REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2014 – 01413

BETWEEN

BERTLYN BARKER

Claimant

AND

EASTERN REGIONAL HEALTH AUTHORITY

First Defendant

NORTH CENTRAL REGIONAL HEALTH AUTHORITY

Second Defendant

NORTH WEST REGIONAL HEALTH AUTHORITY

Third Defendant

Before The Honourable Mr. Justice Robin N. Mohammed

Appearances:
Mr. Azeem Mohammed for the Claimant
Ms. Sushma Gopeesingh for the Second Defendant
Ms. Christlyn Moore for the Third Defendant

DECISION

INTRODUCTION

1. Before the Court are two applications, one filed by the 2nd Named Defendant dated 01 March 2016 seeking to strike out the claimant's claim and statement of case which was filed on 25 April 2014 and the second being an application made by the 3rd Named Defendant dated 5 April 2016, seeking summary judgment pursuant to Part 15.2 of the Civil Proceedings Rules 1998 (CPR). Notably, the 1st Named Defendant has not participated in either of the applications.

2. I propose to deal with each application separately and in turn but before doing so it appears necessary to outline the procedural sequence of events leading up to the respective applications.

PROCEDURAL SEQUENCE OF EVENTS

3. On 25 April 2014 the Claimant initiated the instant claim for damages by filing its claim form and statement of case. The Claimant sought against the Defendants, the following relief:

    I. *Damages*
    II. *Special Damages*
    III. *Aggravated and or Exemplary Damages*
    IV. *Damages under the Supreme Court of Judicature Act Chapter 4:01 of the Laws of Trinidad and Tobago*
    V. *Interests pursuant to s.25 of the Supreme Court of Judicature Chapter 4:01*
    VI. *Costs*
    VII. *Such further and/or other relief as may be deemed just and expedient.*

4. On 8 May 2014 the First Defendant entered an appearance indicating an intention to defend the claim. Thereafter, the Second and Third Defendants entered an appearance on 14 May 2014 and giving notice of intention to defend the claim.

5. Subsequently, on 4 August 2014 the Third Defendant filed its defence which was amended on 12 September 2014. The defence of the First Defendant was filed on 28 August 2014 whilst on 9 October 2014 the Second named Defendant filed its defence.

6. On 1 June 2015 permission was granted to the Claimant to file replies to the defences of the Third Defendant on or before 29 June 2015 and a Case Management Conference was scheduled for 29 July 2015. On 12 October 2015 the Honourable Court ordered that an extension of time be granted to the Claimant to file and serve a reply to the defence of the Third Defendant by 30 November 2015 and all further directions were put on hold until the next Case Management Conference fixed for 21 January 2016.

7. On 21 January 2016 the Claimant filed a notice of application seeking leave of the Court for the appointment of an expert medical doctor to assist the Court in assessing the Claimant's damages and to determine whether negligence can be attached to one or all of the Defendants in the care and management of the Claimant. Additionally for the Defendant to pay the costs associated with the medical assessment, report and court attendance as the Claimant is impecunious.

8. On 22 January 2016 the Court ordered that the notice of application be dismissed with no orders as to costs. It was further ordered that any application to strike out and/or for security for costs be filed and served and that all responses be filed and served. Thereafter, for each party to file and exchange written submissions and authorities on or before 25 April 2016. The next Case Management Conference was fixed for 25 May 2016.

9. On 1 March 2016 the Second Defendant filed its notice of application pursuant to the Court Order seeking to have the Claimant's claim form and statement of case which were filed on 25 April 2014 struck out and further that the Claimant pay the Second Defendant's costs to be assessed in default of agreement.

10. On 5 April 2016 the Third Defendant filed its notice of application pursuant to the Court Order seeking Summary Judgement pursuant to Part 15.2 of the Civil Proceedings Rules 1998 and that the Claimant bear the costs of the application.

11. On 25 April 2016 the Second Defendant's application for security for costs which was filed on 1 March 2016 was withdrawn.

12. Thereafter, on 25 April 2016 in accordance with the Court's directions the Second Defendant and the Claimant filed and exchanged submissions in relation to the application to strike out. On 27 June 2016 the Third Defendant filed its submissions and the Claimant filed on 15 July 2016 in relation to the application for summary judgment.

THE CLAIMANT'S CASE

13. The Claimant's claim is for damages for pain, suffering and the loss of his right hand from below the elbow, as a result of the alleged negligence of the Defendants, their servants and/or agents and/or breach of their duty of care in failing to provide a safe system of health care at their respective health care facilities, namely, Sangre Grande Hospital, Eric Williams Medical Sciences Complex (Mt. Hope Hospital) and the Port of Spain General Hospital.

14. The Claimant was employed as a Labourer/Construction Worker on week days and was a Life Guard and Fisherman on weekends. On or about 29 April 2010 at around 10:00 pm the Claimant received a gunshot wound to his right hand which was alleged to have been caused by a trap gun. He arrived at the Toco Health Centre at around 10:30 pm but was transferred to the Sangre Grande Hospital for treatment.

15. He was then transferred from the Sangre Grande Hospital to the Eric Williams Medical Sciences Complex in Mt. Hope where he was attended to at around 6:30 the following morning, 30 April 2010. The Claimant indicated in his statement of case that at the Mt Hope Hospital he was only given pain killers and his wound was bandaged. The Claimant

contends that although he was given pain killers he continued to experience excruciating pain and discomfort.

16. It is the Claimant's claim that despite the severity of his injury he was not operated on until approximately fifteen (15) hours later. He contends that prior to surgery his thumb and index finger were both functioning without any pain or restriction and that doctors at the Sangre Grande Hospital assured him that his hand would be saved but that he may lose his little finger and ring finger.

17. After the surgery the claimant stated that he informed the attending doctor that he could not feel nor move his thumb or index finger and complained of having severe pain in his hand for ten (10) days thereafter but despite his pleas for his hand to be examined, the doctor and staff refused to open the bandages.

18. On the tenth day, against medical advice and the hospital's directions, the Claimant discharged himself from the Second Defendant's hospital and went to see Dr. David Toby who advised him that he could not be helped as his hand had developed gangrene and had to be amputated.

19. Dr. David Toby sent the Claimant to the Port of Spain Hospital on 13 May 2010. On 15 May 2010 the Claimant's hand was amputated. However, four days later, the gangrene having spread, the Claimant's hand had to be cut again on 19 May 2010.

20. It is the Claimant's claim that the said injuries, loss and damage were as a result of the breach of duty of care and/or by reason of negligence on the part of the Defendants, its servants and/or agents. The Claimant contends that the Defendants owed him a duty of care in relation to his treatment including all matters arising out of or incidental thereto.

21. The Claimant's particulars of negligence of the Defendants, its servants and/or agents were listed as follows:

    a) Failure to diagnose or properly diagnose the injury suffered to the Claimant;

b) Failure to take into account that there was only partial injury to the hand;
c) Failure to take preventative measures to protect the right thumb and index finger;
d) Failure to detect or suspect that the Claimant was developing gangrene and failure to give or procure any treatment for same or any investigation which would have discovered same;
e) Failure to observe or heed or take any reasonable steps to investigate the complaints of the Claimant as to his condition;
f) Failure to observe or act upon or investigate properly or at all the steady, serious and obvious deterioration of the Claimant's condition while under the care of each of them respectively;
g) Failure to procure at first, sufficient x-ray plates of the injured area and the subsequent failure to have any or any sufficient further x-ray photograph made of the area;
h) Having originally diagnosed that the injury to the Claimant was repairable failure to review or revise such diagnosis or take any steps to have such diagnosis reviewed or revised when the Claimant's condition deteriorated;
i) Exposing the claimant to a risk of further damage or injury of possible death which the Defendants ought to have known, and;
j) Failing to act in a timely manner when dealing with the Claimant.

22. The particulars of the Claimant's injuries include: severe soft tissue injury to the right hand and wrist, comminute fracture to the distal third of the radius, lack of distal pulses in the limb, below elbow amputation to the right forearm, residual pain in the stump and permanent partial disability of 60%.

APPLICATION OF THE 2ND DEFENDANT RE: STRIKING OUT

23. The Second Defendant filed its Notice of Application on 01 March 2016 supported by the affidavit of Fazia Khan, Legal Officer of the Second Defendant, seeking to strike out the Claimant's Claim and Statement of Case on the grounds that -
    a) the statement of case discloses no grounds for bringing the claim;

b) the Claimant has provided no medical evidence to support an action in medical negligence;
c) the Claimant by his own admission has been unable to appoint an expert medical doctor to support his claim;
d) the Claimant by his own admission has been granted extended leave by the Court to engage the services of specialists doctors to support his claim;
e) the Claimant by his own admission requested that the Court appoint an expert "to determine whether all that could have been done was done" in his treatment; thus making the Claimant uncertain of his own claim.

24. The Second Defendant admitted that it was responsible for the Administration, Management and control of the Eric Williams Medical Sciences Complex inclusive of the Mount Hope Hospital and for the provision of Medical, Surgical and Nursing services at the Mt Hope Hospital.

25. The Second Defendant also conceded that it owed a duty of care to the Claimant in relation to his treatment and all matters arising out of or incidental thereto and further accepted that it employed or engaged the medical, surgical, nursing and other staff who worked at the Hospital at the material time and as such would be liable in respect of any breach of duty or negligence on their part.

26. The Second Defendant, however, denied that the Claimant was first attended to at 6:30am on 30 April 2010 and asserted that the Claimant was seen within forty (40) minutes of arrival by the Orthopaedic and General Surgery Departments.

27. In the Defence filed 9 October 2014 the Second Defendant stated that the Claimant was first seen by the Accident and Emergency Department at 3:40am on 30 April 2010 and that his referral from the First Defendant stated that he had received a trap gun injury to his right wrist and that an x-ray revealed a multiple fragmented compound fracture of distal end of the radius and ulna with displacement. Additionally, that there was no

requirement for a second x-ray. The Claimant was given Pethidine, Gravol and Morphine and was transferred to be seen by the Orthopaedic and Surgical Departments.

28. Thereafter, the Claimant was seen at 4:24am the same day by the Orthopaedic Department and was planned for surgery. He was advised that there may be a need for his hand to be amputated as a result of the severe injury to the bone. The Claimant, however, refused to consent to below the elbow amputation.

29. He was then seen at 4:30am by a team of the surgery department. The Second Defendant averred that although he was able to move his fingers and sensation was intact at that time, pulse oximeter was unable to register any readings on the fingers. The Claimant was advised that an operation was necessary inclusive of exploration and vascular repair and if necessary, the decision would have to be made in surgery whether amputation was necessary to avoid gangrene, sepsis and possible death. He was informed that a dead hand must be amputated. However, the Claimant continued to refuse the option of amputation. The Claimant was then seen at 5:25am by the General Surgery Department and again refused the possibility of amputation. He was advised that vascular repair will not be attempted without his consent to possible amputation as the repair may not be possible.

30. The Claimant was again seen at 7:00am by the surgery department where he was advised of the need for exploration and counselled about the possibility of amputation but he said that he wanted to *"wait and see"*. It is averred that at that time the Claimant's hand was icy cold and though able to move the fingers, there was an absence of distal pulses.

31. At around 8:00am the Claimant was then seen by a new surgical team whilst on rounds. He was later seen at 1:35pm and 5:45pm by the new surgical team where he was again advised of the possible need for amputation but he again refused to sign the consent. He eventually consented to the possible need for amputation and was operated on at 7:25pm.

32. The Second Defendant stated that it was possible that upon going into surgery that the Claimant's thumb and index finger were functioning without restriction or pain.

However, movement of the fingers does not reflect whether there is blood supply to the hand. The thumb and index finger function by pulley mechanism supplied by the forearm. It was further contended by the second defendant that it would have still been possible for the Claimant to move a perishing hand.

33. The second defendant averred that the decision regarding amputation depends on whether there is blood supply to the hand: once there is no such supply the hand will die. In this regard the Claimant was continually counselled about the possibility of amputation if his vascular injuries could not be repaired. The Second Defendant stated that it is a stranger to the advice allegedly given to the Claimant by the First Defendant and put the Claimant to proof of same.

34. The Second Defendant contends that during the surgery the general surgery team attempted to repair the hand but was unable to re-vascularise it. Further, the attempted repair included two main arteries, ulna and radial, which supplied the hand with blood and had been badly damaged and clotted with blood. The ulna nerve was macerated. The Second Defendant indicated that any attempted repair was a trial. The limb was given a chance to heal with full knowledge that if it failed then amputation would be the only option. Had the surgical team found, during surgery, that the vessels were crushed and unable to repair, they would have amputated the hand. The Second Defendant contends that in their professional opinion nothing further could have been attempted in surgery.

35. The Second Defendant denied the Claimant's assertion that after surgery he informed the attending doctor that he could not feel or move his thumb or index finger. It is further denied that he complained bitterly of pain for the next ten days after the surgery and that the attending doctor and staff refused to open the bandage and examine him.

36. In opposition the Second Defendant stated that the Claimant was closely monitored and managed after the surgery up until 10 May 2010 when he was advised that amputation was the best option since his hand was dead. The hand was closely monitored and even though the fingers initially "pinked up" upon repair, by the second day, post-surgery, the

pulse oximeter detected no blood supply to the fingertips and there was no capillary re-fill. Post-surgery the hand was always cold although there had been slight improved movements. Eventually, the fingers started to turn black and gangrenous and all efforts to re-vascularise the hand had failed, not through any fault of the Second Defendant but, as a result of the injury sustained, as the Second Defendant contends.

37. The Second Defendant maintains that a dead hand receiving no blood must be amputated. It was also stated that other than the first day post-surgery, the Claimant did not complain of pain. Further, there was no need to open the bandages post-surgery until 10 May 2010 when they were removed as there was no sign indicating that they should be removed, there being no swelling. The Second Defendant maintains that when the bandages were removed there was no puss or infection.

38. The Second Defendant pleaded that it is a stranger to any related advice given to the Claimant by Dr David Toby or whether he was at all seen by Dr Toby but maintains and accepts that the Claimant discharged himself against the medical advice of the Second Defendant.

39. The Second Defendant denied that its servants and/or agents were negligent as alleged by the Claimant in his Statement of Case under the heading "Particulars of Negligence" and maintained that the resulting need for amputation was not due to negligence of the Second Defendant or its agents or servants, but rather as a result of the injury sustained to the hand. The Second defendant also denied liability for any pain, suffering, loss of amenities, loss of earnings, both past and future, as well as special, general, aggravated and/or exemplary damages as a result of the injuries sustained by the Claimant as no negligence was attributed to the Second Defendant.

40. Consequently, the Second Defendant submitted that the Claimant's claim and statement of case ought to be struck out as there is no reasonable basis upon which his claim has been founded.

ISSUES

41. The following issues arose for determination in relation to the application to strike out:

i. **Has the Claimant shown, in his Statement of Case and/or in any medical report before the Court, any reasonable evidence upon which negligence could be attributed to the Second Defendant for his injury as particularized under the heading "Particulars of Injury" in his Statement of Case so as to sustain an action in medical negligence against the Second Defendant?**

ii. **If not, should the Claimant's claim against the Second Defendant be struck out as submitted by the Second Defendant?**

LAW AND ANALYSIS

42. The Second Defendant submitted that the Claimant's pleadings are insufficient to found a claim in medical negligence against it and referred to **CPR Part 8.6** which stipulates that the Claimant has a duty to set out his case and **CPR Part 8.10** which provides for special requirements applicable to claims for personal injuries.

43. **Part 8.6 of the CPR** provides as follows:

> **"(1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.**
> **(2) The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case."** [Emphasis added]

44. **Part 8.10 of the CPR** states as follows:

> **"(1) This rule sets out additional requirements with which a claimant in a claim for personal injuries must comply.**

(2) The claim form or the statement of case must state the claimant's date of birth or age.

(3) <u>If the claimant will be relying on the evidence of a medical practitioner the claimant must attach to the claim form a report from a medical practitioner on the personal injuries which he alleges in his claim</u>.

(4) The claimant must include in, or attach to, his claim form or statement of case a schedule of any special damages claimed." [Emphasis added]

45. It is the Second Defendant's submission that while the Claimant complied with **<u>CPR Part 8.10</u>** insofar as attaching medical records and reports, there are no further supporting documents with regard to **medical negligence** pursuant to **<u>CPR Part 8.6</u>** and further that the Claimant failed to attach any relevant medical report or any document which supports a claim in medical negligence.

46. The law is clear that in medical negligence cases, the burden of proof rests on the Claimant to prove, on a balance of probabilities, medical negligence on the part of the defendant. As such it was for the Claimant to not only show that an injury was sustained, but further that it was as a result of medical negligence on the part of the Second Defendant in his treatment and management.

47. To prove a claim in negligence it must firstly be established that a duty of care existed between the parties, i.e. a duty of care was owed to the Claimant by the Defendant. There must also be a breach of that duty followed by damage or injury caused to the Claimant as a direct result of the breach, thereby creating the necessary causal link.

48. The Second Defendant, in its defence, has accepted that it did in fact owe a duty of care to the Claimant. However, difficulty arises with regard to whether there was a breach of that duty owed to the Claimant by the Second Defendant.

49. As submitted by the Second Defendant, the duty of care owed by a medical professional to a patient whom he treats is set out in, what is known as, the **<u>Bolam</u>** <u>test.</u>

50. In **XYZ v Warrington and Halton NHS Foundation Trust [2016] EWHC 331 (QB)**[1] Dove J. stated that the appropriate legal test was clearly established in the seminal case of **Bolam v Friern Hospital Management Committee (1957) 1 WLR 582** where McNair J stated as follows:

> ***"But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not, is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent."***

51. The essence of the **Bolam** test was distilled by Lord Scarman in **Sidaway v Governors of Bethlem Royal Hospital [1985] AC 871** in the following statement of the court:

> ***"A doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."***

[1] XYZ v Warrington and Halton NHS Foundation Trust [2016] EWHC 331 (QB) at paragraph 60

52. The **Bolam test** was applied with approval in this jurisdiction by the Court of Appeal in **Dr. Patricia Deonarine v Rana Ramlal Civil Appeal No. 28 of 2003**[2]. Consequently, it is submitted that the Court must look at the expert evidence and determine whether, in all the circumstances of the case, the requisite professional standard of care was not reached. This requires firstly, that the medical expert evidence should demonstrate what should have been done, and secondly, that what was done fell below this standard.

53. Accordingly, in the case at bar, the Court must examine whatever medical expert evidence has been or may be put before the Court to ascertain whether the Second Defendant's duty of care owed to the Claimant fell below the professional standard required of it in all the circumstances.

54. In this regard, the Claimant must, in a medical negligence case of this nature, have the medical evidence to support the claim in respect of a breach of duty, without which a claim could not succeed.

55. In the case at bar, the Claimant has failed to specify his case against each Defendant as no allegations were specifically put to any one Defendant; and the allegations which were made were not sufficiently made out or supported by either necessary or compelling evidence.

56. The Second Defendant has thus relied upon **CPR Part 26.2(1)(c)** which stipulates that-

> **"The court may strike out a statement of case or part of a statement of case if it appears to the court—**
> **(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim."**

57. On the 13 November 2014 the first Case Management Conference (CMC) was preserved to allow the Claimant's Attorney-at-law an opportunity to consider possible amendments

[2] The Judgment of Mendonca JA unanimously approved and delivered on 7 February 2007

to the Claim and Statement of Case. No such amendments have been made to date. Additionally, directions were given since 27 May 2015 for the Claimant to apply for permission to file Replies to the Defences of all 3 Defendants and although extensions of time were granted, the Claimant has, to date, still not complied with those directions. As a result, the Court is faced with the original pleadings alone in which the Claimant has not been able to sufficiently present a case in medical negligence.

58. Notably, the Claimant and his Attorney-at-law have made repeated attempts to engage the services of an expert/specialist doctor to support the Claim but have not been successful in those efforts. The Claimant then sought relief from the Court to appoint an expert and have the Defendants pay the related costs as the Claimant pleaded impecuniosity. However, after much resistance by Attorneys-at-law for all 3 Defendants the application was dismissed by this Court.

59. The decision to dismiss the said application was based on the fact that there is no supporting medical evidence as it relates to medical negligence, despite the Claimant being afforded ample time (a period of over a year) to gather supporting documents and having failed to do so.

60. The Second Defendant submitted that the only aspect of merit of the Claimant's affidavit and submissions in response is that it may be argued that striking out at this stage may be premature and referred to the Court of Appeal case of **Christianne Kelsick v Dr. Ajit Kuruvilla & Others**[3] where **Justice of Appeal Jamadar** stated as follows:

> "*On the issue of the timing of the application, it is clear that the general rule is that a Court ought to consider whether to use expert evidence and reports at the stage of case management. However this is not an absolute rule. Flexibility must be applied by the court because an expert is there to primarily assist the court. In this case, the fact that the application was made in October, 2012, five months before the date scheduled for trial, was in itself of little consequence. What mattered were the considerations*

[3] CA No. P277 of 2012 page 13, paragraph 36

of cogency, usefulness and proportionality, applied to the circumstances of the case, as have been discussed above. Always, an underlying consideration for the trial judge ought to be; Can this expert evidence and report help in determining the issues I am called upon to resolve? The question must be posed and held in a neutral way and considered from the Court's perspective and responsibilities - not solely from the parties."

61. Based on the foregoing, as was submitted by the Second Defendant, whenever an application to use expert evidence is made, the approach should be to consider admissibility, cogency, usefulness and proportionality, together with, when relevant, fairness, prejudice, bona fides and the due administration of justice. These must be weighed and balanced and the tension that will sometimes arise between what is "reasonably required" to resolve issues and the "just resolution" of proceedings worked out on a case by case basis[4].

62. The Second Defendant submitted that the case at bar is easily distinguishable from that contemplated in the ***Kelsick v Kuruvilla*** case (supra) as in the instant matter, no supporting medical evidence in relation to medical negligence has been provided by the Claimant. Further, that the medical reports provided only relayed the treatment of the Claimant which effectively are of little use to the Claimant's claim in seeking to establish negligence on the part of any of the Defendants, let alone the Second Defendant.

63. I am minded to accept the Second Defendant's submissions since the Claimant himself has admitted the difficulty in finding an expert to support his claim. He has also admitted that he is impecunious which in effect means that he would be unable to pay the Defendant's costs if so ordered and the Defendants therefore cannot be expected to continue to defend a case at their own cost, which to date has not been able to cross the first hurdle in law.

[4] Page 13 para 37 of the Judgment of Jamadar JA in Kelsick v Kuruvilla (supra)

64. In the absence of any such medical evidence it is difficult to see how the claim can succeed and if no such evidence is filed the Court may consider striking out the claim on request.

65. Submissions made by Counsel for the Claimant are, for all intents and purposes, the same for both applications (striking out and summary judgment) before the Court. I have dealt with those submissions more extensively under the application for summary judgment and therefore I do not propose to rehash them here. Suffice it to say, however, that the essence of the Claimant's submissions in this regard hinges upon the notion that this application to strike out is premature in that the Court should exercise its discretion and appoint a medical expert to assist in ascertaining whether there was any wrong doing by the Defendant(s) or breach of their duty of care owed to the Claimant. In this regard he relied upon the case of **Asiansky Television plc v Bayer Rosin, 92001) EWCA Civ 1792** seeking to establish that before a Judge exercises his discretion to strike out an action, he should consider alternative possibilities short of striking out. In that case it was held that:

> *".....every application for proceedings to be struck out had to be determined in accordance with the overriding objective and the essential question for the court, in every case, would be what was a just order to make having regard to all the circumstances. The CPR were flexible in nature and provided a number of sanctions short of the draconian measure of striking out, and a judge was bound to consider those other possibilities. Consideration had to be given to whether striking out was disproportionate and if it was found to be proportionate, a judge had to give reasons for that decision. The court should only use its power to strike out where there had been flagrant abuse of process."*

66. Counsel also referred to the case of **Belize Telemedia and another v Magistrate Usher and another (2008) 75 WIR 138** at paragraph 20, where it was stated that -

> "*It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding*

objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?"

67. Based on the evidence before this Court, it cannot be said at this stage that the Second Defendant has fallen below the professional standard of care owed to the Claimant as there is no evidence to establish medical negligence. The question thus arises as to whether the Claimant will be in a position to produce such evidence if given yet a further opportunity to do so. In this regard, Counsel for the Claimant sought to rely upon the **doctrine of *res ipsa loquitur*** to shift the burden of proof on the Defendants and to plead with the Court and the Defendants to assist in having Dr Stephen Ramroop or any other medical expert appointed to ascertain whether ***"all that could have been done was done"*** in the care of the Claimant.

68. The misconceptions of these submissions are enormous and quite startling, to say the least. First, the idea that the **doctrine of *res ipsa loquitur*** applies in this case is misplaced. It is trite law that the burden of proving one's case, especially medical negligence, rests with the Claimant. This burden only shifts in very few exceptional cases, none of which applies to the facts of this case. Counsel for the Claimant has not provided any authority to support his contention and has chosen to rely on his bald assertion that the burden has shifted to the Defendants to establish that their standard of care did not fall below the accepted standard. Secondly, the Claimant has admitted that he is unable to prove his case with the evidence now before the Court and is also unable to secure the medical evidence of an expert. Thirdly, he wishes for the Court to appoint an expert at the expense of the Defendants on the basis that he is impecunious. This submission is ludicrous as the there is no guarantee that any report from any medical expert may be in his favour and if not, then the Claimant is admitting that he will not be able to honour any order for costs that may be made against him. This means that the

longer the matter continues the more costs will be incurred by all parties. This is contrary to all noble principles embodied in the overriding objective of the CPR, in particular, the principles of fairness, saving expense (economy) and proportionality. In keeping with direction given in the **Belize Telemedia case**[5] (supra) I have focused on the intrinsic justice of the case from both sides and I am of the opinion that it would be unjust and disproportionate to put the Second Defendant ***"through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail."***

FINDINGS

69. It is in light of the foregoing that the Claimant's claim for damages as an alleged result of negligence, on the part of the Defendant(s), for which no satisfactory evidence is before the Court, and no plausible answer having been offered in the course of argument by the Claimant, does, as it seems to me, illustrate the correctness of the conclusion that this application to have the Claimant's Claim against the Second Defendant struck out, must succeed.

APPLICATION OF THE 3RD DEFENDANT RE: SUMMARY JUDGMENT

70. The Third Defendant has filed a Notice of Application on the 5 April 2016 for Summary Judgment pursuant to **CPR Part 15.2** against the Claimant on the basis that the Claimant's Claim has ***no realistic prospect of success***. The following grounds are relied upon in pursuance of the said application, namely:

    a. The Claimant has not made any specific averments of neglect against it in either his claim form or statement of case, and;

    b. The Claimant admitted that he is unable to provide evidence to support his claim of negligence as stated in his affidavit dated 21 January 2016.

[5] Belize Telemedia and another v Magistrate Usher and another(2008) 75 WIR 138 para 20

71. The said application was supported by affidavit deposed by Salisha Baksh, General Manager of Legal and Corporate Affairs of the Third Defendant. In response the Claimant filed his affidavit in opposition on the 3 June 2016. Thereafter, in accordance with the directions of the Court, written submissions were filed by the Third Defendant on the 27 June 2016 and by the Claimant on the 15 July 2016.

Submissions on Application for Summary Judgment

72. Counsel for the Third Defendant submitted that in considering the said application the Court must look at all the documents filed in the matter before coming to any conclusion. Counsel submitted that from the pleadings there is no dispute as to the facts regarding the intervention of the Third Defendant in the treatment of the Claimant, in that it is accepted that the Claimant was referred to the Third Defendant by Dr. Toby because the Claimant's hand had developed gangrene and had to be amputated, which was in fact done on the 15 May 2010. There is also agreement that there was a second amputation four days later (on the 19 May 2010) because the gangrene had spread. Save for the difference in the date of admission to the Port of Spain General Hospital (the Claimant having pleaded in paragraph 10 of the Statement of Case that he was sent to the hospital on the 13 May 2010 but the Third Defendant's Amended Defence says that he was admitted on the 14 May 2010) it was submitted that the Claimant in his Statement of Case admitted to these facts and therefore there remains no dispute as to the necessity for the surgeries.

73. There remains, however, a bare allegation made by the Claimant against all Defendants in this matter for medical negligence. The Third Defendant submitted that the Claimant has failed to set out any particulars of negligence against it and relied on **CPR Part 8.6** previously outlined at paragraph 43. It was also submitted that the Claimant has not been able to provide any particulars of breach of the Third Defendant's duty of care to him upon which a claim can succeed. It was further submitted by the Third Defendant that it was the events which occurred prior to the Claimant's admission to the Port of Spain General Hospital which led to the ultimate amputation of the Claimant's arm.

74. It is essentially based on these aforementioned circumstances that the Third Defendant has made an application for Summary Judgement.

75. In response submissions Counsel for the Claimant agreed that in cases such as the one at bar, it is settled that the first issue necessarily involves finding the existence of a duty of care to the Claimant, and secondly, considering whether there has been a breach of that duty. The second issue is one of causation and relies on medical evidence.

76. Counsel also agreed that in order to find a medical professional negligent, it must be shown that his or her conduct fell below a generally accepted standard of medical care. He argued that to establish the standard to be applied, a claimant must present the testimony of another medical expert, qualified in the same area of medicine as the defendant, indicating what standard or level of care is commonly met by those recognised in the profession as being competent and qualified to practice. The Claimant will have to present expert testimony not only as to this standard of care but also show the Defendant failed to meet this standard.

77. Counsel posited that the Court can take notice of the fact that establishing wrongdoing on the part of a health care provider is often difficult. It requires hiring expert witnesses who must testify as to what the defendant should have done under applicable professional standards. Proving malpractice is also difficult because as in the case at bar the defendants are the ones who write the medical reports that may form the basis of the suit. He surmised that some health care providers may frame their reports so as to protect someone guilty of misconduct.

78. Counsel for the Claimant further submitted that based on the pleadings and the facts of this case, the Claimant is faced with a difficult hurdle of proving medical negligence because as a patient injured as a result of medical procedure, he does not know exactly what caused his injury. However, Counsel contended that it is the type of injury that would not have occurred without negligence on the part of his health care provider(s). Counsel thus sought to invoke the **doctrine of *res ipsa loquitur*** and contended that the Claimant only needs to show that a particular result occurred and would not have

occurred but for someone's negligence. It is Counsel's contention that by the applicability of this doctrine the burden of proof shifts to the Defendants to show that they were not negligent.

79. Counsel for the Claimant further submitted that the **doctrine of *res ipsa loquitur*** applies in this case because of the following reasons:

    a) *Evidence of the actual cause of the injury is not obtainable;*
    b) *The injury is not the kind that ordinarily occurs in the absence of negligence;*
    c) *The Claimant was not responsible for his own injury;*
    d) *The Defendants, or their employees or agents, had exclusive control of the instrumentality that caused the injury; and*
    e) *The injury could not have been caused by any instrumentality other than that over which the Defendants had control.*

80. Counsel for the Claimant argued that the Claimant is seeking to establish, *inter alia* that since evidence was still being acquired or investigated through his attempts to have a medical expert appointed, that in those circumstances, summary judgment would be premature and sought to rely on the case of **Derksen v Pillar (2002) LTL 17/12/2002** to support his contention. In that case evidence was still being acquired or investigated, the claim raised complex issues and summary judgment was regarded as inappropriate.

81. The case of **Bolton Pharmaceutical Company 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others [2006] EWCA Civ 661** was also submitted for consideration, particularly as per **Mummery LJ** at paragraph 5, which states as follows:

> "…..*The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials."*

82. The Claimant submitted that in the matter at bar, it would be appropriate for the Court to adjourn the Third Defendant's application and have it relisted, if so desired, after the appointment of a medical expert to assist the Court in assessing the medical reports which

are relied on by the respective Defendants and a medical opinion is given with regard to same by the expert.

83. The Claimant maintained that the Third Defendant's application for summary judgment is premature and is based on an alleged insufficiency of evidence of medical negligence of the said Defendant. The Claimant was adamant in its submissions that in a case of this nature where medical negligence is at the core, that the Claimant would only be able to properly prove and present his case after a medical expert gives a report especially since the Defendant, being a medical health care provider, provided documentation, which in the Claimant's view could only be dispelled by the appointment and opinion of a medical expert called to give evidence in this matter. Further, that the particulars of negligence as claimed, disclose an arguable claim for negligence against the Third Defendant.

ISSUE

The issue arising for determination in relation to the Third Defendant's application for summary judgment is -

i. **Whether the Claimant's claim against the Third Defendant has a realistic prospect of success, in default of which, whether the Third Defendant's application for Summary Judgment can succeed.**

LAW AND ANALYSIS

84. The application for summary judgment is governed by **Part 15 of the CPR**. **Part 15.2** provides as follows:

> **"The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that—**
> **(a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue; or**

(b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of the claim or issue."

85. The basic principles of summary judgment have been well established and settled in case law. The authority of **Western United Credit Union Co-operative Society Limited v Corrine Ammon**[6] which referred to the decisions of **Toprise Fashions Ltd v Nik Nak Clothing Co Ltd and ors**[7] and **Federal Republic of Nigeria v Santolina Investment Corp.**[8] , is often cited for its comprehensive outline of the basic principles as follows:

> *"(i) the court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success:* ***Swain v Hillman [2001] 2 All ER 91****;*
>
> *(ii) A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable:* ***ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];***
>
> *(iii) In reaching its conclusion the court must not conduct a "mini-trial":* ***Swain v Hillman****;*
>
> *(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statement before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly, if contradicted by contemporaneous documents:* ***ED & F Man Liquid Products v Patel at [10];***
>
> *(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:* ***Royal Brompton Hospital NHS Trust v Hammon (No.5) [2001] EWCA Civ 550;***
>
> *(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation*

[6] Civ. App. No. 103 of 2006 [3] per Kangaloo JA
[7] 3 (2009) EWHC 1333 (Comm)
[8] (2007) EWHC 437 (CH) Page 12 of 18

into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63."***

86. The Third Defendant cited the case of **Swain v Hillman [2000] 1 All ER 91**, where **Lord Woolf MR** opined that the term ***"no realistic prospect of success"*** was self-explanatory and needed no further amplification and further that the Court must determine whether there was a ***"realistic"*** as opposed to a ***"fanciful"*** prospect of success.

87. The Third Defendant also referred the Court to the case of **SC DG Petrol SRL v Vitol Broking Ltd and others [2013] EWHC 2176 (Comm)** where **Eder J** at paragraph 3 (ii) and (iii) of the judgment stated as follows:

"Crucially, the Claimant is not required to show that its case will probably succeed at trial: "[t]he criterion which the judge has to apply under CPR Pt 24[9] *is not one of probability: it is absence of reality: see Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 (HL), at 158, [2000] 3 All ER 1, [2000] 2 WLR 1220, per Lord Hobhouse.*

iii) In this regard, the burden rests firmly with the Defendant to establish, if it can, the negative proposition that the Claimant's claim has no real prospect of success. The burden on the Claimant is, at most, an evidential one: see, for example, Apvodedo NV v Collins [2008] EWHC 775 (Ch), at 32, per Henderson J."

[9] The equivalent to Part 24 of the UK CPR in our jurisdiction is CPR Part 15 (Summary Judgment)

88. Additionally, the case of **Mercury Marketing Limited v VB Enterprises Limited CV2014-02694** was cited, in which **Kokaram J** following the **Western United Credit Union v Ammon case** (supra) outlined the main principles which ought to be considered when determining a summary judgment application. These principles are as follows:

> *"(i) The Court should not conduct a mini trial without giving the parties ample opportunity to present their evidence through witness statements and the process of disclosure and further information;*
>
> *(ii) The Court must consider whether this Defendant has a realistic as opposed to a fanciful prospect of success;*
>
> *(iii)A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable;*
>
> *(iv)This does not mean that the Court must take at face value and without analysis everything the Defendant says in his statements before the Court. In some cases it may be clear there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents. However, in reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial;*
>
> *(v) Where a party advances a groundless defence or no defence it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion; and*
>
> *(vi)Whether there is any realistic prospect of success on its defence to the claim, part of the claim or issue, the Court is engaged in an exercise of discretion to give effect to the overriding objective, bearing in mind the*

policy of such an application is that it would be a waste of the parties' and the Court's resources to do otherwise and that further management to trial is an uneconomical, un-proportionate response to the nature of the case presented by the litigant."

89. It was further submitted that ***proportionality*** must be the marker when looking at the documents and information before the Court so that it can make a determination on whether the case was so weak, that it had no real prospect of succeeding. As per **Kokaram J at paragraph 15** in the case of **Mercury Marketing Limited**,

> *"Indeed for this reason the exercise of the Court's discretion on these applications is against the backdrop of achieving the overriding objective to deal with a case justly. Proportionality will always be a useful rudder to determine the outcome of the just result and a Court must always be sensitive of running a risk of summary injustice. However to simply say that a Court should not conduct a mini trial on a summary judgement application is to mischaracterize the purpose of the exercise."*

90. Counsel for the Third Defendant highlighted that the Claimant had the duty to set out his case of medical negligence against it in accordance with Part 8, particularly **CPR Rule 8.6** which provides -

> **"(1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.**
>
> **(2) The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case."**

91. To bolster its position that the Claimant in his claim form and statement of case provided no grounds on which the Third Defendant could be held to be prima facie negligent, reference was made to **Blackstone's Civil Practice (2001) para. 24.18** which states-

"A good claim or defence should enable the parties and the court to narrow down and identify the central issues in dispute. This has always been the case. For example, a defendant is entitled to know not merely the cause of the action against him but also the manner in which it is alleged that he was in breach of his duty, thereby causing the claimant to seek redress against him. To achieve that objective requires no more than a properly detailed set of particulars (as opposed to evidence) thereby allowing him to set out his case in response."

92. Further,

> ***"Thus, as in the past, a claim or defence which discloses little or nothing about the party's case is liable to be (and today almost certainly will be) struck out."***

93. It was submitted that the Claimant failed to show how the Third Defendant breached its duty of care owed to him and also failed to disclose a claim in negligence.

94. This Court took into consideration the overriding objective as embodied in **CPR Part 1.1(1)** which is to deal with all cases justly[10]. As expressed in **CPR Part 1.1(2),** dealing justly with cases includes-

> ***"(a) ensuring, so far as is practicable, that the parties are on an equal footing;***
>
> ***(b) saving expense;***
>
> ***(c) dealing with cases in ways which are proportionate to—***
>
> ***(i) the amount of money involved;***
>
> ***(ii) the importance of the case;***
>
> ***(iii) the complexity of the issues; and***
>
> ***(iv) the financial position of each party;***
>
> ***(d) ensuring that it is dealt with expeditiously; and***

[10] Parks International Limited v Juliana Webster C.V. No 2010-01619 Before the Honourable Justice Robin Mohammed

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

95. The Claimant has failed to show with any degree of sufficiency that the Third Defendant breached its duty of care to him and has put forward no arguments of merit with which this Court can determine a claim in negligence against the Third Defendant. As was rightly stated by Counsel for the Third Defendant at the hearing of the application, the Claimant has made a bare allegation and his pleadings were also skeletal as he has not set out any negligent act or omission on the part of the Third Defendant or any of the Defendants for that matter.

96. In fact, the Claimant came to the Third Defendant after having gone to a private doctor and being informed of a developing gangrenous infection in his arm. The Third Defendant assisted him and did what was necessary as a result of his condition. Two operations were subsequently conducted. The Claimant has failed to set out particulars of negligence that the Third Defendant conducted those operations in a negligent manner or that there was any negligence at all in the way he was treated or monitored. Instead, Counsel for the Claimant sought to shift the burden to the Defendant(s) by forcing the applicability of the **doctrine of *res ipsa loquitur***, a submission this Court has already dismissed as untenable in the analysis of the submissions under the application to strike out dealt with earlier.

97. The Claimant himself has admitted that he has had difficulty in adducing any further evidence by way of an expert report and that he is impecunious. Therefore, in keeping with the overriding objective of the CPR, and the weight of the authorities developed in this regard, in all these circumstances of this case, it would be in violation of the principle of proportionality to send this matter to a full trial against the Third Defendant as it is unlikely that any further investigation will advance the case in favour of the Claimant. Such an exercise is destined to be costly for all parties and it is clear, by the Claimant's own admission, that he will be unable to honour any order for costs in the likely event that he is unsuccessful.

98. In a claim for negligence the burden of proof rests on the Claimant to show that there was an actual breach of the duty owed to him by the Third Defendant and the Claimant has failed to produce any such evidence.

FINDINGS

99. Considering the lack of evidence against the Third Defendant and the difficulty which the Claimant has admitted with regard to his likelihood of producing any further evidence against the Third Defendant, as it stands now, this Court is of the firm view that the Claimant does not have a realistic prospect of success against this Defendant. Any prospect of success entertained by the Claimant in relation to the status of his Claim is merely ***"fanciful"*** and therefore the application for Summary Judgment must succeed.

100. Accordingly, in light of the above analyses and findings in relation to the two applications before the Court, the order of this Court is as follows:

ORDER:

I. In relation to the Second Defendant's Notice of Application filed on 1 March 2016, the Claimant's Claim and Statement of Case filed on 25 April 2014 be and is hereby struck out pursuant to CPR Part 26.2(1)(c).

II. Costs of the said Notice of Application of the 1 March 2016 to be paid by the Claimant to the Second Defendant to be assessed in accordance with CPR Part 67.11, in default of agreement.

III. In relation to the Third Defendant's Notice of Application filed on 5 April 2016, summary judgment be and is hereby granted in favour of the Third Defendant pursuant to CPR Part 15.2 on the basis that the Claimant has no

realistic prospect of success on his Claim filed on 25 April 2014 against the Third Defendant.

IV. Costs of the said Notice of Application of 5 April 2016 to be paid by the Claimant to the Third Defendant to be assessed in accordance with CPR Part 67.11, in default of agreement.

Dated this 6th day of October, 2016

_____

Robin N. Mohammed
Judge