

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

Claim Number: **SLUHCV2018/0112**

Between

MARY SAMUEL

Claimant

and

**(1) CRAIG FONTENELLE
(2) JUDAH MATER
(3) STEPHEN MATER**

Defendants

Appearances

Mr. Stanley Felix of Counsel for the Claimant

Mr. Duane Jean Baptiste of Counsel for the Defendant

**2020: February, 18th
2020: May, 27th**

JUDGMENT

Introduction & Background:

- [1] **SANDCROFT, M. [Ag.]**: This is an application for striking out the statement of case (amended statement of case). The claimant Mary Samuel formerly of Jn Baptiste Street, Castries along with another passenger was involved in a motor vehicle collision on the 28th day of June 2017 at 5:15 am, along the Sans Souci Road towards the intersection of the John Compton Highway. The other vehicle driven by Craig Fontenelle, the 1st defendant, and registered in the names Judah Mater and Stephen Mater, the 2nd and 3rd defendants, was heading south along the John Compton Highway. The 1st defendant negligently drove and or lost control of his vehicle and collided with the claimant's vehicle causing her injuries.

- [2] The defendants applied to have the statement of case (including the amended statement of case) of the claimant to be struck out. They supported their application with submissions.
- [3] The claimant on 20th February, 2018 filed a claim against all three defendants for damages as a result of the collision but went on to file an amended claim on the 4th day of June 2018, wherein the Insurance Company, who was previously named as a defendant to the claim, was removed.
- [4] The claimant's claim is for special damages in the amount of \$ECD74, 771.25 along with general damages and interest to be assessed, and any other relief that the court deems fit in the circumstances.
- [5] The claimant's claim was for damages for Personal Injuries against all three defendants, as specifically stated in the amended claim form filed on June 4, 2018. The claim against the 2nd and 3rd defendants burgeoned out of the negligent driving of the 1st defendant, who at the time was said to be the driver of an Omni-bus belonging to the 2nd and 3rd defendants, which was contrary to the 2nd and 3rd defendants' assertion in paragraph five (5) of their defence. The claimant submitted that although no specific allegations were pleaded against the 2nd and 3rd defendants, the claim however, specifically included them as being liable for the personal injuries caused to the claimant, as a result of the negligent driving of the 1st defendant.
- [6] The defendant responded by way of a defence filed on the 27th day of March 2018 on behalf of the 2nd and 3rd defendants, namely Judah Mater and Stephen Mater. However, no defence was filed by or on behalf of the 1st defendant who was the driver of the said Omni-bus belonging to the 2nd and 3rd defendants as their driver; thereby he accepted liability.
- [7] The 2nd and 3rd defendants stated in their defence that the claimant, by way of her claim did not make any allegations of negligence against them and therefore the Claimant is not entitled to the relief claimed or to any relief at all.

Claimant's Submissions

- [8]The claimant submitted that the 1st defendant was within the employ of the 2nd and 3rd defendants who were owners of the motor omnibus M584 and who are vicariously liable for all his acts during the course of his employment. The case of **A Rudolph Harvey v. Noel Durrant et al** is instructive on this point. Brucelyle J, in the instant case, referred to **Paragraph 821 A Halsbury's laws of England, 4th edition, volume 45(2)**, wherein it states the following:

“Employee engaged on his own business. In order to render to employer, liability for employment act , it is necessary to show that the employee, in doing the act which occasioned the injury, was acting in the course of his employment, whilst using his employers property in the course of his employment, embarks upon business of his own, and the injury is occasioned afterwards. The employer's liability continues unless the employee in deviating from the business which he was employed to perform, can no longer be considered to be acting in the course of his employment, and must be regarded as engaged in a separate transaction.”

[9] The claimant also posited that whether the 1st defendant, “the driver”, was at the time of the collision acting in the course of his employment, or even if he had embarked on his own business during the course of his employment, the 2nd and 3rd defendants would still be liable for his acts.

Defendants’ Submissions:

[10] The 2nd and 3rd defendants submitted that the amended claim remained silent on the issue of vicarious liability. The Amended Claim only referred to a claim against Judah Mater and Stephen Mater (referred to by the claimant as “Defendants 2 and 3” but herein referred to as “the Defendants”), as a result of the negligence of Craig Fontenelle in a motor vehicular accident.

[11] The 2nd and 3rd defendants further submitted that the sole reference to the defendants in the Statement of Claim can be found at paragraph 3 of the Statement of Claim, which merely stated that:

“The said vehicle was insured in the name of Judah Mater and Stephen Mater.”

[12] The defendants posited that the claimant's pleadings revealed no reasonable ground for bringing the claim and no real prospect of succeeding on this claim. The claimant asserts (at paragraph 2 of her submissions, under the rubric "Are Defendants 2 and 3 liable?") that:

"... although no specific allegations were pleaded against Defendants 2 and 3, the claim however, specifically included them as being liable for the personal injuries caused to the Claimant, as a result of the negligent driving of defendant number 1 who was within their employ, and during the course of business at the time of the collision."

The Law and Application

[13]The Claim

8. As it pertains to the substance of the claim, one need not look any further than Parts 8.6 and 8.7 of the CPR which provides as follows:

- a) The claimant must include a short description of the nature of the claim; and**
- b) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.**

[14] The defendants further posited that it naturally followed from the above-mentioned requirements of the CPR that it must not be left to the defendant (or to this Honourable Court for that matter) to infer the nature of the claim and facts on which the Claimant relies. The defendants ought to have received a clear indication as to the claim being made against them and the basis of that claim. Therefore, it was necessary for the claimant to provide the facts to support a claim for vicarious liability, consistent with the facts alleged in the claimant's submissions.

[15]The defendants submitted that as it pertains to vicarious liability in motor-vehicular collisions, the Learned authors of Halsbury's Laws of England (Vol. 97 (2015) at paragraph 792 noted that:

"If the driver of a vehicle is an employee or independent contractor the general rules of vicarious liability apply. If the owner of the vehicle

authorizes a person who is neither an employee nor an independent contractor to drive the vehicle for the owner's purpose, or partly for the owner's purposes and partly for his own purposes, the owner will be liable for torts incidental to that use. Mere permission to use the vehicle is not enough."

[16]The defendants also posited that merely suggesting vicarious liability on the part of the defendants would not suffice as the claimant could have properly alleged and pleaded that:

- a) the defendants were the employers of the negligent driver, who was driving during the course of business when the collision occurred;
- b) Craig Fontenelle was an independent contractor and the circumstances were such that the Defendants could properly be found to be vicariously liable; or
- c) the Defendants owned the vehicle and permitted Craig Fontenelle to drive the vehicle for the Defendant's purposes or partly for the Defendant's purposes and the negligent driving was incidental to that use.

[17]The defendants further posited that the Statement of Claim merely spoke to Craig Fontenelle being the negligent driver of a vehicle insured in the name of the 2nd and 3rd defendants. This, the 2nd and 3rd defendants submitted would be tantamount to the claimant pleading that the 2nd and 3rd defendants had an insurable interest in the vehicle.

[18]The defendants submitted that the pleadings were woefully inadequate and revealed no claim founded on vicarious liability or on any basis at all. The corollary of which was, that the claimant had no basis for bringing the claim and as such had no real prospect of succeeding on the claim.

[19]The defendants further submitted that the claimant accepted that no specific allegations were pleaded against the 2nd and 3rd defendants.

[20]The defendants posited that in order for the claimant to have a real prospect of success or any

prospect of success at all, it would have been necessary for the claimant to have pleaded all of the facts of vicarious liability, which he intended to rely upon. That it was not sufficient to merely refer to the 2nd and 3rd defendants as being liable without establishing the basis for the alleged liability. This is even more so as vicarious liability, on the basis of the existence of an employer/employee relationship, was not the only possible conclusion from the pleadings.

[21] The defendants further posited that the claimant's omission to, at the very least, plead the existence of an employment relationship between Craig Fontenelle on one hand and the 2nd and 3rd defendants on the other, ought to result in the dismissal of the claim against the defendants, with costs, as the claimant had no reasonable grounds for bringing the case and no real prospect of succeeding on the claim.

ISSUES:

[22] (i) The main issue for me to determine is whether or not the claimant has a cause of action or reasonable cause for bringing the claim / whether the claimant's statement of case ('claim' for this purpose), discloses no reasonable grounds for bringing this particular claim; and

(ii) whether the driver of the Omni-bus was employed to its registered owners?

(iii) whether Craig Fontenelle was acting within the course of his employment at the time of the collision?

Analysis & Findings:

[23] Clearly, the court is exercising its case management powers in setting down this preliminary issue to be decided upon. The court is clearly, authorized by rules of court, so to do. See **rule 26.1 (2) (i) and (j)** in that regard.

The claimant's pleadings & Striking Out

[24] The defendants' submissions raise issues that attack the claimant's pleadings. A party has the right to amend his pleadings to present the case he thinks best. Under the **Civil Procedure Rules, 2000 (CPR, 2000)** a case should not fail due to technical error, as the court can apply its broad

case management powers to rectify these. In the case at bar, any defects in the pleadings can be brought to the notice of the case management or pre-trial judges by the defendants. At this stage, the defendants could be permitted to amend their statement of case to answer any amendments sought. Also, if sufficient particularity was not pleaded, then the other side could seek further and better particulars to know what case he had to meet at trial.

[25] The question now to be answered by this court, is, as clearly suggested by the wording of **rule 26.3 (1) (b) of the CPR, 2000**, whether the claimant's statement of case ('claim' for this purpose), discloses no reasonable grounds for bringing this particular claim? This is, as earlier stated, to be entirely distinguished from a consideration as to whether or not the claimant's claim is one which has a realistic prospect of success. A party's claim may disclose reasonable grounds for bringing a claim, but yet, may be one which has no realistic prospect of success, such as for instance, if that claim cannot be supported by the evidence expected to be relied on by either party, during a trial of that claim, or, if, for example, that claim is expressly contradicted by documentary materials – **Blackstone's Civil Practice 2014**, at para. 34.25.

[26] **Rule 26.3 of the CPR, 2000** sets out the circumstances in which this court may strike out a claim. The only one of those circumstances that is presently applicable for consideration by this court, in the particular circumstances of this particular case, is the one which states that this court may strike out a statement of case, or part of it, if it appears to the court, that **'the statement of case or the part to be struck out, discloses no reasonable ground for bringing or defending a claim.'**

[27] From the onset of this court's consideration of whether or not the claimant's claim discloses, a 'reasonable ground' or 'reasonable grounds,' 'for bringing' the claim, it must firstly, be carefully noted by all, that what this court is not now required to determine, is whether or not the claimant's claim has any reasonable, or realistic prospect of success. A claimant's statement of case, may not have even so much as a realistic prospect of success at trial, much less a reasonable prospect of success, but yet, this is not to be taken as automatically meaning or even leading to the implication, that there existed, as far as that statement of case is concerned, and more importantly, as far as is disclosed and the means of that statement of case is disclosed, no reasonable grounds for bringing the claim. The phrase – 'real prospect of successfully defending the claim,' as used in respect of applications for summary judgment (see **rule 13.3 of the CPR, 2000**), ought not to be equated with a statement of case disclosing no reasonable grounds for bringing or defending a claim.' See: **Gordon Stewart and John Issa** – Supr. Ct. Civil Appeal No. 16 of 2009, on this point.

[28] The **Eastern Caribbean Countries' CPR 26.3 (1) (b)** is the equivalent of England's present **CPR 3.4 (2)**. There is no doubt that the court's jurisdiction to strike out a party's statement of case is a jurisdiction which ought to be exercised sparingly. It makes no difference, in that respect, whether or not the court is minded to the possibility of making such an order, upon a hearing scheduled as regards same, as a matter of its own motion, or upon written application to this court. Striking out should be done, in respect of either part, or the whole of a party's statement of case, only in plain and obvious cases. The law in that regard, pre- CPR and post – CPR, remains the same. This point is made in the text – **Blackstone's Civil Practice (2014)**, at para. 33.6 (p. 527). As such, as was made clear in the case – **Wenlock v Moloney** – [1965] 1 WLR 1238, it is generally improper to conduct what is, in effect, a mini-trial involving protracted examination of the documents and facts as disclosed in the written evidence on a striking – out application. The case: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 A.C. 1, esp. at paras. 96-97, has applied the aforementioned principles.

[29] If the court is hearing an application to strike out, pursuant to **CPR 26.3(1) (b)** of the **CPR, 2000**, it is to be assumed that the facts alleged by the respondent, are true. See: **Morgan Crucible Co. plc v Hill Samuel and Co. Ltd.** – [1991] Ch 295. In the circumstances, adapting that legal approach to the present legal scenario, it is this court's view that this court is not, at this time, entitled to disbelieve the claimant's statement of case. Indeed, it is equally, not entitled to disbelieve the defendants' statement of case. The issue as to whether either of same ought to be believed, is one which will have to be determined at a trial, if this court orders that this claim shall proceed to trial. In any event though, it must not be forgotten, that whilst the 2nd and 3rd defendants will have an evidentiary burden at trial – that being a burden to lead sufficient evidence capable of supporting their defence, the legal burden to prove its claim, rests squarely and solely on the claimant's shoulders.

[30] As long as the claimant's case herein is therefore, one which raises some question fit to be tried by this court, then, striking out of their case, would neither be appropriate in law, nor warranted. See: **Chan U Seek v Alvis Vehicles Ltd.** – [2003] EWHC 1238. The test is one as to whether as far as the claimants' case is concerned, that case is not one which, as a matter of law, can properly constitute a case for the claim instituted by the claimant against the 2nd and 3rd defendants. Even if the claimant's case were to be perceived by this court, as being one which is, 'fraught with difficulty,' nonetheless, the claimant's statement of case should not be struck out, on that basis.

See: **Smith v Chief Constable of Sussex** – [2008] EWCA Civ 39. As such, the apparent implausibility of a case on paper is not in itself, a sufficient basis to justify striking out that case.

See: **Merelie v Newcastle Primary Care Trust** – [2004] EWHC 2554. Also, it would be improper for this court to strike out a claim in circumstances wherein the central issues are in dispute. See: **King v Telegraph Group Ltd.** [2003] EWHC 1312.

[31] This is the legal difference in approach, between an application to strike out a claim, pursuant to rule **26.3 (1) (b) of the CPR 2000** and an application pursuant to rule **15.2 of the CPR**, for summary judgment. This was made clear in para. 14 of the Court of Appeal's Judgment in the case - **Gordon Stewart and John Issa** – op. cit. It is not for this court, to divine what will be the outcome of a properly filed defence. Such should be the primary consideration for this court, if and when considering an application for summary judgment, since in that respect, it will be for this court to determine, as the case may be, whether the claim or defence, has a realistic prospect of success.

[32] **CPR 15.2** gives the court the power to grant summary judgment on the claim or on a particular issue if it considers that, either the claimant has no real prospect of succeeding on the claim or the issue, or that the defendant has no real prospect of successfully defending the claim or the issue. In dealing with evidence for the purpose of the summary judgment hearing **CPR 15.5** requires an applicant to file affidavit evidence in support of the application as well as it requires a respondent who wishes to rely on evidence to file affidavit evidence.

[33] This court has not only given careful consideration to the primary issue as to whether the claimant's amended statement of claim, filed on June 4, 2018 should be struck out, but also, to the secondary issue as to whether any part thereof, should be struck out. This court has given careful consideration to each of those issues, in accordance with the express wording and undisputable intendment of **rule 26.3 (1) of the CPR 2000**, which is the rule that permits this court to strike out a statement of case or part of a statement of case. As such, even if this court were to accede to the 2nd and 3rd defendants' submissions and, while acting of its own motion, refuse to strike out the entirety of the claimant's amended statement of case, it would still be open to this court to strike out any part thereof which discloses no reasonable ground for bringing the claims made by the 2nd and 3rd defendants against them.

[34] The amended claim form and statement of the claim of the claimant were both filed on June 4, 2018 and the amended notice of application by the 2nd and 3rd defendants to strike out the

amended statement of claim was filed on April 22, 2020 and via oral application. It is these documents that this court has paid special regard to, in deciding as to whether the claimant's claim is one which 'discloses reasonable grounds for bringing the claim.' In other words, this court has paid special regard to the issue as to whether the amended statement of claim, when considered in the context of the claimant's claim against the 2nd and 3rd defendants, is one which can constitute, as a matter of law, a valid and reasonable basis for bringing the claim. This is precisely the approach adopted by my another Judge- Mr. Justice David Batts, in a similar legal context, in the case – **City Properties Ltd. v New Era Finance Ltd.** – [2013] JSC Civ. 23.

[35] The court's power to strike out statements of case is exercisable under its inherent jurisdiction and is also governed by rules of court. In **Biguzzi v Rank Leisure Plc** [1999] 4 All ER 934, the English Court of Appeal noted that the English Rules of Civil Procedure, 1999, confer a very wide discretion upon judges to strike out statements of case. According to Lord Woolfe MR:

"The fact that a judge has the power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the CPR over the previous rules is that the Court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

However, the Court has frowned upon statements of claim, or defence, or parts therein which are frivolous and vexatious, that are likely to obstruct the just disposal of the proceedings.

[36] In **Blackstone's Civil Practice, 2010**, the learned authors in commenting on Rule 3.4(2) (a) of the English Civil Procedure Rules, which is the equivalent of our CPR Rule 26.3(1) (b), state at paragraph 33.7 that:

"Applications ... may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally, this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence..."

[37] In discussing the court's power to strike out pleadings, the learned authors of Halsbury's, Laws of England, 4th Edition, at paragraphs 430-435, stated, inter alia, that:

“... the powers are permissive...and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading. . . Where a pleading discloses no reasonable cause of action... it would be ordered struck out or amended, if it is capable of amendment. . . No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed. . . .However, summary procedure... will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable. . .Nor will a pleading be struck out where it raises an arguable, difficult or important point of law.”

[38] The claim at bar, therefore should not be struck out as against the 1st defendant since it discloses a cause of action. 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.”

[39] Lord Kilbrandon, in giving the advice of the Board in **Yat Tung Investment Co. Ltd. v Dao Heng Bank** [1975] AC 581 at 590, noted that the court has a duty not to deny a litigant his or her right to bring a claim before the court ‘**without scrupulous examination of all the circumstances.**’

[40] 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.

[41] In determining whether the claimant’s statement of case or part thereof does not disclose any reasonable cause of action, it ought to first be recognized that rule 26.3 (1) (b) gives this court the power to strike out a statement of case or part thereof if it does not disclose any reasonable ground

for bringing or defending the claim. 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.’

[42] This court cannot though, at this stage of these proceedings, strike out the claimant’s claim as not disclosing a cause of action as against the 1st defendant. However, as against the 2nd and 3rd defendants, the cause of action is tenuous. This is so because, as stated by the authors, in the text – **Blackstone’s Civil Practice, 2014**, at paragraph 33.12 – ‘Applications to strike out for abuse of process should be made shortly after service.’

[43] Where a statement discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (b) however, will only be applied to cases which are “plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it, obviously unsustainable , or where the case is unarguable.”

[44] In considering the issue of whether the present claim does not disclose any reasonable ground for bringing or defending the claim against the 2nd and 3rd defendants, I am guided by the authorities that show that a litigant ought not to be denied his or her right to bring a claim before the court “without scrupulous examination of all the circumstances.”

[45] Cause of action has been held to mean every fact which is material to be proved to entitle the plaintiff to succeed, or all those things necessary to give a right to relief in law or equity. See **Letang v Cooper** (1965)1 Q.B. 232 at p.242. . The foundation of the claimant’s action is the negligent driving on the part of the 1st defendant and causing injury to the claimant by the commission of the tort. However, though there is a reasonable cause of action as against the 1st defendant, the statement of cause seems to be as quiet as a cemetery on the issue of vicarious liability in relation to the 2nd and 3rd defendants. Therefore, I have been persuaded that there is no cause of action in the case at bar as against the 2nd and 3rd defendants.

[46]The essence of the claimant's claim against the 2nd and 3rd defendants is that which they allege was the negligence of the 1st defendant who had been driving an Omni-bus owned by the 2nd and 3rd defendants. Accordingly, it is essentially being alleged that in the particular circumstances of this particular claim, if this court were to conclude that the 1st defendant's negligence resulted in injury and/or loss to the claimant, then, the claimant is entitled to recover for such loss and/or injury, through this court, from the 2nd and 3rd defendants.

[47]However, the claimant's claim is, it seems to me, perhaps deficient in certain respects, especially as it relates to the liability of the 2nd and 3rd defendants. This does not mean though, that the claimant's statement of case should be struck out as against the 1st defendant, or that any part of it, should be struck out, as is desired by the 2nd and 3rd defendants.

[48]The 2nd and 3rd defendants in their defence admitted paragraph 2 of the statement of claim to the extent that the 1st defendant was at all material times the driver but not the owner of motor omnibus registration number M584, and that they were the owners of motor omnibus registration number M584.

[49]I wish to reiterate for emphasis at this juncture that where a statement (amended statement of case) of case discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (b) however, will only be applied to cases which are **"plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable , or where the case is unarguable"**.

[50]In the final analysis, it is apparent to this court, that the claimant's amended statement of case does not disclose reasonable grounds for bringing this claim against the 2nd and 3rd defendants. 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.

[51]I am also 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. Instead, the correct question for the Court to ask is whether the commencement of the present suit constitutes a plain and obvious case of a claimant bringing a claim which discloses no reasonable ground for bringing the claim.

[52] Additionally, unlike applications to strike out pleadings under **CPR 26.4**, where the court is concerned solely with the form of the pleading and where, if the application is successful, leave may be granted to amend to plead in proper form. In applications under this rule the court is not limited to a consideration of the form of the pleading but receives evidence to determine whether the claimant's claim has any prospect of success. If it has, but the claim is not adequately expressed in the pleading, the court should not dismiss the proceedings or the particular claim, but should grant leave to the plaintiff to file an amended statement of claim or cross-claim (in the case of an application in respect of a cross-claim).

[53] I have also borne in mind that while the claims, as filed, are only allegations at this stage and could be completely cleared away at a trial; there was the need for a full hearing on the merits, so it would be unwise to shut the claimant out at this stage.

[54] The courts exist to adjudicate and determine disputes between parties and therefore litigants ought not to be denied the opportunity of having their issues decided on the merits by the court. In light of the fact that there was no trial in the present claim, I am of the view that it would be a draconian step to strike out the claim as disclosing no reasonable ground for bringing the claim as against the 1st defendant.

[55] In any event the pleadings clearly particularize a claim in negligence against the 1st defendant as driver but not the 2nd and 3rd defendants as owners of the Omni-bus and employers of the 1st defendant. The claimant has cast liability at the feet of the first defendant but failed in asserting a relationship between the 1st defendant as the driver of the said Omni-bus M584 and the 2nd and 3rd defendants as either one of agency or one of service.

[56] In view of the foregoing I find that it would be unjust in all the circumstances to not strike out the claim as being an abuse of the process of the court and on grounds that it discloses no reasonable cause of action as against the 2nd and 3rd defendants.

What is vicarious Liability?

[57] Vicarious liability is a genius of strict liability that reflects the policy and legal attempts to balance the aim of providing innocent victims of torts with legal/financial recourse, against the desirability of protecting employers from having the net of responsibility for the consequences of their employees' unauthorized, unlawful conduct, being cast too widely.

[58] This need for balance was clearly outlined in **Bazley v Curry** (1999) 174 DLR (4th) where McLachlin J observed (at 62):

The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence."

[59] In order that the doctrine of vicarious liability may apply, there are two conditions which must co-exist:¹

(a) The relationship of master and servant must exist between the defendant and the person committing the wrong complained of;

(b) The servant must in committing the wrong have been acting in the course of his employment. "Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented "a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business

¹ Salmond & Heuston on The Law of Tort, 19th ed. (1982), p. 510.

enterprise": The Law of Torts, 9th ed (1998), pp 409-410. (per Lord Steyn, Lister v Hesley v Hall [2002] 1 A.C. 215 at paragraph 14.)²

Who is an Employee?

[60] "Any person employed by another to do work for him on the terms that he, the servant is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done."³ It must follow that an employee is one who is bound to obey any lawful orders given by the employer as to the manner in which his work shall be done. The employer retains the power of controlling him in his work, and may direct not only what he shall do, but how he shall do it.⁴ Whether the job is assigned daily or by task is of no moment."

[61] A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and direction of his employer in respect of the manner in which his work is to be done.⁵

Course of Employment

[62] "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. (See Ilkiw v Samuels [1963] 1 W.L.R. 991). But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes-of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorized to do carefully,

² W.V.H. Rogers, Winfield & Jolowicz on Tort, 13th ed. (1989), p. 560.

³ Salmond & Heuston on the Law of Torts, 20th ed. (1992), p. 448.

⁴ Saddler v Henlock (1855) 4 E. & B. 570 at 578, per Crompton, J.

⁵ Salmond & Heuston on the Law of Torts, 19th edn. (1989), p. 511.

or if he does fraudulently that which he was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it.”⁶

The learned authors of Charlesworth 2 Percy on Negligence stated:

[63] “In determining whether or not an employee’s wrongful act is done in the course of his employment, it is necessary that a broad view of all the surrounding circumstances should be taken a whole and not restricted to the particular act which causes the damage. There is no simple test which can be applied to cover every set of circumstances, so that it remains essentially a question of facts for decision in each case.”⁷

[64] In the case of **Princess Wright v Alan Morrison**, [2011] JMCA Civ. 14, Harris, JA in delivering the judgment of the Court of Appeal stated at paragraph 12:

“The law recognizes liability for negligence on the part of an owner of a motor vehicle, not only in circumstances where at the time of an accident, the vehicle was being driven with the owner’s consent but also where it is driven without consent. Where there is consent, liability on the part of the owner may be rebutted by evidence that although the driver had the owner’s general permission, the use of the vehicle was for his own purpose.”

[65] At paragraph 13, Harris, JA went on to say:

“An owner may be vicariously liable even where a wrongful act occurs by the fault of an employee acting contrary to the prohibition by the employer.

⁶ This is the well-known passage in Salmond which has been approved in myriad number of courts and described as the test.

⁷ Charlesworth & Percy on Negligence, 10th ed. (2001), p. 136 citing Finmore, J in Staton v N.C.B [1957] 1 W.L.R. 893 at 895.

In Canadian Pacific Railway Company v Lockhart [1942] AC 591 in which the respondent was injured by the negligent driving of the appellant's servant, who had embarked on a journey using his uninsured motor vehicle for the purpose of and the means of carrying out work which he was employed to do, disregarding notices which barred employees from using privately owned motor cars for the applicant's business except the vehicles were adequately insured. It was held that the prohibition of the use of the uninsured vehicle simply restricted the way in which or means of which the employee should execute his work that the means of transport was incidental to that which the servant was employed to do and the appellant was liable."

[66] The learned Judge of Appeal went on to cite the noted passage from Salmond & Heuston on Tort which stated that a master is liable for acts which he has not authorized provided they are so connected with acts which he has authorized that they may be regarded as modes of doing them albeit improper modes. The master was responsible for not only what the servant was authorized to do but also the way in which he does it.

[67] Harris, JA then adopted and cited the dictum of Lord Steyn in paragraphs 15 and 20 of **Lister v Hesley Hall [2002] 1 AC 215** which established the close connection test as follows:

"15. For nearly a century English judges have adopted Salmond's statement of the applicable test as correct. Salmond said that a wrongful act is deemed to be done by a "servant" in the course of his employment if "it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master": Salmond, Law of Torts, 1st ed (1907), p 83; and Salmond & Heuston on the Law of Torts, 21st ed, p 443. Situation (a) causes no problems. The difficulty arises in respect of cases under (b). Salmond did, however, offer an explanation which has sometimes been overlooked. He said (Salmond on Torts, 1st ed, pp 83-84) that "a master ... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they

may rightly be regarded as modes--although improper modes--of doing them" (my emphasis): see the citation of Salmond with approval in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591, 599 (Salmond, *Law of Torts*, 9th ed (1936), p 95) and in *Racz v Home Office* [1994] 2 AC 45, 53 (Salmond & Heuston on the *Law of Torts*, 19th ed (1987), pp 521-522; 20th ed (1992), p 457). Salmond's explanation is the germ of the close connection test adumbrated by the Canadian Supreme Court in *Bazley v Curry* 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71.

[68] And at paragraph 20:

Our law no longer struggles with the concept of vicarious liability for intentional wrongdoing... It remains, however, to consider how vicarious liability for intentional wrongdoing fits in with Salmond's formulation. The answer is that it does not cope ideally with such cases. It must, however, be remembered that the great tort writer did not attempt to enunciate precise propositions of law on vicarious liability. At most he propounded a broad test which deems as within the course of employment "a wrongful and unauthorised mode of doing some act authorised by the master". And he emphasised the connection between the authorised acts and the "improper modes" of doing them. In reality it is simply a practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability. The usefulness of the Salmond formulation is, however, crucially dependent on focusing on the right act of the employee. This point was explored in *Rose v Plenty* [1976] 1 WLR 141. The Court of Appeal held that a milkman who deliberately disobeyed his employers' order not to allow children to help on his rounds did not go beyond his course of employment in allowing a child to help him. The analysis in this decision shows how the pitfalls of terminology must be avoided. Scarman LJ said, at pp 147-148:

"The servant was, of course, employed at the time of the accident to do a whole number of operations. He was certainly not employed to give the boy

a lift, and if one confines one's analysis of the facts to the incident of injury to the plaintiff, then no doubt one would say that carrying the boy on the float--giving him a lift - was not in the course of the servant's employment. But in *Ilkiw v Samuels* [1983] 1 WLR 991 Diplock LJ indicated that the proper approach to the nature of the servant's employment is a broad one. He says, at p 1004: 'As each of these nouns implies'--he is referring to the nouns used to describe course of employment, sphere, scope and so forth--'the matter must be looked at broadly, not dissecting the servant's task into its component activities--such as driving, loading, sheeting and the like--by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would.'

"Applying those words to the employment of this servant, I think it is clear from the evidence that he was employed as a roundsman to drive his float round his round and to deliver milk, to collect empties and to obtain payment. That was his job ... He chose to disregard the prohibition and to enlist the assistance of the plaintiff. As a matter of common sense, that does seem to me to be a mode, albeit a prohibited mode, of doing the job with which he was entrusted. Why was the plaintiff being carried on the float when the accident occurred? Because it was necessary to take him from point to point so that he could assist in delivering milk, collecting empties and, on occasions obtaining payment.

If this approach to the nature of employment is adopted, it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also busy caring for the children."

[69] In the view of the Privy Council in **Clinton Bernard v Attorney General** (2004) 65 WIR 245, the case of **Lister v. Hesley Hall** “...emphasized clearly the intense focus required on the closeness of the connection between the tort and the individual tortfeasor’s employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment.”

[70] In **Clinton Bernard**, Lord Steyn went on to state that the test of wrongful and unauthorised mode of doing some act authorized by the master is not entirely apt in the cases of intentional wrongs. The correct approach is the close connection test between the nature of the employment and the particular tort, looking at the matter in the round. In deciding this question, the judge should look at the risks to others created by an employer who entrusts duties, tasks and functions to an employee. The cases point to the liability for an employer “**for torts which can fairly be regarded as a reasonably incidental risk to the type of business he carried on.**”

[71] In **Allan Campbell v National Fuels & Lubricants Ltd et al** C.L. 1999/C-262 delivered 2nd November, 2004 a decision of Sykes, J (Ag.) (as he then was), my erudite brother and colleague, having conducted a comprehensive review of the plenitude of authorities stated at paragraph 64 of his judgment stated that there was no such thing as principles of vicarious liability which were applicable to intentional torts as distinct from principles of vicarious liability applicable to other torts.

[72] While Lord Steyn is widely regarded as the renowned expert in this area of vicarious liability, Lord Millett in **Lister v Hesley Hall** had much to say on the approach the court should take in respect of determining liability. I could never dream of improving upon it and therefore I will quote extensively from his dictum.

“The classic Salmond test for vicarious liability and scope of employment has two limbs. The first covers authorised acts which are tortious. These present no relevant problem. Whether or not some act comes within the scope of the servant’s employment depends upon an identification of what duty the servant was employed by his employer to perform. (See Diplock LJ above.) If the act of the servant which gives rise to the servant’s liability to the plaintiff amounted to a failure by the servant to perform that duty, the act

comes within "the scope of his employment" and the employer is vicariously liable. If, on the other hand, the servant's employment merely gave the servant the opportunity to do what he did without more, there will be no vicarious liability, hence the use by Salmond and in the Scottish and some other authorities of the word "connection" to indicate something which is not a casual coincidence but has the requisite relationship to the employment of the tortfeasor (servant) by his employer: Kirby v National Coal Board 1958 SC 514; Williams v A & W Hemphill Ltd 1966 SC(HL) 31.

My Lords, the correct approach to answering the question whether the tortious act of the servant falls within or without the scope of the servant's employment for the purposes of the principle of vicarious liability is to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer. The second limb of the classic Salmond test is a convenient rule of thumb which provides the answer in very many cases but does not represent the fundamental criterion which is the comparison of the duties respectively owed by the servant to the plaintiff and to his employer.

One of these steps in this analysis could, I think, usefully be elided to impose vicarious liability where the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment. Such a formulation would have the advantage of dispensing with the awkward reference to "improper modes" of carrying out the employee's duties; and by focusing attention on the connection between the employee's duties and his wrongdoing it would accord with the underlying rationale of the doctrine and be applicable without straining the language to accommodate cases of intentional wrongdoing.

But the precise terminology is not critical. The Salmond test, in either formulation, is not a statutory definition of the circumstances which give

rise to liability, but a guide to the principled application of the law to diverse factual situations. What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing and not to verbal formulae. This is the principle on which the Supreme Court of Canada recently decided the important cases of *Bazley v Curry* 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71 which provide many helpful insights into this branch of the law and from which I have derived much assistance.

Just as an employer may be vicariously liable for deliberate and criminal conduct on the part of his employee, so he may be vicariously liable for acts of the employee which he has expressly forbidden him to do. In *Ilkiw v Samuels* [1963] 1 WLR 991 a lorry driver was under strict instructions from his employers not to allow anyone else to drive the lorry. He allowed a third party, who was incompetent, to drive it without making any inquiry into his competence to do so. The employers were held vicariously liable for the resulting accident. Diplock LJ explained, at p 1004, that some prohibitions limited the sphere of employment and others only dealt with conduct within the sphere of employment. In order to determine into which category a particular prohibition fell it was necessary to determine what would have been the sphere, scope, or course (nouns which he considered to amount to the same thing) if the prohibition had not been imposed. In a passage which is of some importance in the present case, he added:

"As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities--such as driving, loading, sheeting and the like--by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would."

[73] Lord Millett also opined that the job which the driver was engaged to perform was to collect a load of sugar and transport it to its destination, using for that purpose his employers' lorry, of which he was put in charge. He was expressly forbidden to permit anyone else to drive the lorry in the

course of performing this job. That was not a prohibition which limited the scope of his employment, but one which dealt with his conduct within the sphere of his employment.

[74] The case was followed in **Rose v Plenty** [1976] 1 WLR 141 where despite strict instructions not to do so a milk rounds-man employed a boy to help him deliver milk and let him accompany him on his float. The employer was held liable for injuries sustained by the boy when he fell off the float as a result of the roundsman's negligent driving. Scarman LJ agreed that the roundsman was certainly not employed to give the boy a lift, and that if one confined one's analysis of the facts of the incident which caused injury to the boy, then it could be said that carrying the boy on the float was not in the course of his employment. But quoting with approval, at pp 147-148, the passage cited above from the judgment of Diplock LJ in **Ilkiw v Samuels** [1963] 1 WLR 991, 1004 he adopted a broad approach to the nature of the roundsman's employment. His job was to deliver milk, collect empties, and obtain payment. Disregarding his instructions he enlisted the boy's assistance in carrying out his job. If one asked: why was the boy on the float? The answer was that it was because he was assisting the roundsman to do his job.

[75] So it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.

[76] Considering the dictum of Lord Millett in **Lister v Hesley Hall** (supra) and the reasoning of Lord Steyn in **Clinton Bernard** (supra), this court has to consider what connection there is, if any, between the act in question and the employment. The act in question being the driving of the bus registered M584, the employment being the driving of the bus registered M584. If there is a connection, then the closeness of that connection has to be considered. To make that determination, the court must take into account whether the wrongful actions should be viewed as ways of carrying out the work the employer had authorised.

[77] Adopting a broad approach recommended by **Ilkiw v Samuels** (supra), the court should consider in deciding the closeness of the connection, the following factors:

1. The particular act complained of.

2. The purpose and nature of the act.
3. The time and place at which the actions occurred, within the context and circumstances in which it occurred.
4. In the circumstances, is it just and reasonable to assign liability to the employer?
5. What is the danger to others created by the employer who assigned duties to the employee?

[78] These factors while relevant are not necessarily conclusive, as each case has to be decided on its particular facts. I hold that the close connection test is applicable to this case.

[79] In **Ilkiw v Samuels** [1963] 1 WLR 991, Diplock LJ encouraged a broad approach to what the duties of the employee were towards his employer and this approach was expressly approved by Scarman LJ in *Rose v Plenty* [1975] 1 WLR 141, 147-148.

[80] In the instant case, Mr. Felix argued that the 1st defendant was employed as a driver, the reason he was driving the vehicle was known. Therefore, the absence of evidence of liability/purpose for the 2nd and 3rd defendants should lead to a finding that the vehicle was being driven for the 2nd and 3rd defendants' business, as they had not rebutted the presumption that the vehicle was not so engaged.

[81] However, the purpose is to set out the case in sufficient detail, but it should not be so extensive as to lead to prolixity but comprehensive enough to allow the opposing party to answer the case. The dictum in **Davey v Garrett** where Lord Justice Baggallay stated that the statement of unnecessary facts tends to embarrass the defendants. In that case, Baggallay LJ found that the statement of claim presented was embarrassing both from the excessive length at which the statements of necessary facts were set out and from the statement of unnecessary facts.

[82] In **Eastern Caribbean Flour Mills v Ormiston St Vincent and the Grenadines** Civil Appeal No 12/2006 delivered 16 July 2007, Barrow JA at paragraphs 43 and 44 also endorsed the principles laid out by Lord Woolf –

“[43] ...to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with an n extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader’s case.

[44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. “

[83] Pleadings should not be approached in an untailored manner. The central point is that the material facts must be pleaded. This is in an effort for the opposing side to adequately respond to the claims. In **Boake Allen Ltd et al v HMRC** [2006] EWCA Civ 25, Mummery LJ stated:

“[131] While it is good sense not to be pernicky about pleadings, the basic requirement that material facts should be pleaded is there for good reason – so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. “

[84]The most fundamental rule is that pleadings must contain the statement of the material facts upon which the claim rests but not the evidence which is to be relied upon. Therefore, it can be discerned that only relevant facts must be pleaded. The Bahamian case of **Mitchell et al v Finance Corporation of the Bahamas Limited (RBC FINCO)** et al BS 2014 SC 036, which is distinguished by the fact that they are not governed by Civil Procedure Rules but very similar rules under the Rules of the Supreme Court, states –

“Every pleading must contain, and contain only, a statement in a summary form of material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by

which those facts are to be proved, and the statement must be as brief as the nature of the claim admits.”

[85] The English authority of **North Western Salt Co. Ltd v Electrode Alkali Co. Ltd.** [1913] 3K.B. 422 at 425, per Farewell J posed that the pleader must plead facts, not law, and must not plead the evidence in support of his facts. Further, counsel submitted that it is a fundamental principle of the pleading that a party know what allegations are made against him with precision so that he can decide how to respond to him. Counsel relied on **William v. Wilcox** (1838) 8 A and E 314 at 331 where Lord Denman, C.J. stated:

“It is an elementary rule in pleading, that when a state of fact is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation... The certainty or particularity of pleadings is directed not to the disclosure of the case of the party, but to the informing of the court, the jury and the opponent, of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from the stating all the steps which leads up to that point.”

[86] In the instant case the claimant did not plead neither in its statement of claim or even its amended statement of claim that the driver had the authority to drive the said Omni-bus belonging to the 2nd and 3rd defendants. There was also no pleading that the 1st defendant was acting as an agent of the 2nd and 3rd defendants when he drove the said Omni-bus registered M543 in a negligent manner which caused the said collision.

[87] Finally, I wish to thank learned counsel for their written submissions in this matter.

[88] The 2nd and 3rd defendants’ application to strike out the claimant’s amended statement of claim as against them is granted and these are the orders that follow:

[89] The Court's Orders are as follow:

1. The 2nd and 3rd defendants' application to strike out the claimant's statement of case is granted and as such, the claimant's amended statement of case stands as against the 1st defendant only;
2. Summary judgment is granted in favour of the claimant against the 1st defendant in default of a defence;
3. The costs of the 2nd and 3rd defendants' application to strike out are awarded to the 2nd and 3rd defendants and such costs shall be assessed, if not sooner agreed.
4. The claimant is awarded special damages in the amount of \$ECD74,771.25;
5. The claimant is awarded interest on the special damages at the rate of 3% per annum from the 20th day of February, 2018 to the 18th day of February, 2020.
6. Prescribed costs as per the CPR, 2000.
7. The claimant shall file and serve this order.

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar