

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Numbers: **AXAHCV2020/0033**

Between

KAREMA SENORA GUMBS

Claimant/Respondent

AND

- (1) JOSE VANTERPOOL**
- (2) ATTORNEY GENERAL OF ANGUILLA**
- (3) COMMISSIONER OF POLICE**
- (4) HEALTH AUTHORITY OF ANGUILLA**
- (5) GOVERNMENT OF ANGUILLA**

Defendants/Applicants

Appearances:

Ms. Merlanih Lim of Counsel for the claimant
Mr. Dwight Horsford Honourable Attorney General with Ms. Erica L.P. Edwards
Counsel for the 2nd, 3rd & 5th defendants

2020: July, 3rd
2020: August, 14th
2020: October, 8th

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: Presently serving before this court, under the judicial scalpel, is a critical application for determination, viz the defendant is vociferously contending that the claim and those parts of the claim against the Attorney-General, The Commissioner of Police and the Government of Anguilla, should be struck out as they do not disclose any reasonable or justiciable grounds for bringing a claim against those named parties. That the claimant had brought a claim that is outside the discernible limits of the law.
- [2] The issues raised by the applicant in the application for striking-out are that, as according to paragraph 66 of the statement of claim aforesaid alleged that the 2nd defendant, the Attorney

General of Anguilla and the 3rd defendant, the Commissioner of Police owed a duty of care to the claimant “to properly investigate (if at all) and/or prosecute the claimant’s complaints against the first named Defendant”, Jose Vanterpool. And at paragraphs 67 and 68 it is alleged that the 5th defendant, the “Government of Anguilla”, owed a duty of care to the claimant as a patient of the Princess Alexandra Hospital to prevent physical and psychological harm and injury and to respond in a timely manner to the claimant’s request for a copy of hospital surveillance video and to prevent loss of evidence relevant to the claimant’s complaint to the police, among other allegations.

- [3] That the pleadings at paragraphs 66, 67 and 68 of the Statement of Claim, referred to above, disclose no justiciable cause of action at law against the named parties.

Background/Chronology

- [4] On January 14th and 15th, 2020, the 1st defendant allegedly committed the tort of assault and/or battery on the claimant by forcibly injecting marijuana smoke into the claimant’s mouth against her will by placing his mouth onto the claimant’s mouth, and exhaling the marijuana smoke from his marijuana vapouriser whilst he was driving, marijuana being an illegal substance under Anguilla law; thereby causing physical and psychological harm and injury to the claimant.
- [5] On January 14th and 15th, 2020, the 1st defendant allegedly committed the tort of sexual assault and/or battery on the claimant at his workplace at Malliouhana, An Auberge Resort, Anguilla, and at his residence at Welches, Anguilla; thereby causing physical and psychological harm and injury to the claimant.
- [6] On January 14th and 15th, 2020, the 1st defendant allegedly committed the tort of negligence against the claimant by breaching his duty of care owed to the claimant who was a passenger in his vehicle, by exposing her to marijuana smoke which he exhaled from his marijuana vapouriser whilst he was driving, marijuana being an illegal substance under Anguilla law; thereby causing physical and psychological harm and injury to the claimant.
- [7] On 15th January 2020, the 1st defendant allegedly committed the tort of false imprisonment against the claimant in that the 1st defendant as the driver of his vehicle detained the claimant who was his passenger against her will and deprived her of her liberty to seek urgent medical attention in his refusal to do so despite her repeated pleas, thereby jeopardizing the health and safety of the claimant.

- [8] The claimant made complaints against the 1st defendant pursuant to her statements on January 21 and 24, 2020.
- [9] On 11th June, 2020, the claimant/respondent initiated proceedings by filing a Claim Form and Statement of Claim which alleged negligence against the applicants herein in addition to other claims against Jose Vanterpool and the Health Authority of Anguilla.
- [10] An amended application to strike out the claim, accompanied by affidavit in support was filed by the claimant on 22nd June 2020. The 2nd, 3rd and 5th defendants/applicants also filed the application to strike out and stay the proceedings on the 22nd day of June, 2020, seeking an order striking out those claims for negligence against them as disclosing no justiciable cause of action, as well as an interim order staying the proceedings, save in relation to the determination and disposition of the strike out application.
- [11] By Order dated 27th February 2020 directions were given by Master Ricardo Sandcroft [Ag] for the claimant to file and serve submissions and authorities on or before 13th March 2020 and for the defendant to file and serve submissions and authorities on or before 27th March 2020.

2nd Defendant's/Applicants' Submissions

- [12] The 2nd defendant/applicant and also on behalf of the 3rd and 5th defendants has applied to strike out the claimant's claim and statement of claim, based on several grounds. Those grounds include:

- 'i) The claimant's statement of case and amended statement of case do not set his case; and**
- ii) pursuant to rule 26 the court is empowered to dismiss or give judgment on a claim after a decision on a preliminary issue.**
- iii) Pursuant to rule 26.3 the court is empowered to strike out the statement of case if it appears to the court that the claim is:**
 - a. same is an abuse of the process of the court;**
 - b. discloses no reasonable grounds for bringing the claim; or**
 - c. prolix or does not comply with the requirements of Part 8.**

iv) **Furthering the over-riding objective would justify granting the orders sought. The time allocated for trial herein would be a waste of court time and costs.**

v) **That this is a fair, just and reasonable manner of disposing of this matter.”**

[13] Mr. Horsford, the Honourable Attorney General for the 2nd, 3rd and 5th defendants submitted inter alia that the averments that the claimant was in the care of the “Government of Anguilla” as a patient, in respect of whom the alleged duty of care is owed, is without legal foundation, for –

- (i) The Health Authority (by statute) is not the servant or agent of the Government of Anguilla, but a corporate body with separate legal existence, and
- (ii) The Claimant/Respondent was not a patient in the care of the Government of Anguilla, but in the care of the servants of the Health Authority, so that no duty of care is owed by the Government in medical negligence to the claimant/respondent.

[14] Counsel also submitted that Rule 26.3 (1) (b) of CPR 2000 (as amended) expresses the requisite test which must be applied-

“...the court may strike out a statement of case or part of a statement of case if it appears to court that –

...

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim”

[15] Counsel posited that the proper approach is that the Court is confined to the pleadings and must assume all the facts pleaded in the statement of case to be true for this purpose and no evidence is admissible. The pleadings are closely examined and if the Court finds that they are untenable as a matter of law, a party may have his/her claim or defence struck out without prejudice, of course, to remedying the defects and further bringing properly constituted legal proceedings: **Didier and Ors v Royal Caribbean Cruises Ltd.** (St. Lucia) ALUHACVAP2014/0024 and SLUHCVAP 2015/0004 (decided 2016: June 6) ECCA, per Pereira CJ at paragraphs [24] – [28].

No general duty of care owed by police in their investigation and crime suppression activities

[16] Counsel also posited that the legal test for striking out must never be conflated with that for summary judgement under Part 15 of the CPR which is a wider merits-based jurisdiction: **Didier and Ors v Royal Caribbean Cruises Ltd.**, supra at paragraph [23].

- [17] Counsel further posited that the law in this area is not in a state of flux, but is rather well stated. And that the duty of the police for the preservation of the Queen's peace is owed to members of the public at large, and does not normally involve the kind of case or special relationship or proximity necessary for the imposition of a private law duty of care: **Michael & Ors v Chief Constable of South Wales Police & Anor** [2015] AC 1732 (UKSC).
- [18] Counsel submitted that the rule which prevailed for decades on this subject was that although police officers could be liable in tort to persons injured as a direct result of their acts or omission, there was no general duty of care owed by the police to victims in respect of their activities in investigating crime to prevent harm to them by third parties, save where their actions created an exceptional added risk, different in incidence from the general risk to the public at large from criminal activities, so as to establish sufficient proximity of relationship between the police and the victims of crime: **Hill v. Chief Constable of West Yorkshire** [1989] 1 AC 53 (HL).
- [19] Counsel also submitted that in the **Hills** case, *supra*, Lord Keith of Kinkel posited that a further reason why an action should not lie against police for damages in negligence was that the manner and conduct of investigations by the police necessarily involved a variety of decisions of a mixed policy and discretionary nature, that if they were pursued by litigation in the courts on those matters, it would be deleterious of the suppression of crime and the administration of justice. Lord Keith considered that the police were immune from an action in negligence on this basis. Indeed, he likened that immunity to that which attended a barrister: **Hills case, supra** at paragraphs 63 - 64 A-H and 64 A.
- [20] Counsel further submitted that the aforesaid remarks by Lord Keith created a nostrum which became a fertile source of misunderstanding of the fundamental legal principles. It engendered the judicial approach that police enjoyed a blanket immunity from suit in negligence: **Brooks v. Commissioner of Police of the Metropolis & Ors.** [2005] 1 WLR 1495 (HL).
- [21] Counsel posited that the law was clarified by a return to basic principles as recognised in the **Hills case** before the diversion into notions of immunity, by the restatement of the law in these terms: that there was no general rule that the police were not under any duty of care when discharging their functions of preventing and investigating crime; they generally owed a duty of care in accordance with the ordinary principles of the law of negligence unless statute or the common law provided otherwise, that in applying those principles, the police might be under a duty of care to protect an individual from danger of injury which they (the police) themselves had created, but in

the absence of circumstances such as an assumption of responsibility, they were not normally under such a duty where they had not created the danger of injury, including injury caused by acts of third parties: **Robinson v. Chief Constable of West Yorkshire Police [2018]** 2 WLR 529 (UKSC).

[22] Counsel also posited that in paragraph 66 of the statement of claim, the allegation is of a duty of care owed to citizens to properly investigate and or prosecute the claimant's/ respondent's complaints against the 1st defendant, and that an examination of the law set against these pleadings clearly reveals that those averments do not disclose a discernible cause of action in law, for no such duty exists. The pleadings therefore are unsustainable and ought to be struck out.

[23] Counsel submitted that the police and prosecution have the concurrent power to lay charges, but those powers are independent of each other, so that the prosecution does not direct the police on whether to charge or neither can the Attorney-General as director of public prosecutions direct the police to charge or not to charge: **Commissioner of Police v. Benjamin [2014]** WIR 307 (PC).

[24] Counsel also submitted that the Attorney-General as chief prosecutor, and all prosecutors of the crown, are under no general duty of care owed to the public at large in the conduct of prosecutions: **Elgizouli-Daf v Commissioner of Police [1995]** 2 WLR 173 (CA).

[25] Counsel further submitted that prosecutors therefore owed their duties to the court and not to individuals. Unless the prosecutor assumes a duty of care on the well-established principles aforementioned, a victim or an accused, or any person, may not sue the prosecutor or prosecution authorities in negligence for carelessly commencing or failing to commence proceedings.

[26] Counsel posited that the pleaded case, when assumed to be true, does not give rise to a prosecutorial role of the Second Applicant, the Attorney-General, in the circumstances of the complaints referred to in the pleadings, and therefore discloses no justiciable cause of action in this behalf.

[27] Mr. Horsford also submitted that at paragraph 4 of the statement of claim, the claimant/respondent alleged that the Health Authority and the Government governed the public sector health care services; and that on the assumption of the truth of those pleaded facts; the court must examine the law. That the relevant law was sections 4, 23 and 24 of the Health Authority Act which made plain that the Authority is a Corporation independent of the Government and its employees are not the servant of the Crown in that behalf.

- [28] Counsel further submitted that there was therefore no relevant nexus between the Claimant/Respondent's interaction with the Authority's employees at the Hospital and the Government of Anguilla, as Fifth Defendant, so as to attract the provisions of section 13 of the Civil Proceedings Act, in respect of which, the Attorney-General is properly called upon to answer on behalf of the Crown.
- [29] Counsel also posited that Rule 64.8 of CPR 2000 (as amended) governs the exercise of the Court's jurisdiction to make wasted costs orders. That the CPR 2000 does not confer on the Court substantive jurisdiction; they merely regulate the exercise of power which already exists in the Court. That jurisdiction may exist inherently or may be created or vested by statute: **Levy v. Ken Sales & Marketing Ltd.** [2008] UKPC at paragraph [19] (Lord Scott of Foscote).
- [30] Counsel further posited that the wasted costs jurisdiction stems from the inherent powers of the Court which have over time been regulated by the Supreme Court Act and Civil Procedure Rules: **Ridehalgh v Horsefield & Anor** [1994] Ch. 205 (CA). That the wasted costs jurisdiction is exercisable where costs are incurred in consequence of a party or party's legal practitioner's improper or unreasonable, even negligent, conduct in the pursuit of a matter before the Courts: **Ridehalgh v Horsefield & Anor, supra.**
- [31] Counsel finally submitted that the pleaded averments at paragraph 66 in particular are plainly hopeless and ought properly to be struck out. That the allegations at paragraphs 67 and 68 are demonstrably untenable in law and should be struck out as accordingly.
- [32] Counsel also posited that the 2nd, 3rd and 5th defendants/applicants had been menaced with claims contained in the Statement of Claim which objectively are improper and unreasonable, and which, could have been ascertained by due diligence or reasonable consultation with the law.
- [33] Counsel further posited that the claimant's/respondent's legal practitioner failed to advert to the law and should appropriately be mulcted in wasted costs. That the Applicants therefore urged that the application to strike should appropriately be granted on all the foregoing premises.

Claimant's/Respondent's Submissions

- [34] Ms. M. Lim, for the claimant/respondent, submitted inter alia that an application to strike out a claim is governed by Rule 26.3(1) of the **Civil Procedure Rules** (*hereinafter referred to as "CPR"*) which stated as follows:

"The court may strike out a statement of case or part of a statement of case

if it appears to the court that:

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) 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; or.

[35] Counsel further submitted that the overriding objective of the rules of the CPR (as amended 2000) was to ensure that cases are dealt with justly, ensuring that justice is done by all the parties involved. That the claim should not be struck out as against the 2nd, 3rd and 5th defendants; the claimant would be the one to be prejudiced, being deprived of the right to a hearing on the merits of the case before the court as against the 2nd, 3rd and 5th defendants. The claimant also submitted that the present application be dismissed to further the overriding objective of the CPR, and that costs be granted to the claimant and further directions be given for the matter to proceed to trial.

[36] Counsel posited that the case of **Tawney Assets v East Pine Management Ltd. And Others** HCVAP 2012/007, where the court imposed a high threshold when considering whether to strike out a party's defence. That was so because it would deprive the defendant of his right to a trial and the opportunity to strengthen its case through the process of disclosure. Therefore, it would be only in exceptional circumstances that that drastic step would be taken.

[37] Counsel also posited that the case of **Hill v. CC of West Yorkshire Police [1989] AC 53**, the mother of a murder victim filed a negligence claim against the police, claiming that their failure to apprehend the killer led to her daughter's death. The courts held that the police owed no duty of care to members of the public in relation to actions in the course of suppressing crime. The courts therefore found that the police owed no duty of care to the claimant's daughter on two alternative grounds: firstly, that there was insufficient proximity to establish that such a duty of care arose as the victim her daughter was one of a vast number of potential victims at risk in society; secondly and/or alternatively, that as a matter of public policy, the imposition of such a duty would perpetuate "defensive policing" by the police and detract time and resources from policing in order to defend such claims.

[38] Counsel further posited that the **Hill** "blanket police immunity" doctrine has since been eroded and replaced with an approach whereby police immunity will not be granted by default against negligence claims in every single case.

[39] Counsel also submitted that in the pivotal 2018 case of **Robinson v. CC of West Yorkshire Police [2018] UKSC 4**, the Supreme Court took a momentous step away from **Hill**. The case concerned an elderly woman bystander, who sustained physical injury during the course of an arrest of a suspect by the police. The court distinguished **Hill**, and held in that the police do owe a duty of care to claimants who sustain physical injury as a result of operational duties performed by the police. The law lords, however upon engaging in a discourse of the **Hill** principles, opined on the basis of “**public policy**”, that the police did not owe to the individual claimant, a duty of care in the course of their investigations and suppression of crimes.

[40] Council further submitted that as set out at paragraph [110] of **Robinson** and quoting **Smith v. CC of Sussex Police [2008] EWCA Civ 39** :

“[...] 132. First, concern that the imposition of the liability principle upon the police would induce in them a detrimentally defensive frame of mind. So far from doubting whether this would in fact be so, it seems to me inevitable. If liability could arise in this context (but not, of course, with regard to the police’s many other tasks in investigating and combating crime) the police would be likely to treat these particular reported threats with especial caution at the expense of the many other threats to life, limb and property of which they come to learn through their own and others’ endeavours. They would be likely to devote more time and resources to their investigation and to take more active steps to combat them. They would be likely to arrest and charge more of those reportedly making the threats and would be more likely in these cases to refuse or oppose bail, leaving it to the courts to take the responsibility of deciding whether those accused of making such threats should remain at liberty. The police are inevitably faced in these cases with a conflict of interest between the person threatened and the maker of the threat. If the police would be liable in damages to the former for not taking sufficiently strong action but not to the latter for acting too strongly, *the police, subconsciously or not, would be inclined to err on the side of over-reaction. I would regard this precisely as inducing in them a detrimentally defensive frame of mind. Similarly with regard to their likely increased focus on these reported threats at the expense of other police work [emphasis added].*

The second public policy consideration which I would emphasise in the present context is the desirability of safeguarding the police from legal proceedings which, meritorious or otherwise, would involve them in a great deal of time, trouble and expense more usefully devoted to their principal function of combating crime. This was a point made by Lord Keith of Kinkel in **Hill** and is of a rather different character from that made by Lord Steyn in para 30 of his opinion in **Brooks** - see para 51 of Lord Bingham’s opinion. In respectful disagreement with my Lord, I would indeed regard actions pursuant to the liability principle as diverting police resources away from their primary function. Not perhaps in every case but sometimes certainly, the contesting of these actions would require lengthy consideration to be given to the deployment of resources and to the nature and extent of competing tasks and priorities [emphasis added].”

- [41] Counsel submitted that the interests that each and every case is dealt with fairly and justly – and not just expeditiously, requires that the “public policy immunity” argument should not be applied as a blanket approach to every case without further judicial scrutiny as to the applicability of this argument, distinguishing “special circumstances” of each case which necessitate consideration of whether a duty of care arose, and the “public policy” consequences should such a duty of care held to be inapplicable.
- [42] Counsel also submitted that the “public policy immunity” argument in favour of the police which the UK law lords have created is only relevant if considered against the backdrop of local (Anguilla) public policy considerations. This principal must not be applied wholly and merely as a foreign import made as a result of judicial pronouncements in the context of foreign social and public policy considerations, irrelevant in the context of Anguilla society. In essence, this “public policy immunity” argument must not be blindly applied in a vacuum, without consideration of public policy considerations and sensitivities of Anguilla as a society and as a jurisdiction.
- [43] Counsel further submitted that despite lengthy written complaints provided by the Claimant to the police (in which the Claimant was instructed to include specific information which she considered material), and requests that the police obtain and/or otherwise secure video surveillance footage of relevant locations to corroborate the nature of her complaints, no action was taken by the police. It was only several months later after repeated fruitless enquiries by the Claimant, that the police informed her that the evidence was “insufficient”. The Claimant further asserts that the failure of the police to obtain relevant information including the surveillance footage caused such information to be irretrievably lost to her detriment.
- [44] Counsel posited that no further steps were taken by the police and/or the Attorney General to further investigate or otherwise obtain evidence which they deemed to be “insufficient” albeit the foregoing as set out in paragraph 17 above. (**Charmaine Rosan-Bunbury v. AG et al (BVIHCV2013/44)**)
- [45] Counsel further posited that this is not a case where the police and the Attorney General should be permitted to hide behind the curtain of “public policy immunity” or where “the interests of the wider community must prevail over those of the individual”, as the specific facts pleaded by the Claimant reveal special circumstances which necessitate further judicial scrutiny.
- [46] Counsel also posited that the **Hill** and **Robinson** principles were pronounced by the law lords in England and Wales – a jurisdiction which has reasonably differing societal and policy

considerations from Anguilla. Consequently, to apply these principles in a blanket fashion to this present case in view of foreign public policy considerations would not only be irrelevant, but against the universal principles of fairness and justice.

[47] Counsel submitted that the law is and has to be in a constant state of flux so as to remain applicable and relevant not only in a modern-day context, but also taking into consideration the relevant local jurisdictional and societal “public policy” considerations of the island community of Anguilla, which distinguish our jurisdiction from that of the foreign law lords. That the onus lies with this Honourable Court to consider and question the wholesale applicability of **Hill** and **Robinson** to the present case to afford immunity to the 2nd defendant/applicant; further, that the heftier obligation and duty to uphold the overriding objective necessitates that the 2nd defendant/applicant is held to owe a duty of care to the claimant.

[48] Counsel also submitted that there are distinguishing factual considerations in the present case which necessitate further judicial consideration in the course of the civil proceedings and the discovery process. It would therefore be premature and contrary to the interests of justice and fairness, should the Court grant the 2nd defendant’s/applicant’s application in respect of the 2nd, 3rd and 5th defendants to strike out the claim.

[49] Counsel further submitted that the 2nd defendant/applicant through their actions had acquiesced to the inclusion of the 5th Defendant as a party to these proceedings. Alternatively, should the Court deem it necessary to remove the 5th Defendant, that CPR 2000 Rule 26.9 should be invoked for the court to direct that an amendment be made as a matter of procedure, without sanction to the claimant and without affecting the substantive claim - the prior inclusion of the 5th Defendant caused no prejudice or detriment to the 5th Defendant or such other party, as the Attorney General’s Chambers had at all material times entered an appearance on their behalf.

[50] Counsel posited in conclusion that the claimant has a good arguable case which should continue through the usual course of civil proceedings without further delay or obstruction. Further, there are material facts alleged by the claimant which should be permitted to be adduced during these proceedings and in the discovery process.

[51] Counsel finally posited that the 2nd defendant/applicant on behalf of the 2nd, 3rd and 5th defendants has not satisfied the grounds for a striking out application, and it necessarily follows that the 2nd defendant’s/applicant’s Amended Notice of Application filed on 22 June 2020 should be dismissed with costs. Costs should also be ordered against the 2nd defendant/applicant in relation to its

application for the interim stay order which was determined to be nugatory by the Court on 25th June 2020.

[52] Counsel further posited that wasted costs should be ordered against the applicant for having moved this Honourable Court to list the hearing on 25th June 2020 without sufficient (less than twenty-four (24) hours') notice to the claimant, or having given the claimant any opportunity to respond to the application.

Issues

The issues that arise to be resolved by the court are as follows:

- [52] (a) whether the 2nd, 3rd and 5th defendants owe a statutory duty of care to the claimant and whether that duty of care was breached causing damage to the claimant;
- (b) whether the court should strike out the claim as not disclosing any justiciable and reasonable ground for bringing the claim;
- (c) whether this court should strike out the claim (statement of case) of the claimant as against the 2nd, 3rd and 5th defendants on the basis that it discloses no reasonable ground for bringing the claim and disallow the claim of negligence against those said defendants.

Discussion & Analysis

Legislative Framework

Anguilla Constitution Order 1982 S.I. 1982 No. 334:

[53] **Fundamental rights and freedoms of the individual**

1. Whereas every person in Anguilla is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest.

Protection from inhuman treatment

6. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

Anguilla Police Act R.S.A. c. A70:

PART 2 POWERS AND DUTIES

Power to arrest without a warrant

19. (1) It shall be lawful for any police officer to arrest without a warrant—

- (a) any person who is charged by any other person with committing an aggravated assault in any case in which such police officer has good reason to believe that such assault has been committed although not within his view, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender;**
- (b) any person who commits a breach of the peace in his presence;**
- (c) any person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;**
- (d) any person in whose possession anything that may reasonably be suspected to be stolen property is found or who may reasonably be suspected of having committed an offence with reference to such thing;**

- (e) any person whom he finds lying or loitering in any highway, yard or other place between the hours of 8:00 p.m. and 5:00 a.m. and not giving a satisfactory account of himself;
- (f) any person whom he finds in any highway, yard or other place between the hours of 8:00 p.m. and 5:00 a.m. and whom he suspects upon reasonable grounds of having committed or being about to commit an offence;
- (g) any person found between the hours of 8:00 p.m. and 5:00 a.m. having in his possession without lawful excuse any implement of housebreaking; or
- (h) any person for whom he has reasonable cause to believe a warrant of arrest has been issued.

(2) Without prejudice to the generality of the powers conferred upon a police officer by subsection (1), it shall be lawful for any police officer, and for all persons whom he shall call to his assistance, to arrest without warrant any person who within view of such police officer offends in any manner against any law and whose name and residence are unknown to such police officer and cannot be ascertained by him.

(3) Any warrant lawfully issued by the Magistrate for apprehending any person charged with any offence may be executed by any police officer at any time notwithstanding that the warrant is not in his possession at that time, but the warrant shall, on the demand of the person apprehended, be shown to him as soon as practicable after his arrest.

General duties of the Force

20. It shall be the duty of all police officers—

- (a) to preserve the peace and prevent and detect crimes and other infractions of the law;
- (b) to apprehend and bring before the Magistrate persons found committing any offence rendering them liable to arrest without warrant, or whom they may reasonably suspect of

having committed any such offence, or who may be charged with having committed any such offence;

(c) to apprehend smugglers or others found in the commission of offences against the revenue laws and to seize all goods liable to seizure for any breach of the revenue laws, and otherwise to aid in the detection of such offences and to give such assistance as may be necessary to the officers of the revenue in all departments;

(d) to stop, search, and detain any vessel, boat, aircraft, motor vehicle, cart or carriage in or on which there shall be reason to suspect that anything stolen or unlawfully obtained or any smuggled goods may be found and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained or any smuggled goods;

(e) to summon before the Magistrate and to prosecute persons found committing any offence, or whom they may reasonably suspect of having committed any offence or who may be charged with having committed any offence;

(f) to serve and execute at any time (including Sundays) all process which they may be directed by any court of criminal jurisdiction or by the Magistrate or Coroner, or by any Justice of the Peace in any criminal matter, to serve or execute;

(g) to keep order in and within the precincts and in the vicinity of all courts of competent jurisdiction during all sittings of such court;

(h) to repress internal disturbance; and

(i) generally, to do and perform the duties appertaining to the office of a constable.

Duty of Care/Statutory Liability of the 2nd, 3rd and 5th Defendants

[54] The first case in England in which the concept of a special risk was employed in this context was **Home Office v Dorset Yacht Co Ltd**.¹ A party of borstal trainees was working on an island in Poole Harbour under the supervision and control of three borstal officers. During the night seven of them escaped and boarded a yacht which they found nearby. They cast the yacht adrift and it collided with the plaintiff's yacht, which was moored in the vicinity. They then boarded the plaintiff's yacht and did a lot of damage to it. In breach of their instructions the borstal officers had gone to bed, leaving the trainees to their own devices. Five of the seven trainees each had a record of previous escapes from borstal institutions.

[55] Their Lordships focused primarily on control in deciding that a duty of care was owed. It was only Lord Diplock who made specific reference to the two different relationships we have identified above.² Speaking of the relationship between defendant and plaintiff (the proximity relationship), his Lordship made a distinction for duty of care purposes between people who were at risk from the actions of the immediate wrongdoer simply because they were members of the general public (to whom no duty was owed), and people who were the subject of a "particular risk", different in its incidence from the risk faced by the general public, to whom a duty was owed.³

[56] His Lordship also used the concepts of a "distinctive added risk" and an "exceptional added risk" in making that distinction. Lord Diplock was thereby using special risk as an indicator of the existence of a sufficient relationship between plaintiff and defendant to give rise to the necessary proximity between them. In the case at hand Lord Diplock regarded the plaintiff yacht owner as being a member of a sufficiently delineated group which was the subject of the necessary enhanced risk. Hence there was proximity between plaintiff and defendant.

[57] Lord Morris of Borth-y-gest also took the view that the Home Office owed a duty of care to the plaintiff yacht owner because he was a member of a class of persons who were at distinct risk of harm from the escapees. His Lordship said that the borstal officers must have appreciated that, either in an escape attempt or by reason of some other prompting, the boys might interfere with one of the yachts with the consequent likelihood of doing some injury to it. His Lordship described the risk of harm to owners of yachts in the vicinity as being "glaringly obvious".⁴ In effect therefore

¹ [1970] AC 1004.

² At pp. 1061 and 1062.

³ At p 1070.

⁴ At p 1034.

Lord Morris found that a duty of care was owed to them because they were at special risk of suffering the harm which eventuated. A little later in his speech Lord Morris used the test of “manifest and obvious risk”.⁵

[58] The aspect of Lord Pearson’s speech in **Dorset Yacht** which is significant for present purposes is his Lordship’s reference to the citation by Lord **Thankerton in Bourhill v Young**⁶ of a passage from the judgment of Lord Johnston in **Kemp & Dougall v Darngavil Coal Co Ltd**⁷, in which Lord Johnston had said that the person to whom a duty of the kind in question is owed “**must be a person or of a class definitely ascertained**”.⁸ Lord Pearson went on to say that on this basis the plaintiffs as boat owners were in law “**neighbours**” of the defendants and were thus owed a duty of care.⁹

[59] The present application is concerned principally with the existence of a duty of care and its relation to liability. However, there is some artificiality in dividing up the elements of negligence. The factors bearing on duty of care, breach of duty and consequential harm, overlap. The point was made by Lord Pearson in **Dorset Yacht**:¹⁰

The form of the order assumes the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage. The actual damage alleged to have been suffered by the plaintiffs may be an example of a kind or range of potential damage which was foreseeable, and if the act or omission by which the damage was caused is identifiable it may put one on the trail of a possible duty of care of which the act or omission would be a breach. In short, it may be illuminating to start with the damage

⁵ At p 1035.

⁶ [1943] AC 92 at p 98.

⁷ [1909] SC 1314.

⁸ At p 1327.

⁹ At p 1054.

¹⁰ At p 1052.

and work back through the cause of it to the possible duty which may have been broken.

[60] Although some may deplore this as “reasoning backwards”,¹¹ it strikes us as largely inevitable when determining liability for harm carelessly caused. So, Deane J in **Sutherland Shire Council** made it clear that his conclusion that no relevant duty of care was owed by the Council in that case was based to “no small extent” on the particular combination of factors, “including the nature of the damage sustained by the respondents”.¹² And Gault J, delivering the judgment of the Court of Appeal in **Wellington District Law Society v Price Waterhouse**, took the view that, instead of starting with duty analysis, it is equally legitimate to start with “aspects of causation or damage” or “the claimed cause of liability”, in order to “determine whether the ‘proximity’ of the parties is such that the law should impose that liability”.¹³ Gault J pointed out that, while the sequence should not matter in the end, starting with “the claimed cause of liability” tends:¹⁴

“... to highlight the limits of the strike out jurisdiction because it requires early focus on the facts of the case which may not be sufficiently clear to warrant dismissal without further investigation.”

[61] Care has to be taken in strike-out determinations to ensure that the facts are sufficiently known to enable it to be confidently said that no duty of care or a duty of care can be owed. In difficult cases, duty of care is no more suitable for peremptory assessment on assumed facts than questions of breach or damage. The sequence in which the elements of negligence are considered should not matter. Since considerations pertinent to the determination of duty of care are also pertinent to breach of duty or causation and remoteness of damage, only high level and generalised legal policies may be suitable for consideration in relation to duty of care on strike-out. Consideration of the particular circumstances of the case may more properly be treated as bearing on the remoteness of damage or breach, by which ultimate responsibility under a duty of care owed by the defendant to the plaintiff is determined.

[62] Lord Diplock considered that it would be arbitrary to hold borstal officers liable for the criminal actions of escaped trainees when the risk of criminal damage by those already within the

¹¹ See William Young P at para [106] and Chambers J at para [166] in the Court of Appeal in this case. To perhaps similar effect, Tipping J in the New Zealand Court noted at para [118] that “the assessment should be made prospectively”.

¹² At para [22].

¹³ [2002] 2 NZLR 767 at paras [42] – [44].

¹⁴ At para [45].

community lies where it falls. He thought a duty of care would arise between a negligent custodian and a person harmed by an escaped inmate only where there was:¹⁵

some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public.

He found such “distinctive added risk” in the fact that a trainee who has escaped is liable to recapture and therefore it is:¹⁶

a reasonably foreseeable consequence of a failure to exercise due care in preventing him from escaping ... that in order to elude pursuit immediately upon the discovery of his absence the escaping trainee may steal or appropriate and damage property which is situated in the vicinity of the place of detention from which he has escaped.

A duty of care was owed:¹⁷

only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped.

[63] Whether the defendant is under a duty of care to the plaintiff is a matter of judgment arrived at principally by analogy with existing cases and with no better organising tools than the broad labels of “neighbourhood”, foresight, proximity, remoteness and such other considerations of policy as may be prompted by the circumstances. Proximity, “neighbourhood” and remoteness are general concepts which, as Professor Jane Stapleton has pointed out in relation to remoteness, may in fact be misleading if they are taken to suggest purely temporal or spatial concerns.¹⁸ Nor does the

¹⁵ At p 1070.

¹⁶ At p 1070.

¹⁷ At pp. 1070 – 1071.

¹⁸ “Perspectives on Causation” in Horder (ed), *Oxford Essays in Jurisprudence* (4th series, 2000) 60, pp. 78 – 79.

connection between plaintiff and defendant which gives rise to a duty of care in law depend on an existing relationship. Cardozo CJ described negligence as itself “a term of relation”:¹⁹

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.

[64] In **Wellington District Law Society v Price Waterhouse**, Gault J described the proximity between defendant and plaintiff as “a broad concept not confined to the closeness of the relationship”:²⁰

That is only one aspect. It is not possible to determine whether the law should impose a duty of care in the abstract or merely by reference to the nearness or distance of the relationship between the parties. To the extent that there are incorporated into the concept of proximity aspects of foreseeability and reliance (appropriately limited by remoteness policies) it is necessary to focus on the potential scope of any duty. What is it that should have been foreseen, whom was it likely to harm, and in what way? In what circumstances is it said that there was a duty to take reasonable care? This can be approached by asking of the duty contended for what is there a duty to protect against. That in turn extends into aspects of causation and damage.

[65] The “**neighbours**” in law invoked by Lord Atkin in **Donoghue v Stevenson** were those:²¹

“... so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

[66] To these concepts of proximity and foreseeability, Lord Wilberforce in **Anns** acknowledged a controlling role for considerations of policy which “**ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise**”.²² In this explanation he drew on Lord Reid’s judgment in **Dorset Yacht**. There, Lord Reid declined the invitation to return to the days when the categories of

¹⁹ Delivering the judgment of the majority of the Court of Appeal of New York in *Palsgraf v Long Island Railroad Company* (1927) 248 NY 339 at pp. 344 – 345.

²⁰ [2002] 2 NZLR 767 at para [42] (CA).

²¹ At p 580.

²² At p 752.

negligence were “**virtually closed**”.²³ He thought the time had come to apply Lord Atkin’s statement of principle in **Donoghue v Stevenson** to novel circumstances “**unless there is some justification or valid explanation for its exclusion**”.²⁴

[67] **Anns** has been consistently followed in other jurisdictions with acknowledgement that the ultimate judgment must be one that is “**fair, just and reasonable**”.²⁵ Despite refinement of the **Anns** test in subsequent decisions of the House of Lords²⁶ and High Court of Australia,²⁷ in the Anglo-phone Caribbean we have tended to take the view that no substantial difference in result follows the changes in emphasis. The Supreme Court of Canada has similarly found it unnecessary to reconsider **Anns**.²⁸

[68] Except in cases of clear impediment (such as where tortious liability is inconsistent with statute), the judgment as to whether as a matter of proximity and policy, it is right to recognise a duty of care in novel circumstances will usually be intensely fact-specific. Lord Steyn in **Gorringe v Calderdale Metropolitan Borough Council** emphasised the especial need to focus closely on the facts and background social context when negligence arises in the exercise of statutory duties and powers, a subject he regarded as one of “**great complexity and very much an evolving area of the law**”.²⁹ Kirby J in **Pyrenees Shire Council v Day** thought it best to accept that liability in negligence in such hard cases is fixed by reference to a “**spectrum**” of factors of the kind examined in **Stovin v Wise** by Lord Nicholls³⁰ and by the “**candid evaluation of policy considerations**” by Lord Hoffmann³¹ in the same case.³² I agree with that view.

[69] The fact that the direct cause of injury to Ms. Gumbs was the allegedly deliberate conduct of Mr. Jose Vanterpool, a third party, does not prevent the Commissioner of Police (the 3rd defendant),

²³ At p 1026.

²⁴ At p 1027.

²⁵ *Brown v Heathcote County Council* [1986] 1 NZLR 76 at p 79 (CA) per Cooke P and *South Pacific Manufacturing* at pp. 294 – 295 per Cooke P and at pp. 305 – 306 per Richardson J, in application of the approach suggested by Lord Morris and Lord Pearson in *Dorset Yacht*, applied by Lord Keith of Kinkel in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 and formalised in the tripartite test adopted in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, where it was applied to a claim for economic loss. In *X* it was used by Lord Browne-Wilkinson in a case of physical harm to hold that no duty of care applied despite the fact that the defendant had not contested foreseeability and proximity. The “fair, just and reasonable” formula was confirmed in England as one of general application, not confined to claims for economic loss alone in *Marc Rich & Co AG v Bishop Rock Marines Co Ltd* [1996] 1 AC 211 at pp. 221 – 225 per Lord Lloyd.

²⁶ *Peabody and Caparo*.

²⁷ *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

²⁸ *Kamloops v Nielsen* [1984] 2 SCR 2, *Cooper v Hobart* [2001] 3 SCR 537.

²⁹ [2004] 1 WLR 1057 at p 1059 (HL).

³⁰ [1996] AC 923 at pp. 938 – 941.

³¹ At pp. 956 – 958.

³² (1998) 192 CLR 330 at para [242].

from being liable for its lack of care in the investigations into the alleged actions of the 1st defendant, if that want of care is causative of loss or harm. **Dorset Yacht** established as much. To the argument that no one is responsible for the acts of another not acting on his behalf, Lord Reid made the reply that the ground of liability was not responsibility for the acts of the escaping trainees but **“liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind”**.³³ If tortious or criminal action is the “very kind of thing” likely to result from such lack of care, the damage will not be too remote.³⁴

[70] **Dorset Yacht** also elucidates that statutory authority does not licence needless harm, carelessly caused.³⁵ It has been established since **Mersey Docks and Harbour Board Trustees v Gibbs**³⁶ that public bodies are liable in tort in the same way as private individuals. If public bodies act to create a danger or cause direct harm through use of their powers, there is no impediment to their liability on ordinary principles, unless such liability is inconsistent with the statute conferring their powers.

[71] A duty of care in the exercise of statutory obligations and powers will often be more readily apparent than in the case of private actors, as Lord Nicholls, dissenting, recognised in **Stovin v Wise**:³⁷

Parliament confers powers on public authorities for a purpose. An authority is entrusted and charged with responsibilities, for the public good. The powers are intended to be exercised in a suitable case. Compelling a public authority to act does not represent an intrusion into private affairs in the same way as when a private individual is compelled to act.

[72] Those operating under statutory duties, as the Attorney General and the Anguillan police who were investigating and prosecuting the 1st defendant, Jose Vanterpool, are not entitled to be indifferent bystanders. In **Stovin v Wise**, Lord Hoffmann, who delivered the leading speech for the majority, accepted that there is no **“why pick on me?”** concern in such cases.³⁸ In similar vein, Mason J in

³³ At p 1027.

³⁴ As Lord Reid made clear at p 1028, applying a dividing line proposed by Greer LJ in *Haynes v Harwood* [1935] 1 KB 146 at p 156 (CA).

³⁵ At p 1032 per Lord Reid and at p 1036 per Lord Morris.

³⁶ (1866) 1 LR HL 93.

³⁷ At p 935.

³⁸ At p 944.

Sutherland Shire Council expressed the view that the “**floodgates**” concern is not so potent with respect to public authorities, noting that:³⁹

It scarcely needs to be mentioned that the reasons which lie behind the common law's general reluctance to require an individual to take positive action for the benefit of others have no application to a public authority with power to take positive action for the protection of others by avoiding a risk of injury to them.

[73] In the present case, neither the Anguillan Police nor the Commissioner of Police could not be seen as indifferent bystanders. It was obliged to undertake the investigations which were its statutory duty. It had no discretion as to whether or not to supervise. Since it was obliged to exercise its statutory powers reasonably, a duty of care in negligence would “**march hand in hand**” with its statutory responsibilities.⁴⁰ The Anguillan police are properly to be regarded as professional people exercising skill, as Lord Bingham thought was significant in the case of the social workers in *X*,⁴¹ and as Lord Slynn accepted was important to consider in relation to the social workers in *Barrett*.⁴² The functions being performed were not self-evidently policy-laden, and to the extent that what happened may have been a result of closely balanced discretionary decisions, the care reasonably to be expected of the Anguillan police will be adjusted in considering breach. The recognition that probation officers must act with reasonable care is in line with what is expected of other skilled professionals, also acting in circumstances of pressure and when asked to make difficult judgments. It is not immediately apparent why employees of the Anguillan police force or even the Commissioner of Police should have an immunity not possessed by solicitors, nurses, and engineers or building inspectors, such as would be provided by denial of a duty of care.

[74] The statutory duties imposed on the officers of the Anguillan police force were not general, high level responsibilities of the type Lord Scott in *Gorringe* described as “**target duties**”.⁴³ With respect to such duties there may be reluctance to impose on public bodies liability for failure to use general powers to prevent harm.⁴⁴ This was the area of disagreement between the majority and minority in *Stovin v Wise*. It was also the area of difference between the views taken in *Takaro* by

³⁹ At para [37].

⁴⁰ *Stovin v Wise* at p 936 per Lord Nicholls.

⁴¹ At p 659.

⁴² At p 569.

⁴³ At p 1078.

⁴⁴ See *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 and *Stovin v Wise*.

the Court of Appeal and the Privy Council.⁴⁵ It may be more readily accepted that the existence of an action in negligence for acts and omissions in the course of exercising such high level responsibilities may be precluded as a matter of implied legislative intent. But, as Deane J suggested in respect of the liability of a building inspector in **Sutherland Shire Council**, no such legislative intent can be assumed **“where the relevant powers and functions are of a routine administrative or ‘operational’ nature”**.⁴⁶ As importantly for present purposes, in such circumstances he considered that **“the existence of the statutory powers and functions, the assumption of responsibility which may be involved in their exercise, or any reliance which may be placed upon a presumption that they have been or are being properly exercised”** may give a relationship between the public body and a private citizen **“a degree of proximity which [is] adequate to give rise to a duty of care under the principles of common law negligence”**.⁴⁷

[75] A duty of care may arise through the exercise or existence of statutory duties or powers. They may create sufficient relationship between the statutory authority and a person suffering harm as a result. That was the view of Lord Hutton in **Barrett**.⁴⁸ He cited as authority the judgment of Lord Greene MR in **Fisher v Ruislip-Northwood Urban District Council**,⁴⁹ holding that a local authority was liable in negligence for failing to light an air-raid shelter on the highway. There Lord Greene said:⁵⁰

Negligence is the breach of a duty to take care. That duty arises by reason of a relationship in which one person stands to another. Such a relationship may arise in a variety of circumstances. It will, to take a simple instance, arise when a person exercises his common law right to use the highway – by doing so he places himself in a relationship to other users of the highway

⁴⁵ *Rowling v Takaro Properties Ltd* [1987] 2 NZLR 700 (PC).

⁴⁶ At para [7]. Although an “operational”/“policy” divide has been doubted by some of the English cases (see, for instance, *Takaro* at p 709 per Lord Keith of Kinkel for the Board, *Gorringe* at p 1067 per Lord Hoffmann, and *Stovin v Wise* at p 951 per Lord Hoffmann), in Australia it was adopted by Mason J in *Sutherland Shire Council* at paras [38] – [39] and it is used in Canada (see *Kamloops v Nielsen* [1984] 2 SCR 2 at p 23 per Wilson J, *Just v British Columbia* at pp. 1239 – 1243 per Cory J, and more recently *Cooper v Hobart* [2001] 3 SCR 537). For present purposes it is enough to note that a similar concept is addressed by reference to “justiciability” in the English cases (see, for instance, *Barrett* at p 571 per Lord Slynn and at p 583 per Lord Hutton). For the purposes of considering whether the scheme of legislation is properly to be seen as excluding liability in negligence, the “operational”/“policy” division seems to us to be a useful consideration.

⁴⁷ At para [7].

⁴⁸ At pp. 577 – 585.

⁴⁹ [1945] 1 KB 584 (CA).

⁵⁰ At p 595.

which imposes upon him a duty to take care. Similarly, if the right which is being exercised is not a common law right but a statutory right, a duty to take care in its exercise arises, unless, on the true construction of the statute, it is possible to say that the duty is excluded.

Lord Greene considered that the exercise of such powers placed the authority **“in a relationship to the public which from its very nature imports a duty to take care”**.⁵¹

[76] In *Dorset Yacht*, Lord Pearson put the duty of care on the same basis. He considered that a duty of care arose **“to make proper exercise of the powers of supervision and control for the purpose of preventing damage to the plaintiffs as ‘neighbours’”**.⁵² A public policy in the system of borstal training (which was said to require that the inmates be given a considerable measure of freedom) would affect the content of the standard of the duty but not its existence:⁵³

The needs of the Borstal system, important as they no doubt are, should not be treated as so paramount and all-important as to require or justify complete absence of care for the safety of the neighbours and their property and complete immunity from any liability for anything that the neighbours may suffer.

[77] Liability in negligence arises where a defendant has assumed a responsibility to protect the plaintiff from injury, including at the hands of a third party. Such assumption of responsibility is illustrated by the case where a decorator failed to follow instructions to lock the door when he left the house where he was working, leaving it vulnerable to burglary.⁵⁴ If voluntary assumption of responsibility can give rise to sufficient proximity, it would seem odd if statutory imposition of responsibility is wholly irrelevant to the judgment whether there is a duty of care. I do not think it can be. In some cases such responsibility may be determinative. In others it may be simply one of the circumstances to be weighed. Key to the ultimate assessment will be the purpose of the statute and the ability of individuals to protect themselves from harm of the sort suffered. The last was a consideration which was important to Lord Atkin’s judgment in *Donoghue v Stevenson* that the manufacturer of the ginger beer owed a duty of care to consumers.

⁵¹ At p 615.

⁵² At p 1056.

⁵³ At p 1056.

⁵⁴ *Stansbie v Troman* [1948] 2 KB 48 (CA).

[78] **Fisher v Ruislip-Northwood** was relied upon by Mason J in **Sutherland Shire Council** in developing the view that proximity sufficient to give rise to a duty of care may arise out of the existence of public duties when there is “**general reliance**” upon the proper exercise of such powers:⁵⁵

There will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on the one side (the individual) ... a general reliance or dependence on its exercise of power. The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building by a fire authority ... may well be examples of this type of function.

[79] The statutory obligation is I think highly relevant to the judgment of sufficient proximity between the claimant and statutory authority to give rise to an actionable duty of care. And in some cases, particularly those where individuals cannot reasonably protect themselves from risk which a statutory body has a duty to abate or manage, I consider that sufficient proximity may well follow from the statutory obligations.

[80] The scope of those to whom the officers of the Anguillan police force might ultimately be liable will be relevant in any final determination of whether there is a duty of care. As indicated, I do not think that the authorities compel the view that duties of care can be owed only to those who are members of a limited class. It is in the nature of public functions that those foreseeably at risk if statutory responsibilities are discharged negligently will be a wide class, perhaps as wide as the general public if the responsibilities are imposed for public protection (as the duties imposed by the Constitution and other pieces of legislations that confer on the Anguillan police force wide powers of investigation and protection of matters within the purview of the police force explicitly are), and if the risk warrants it. Actual liability will be limited by the need to show causation and by principles of

⁵⁵ At para [29].

remoteness of damage. Although duties of care may be expressed as being owed by manufacturers to consumers for defective products, by public authorities to road users for highway hazards, by local councils to owners and occupiers of houses for building defects, by the police to “young people” at risk from a pedophile, these “categories” effectively amount to recognition of duties to the whole world. However, at least in the case of physical harm, it is only those who come within the vicinity of the hazard who will be harmed and who may have a claim. In principle, therefore, I do not see a decisive impediment to proximity in the breadth of the class to whom the Anguillan police force might owe a duty of care in the investigation of matters or incidents complained of by citizens or residents of Anguilla. If the officers of the Anguillan police force are shown to have acted below the standard reasonably to be expected and that want of care is causative of loss or harm, it is not immediately clear that the plaintiff/claimant should not be able to claim as a member of the public if she suffered harm, if the public generally is foreseeably at risk and the harm not too remote. Much will depend on the nature of the risk and whether it is significant enough to import the necessary relation.

[81] On any view, knowledge of the risk posed by Jose Vanterpool will be critical to an ultimate conclusion of legal responsibility. It turns on facts yet to be established. It was intimated that nothing in Jose Vanterpool’s past record indicated any propensity for such violence or that those residing in the wider community of Anguilla would be at risk. Counsel for Ms. Gumbs points to the complaints that were made by the claimant to the Anguillan police and that they were not acted upon. Such matters cannot be resolved on partial pleadings and without evidence. On the basis of the undisputed information before the court, for the purposes of this preliminary application, it cannot confidently be concluded that Ms. Gumbs will be unable to establish knowledge on the part of the Commissioner of Police that should have alerted its officers to a risk of a magnitude that made it a breach of duty to fail to exercise available powers of control and investigation of allegations under the Anguilla Police Act and of physical proximity between Ms. Gumbs and Jose Vanterpool, or to take such other steps as were reasonably available to eliminate or contain the risk.

[82] In both **X** and **Barrett** members of the House of Lords expressed the view that in considering the liability of public authorities, **“the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-**

considerations are required to overrule that policy”.⁵⁶ William Young P seems to have taken the view that the statutory regime of compensation overtakes this principle. However, the continued role of exemplary damages may indicate that the remedy for a wrong is not to be seen in terms of compensatory damages only. If the plaintiff has suffered wrong due to egregious fault on the part of the defendant, there may be public policy in the remedies of vindication, insistence on proper standards, and general deterrence provided through exemplary damages. An ability to call to account those who cause such harm through serious fault may be thought to serve a public need. In this connection it is of significance that the harm for which redress is sought is physical injury, not economic loss or nervous shock. These floodgates considerations are less potent in the case of physical injury.

[83] Women, children and young people who make sexual assault and domestic abuse complaints to the all-powerful State are considered to form part of a vulnerable class of people. They do not have the knowledge of risk possessed by the officers of the Anguillan police force. In circumstances where several statutes have the explicit purpose of protection of women, children, young persons and vulnerable persons, and an obligation to take reasonable care is consistent with these statutory obligations, this vulnerability supports the recognition of a duty of care.⁵⁷ There is no public law remedy for those injured if the officers (employees) of the Anguillan police force act carelessly in the discharge of their responsibilities. This circumstance was one thought to support a duty of care in negligence by Lord Nicholls in **Stovin v Wise**.⁵⁸

[84] Although vulnerable women are not analogously under the close control exercised in respect of prison inmates, they are nevertheless subject to continuing supervision and control in the ways already described. It is analogous rather to other cases in which powers of control have been significant in the recognition of a duty of care such as the school/pupil control in **Carmarthenshire County Council v Lewis**,⁵⁹ the prison authority/prisoner control in **Ellis v Home Office** and **D’Arcy v Prison Commissioners**, and the borstal officer/trainee control in **Dorset Yacht**. The fact of control means that the present case comes within established principle and is suitable for strike out.

⁵⁶ X at p 749 per Lord Browne-Wilkinson. See also at p 663 per Lord Bingham and Barrett at p 568 per Lord Slynn.

⁵⁷ *Stovin v Wise* at p 940 per Lord Nicholls.

⁵⁸ At p 940.

⁵⁹ [1955] 2 WLR 517 (HL).

[85] In **Osman v Ferguson** the Court of Appeal in England held that the plaintiffs had been “**exposed to a risk [from the immediate wrongdoer] over and above that of the public at large**”.⁶⁰ That risk was found to give rise to a “very close degree of proximity”⁶¹. In **Swinney v Chief Constable of the Northumbria Police Force** the Court of Appeal held that it was at least arguable that the plaintiffs were “**distinguishable from the general public**” because they were “**particularly at risk**”.⁶² In **Palmer v Tees Health Authority** Gage J spoke of the plaintiff victim as not being a person who was subject to a “**special or exceptional or distinctive category of risk**”.⁶³ The relevance of the circumstance is that there is no common law duty of care

[86] In **Van Colle** and **Smith**, two associated cases heard together, the complaint was that police had failed to follow up reports of threats to kill. In **Van Colle**, the alleged failure had resulted, it was claimed, in the killing of the individual who was the subject of the threats. In **Smith**, the victim was seriously injured. The first case was brought solely under the Human Rights Act, alleging violation of article 2. It failed on its facts. In **Smith**, no HRA claim was made. The appellant relied solely on the common law, alleging negligence by the police. The House of Lords rejected the argument that “the common law should now be developed to reflect the Strasbourg jurisprudence about the positive obligation arising under articles 2 and 3 of the Convention” (para 136). A similar approach was taken by the majority in that court in **Michael v Chief Constable of South Wales Police** [2015] AC 1732.

[87] As Laws LJ, in the Court of Appeal in another case pointed out, the essence of the argument on behalf of the appellants in those cases was that the common law rule (that police owe “no general duty of care. ... to identify or apprehend an unknown criminal, nor. ... a duty of care to individual members of the public who might suffer injury through the criminal’s activities ...” - **Hill v Chief Constable of West Yorkshire Police** [1989] AC 53) should be moderated so as to accommodate

⁶⁰ [1993] 4 All ER 344 at p 350 (CA). The immediate wrongdoer was a male school teacher who had formed an unhealthy attachment to the 15 year old male plaintiff. In the course of an interview with a police officer, as a result of his having thrown a brick through a window at the boy’s home, the teacher said that he was distressed by the loss of his job and there was a danger he would do something “criminally insane”. The police laid an information against the teacher for the brick incident but did not serve the summons. A little later the teacher followed the boy to his home and there shot and severely injured him, and killed his father. The boy and his mother (as administratrix of her late husband) brought proceedings against the police. Although the Court of Appeal found sufficient proximity, they held that for policy reasons no duty of care was owed.

⁶¹ At p 350.

⁶² [1997] QB 464 at p 479.

⁶³ (1998) 45 BMLR 88 at p 101 (QB). A psychiatric patient told medical authorities he would murder a child following discharge. He did just that. The victim lived on the same street as the man who killed her. This degree of physical proximity was not regarded as giving rise to the necessary special and distinct risk. This aspect did not feature on appeal: [1999] 1 Lloyd’s Med Rep 351 (CA).

the ECHR - para 30. As he observed, the converse is contended for in this appeal. The appellant and the Secretary of State argue that the exemption from liability of the police at common law should be extended to claims advanced under HRA so that the two systems should be in harmony. There are two reasons for rejecting the argument.

[88] In the first place, the bases of liability are different. In as much as it was considered that the common-law duty should not be adapted to harmonise with the perceived duty arising under the Protection of Fundamental Rights and Freedoms sections of the Anguilla Constitution Order 1982, so should the latter duty remain free from the influence of the pre-Protection of Fundamental Rights and Freedoms domestic law. Alternatively, it requires, at least, to be considered on its own merits, without the encumbrance of the corpus of jurisprudence under common-law.

[89] Secondly and more importantly, no assumption should be made that the policy reasons which underlay the conclusion that an exemption of police from liability at common law apply *mutatis mutandi* to liability for breach of Constitutional rights. In **Michael** much of the debate as to whether police owed a duty to an individual member of the public centred on the question whether there was a sufficient proximity of relationship between the claimant and the police force against whom action was taken. No such considerations arise in the present context. The issue here is simple. Did the state through the police force fail to comply with its protective obligation under sections 1 and 6 of the Anguilla Constitution Order 1982 and the Anguilla Police Act?

[90] The other principal argument advanced on behalf of the police in **Michael** was that it would not be “fair, just and reasonable” to impose liability on them for failings in individual cases. This is a concept with which the common law, with its innate flexibility, can cope but it is not one which can easily be accommodated in Convention jurisprudence.

[91] The police either have a protective duty under sections 1 and 6 of the Anguilla Constitution Order 1982 or they do not. The presence of the duty cannot depend on one’s conception of whether it is fair, just or reasonable for it to exist.

[92] Lord Hughes had said (in para 130 of his judgment) that law enforcement and the investigation of crime involve a complex series of judgments and discretionary decisions; that they concern the choice of lines of inquiry, the weighing of evidence and the allocation of finite resources. All of that is unexceptionable. But the claim that to “re-visit such matters step-by-step by way of litigation ... would inhibit the robust operation of police work ... divert resources from current inquiries [and act as a deterrent] not a spur to law enforcement” is unsupported by any evidence. In the first place,

none of the cases cited above required a painstaking, minute examination of decisions taken by police.

[93] Carrying out police investigations efficiently should not give rise to a diversion of resources. On the contrary, it should lead to more effective investigation of crime, the enhancement of standards and the saving of resources. There is no reason to suppose that the existence of a right under the Constitution to call to account egregious errors on the part of the police in the investigation of serious crime would do other than act as an incentive to avoid those errors and to deter, indeed eliminate, the making of such grievous mistakes.

[94] The statement made by Lord Hughes (in para 130) about the undesirability of the investigation of terrorist activity and the “delicate and difficult decisions” it involves being subject to review would be a powerful factor, if it were a possible consequence of following the human rights jurisprudence in this area. But, in my view, it is not. As was previously stated by other tribunals, only obvious and significant shortcomings in the conduct of the police and prosecutorial investigation will give rise to the possibility of a claim. Therefore, there is no reason to suppose that courts will not be able to forestall challenges to police inquiries based on spurious or speculative claims.

[95] I therefore, favour the wider approach that has been adopted by other modern jurisdictions based on evolving constitutional rights, namely that a claimant need only establish serious defects in the investigation into his or her particular case, irrespective of whether they are systemic or operational failures.

[96] Indeed, in my view, there are good reasons for favouring the wider approach. First, one starts with the proposition that, given that it is rightly accepted on all sides that the authorities have an investigatory duty, it would be of little value unless it was a duty to investigate effectively. Provided that courts bear clearly in mind “the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources” and the need to interpret the duty “in a way which does not impose an impossible or disproportionate burden on the authorities” (**Osman v United Kingdom** (1998) 29 EHRR 245, para 116), I find it difficult to understand why an investigation which is seriously defective in purely operational terms should, in effect, be held to satisfy the investigatory duty.

[97] There are also forensic considerations. In that connection, I would start by rejecting the notion that it could be right for a court to dismiss a claim that an investigation was seriously defective simply because the relevant police procedures as set out in official documents were satisfactory. It would

not merely be formalistic, but both unjust and unrealistic, to hold that an investigation, which was seriously systematically defective in practice, nonetheless complied with the statutory duty simply on the grounds that, while the systemic defects occurred in practice, they did not reflect the systems as laid down officially. Whether the wider or the narrower approach is correct, the court must surely consider the real, not the hypothetical.

[98] Once that is accepted, I consider that the narrower approach could present a court with difficult practical, categorisation, and apportionment issues. Whichever approach applies, a court must inevitably start by considering the failures in the particular case. On the wider approach, the court would simply ask whether those failures were sufficiently serious to represent an infringement of the investigatory duty. On the other hand, on the narrower approach, the court would have to consider which of the failures were operational and which were systemic, and that, as I see it, is where problems would often start. Serious operational failures by individual officers would frequently throw up arguable systemic issues, such as systems of supervision or even of appointment of those officers. And, in order to decide whether the operational failures were systemic in origin, the court might often have to embark on an inquiry whether, for instance, the failures were redolent of what happened in other investigations. That could involve a potentially time-consuming and expensive inquiry into other investigations, as well as arguments as to the number and types of investigation, if any, to which the inquiry should be restricted. The question whether the defective investigation was attributable to systemic, rather than purely operational, failures could also involve difficult issues of categorisation and inference. For instance, in many cases it may be hard to decide whether a particular failure is operational or systemic, or whether the operational failures in an investigation or a set of investigations entitle the court to infer a systemic failure. And what happens if, as may very often be the case, there are some operational failures which are purely operational and some which are attributable to structural failures?

[99] I do not consider that my view is undermined by the reasoning expressed or conclusions reached in **Hill v Chief Constable of West Yorkshire Police** [1989] 1 AC 53, **Brooks v Comr. for the Police for the Metropolis** [2005] 1 WLR 1495, **Van Colle v Chief Constable of Hertfordshire Police**; **Smith v Chief Constable of Sussex Police** [2009] AC 225 and **Michael v Chief Constable of South Wales Police** [2015] AC Page 31 1732. Those cases establish that, absent special factors, our domestic law adopts the view that, when investigating crime, the police owe no duty of care in tort to individual citizens. That is because courts in this country consider that the

imposition of such a duty would, as Lord Hughes puts it, “inhibit the robust operation of police work, and divert resources from current inquiries; it would be detrimental, not a spur, to law enforcement”. That view is entirely defensible, but, at least in the absence of concrete evidence to the contrary, so is the opposite view that the imposition of such a duty, provided that it is realistically interpreted and applied, would serve to enhance the effectiveness of police operations. It is therefore understandable that human rights law, with its investigatory duty under the Constitution, differs from domestic tort law in holding that it is right to impose an investigatory duty on the police. Just as the majority of the United Kingdom Supreme Court accepted in **Michael**, at paras 123-128, that the domestic tortious test for liability should not be widened to achieve consistency with the human rights test, so should the human rights test for liability not be narrowed to achieve consistency with the domestic, tortious test.

Duty to Prosecute & Investigation

[100] General duties of the Force

20. It shall be the duty of all police officers—

(a) to preserve the peace and prevent and detect crimes and other infractions of the law;

[101] It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgment on the facts of each case. It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted. Those suspected of terrorism, hijacking or child abuse are obvious examples. This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecutions do not allow their awareness of political or public opinion to sway their professional judgment.

[102] It is well-established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review: **Matalulu**, above, pp. 735-736; **Mohit v Director of Public Prosecutions of Mauritius** [2006] UKPC 20, paras 17, 21. It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: “rare in the

extreme” (*R v Inland Revenue Commissioners, Ex p Mead* [1993] 1 All ER 772, 782); “sparingly exercised” (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140); “very hesitant” (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); “very rare indeed” (*R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); “very rarely” (*R (Birmingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 371, Lord Steyn said:

“My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.”

With that ruling, other members of the House expressly or generally agreed: pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute (see Mohit, para 18): in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy: *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800, para 67; *Matalulu*, above, p 736. In *Wayte v United States* (1985) 470 US 598, 607, Powell J described the decision to prosecute as “particularly ill-suited to judicial review.”

[103] The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:

- (i) “the great width of the DPP’s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits” (*Matalulu*, above, p 735, cited in *Mohit*, above, para 17);
- (ii) “the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account” (counsel’s argument in *Mohit*, above, para 18, accepting that the threshold of a successful challenge is “a high one”);
- (iii) the delay inevitably caused to the criminal trial if it proceeds (*Kebilene*, above, p 371; *Pretty*, above, para 77);

- (iv) “the desirability of all challenges taking place in the criminal trial or on appeal” (Kebilene, above, p 371; and see Pepushi, above, para 49). In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (R v Horseferry Road Magistrates’ Court, Ex p Bennett [1994] 1 AC 42). But, as Lord Lane CJ pointed out with reference to abuse applications in Attorney-General’s Reference (No 1 of 1990) [1992] QB 630, 642,
- (v) the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts: Director of Public Prosecutions v Humphrys [1977] AC 1, 24, 26, 46, 53; Imperial Tobacco Ltd v Attorney-General [1981] AC 718, 733, 742; R v Power [1994] 1 SCR 601, 621-623; Kostuch v Attorney General of Alberta, above, pp 449-450; Pretty, above, para 121.

Discussion & Finding: The Striking Out Application

[104] I have paid particular regard to the submissions of Counsel and have perused the claim and statement of case in question.

[105] In this application, Mr. Horsford relied on **Part 26.3(1) (b) & (c) of the Civil Procedure Rules 2000**. Further, **Part 26.3 (1) of CPR 2000** empowers the Court to strike out a statement of case or part thereof if it amounts to an abuse of the process of the Court or if it is likely to obstruct the just disposal of the proceedings and also if there is no reasonable grounds for bringing or defending the claim.

[106] **Part 26.3 (1) of the Civil Procedure Rules 2000** also provides that: “In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court:

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

[107] In order to succeed on this application, the 2nd defendant on behalf of the 3rd and 5th defendants must establish that the claim of the claimant is bound to fail against 2nd, 3rd and 5th defendants.

[108] The principles to be applied in relation to the summary disposal of cases are well established. The objective of resolving issues at an early stage is to save time and costs, which is an important feature of active case management. In deciding whether to exercise powers of summary disposal, the court must consider whether the overriding objective of dealing with cases justly is better served by the summary disposal of a particular issue or by letting all matters go to trial so that they can be fully investigated and an informed decision arrived at: **Three Rivers District Council v**

Bank of England [2001] 2 All ER 513. Although the above principles were adumbrated in relation to the summary dismissal of cases, the discretion to strike out is subject to similar considerations and, where the allegation involves the failure to disclose grounds for bringing or defending a claim, is exercisable where the claim is bound to fail on its merits or as a matter of law. An important consideration is that the court, when faced with an application to strike out, must consider whether the justice of the case militates against this nuclear option and requires a more proportionate response: **Real Time Systems Limited v Renraw Investments Ltd.** [2014] UKPC 6.

[109] The authorities postulate that in many cases there will be alternatives which enable the court to deal with a case justly without taking the draconian step of striking it out, having regard to the armoury of powers available under the CPR 2000, including the power to order a party to supply further details or to file an amended pleading within a specified time subject to conditions stating the consequences of non-compliance (which may also include striking out): **Asiansky Television Plc. v Bayer** [2001] EWCA Civ. 1792; **Real Time Systems Limited v Renraw Investments Ltd.** (supra).

[110] In the circumstances, it is the claimant's claim and statement of claim which must be under consideration by this court, for the purpose of determining whether the claimant's claim and statement of case should be struck out.

[111] As regards whether the claimant's claim and statement of claim constitute an abuse of process, it ought to first be recognized that **rule 26.3 (1) (c)** gives this court the power to strike out a statement of case which is an abuse of the court's process. As stated in **Hunter v Chief Constable of the West Midlands Police**, by Lord Diplock – [1982] AC 529, at 536, this is a 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.'

[112] In **Baptiste v Attorney General** GD 2014 HC 15, and. in **Tawney Assets Limited v. East Pine Management Limited and Ors** Civ Appeal HCVAP 2012/007, Mitchell JA at paragraph 22 stated:

"The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases...The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the

statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.”

[113] The applicant is vehemently contending that the claimant’s claim should be struck out on the ground that the same discloses no reasonable grounds for bringing the claim (‘reasonable cause of action.’). **Rule 26.3 (1) (b)** of the **C.P.R. 2000** permits this court to strike out a claim on the basis that same discloses no ‘reasonable grounds for bringing or defending a claim.’ I am prepared for present purposes, to equate the phrase – ‘no reasonable cause of action,’ with the phrase ‘no reasonable grounds for bringing a claim.’

[114] An application to strike out a party’s statement of claim on that basis must be distinguished from an application for summary judgment.

[115] Upon an application for summary judgment, this Court can consider the evidence expected to be relied on by the respective parties at trial. In that regard, see: **Three Rivers district Council v Bank of England (No. 3)** supra.

[116] That though, will be the approach to be taken by this Court, upon its consideration of an application to strike out on the ground that the statement of case discloses no reasonable grounds for bringing the claim in so far as, upon such an application, this Court is constrained to only consider that which has been expressly set out in the claimant’s statement of case.

[117] It is either that the claimant’s statement of case disclosed reasonable grounds for bringing the claim, or it does not. The answer as to whether the same does so or not must be found from a careful consideration of only that which is, to use a descriptive phrase, ‘within the four (4) corners of the claimant’s statement of case.’

[118] In the claimant’s statement of claim, it has been alleged as follows: ‘On or around 21 January 2020, the claimant made a police report against the 1st defendant to the Royal Anguilla Police Force with a view to pressing criminal charges against him in relation to the incident of 14 January and 15 January 2020. The claimant provided two written statements to the police dated 21 January 2020 and 24 January 2020.

[119] The claimant’s statement of claim, in paragraph sixty-six (66) of that sixty-eight (68) paragraph document stated as follows: ‘The Claimant claims that the Second and Third Defendants were negligent in that they breached their duty of care which they owed to the Claimant as a citizen and resident of Anguilla, in their failure to properly investigate (if at all) and/or prosecute the Claimant’s complaints against the First Defendant pursuant to her statements of 21 January and 24 January

2020, which they were required to so do in their capacity as investigatory and law enforcement authorities of Anguilla, thereby causing irretrievable loss of critical evidence relevant to the Claimant's complaints and breach of the Claimant's fundamental right to justice.'

[120] Lord Woolf pointed out in **Kent v Griffith** [2001] 1 QB 36 that it is not accurate to say that a court should be reticent about striking out a statement case (or defence in this case) that has no real prospect of success when the legal position is clear and the investigation of the facts would be of no assistance. Indeed his Lordship said that the courts are now being encouraged to take issues that have been or can be identified at an early stage and deal with them so that time and expense can be saved. Active case management is an ongoing process. It does not stop because this or that application is being made. It may be that during the application the issues become more sharply defined. The applicable law becomes evident. If that is the case, it makes no sense to say that because there is this particular application then that application alone is an end in itself and the court should not take all opportunity to resolve other issues. Once the parties have the opportunity to make their case then there can be nothing wrong with using case management powers to deal with the case justly and save expense regardless of the application being made.

[121] The point being made by this court is that the **CPR 2000** is a new procedural code (it is not an updated version of the old and defunct Civil Code) with expanded powers to manage cases in such a manner that cases that should not go to trial are identified and disposed of early. Striking out is not the only way of stopping cases from going forward. The power of active case management exists at all times whilst the case is within the court system. It is time we left behind the notion of trying to fit the old Civil Procedure Code with all its defects into CPR 2000. New at any pertinent time still means new and resist the attempt of pouring "new wine" into the "old wine skins" of the former Civil Procedure Code.

[122] Rule 25 of the CPR urges the court to identify issues at an early stage. Resolve those that can be resolved at the time the case is before the court. The issues can be identified through pleadings; they can be identified with greater precision during various applications. This court has had experience where during applications the parties see both their case and other side's with greater clarity and that has led to settlements and in some cases discontinuance of the claim. If this happens then the objectives of the new rules are being met. The trial-at-all-cost mentality is behind us. It cannot be that because a particular application is being made the court must sit like an entombed mummy or like a Jack in the box popping up to do the bidding of he or she who winds up

the key for the box, ignore the possibility of clarifying the matters so that a settlement on some or even all issues can be arrived at. Why this can happen is that the litigants are under the specific obligation of assisting the court to further the overriding objective. One way of doing this is admitting facts when the party so doing knows that what is being said is true. We are long past the days of mechanical judicial responses to applications and blinkered vision. The new rules empower the courts to seek to resolve as many issues as possible on each occasion the case comes before the court. This is what active case management looks like.

[123] Lord Woolf indicated in *Kent* that there may be cases where the critical facts need examination in detail but this is not because it arises in any particular corner of the law but because the pleaded cases show that there are important facts to be determined which cannot be decided on the pleadings.

[124] Ms. Lim posited that the test to determine whether it is appropriate to strike out the claim is that if there are central issues in dispute, striking out is not appropriate and an option the courts should have restraint in applying. The claimant's claim raises several central factual and legal issues in dispute of the claimant's statement of claim and it is submitted that the statement of case should not be struck out.

[125] The Rules declare that its overriding objective is to empower the court to save time and costs by dealing with matters expeditiously. If there are no reasonable grounds for bringing an action, the court ought to strike it out pursuant to rule 26.3 (1) (b).

Conclusion

[126] Mr. Horsford submitted that the claim and statement of case did not disclose any justiciable grounds for the allegations of battery; assault; negligence; and false imprisonment as there was no factual basis for rebutting the allegations that the claimant was the victim of these torts.

[127] Striking out of a claim, should always be a matter of last resort and thus, should only be ordered by a court in plain and obvious cases: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 AC 1, esp. at [96] – [97].

[128] **Rule 26.1 (i) of the C.P.R. 2000** allows this court to dismiss or give judgment on a claim after a decision on a preliminary issue.

[129] I have borne in mind that the court should only exercise its power to strike out in “plain and obvious” cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: **Kwa Ban Cheong**, citing **North West Water Ltd v Binnie & Partners** [1990] 3 All ER 547 at 553. I am fully cognisant that the role of the Court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see **Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others** [1997] 3 SLR(R) 649 at [18] and The “**Osprey**” [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court, and conducting a trial of the case in chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see **Ko Teck Siang and another v Low Fong Mei and another and other actions** [1992] 1 SLR(R) 22 at [15], citing **Wenlock v Moloney** [1965] 2 All ER 871 at 874.

[130] The allegation of negligence is sufficiently particularized for the purposes of the claim against the 3rd defendant: the Commissioner of Police, this is a claim for damages for negligence, and the defendant would be raising a denial of the claimant’s case. I do find that both sides have raised triable issues which require a hearing.

[131] I find that the claim against the Attorney General and the Government of Anguilla is unsustainable and there are no reasonable grounds for bringing the claim against them. In the final analysis, it is apparent to this court, that neither the claimant’s claim nor the statement of claim discloses any reasonable grounds for bringing this claim against the 2nd and 5th defendants only. However, there is some merit in the claim as against the 3rd defendant.

[132] Finally, I wish to thank learned Counsel for their submissions in this matter.

[133] The defendant’s application to strike out the claimant’s claim and statement of claim as against the claimant’s case for negligence against the 2nd and 5th defendants only is granted and these are the orders that follow:

[134] **Orders**

- (i) For the above reasons and upon an overall consideration of the matter, I am of the view that the 2nd defendant has established that the claimant’s claim should be struck out pursuant to Part 26.3 (1) (b) of the CPR 2000 in relation to the negligence claim as against

the 2nd and 5th defendants only. I would therefore grant the application; the claimant's claim and statement of claim stand as struck out in relation to the breach of duty owed to the claimant as against the 2nd and 5th defendants only.

- (ii) The application of the 2nd defendant to have the claim struck out as against the 3rd defendant, the Commissioner of Police is refused and the claim and the parts of the statement of claim stand as against the 3rd defendant.
- (iii) The matter is referred to mediation at the pre-crystallization of this claim.
- (iv) Matter is set for November 4th, 2020 for Case Management Conference.
- (v) The costs of USD\$1,500.00 of the 2nd defendant's application to strike out the claimant's claim and the statement of claim are awarded to the 2nd and 5th defendants.
- (vi) The claimant shall file and serve this order.

Ricardo Sandcroft
Master [Ag]

By the Court

Registrar