

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

Claim Numbers: **SLUHCV2019/0509**

Between

SHANE AVRIL

Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Appearances: Mr. Huggins Nicholas of Counsel for the Claimant
Mr. Rene Williams Counsel for the Defendant

2020: May, 14th

2020: July, 8th

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: Presently serving before this court, under the judicial scalpel, is a critical application for determination, viz the claimant is requesting that the Defence of the defendant be struck out because it disclosed no reasonable grounds for defending the claim. That the defendant had accepted liability by conceding that the claimant suffered serious injuries at the hands of a ward while in the care and custody and under the control and management of the servants and agents of The State and therefore liability was no longer a live issue for determination by the court.
- [2] The issues raised by the applicant in the application for striking-out is that the issue as to whether the claimant was sufficiently compensated for the injuries suffered is not a question for the Attorney General but one for the High Court on an Assessment of Damages exercise. And that an estoppel by approbation and reprobation arises in that the defendant cannot be made to approbate and simultaneously reprobate.

Background/Chronology

- [3] The claimant/applicant commenced these proceedings against the defendant/respondent by Claim Form and Statement of Claim filed on 21st October 2019 and Amended Statement of Claim filed 8th November 2019. An agreement for an extension of time to file a Defence was filed on 29th November 2019 whereby the time for filing a Defence was extended to 25th January 2020. A Defence was filed on 24th January 2020.
- [4] An application to strike out the defence, accompanied by affidavit in support was filed by the claimant on 30th January 2020. An amended defence was filed on 25th February 2020. An affidavit in reply to the claimant's application was filed on 26th February 2020.
- [5] 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.

Claimant's/Applicants' Submissions

- [6] The claimant/applicant has applied to strike out the defendant's Defence and amended defence, 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.”**

- [7] Mr. Nicholas also submitted that the defence and amended defence did not disclose a defence to 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 the aforesaid torts.
- [8] Counsel posited that compliance with the **Children and Young Persons Act Chapter 3.09** would be the only defence which would be opened to the defendant/respondent to have advanced; that it took all reasonable steps as a custodian in protection of the welfare of a juvenile, to ensure that he was kept in such a place where he would be protected from the type of attack which the claimant suffered.
- [9] Counsel also posited that there was nothing in the defence and amended defence of the defendant to show that it ensured compliance with The **Children and Young Persons Act Chapter 3.09** by providing a safe place and a secured living environment for the claimant as required by the said legislation.
- [10] Counsel further posited that the defendant had not adduced any evidence, whether through its pleading of the facts that supported its denial or established facts to show that the incident did not occur as alleged by the claimant, that was capable of raising a dispute of fact or of law which must be tried.
- [11] Counsel submitted that the defence did not raise any serious issues of fact which were diametrically opposed to the allegations raised by the claimant/applicant and which could only be resolved by the trial process of hearing evidence and arguments to determine where the truth lay.
- [12] Counsel also submitted that the defendant had failed to raise matters, either to prove as a fact or to cause an inference to be drawn, that there were supervening events which broke the chain of causation between the duty of care which it owed to the claimant and which was breached, thereby causing the claimant to suffer injury.
- [13] Mr. Nicholas further submitted that there were no reasonable grounds for defending the claim in that the defendant had conceded the following:-

- (i) That the claimant was indeed a ward of the institution called the Boys Training Centre.
- (ii) That the defendant was authorised in law to accept the claimant as a lawful ward when and in cases where he was sent to the Boys Training Centre for care and protection by the Order of a Magistrate.
- (iii) That the Boys Training Centre is a suitable place where inmates and wards may be institutionalised for care and protection.
- (iv) That the Boys Training Centre is equipped with the personnel and resources to ensure that wards and persons sent for care and protection are kept in a safe and satisfactory environment.
- (v) That at the time of the incident giving rise to this claim the claimant was on the compound and under the care, custody and management of the defendant.
- (vi) That the ward who administered the beating on the claimant was also under the care, custody and management of The defendant and was not a trespasser who illegally forced his way on to the compound of the Boys Training Centre.
- (vii) That there was foreseeability on the part of the defendant who knew that these types of squabbles and inflicting of blows are likely actions which are performed by boys in need of care and protection and who are sometimes hyperactive and beyond control.
- (viii) That there was also proximity, that is to say, such close and direct relations between The Claimant and The Defendant that the act complained of directly affects The Claimant who is a person whom The Defendant, the person alleged to be bound to take care would know would be directly affected by his careless act.

Claimant's/Respondent's Submissions

[14] Mr. R. Williams, for the defendant, submitted that an application to strike out a defence is governed by Rule 26.3(1) of the **Civil Procedure Rules** (*hereinafter referred to as "CPR"*) which states 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.

[15] Mr. Williams 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. Counsel stated that the defence should not be struck out as against the defendant; the defendant 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 defendant. The defendant 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.

[16] Counsel posited that the case of **Tawney Assets v East Pine Management Ltd. And Others** HCVAP 2012/007, where the courts 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.

[17] Counsel also posited that the legal principle in **Tawney Assets supra**, stated that once the defence had raised serious live issues of fact which could only be determined on hearing oral evidence, then the defence should not be struck out. Therefore, there were several issues raised in the defence disputing the claimant's allegations as set out in his amended statement of claim.

[18] Mr. Williams further posited that the defence disputed in its entirety that the claimant was not falsely imprisoned by the defendant (at Paragraph 22 of the Defence) and indicated that no agent of the state, in any manner, deprived the claimant of his liberty.

[19] Mr. Williams also submitted that the defence disclosed reasonable grounds to defend the claim in that the defence disputed the negligence alleged by the claimant and outlined the factual steps taken by the staff of the BTC in relation to the matter. It was indicated that the staff of the BTC took the following steps in responding to the incident:

- I. Removed the cricket bat and restrained Joakim Duncan, also known as Joakim Duncan, after the incident occurred.

- II. The officer on duty who was trained in CPR performed medical techniques on the Claimant.
- III. The officer on duty immediately contacted an ambulance for medical assistance.
- IV. The officer on duty alerted the Manager and other staff of the BTC of the situation.
- V. Joakim Duncan, also known as Joakim Duncan, was removed to another secure area of the BTC compound.
- VI. The officer on duty accompanied the claimant in the ambulance along with medical personnel to the Victoria Hospital.
- VII. The BTC Staff notified the claimant's family of the situation.
- VIII. After the incident the BTC provided transportation from the claimant's home to all subsequent visits to Cana Neuro Services for the Claimant's medical treatment.
- IX. The BTC covered the cost of all of the claimant's medical treatment at the Cana Neuro Services during his recovery process.
- X. The BTC provided a guidance counsellor to accompany the Claimant on the aforementioned visits and assist with his recovery needs.

[20] Council further submitted that the defence disclosed reasonable grounds for defending the claim and as such, the defence was not suitable to be struck out.

[21] Mr. Williams also posited that it was the court which must consider whether the defendant's defence disclosed any reasonable grounds for defending the claimant's claim of negligence.

Issues

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

- [22] (a) whether the defendant owes a statutory duty of care to the claimant and whether that duty of care was breached causing damage to the claimant;
- (b) whether the defendant is estopped from denying liability based on its prior approbation;
- (c) whether the court should strike out the defence as an abuse of process;

- (d) whether this court should strike out the defence of the defendant on the basis that it discloses no reasonable ground for defending the claim and uphold the claim of negligence against the defendant.

Discussion & Analysis

Duty of Care/Statutory Liability of the Defendant

[22] 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 had a record of previous escapes from borstal institutions.

[23] 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

[24] 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.

[25] 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

¹ [1970] AC 1004.

² At pp. 1061 and 1062.

³ At p 1070.

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 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

[26] 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

[27] 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

⁴ At p 1034.

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.

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

[28] 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.”

[29] 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.

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].

[30] 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 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.

[31] 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

¹⁵ At p 1070.

¹⁶ At p 1070.

¹⁷ At pp. 1070 – 1071.

be misleading if they are taken to suggest purely temporal or spatial concerns.¹⁸ Nor does the 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.

[32] 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.

[33] 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.”

[34] 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**

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

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.

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 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

[35] **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 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

[36] Except in cases of clear impediment (such as where tortious liability is inconsistent with statute), the judgment 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.

²² At p 752.

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].

[37] The fact that the direct cause of injury to Mr. Avril was the deliberate conduct of Joakim, a third party, does not prevent the Boy's Training Centre from being liable for its lack of care in the boys' supervision, if that want of care is causative of loss. **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

[38] **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.

[39] 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.

[40] Those operating under statutory duties, as the Boys Training Centre was in supervising the claimant and Joakim Duncan, 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**

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.

on me?” concern in such cases.³⁸ In similar vein, Mason J in **Sutherland Shire Council** expressed the view that the “**floodgates**” concern is not so potent with respect to public authorities, noting: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.

[41] In the present case, the Boys Training Centre employee(s) could not be a bystander. It was obliged to undertake the supervision which was its statutory duty. It had no discretion 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 Boys Training Centre employees 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 Boys Training Centre employees 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 asked to make difficult judgments. It is not immediately apparent why employees of the Boys Training Centre 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.

[42] The court notes the contents of the magistrates order of the 30th day of August, 2016 giving the defendant legal custody of the claimant at the time as:

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THE CHILDREN AND YOUNG PERSONS ACT.

Cap 3.09 of the Revised Laws of Saint Lucia 2005

³⁸ At p 944.

³⁹ At para [37].

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

⁴¹ At p 659.

⁴² At p 569.

Section 16 ORDER COMMITTING JUVENILE TO CARE OF FIT PERSON In the First Judicial District before the Juvenile Court sitting at Family Court, Castries

**TO
Monica Jn Baptiste**

WHEREAS Shane Avril, a Juvenile brought before the Court as being in need of Care and Protection.

AND WHEREAS the said Court is satisfied that the welfare of the said juvenile requires an order to be made committing the juvenile to the care of a fit person who is willing to undertake the care of him.

THESE, THEREFORE, are to command you the said Probation & Parole Services to deliver the said juvenile to Boys Training Centre, who has undertaken to care for the said juvenile, and to command you the said Boys Training Centre to receive the said juvenile to your custody and to keep him in accordance with and until 27 February 2017 under the provisions of the Children and Young Persons Act.

IT IS HEREBY DECLARED THAT (a) the age of the said juvenile is 15 years, being born on the 15 January 2001; (b) his religious persuasion - Unknown;

GIVEN under my hand this 30th day of August, 2016 at Castries Magistrate, Family Court

[43] The statutory duties imposed on the employees of the Boys Training Centre 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 the Court of Appeal and 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

⁴³ At p 1078.

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

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

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

[44] 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 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

[45] 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**

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.

⁵¹ At p 615.

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.

[46] 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.

[47] **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

⁵² At p 1056.

⁵³ At p 1056.

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

⁵⁵ At para [29].

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.

[48] The statutory obligation is I think highly relevant to the judgment of sufficient proximity between plaintiff 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.

[49] The scope of those to whom the employees of the Boys Training Centre 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 Children and Young Persons Act upon the employees of the Boys Training Centre explicitly are) and if the risk warrants it. Actual liability will be limited by the need to show causation and by principles of 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. But, 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 Boys Training Centre employees might owe a duty of care in the supervision of a ward of the state. If the employee of the Boys Training Centre is shown to have acted below the standard reasonably to be expected and that want of care is causative of loss, it is not immediately clear that the plaintiff should not be able to claim as a member of the public if he suffers 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.

[50] On any view, knowledge of the risk posed by Joakim Duncan will be critical to an ultimate conclusion of legal responsibility. It turns on facts yet to be established. Counsel for the Attorney-General submitted that nothing in Joakim's record indicated any propensity for such violence or that those residing with him at the training centre would be at risk. Counsel for Mr. Avril points to the psychological and medical assessments of the claimant and the knowledge of problems offered in the previous offending. 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 Mr. Avril will be unable to establish knowledge on the part of the Probation Service that should have alerted its officers to risk of a magnitude that made it a breach of duty to fail to exercise available powers of control of physical proximity between Mr. Avril and Joakim Duncan, or to take such other steps as were reasonably available to eliminate or contain the risk.

[51] 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. But 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.

[52] Children and young persons in the care of the State are vulnerable. They do not have the knowledge of risk possessed by the employees of the Boys Training Centre. In circumstances where the statute has the explicit purpose of protection of children and young persons, and an

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.

obligation to take reasonable care is consistent with the statutory obligations, this vulnerability supports the recognition of a duty of care.⁵⁷ There is no public law remedy for those injured if the employees of the Boys Training Centre 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

[53] Although wards of the state are not 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.

[54] 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 Legislative Framework

[55] Section 29 of the Cap.3.09 Children and Young Persons Act Laws of Saint Lucia states:

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

⁵⁸ At p 940.

⁵⁹ [1955] 2 WLR 517 (HL).

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).

RIGHTS AND POWERS OF FIT PERSONS

The person to whose care a juvenile is committed by an order made under this Act shall, while the order is in force, have the same rights and powers and be subject to the same liabilities in respect of the juvenile's maintenance as if he or she were his or her parent, and the juvenile so committed shall continue in his or her care despite any claim by a parent or other person.

[56] PART 2

PREVENTION OF CRUELTY TO AND PROTECTION OF JUVENILES

5. Cruelty to juveniles

- (1) Every person who having the custody, charge or care of any juvenile wilfully assaults, ill-treats, neglects, abandons or exposes such juvenile, or causes, or procures him or her to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause that juvenile unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement) commits an offence, and is liable—

(a) on conviction on indictment to a fine not exceeding \$500 or to imprisonment with hard labour for any term not exceeding 2 years, or to both such fine and imprisonment;

(b) on summary conviction, to a fine not exceeding \$250 or to imprisonment with hard labour for any term not exceeding one year, or to both such fine and imprisonment.

- (2) For the purposes of this section—

- (a) a parent or guardian or other person having the custody, charge or care of any juvenile shall be deemed to have neglected him or her in a manner likely to cause injury to his or her health, if, being able to do so, such parent or guardian or other person fails to provide adequate food, clothing, rest, medical aid or lodging for him or her;

- (b) where it is proved that the death of an infant under 3 years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passage of the infant) while the infant was on a bed with some other person who has attained the age of 18 years and who was at the time under the influence of drink or any drug, then that other person shall be deemed to have neglected the infant in a manner likely to cause injury to the infant's health;
 - (c) any person having attained the age of 18 years, who gives, or causes to be given, to any child under the age of 12 years any intoxicating liquor except upon the order of a duly qualified medical practitioner, or in case of sickness, apprehended sickness, or other urgent cause, shall be deemed to have ill-treated that child in a manner likely to cause injury to the child's health;
 - (d) any person, having the custody, charge or care of any child under the age of 7 years, who allows that child to be in any room or yard containing a stove, cooker, coal-pot, or open fire-place, not sufficiently protected to guard against the risk of that child being burnt or scalded, without taking reasonable precautions against the risk, and by reason thereof that child is killed or suffers injury, shall be deemed to have neglected that child in a manner likely to cause injury to that child's health.

However, neither this paragraph, nor any proceedings taken thereunder, shall affect the liability of any person to be indicted for manslaughter or for any offence against the Criminal Code.
- (3) A person may be convicted of an offence under this section—
- (a) although actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;
 - (b) despite the death of the juvenile in respect of whom the offence is committed.
- (4) Upon the trial of any person who has attained the age of 18 years for infanticide or for the manslaughter of a juvenile of whom he or she had the custody, charge or care, it shall be

lawful for the jury, if they are satisfied that he or she commits an offence under this section, to find him or her guilty of that offence.

(5) (a) If it is proved that a person charged under this section was directly or indirectly interested in any sum of money accruing or payable in the event of the death of the juvenile and had knowledge that that sum of money was accruing or becoming payable, then—

(i) in the case of a conviction on indictment the maximum amount of the fine which may be imposed under this section shall be \$1,000 and the court may, instead of any other penalty, sentence that person to imprisonment with hard labour for any term not exceeding 5 years;

(ii) in the case of a summary conviction the maximum amount of the fine which may be imposed under this section shall be \$250 and the magistrate may, instead of any other penalty, sentence that person to imprisonment with hard labour for any term not exceeding 6 months.

The doctrine of approbation/reprobation

[57] Mr. Nicholas posited that an estoppel by approbation and reprobation arises in that the defendant cannot be made to approbate and simultaneously reprobate in violation of the Latin maxim quod approbo non reprobo. The defendant cannot be made to have accepted that the claimant suffered serious injuries by exhibiting the medical certificates and then to deny that the claimant is entitled to be adequately compensated for his injuries.

[58] In recent times, the doctrine has been expressed more generally and in broader terms. Notably, in **Express Newspapers Plc v News (UK) Ltd & others** [1990] 1 WLR 1320, a breach of copyright case concerned with mutual copying of news stories, the Court held that the claimant's resistance to judgment on the counterclaim was wholly inconsistent with its own claim and that on the basis of the doctrine of approbation and reprobation the claimant was not permitted to put forward two inconsistent cases. When giving judgment, Sir Nicolas Browne-Wilkinson VC put the doctrine in these terms:

"The fact is that if the defences now being put forward by the defendants in relation to the "Daily Star" article are good defences to the Ogilvy case, they

were and are equally good defences to the claim by the “Daily Express” against “Today” newspaper relating to the Bordes claim. I think that what Mr. Montgomery describes as what is sauce for the goose is sauce for the gander has a rather narrower legal manifestation. There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance. To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case.”

[59] The approbating party must have elected, that is made his choice, clearly and unequivocally.

[60] In essence, the doctrine is about preventing inconsistent conduct and ensuring a just outcome.

[61] The electing party’s subsequent conduct must be inconsistent with his earlier election or approbation.

Discussion & Finding: the Striking Out Application

[80] I have paid particular regard to the submissions of Counsel and have perused the Defence and Amended Defence in question.

[81] In this application, Mr. Huggins 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.

[82] **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;

- [83] In order to succeed on this application, the claimant must establish that the defence of the defendant is bound to fail.
- [84] 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 reached: **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.
- [85] 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, 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).
- [86] In the circumstances, it is the defendant's defence and amended defence which must be under consideration by this court, for the purpose of determining whether the defendant's defence and amended defence should be struck out.
- [87] As regards whether the defendant's defence and amended defence 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.'

[88] 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."

[89] The claimant is also contending that the defendant's defence should be struck out on the ground that the same discloses no reasonable grounds for defending 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 defending a claim.'

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

[91] 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.

[92] 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 defence discloses no reasonable grounds for defending a 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 defendant's defence.

[93] It is either that the defendant's defence or amended defence disclosed reasonable grounds for defending 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 defendant's defence or amended defence.'

[94] In the defendant's amended defence, it has been alleged as follows: 'The defendant admits paragraph 3 of the Amended Statement of claim save and except that the claimant was not

savagely attacked by an inmate but was in fact injured in an altercation with a boy who at the material time was also a ward of the care and protection unit of the BTC.'

[95] The defendant's amended defence, in most of its paragraphs of that thirty-three (33) paragraph document stated as follows: 'The Defendant denies paragraph 7 of the Amended Statement of claim and avers that the Claimant did not suffer a hostile attack by an inmate in a holding area but a fellow ward of the care and protection unit of the BTC, namely Joakim Duncan, in the dorm area of the BTC. The Defendant further avers that an employee of the BTC was present in the care and protection unit and was tending to another ward who was at the door to the unit when the altercation happened and was able to respond within seconds to prevent further harm. And The Defendant denies Paragraph 12 of the Amended Statement of Claim and repeats paragraphs 6 to 9 herein and further avers that the Claimant's treatment was facilitated and paid for by the Defendant up until the point that it was determined that the patient had recovered sufficiently from his injuries.'

[96] To put it at its highest, the defendant's amended defence is obfuscating.

[97] It is confusing in the following respects:

1. The Defendant admits paragraph 2 of the Statement of Claim save and except that the Claimant was not an inmate of the Boys Training Centre, Ministry of Equity, Social Justice, Empowerment, Youth Development, Sports, Culture and Gender Affairs (hereinafter referred to as "the BTC") but was a Ward of the Care and Protection Unit at the BTC. A Ward is a juvenile whom the District Court deems is in need of care and protection and not a juvenile offender.
2. The Defendant admits paragraph 3 of the Amended Statement of claim save and except that the Claimant was not savagely attacked by an inmate but was in fact injured in an altercation with a boy who at the material time was also a ward of the care and protection unit of the BTC.
3. The Defendant denies paragraph 4 of the Amended Statement of claim and avers that the Claimant had not been left in physical, psychological and emotional retardation and further avers that the Claimant has recovered from his injuries due to the procedures undergone at the CANA NEURO SERVICES, which were paid for and facilitated by the Defendant.

4. The Defendant denies paragraph 7 of the Amended Statement of claim and avers that the Claimant did not suffer a hostile attack by an inmate in a holding area but a fellow ward of the care and protection unit of the BTC, namely Joakim Duncan, in the dorm area of the BTC. The Defendant further avers that an employee of the BTC was present in the care and protection unit and was tending to another ward who was at the door to the unit when the altercation happened and was able to respond within seconds to prevent further harm.
5. The Defendant neither denies nor admits paragraph 9 of the Amended Statement of Claim and avers that the attack was not carried out by an agent of the state or an inmate of the BTC but a ward of the care and protection unit.
6. The Defendant denies paragraph 11 of the Amended Statement of Claim and avers that an employee of the BTC who was present at the care and protection unit heard the sounds made by the Claimant indicating an altercation and responded within a matter of seconds to take the cricket bat from Joakim Duncan and separate him from the Claimant and to take the Claimant to the office to get medical attention.
7. The Defendant denies Paragraph 12 of the Amended Statement of Claim and repeats paragraphs 6 to 9 herein and further avers that the Claimant's treatment was facilitated and paid for by the Defendant up until the point that it was determined that the patient had recovered sufficiently from his injuries.
8. The Defendant denies paragraph 15 of the Amended Statement of Claim and repeats the paragraphs herein. The Defendant avers that prior to 4th February 2017 there had been no previous verbal or physical altercations between Joakim Duncan and the Claimant. Therefore, Joakim Duncan was not judged to be a risk to the Claimant. Further, due to the sudden nature of the attack by Joakim Duncan on the Claimant it was not possible for the attack to be prevented.
9. The Defendant denies paragraph 15(I) of the particulars of negligence and avers that there are wardens and security officers assigned to the BTC and Care and Protection Unit specifically one of whom was able to observe and respond swiftly to the incident.

10. The Defendant denies paragraph 15(ii) of the particulars of negligence and avers that the wards of the care and protection unit were in fact monitored and that there was a security officer, Mr. Mandel Thomas, on duty at the ward at the time of the incident who was able to respond swiftly and adequately.
11. The Defendant denies paragraph 15 (iv) of the particulars of negligence and states that both the Claimant and Joakim Duncan were at the BTC as wards of the Care and Protection unit and neither were juvenile offenders or inmates there due to any criminal offence. The Defendant further rejects any insinuation that the incident was as a result of lack of separation as inmates at the BTC sent there due to conviction of criminal offences are indeed kept separate and apart from wards of the care and protection unit.
12. The Defendant denies paragraph 15(v) of the particulars of negligence and states that constant surveillance of the wards is carried out and that Mandel Thomas, security officer of the BTC was stationed at the Ward, and was able to respond swiftly to prevent the situation from escalating and ensure that the Claimant was taken for medical treatment.

[98] 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.

[99] 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 relevant time still means new.

[100]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 Aladdin's genie popping up to do the bidding of he or she who rubs the lamp, 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.

[101]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.

[102]Mr. Williams posited that the test to determine whether it is appropriate to strike out the defence is that if there are central issues in dispute, striking out is not appropriate and an option the courts should restraint in applying. The defendant's Defence raises several central factual and legal issues in dispute of the claimant's amended statement of claim and it is submitted that the Defence should not be struck out. Further, the claimant has failed to satisfy the two grounds for striking out raised in his application.

[103]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

[104]Mr. Huggins submitted that the defence and amended defence did not disclose a defence to 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.

[105]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].

[106]**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.

[107]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.

[108]The allegation of negligence is sufficiently particularized for the purposes of the application, this is a claim for damages for negligence, and the defendant is not raising a denial of the claimant’s case but is denying certain facts of the case which in this context is not a defence. I do not find that both sides have raised triable issues which require a hearing.

[109]I find that the defence is a bare denial and there are no reasonable grounds for defending the claim. In the final analysis, it is apparent to this court, that neither the defendant's defence nor amended defence discloses any reasonable grounds for defending this claim against the claimant.

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

[111]The claimant's application to strike out the defendant's defence and amended defence as against the claimant's case for negligence is granted and these are the orders that follow:

[112] Orders

- (i) For the above reasons and upon an overall consideration of the matter, I am of the view that the claimant has established that the defendant's defence should be struck out pursuant to Part 26.3 (1) (b) of the CPR 2000 in relation to the negligence claim. I would therefore grant the application; the defendant's defence and/or amended defence stands as struck out in relation to the negligence claim.
- (ii) The other claims of assault, battery and false imprisonment are not founded on this application and are dismissed.
- (iii) The matter is referred to mediation.
- (iv) The costs of \$ECD 2,000.00 of the claimant's application to strike out the defendant's defence and the amended defence are awarded to the claimant.
- (v) The claimant shall file and serve this order.

**Ricardo Sandcroft
Master [Ag]**

**By the Court
Registrar**