are not insuperable, and it is better to attempt some rough division than to hold one defendant [liable] for the wound inflicted by the other. Upon the same basis, if two defendants each pollute a stream with oil, in some instances it may be possible to say that each has interfered to a separate extent

¹⁵ [2001] QB 351 at 361 to 362.

with the plaintiff's rights in the water, and to make some division of the damages. It is not possible if the oil is ignited, and burns the plaintiff's barn."

[41] However, where, such as on the facts of Rahman the consecutive torts committed by two or more independent tortfeasors causes distinct aspects of damage to a claimant, the defendants would not be concurrent tortfeasors and liability is several.

[42] As I have stated above, on the facts of this case, it appears that there are two separate and independent alleged torts: the negligent driving of the Driver leading to the collision with the Claimant on his motorcycle resulting in injury to the Claimant, and the alleged negligent acts of the Defendant's employee in providing medical care to the claimant whilst being treated for his injuries at the Hospital; both acts allegedly causing damage to the Claimant or contributing to the damage suffered by the Claimant.¹⁶ Whether the damage is indivisible damage (in which case the tortfeasors would be concurrent tortfeasors) or damage that can be quantified separately, is not a matter appropriate for determination at this stage in the proceedings on a strike out application. What is important at this juncture is the conclusion that in law, the Defendant and the Driver are several tortfeasors.

[43] Contrary to the argument of learned Counsel for the Defendant, there is no alternative liability of the Driver or the Defendant giving rise to election. Rather the Defendant and the Driver are each one of several tortfeasors that the Claimant is free to pursue in respect any damage allegedly suffered. The factual circumstances giving rise to a cause of action in tort against the Driver are in no way inconsistent with the factual circumstances grounding a claim against the Defendant, nor can it be said that the legal bases of both claims cannot be consistently advanced as the alleged acts of the two Defendants are independent acts giving rise to two distinct causes of action in tort.

[44] I am of the view that the Privy Council's decision in Balgobin is quite consistent with the above position as it relates to several tortfeasors. At paragraph 21 of the decision, the Board contrasted two situations. The first, which gives rise to alternative liability and election of liability, where there are inconsistent factual foundations for establishing liability of more than one defendant or inconsistent legal bases for claims against more than one defendant, precluding the maintenance of the alternative claims when a claimant has established and relied on the liability of one defendant. The Board contrasts this with the second situation where there is no joint contract or relationship of principal and agent

¹⁶ It is noted that the Claimant's initial injuries are only attributed to the Driver in his claim against her, and quite properly no allegations are made in his claim against the Defendant that the Defendant caused those initial injuries.

and the obligations are several, and a judgment in an action against one is no bar to an action against another. In my view, the reasoning is equally applicable to a situation as in the present case where there are several tortfeasors.

Effect of Judgment against one of Several Tortfeasors

[45] Where a claimant has instituted proceedings against independent alleged tortfeasor resulting in the same alleged damage for which they would be severally liable, the institution of the proceedings, even up to the obtaining of judgment, will not operate as a bar to the institution of subsequent proceedings or the maintenance of concurrent proceedings against a second independent tortfeasors so long as the entirety of the loss suffered by the Claimant remains unsatisfied.

[46] In the case of **The Kursk**,¹⁷ which involved the collision of two boats leading to the collision of one of the two with a third boat, Scruton LJ explained the common law position where there are independent tortfeasors leading to the same damage:

In the present case the Kursk was guilty of negligence in proceeding out of course across the line of its convoy; the Clan Chisholm was guilty of quite independent negligence in not reversing when the action of the Kursk was observed. These two separate and independent negligence's resulted in a collision, the direct consequence of which was a collision with the Itria. In my view, the Kursk and the Clan Chisholm were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and, therefore, at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued. It is true that in various cases to which we were referred eminent judges have used the phrase "joint tortfeasors" in respect of separate acts of negligence. This was always obiter and in regard to a matter immaterial to the decision. If there is no contribution between joint tortfeasors there is, of course, no contribution between independent tortfeasors, and the phrase "no contribution between joint tortfeasors" is equally true if read "no contribution between tortfeasors." LORD ATKINSON, in *The Devonshire* (4) uses the phrase "joint tortfeasors" about persons guilty of independent acts of negligence where "tortfeasors" would be equally accurate as far as the consequence of several liability for all the damage, the matter then being discussed, was concerned; indeed, he uses the phrase

¹⁷ Law Reports (1924) Probate Div. 140.

"tortfeasors" in the same sentence. I am quite unable to regard these casual and irrelevant inaccuracies as amounting to a determination of principle.

[47] In Jameson and another v Central Electricity Board,¹⁸ Lord Hope of Craighead stated:

"The basic rule is that a plaintiff cannot recover more by way of damages than the amount of his loss. The object of an award of damages is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The liability which is in issue in this case is that of concurrent tortfeasors, because the acts of negligence and breach of statutory duty which are alleged against Babcock and the defendant respectively are not the same. So the plaintiff has a separate cause of action against each of them for the same loss. But the existence of damage is an essential part of the cause of action in any claim for damages. It would seem to follow, as a matter of principle, that once the plaintiff's claim has been satisfied by any one of several tortfeasors, his cause of action for damages is extinguished against all of them. As Lord Atkin said in *Clark v Urquhart*, *Stracey v Urquhart* [1930] AC 28 at 66: '... damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors the cause of action is destroyed.' In that case the plaintiff had received in satisfaction of his claim against one defendant the full amount of damages which he could have received on any of the causes of action against the rest. It was held that his acceptance of the money paid into court was a satisfaction of all the claims in the action and that his damage, in a question with the other defendants, had been satisfied. In *Tang Man Sit (decd) (personal representative) v Capacious Investments Ltd* [1996] 1 All ER 193 at 199, [1996] AC 514 at 522 Lord Nicholls of Birkenhead discussed the limitations on a plaintiff's freedom to sue successively two or more persons who are liable to him concurrently. He explained the point in this way:

'A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued

¹⁸ [2000] 1 AC 455 at p. 471 to 472.

earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. The principle of full satisfaction prevents double recovery.'

[48] The takeaway from the authorities is as I previously stated. A claimant can maintain proceedings against multiple tortfeasors where liability is several, and obtaining judgment against one, is not a bar to maintaining proceedings against another, so long as the judgment remains unsatisfied.

[49] There is no evidence before the Court that the judgment obtained by the Claimant following the assessment of damages against the Driver has been satisfied. In those circumstances, there remains a loss to the Claimant for which the Claimant has also brought separate and independent proceedings against the Defendant. There is no basis upon which this Court can reach the conclusion that the maintenance of the Claimant's claim against the Defendant is an abuse of process warranting the striking out of the Claimant's claim.

[50] Having found that the doctrine of election does not arise in the circumstances of this case, there is no need to consider whether by obtaining a default judgment and an assessment of damages against the Driver that the Claimant has elected to pursue the liability of the Driver.

Disposition

[51] In light of the forgoing, I would dismiss the Defendant's strike out application.

[52] As it relates to the issue of costs, the Claimant being successful on the application is entitled to his costs. Such costs are to be summarily assessed at the next hearing of this matter if not earlier agreed.

[53] I therefore make the following orders:

1. The Defendant's application to strike out the Claimant's claim as an abuse of process is dismissed.
2. The Defendant shall pay the Claimant's costs of this application to be summarily assessed at the next case management conference for this matter, if not earlier agreed.
3. The matter shall be set down for further case management on a date to be fixed by the Registrar of the High Court.

[54] 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