THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-00727

BETWEEN

GLENDA JOACHIM-WARRICK

(As the Legal Personal Representative of the Estate of ANTHONY WARRICK, Deceased)

JUSTIN CHRISTIAN WARRICK

Claimants

AND

THE WATER AND SEWERAGE AUTHORITY OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Wednesday 3 February 2021

Appearances:

Ms. Leandra Ramcharan for the Claimants

Mr. Kirk Bengochea instructed by Mr. Ramnarine Mungroo for the Defendant

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DECISION ON SUBMISSION OF NO CASE TO ANSWER

I. Introduction

[1] Before the Court for decision is the Defendant's submission of "no-case to answer", the Claimants having closed their case after the evidence of all their witnesses. The following is the procedural history leading up to the no-case submission.

[2] The First Claimant, Mrs. Glenda Joachim-Warrick, is the widow and Legal Personal Representative of the Estate of Anthony Warrick, the Deceased, pursuant to the Grant of Letters of Administration dated 21 February 2014. The Second Claimant, Justin

Christian Warrick, is the son and was a dependant of the Deceased at the date of the Deceased's death.

[3] The Deceased died on 2 March 2013 of acute asphyxia as a result of water inhalation/aspiration by drowning. He was 54 years old. The Deceased was submerged in the waters of the Navet Reservoir/Dam, the property of the Water and Sewerage Authority (hereinafter "WASA"), when a single engine vessel he was in, capsized. However, his death was certified on 4 March 2013 when his body floated to the surface of the Navet Reservoir. At the time of his death, the Deceased was gainfully and permanently employed as a Senior Administrative Officer, Operations at WASA.

[4] By way of Claim Form and Statement of Case, the Claimants initiated these proceedings against the Defendant on 23 February 2017 seeking the following reliefs:

1. Damages for the personal injuries and/or the death of Anthony Warrick, Deceased, certified on the 4th day of March 2013, and the consequential loss sustained and caused to his Estate by the negligence and/or breach of statutory duty of the Water and Sewerage Authority, by its servants or agents, on 2nd day of March 2013, in allowing the Deceased and 12 other persons to board a single engine vessel, the property of the Defendant, and to be permitted unsupervised access to the Navet Reservoir, the property of the Defendant, in which the Claimant (*sic*[1]) was submerged when the single engine vessel capsized resulting in his death from acute asphyxia as a result of water inhalation/aspiration from drowning.
2. Damages under the provisions of the Compensation for Injuries Act for the benefit of Justin Christian Warrick as the dependant of the Deceased, Anthony Warrick.
3. Interest.
4. Costs.
5. Further or other relief.

[5] The Claimants alleged that on 2 March 2013, the Defendant, by its servants and/or agents, permitted or allowed the Deceased and 12 other persons to board a single engine

[1] Should be "The Deceased"

vessel, the property of the Defendant, and permitted or allowed the Deceased and the said 12 others unsupervised access to the Navet Reservoir, the property of the Defendant and an artificial body of water, in which the Deceased was submerged when the said single engine vessel capsized resulting in his death from acute asphyxia as a result of water inhalation/aspiration from drowning. The Claimants further alleged that this was caused by the negligence and/or breach of statutory duty of the Defendant. In their Statement of Case, Particulars of the Defendant's Negligence were set out as follows:

a. Approving and permitting the access of the Deceased to the Navet Reservoir outside of his defined working hours.
b. Approving and permitting the access of the Deceased to the Navet Reservoir which is outside of his function as Senior Administrative Officer of the Authority.
c. Approving and permitting the access of 12 unauthorized persons onto the premises of the Navet Reservoir.
d. Allowing and permitting the Deceased unauthorized access to a motorized single engine vessel.
e. Allowing and permitting the Deceased access to the ignition keys to activate the outboard motor of the motorized single engine vessel.
f. Allowing and permitting the Deceased access to the motorized single engine vessel without examining the level of the fuel in the said vessel.
g. Allowing and permitting the Deceased access to the motorized single engine vessel without any pre-operational checks of the vessel.
h. Allowing and permitting the Deceased access to the motorized single engine vessel without monitoring the intended use to which the vessel was to be utilised.
i. Allowing and permitting the Deceased access to the motorized single engine vessel for a purpose for which the said vessel was not intended and not equipped.
j. Allowing and permitting 13 unauthorized persons to embark unsupervised upon a motorized single engine vessel equipped for the use of 4 to 6 persons only.
k. Allowing and permitting 13 unauthorized persons to embark unsupervised upon a motorized single engine vessel equipped with safety equipment for 4 to 6 persons.
l. Allowing and permitting 13 unauthorised persons to embark unsupervised upon a motorized single engine vessel equipped for 4 to 6 persons despite the known presence of potentially life threatening wildlife in and around the waters of the Navet Reservoir.

m. Allowing and permitting 13 unauthorized persons to embark unsupervised upon a motorized single engine vessel equipped for 4 to 6 persons despite the absence of lifeguards and/or trained emergency personnel and/or lifesaving equipment and/or a second backup vessel on the Navet Reservoir.

n. Failing to assist and/or call for immediate backup at the time of the accident.

[6] The Defendant filed an Amended Defence on 22 November 2017 in which the Defendant denied the Claimants' Claim of negligence. The Defendant averred that on 2 March 2013, the Defendant, by its agents or servants, did not give permission to nor authorized the Deceased and a party of 17 persons to enter the compound of the Navet Water Treatment Plant and Reservoir. It was further averred that the Deceased used his position as a senior employee to gain entry to the Defendant's premises for recreational purposes. Accordingly, the Deceased's actions were both outside the scope of his duties as an employee of the Defendant and the scope of the Defendant's invitation to the Deceased to enter onto the Defendant's premises. The Defendant averred that it would rely on the doctrine of *volenti non fit injuria* as well as negligence or contributory negligence on the part of the Deceased.

[7] The trial was fixed for 14 March 2019. The First Claimant, the Second Claimant and Ms. Deborah Ochoa gave evidence in support of the Claimants' case. These witnesses were cross-examined by Counsel for the Defendant. The Claimants, thereafter, closed their case.

[8] At the close of the Claimants' case, the Court asked Counsel for the Defendant if he wished to make an opening statement before calling his evidence. Counsel for the Defendant, however, indicated that he wished to make a no-case submission. Thereafter, both parties were permitted to file written submissions on which the Court will rule as to whether a case has been made out for the Defendant to be called upon to answer the Claim. The Defendant filed its written submissions on its no-case submission on 8 May 2019. The Claimants filed their response to the no-case submission on 22 July 2019. Thereafter, the Defendant filed a reply to the Claimants' response submissions on 15 August 2019.

II. Submissions

Defendant's No-Case Submission

[9] Counsel for the Defendant, Mr. Bengochea, contended that the Defendant has no case to answer for the following reasons: (i) the Claimants have not provided any evidence, or any sufficient reliable evidence that the Defendant granted the Deceased permission to use the boat or to go on the Navet Dam. None of the Claimants' witnesses can speak to this aspect; and (ii) the Claimants have failed on the issue of causation. There is no expert evidence on the viability of the boat and it is not denied that the boat was able to make it across the Navet Dam safely on the first occasion when it was not overloaded. It is only when the Deceased overloaded the boat that the boat sank. The overloading of the boat is outside the control of the Defendant and there is no evidence that the Defendant knew or permitted the boat to be filled to such capacity.

[10] Mr. Bengochea submitted that the Claimants are required to prove their case against the Defendant on a balance of probabilities. Counsel relied on the local authority of **Frank General Contractors Limited v M Rampersad Auto Supplies Limited**[2] a case in which the issue for determination was whether the Defendant was liable for breach of contract in relation to the sale of a motor vehicle to the Claimant. More specifically, the Claimant alleged breach of the warranty agreement that applied to the sale by the Defendant's alleged failure to repair a defective transmission in the vehicle. After the close of the Claimant's case, the Defendant elected not to call any evidence at trial submitting that there was no case to answer. Justice Donaldson-Honeywell stated as follows:

> *"… it is clear that the requisite standard of proof to be met by the Claimant, in the circumstances herein where at the close of the Claimant's case the Defence not only sought to make a no case submission but further elected not to call any evidence, is on a balance of probabilities. It is not sufficient in order to defeat the no case submission for the Claimant to have established at the close of its case a mere prima facie case with regard to all relevant facts pleaded."*

[2] CV2015-04013

[11] On the issue of alleged negligence on the part of the Defendant, Mr. Bengochea relied on the authority of **Flaherty v A E Smith Coggins Ltd**[3] which illustrated the following: (i) reliance of the possibility of negligence does not prove the case for the Claimants; (ii) the Court must not engage in conjecture or surmises to find that the Claimants have proven their case; (iii) there must be evidence from the Claimants that the act complained of was negligent; and (iv) the fact that the act occurred is not in itself evidence of negligence. Lord Justice Birkett stated as follows:

> *"The real question before this Court is whether there was any evidence upon which the Learned Judge… could draw the necessary inference of negligence which enabled the Plaintiff to succeed, and perhaps a subsidiary question whether, when all is considered, the matter was not left in the region of surmise and conjecture so that the onus of proof upon the plaintiff had not been adequately discharged."*

[12] Counsel also referred to the passage of Lord Macmillan in **Jones v Great Western Railway**[4] which was cited by Lord Justice Birkett in **Flaherty (supra)**, as follows:

> *"If the evidence establishes only that the accident was possibly due to the negligence to which the plaintiffs seek to assign it, their case is not proved. To justify the verdict which they have obtained the evidence must be such that the attribution of the accident to that cause may reasonably be inferred. If a case such as this is left in the position that nothing has been proved to render more probable any one of two or more theories of the accident, then the plaintiff has failed to discharge the burden of proof incumbent upon him. He has left the case in equilibrium, and the Court is not entitled to incline the balance one way or the other."*

[13] Accordingly, Mr. Bengochea submitted that the Claimants have failed to prove their case since they have run afoul of all the principles enunciated in **Flaherty (supra)**. Mr. Bengochea further submitted that the Claimants have not discharged their burden of proof in demonstrating a breach of a duty of care and that this breach caused the

[3] [1951] 2 Lloyd's Rep 397
[4] [1930] All ER Rep Ext 830

death of the Deceased. It was submitted that the evidence of breach of duty is woefully insufficient since none of the Claimants' witnesses can speak of the permission that the Deceased received or the scope of permission granted.

[14] Mr. Bengochea further submitted that from the evidence, it is clear that the cause of death of the Deceased was the overloading of the boat. It was only when the boat was filled with 12 persons that it sank. This, was therefore, outside the control of the Defendant and totally within the control of the Deceased. Additionally, the Claimants have not brought any expert evidence on the issue of the viability of the boat and it was admitted by the Claimants' witnesses that the boat made a safe trip across the Navet Dam initially without incident. Therefore, the cause of the accident, prima facie, was not (i) permission; (ii) access to the Navet Dam; or (iii) the boat. Accordingly, the Claimants' case must fail on the issue of causation.

[15] Mr. Bengochea contended that the Claimants have failed to satisfy the Court on a balance of probabilities that: (i) any permission that was granted to the Deceased to use its facilities at the Navet Dam including the use of the boat was responsible in some way for causing the accident which resulted in the death of the Deceased; (ii) the Deceased had obtained the necessary permission from the Defendant using the appropriate procedures to use the Navet Dam for recreational purposes; (iii) permission is usually granted to persons to use its boat for recreational purposes and that the Deceased had obtained such permission to use the said boat at the material time; (iv) if any such permission was obtained by the Deceased, it included the use of the boat to convey his friends across the dam; and (v) if any such permission was granted to the Deceased, that such permission included approval to overload the boat, that is, to convey himself and 12 other persons including foodstuff, ice, clothing and fishing net, all at once across the dam using the said boat. It was further contended that no witnesses were called by the Claimants to provide expert evidence on any alleged capsizing or sinking of the boat and for the reason which led to the boat taking in water and eventually becoming submerged.

[16] Mr. Bengochea submitted that the concomitant effect of the Claimants' evidence is that the Claimants have no evidence which support any allegations in the Statement of Case, particularly as regards the allegation that the Defendant permitted or

authorised the Deceased's use and access of the Navet Reservoir and/or the boat in question at the time of the incident and whether the alleged access to the boat included the conveying of unauthorized persons in such numbers.

[17] Mr. Bengochea further submitted that the Claimants' evidence places reliance on the possibility of negligence. Therefore, such evidence is inviting the Court to speculate or surmise on the Defendant's negligence – an approach which is unacceptable. The fact that the Deceased was present at the Navet Reservoir is not evidence that the Defendant was negligent. Counsel relied on the case of **Darryl Damian Abraham v The Attorney General of Trinidad and Tobago**[5] wherein Rahim J accepted the principle on a Claimant's burden of proof as follows:

> *"In order to recover damages for negligence, a claimant must prove that but for the defendant's wrongful conduct he would not have sustained the harm or loss in question. He must establish at least this degree of causal connection between his damage and the defendant's conduct before the defendant will be held responsible for the damage:* ***Munkman: Employer's Liability at Common Law, Chapter 3 para 3.12****."*

[18] Accordingly, the Claimants are required, in their evidence, to prove wrongful conduct or negligence on the part of the Defendant which was the cause of death. However, there is no evidence of this; the Claimants' evidence does not suffice in any way. Mr. Bengochea, therefore, submitted that the Court should conclude that the Claimants have failed to discharge their burden of proof that the death of the Deceased was caused by the Defendant's wrongful conduct or negligence. It was further submitted that as a result of the lack of evidence in support of the Claimants' case, the Claimants have not discharged the burden of proof on a balance of probabilities which is required in order to succeed on their Claim and for the Defendant to be called upon to answer.

Claimants' Response to No Case Submission

[19] Counsel for the Claimants, Ms. Ramcharan, submitted that the law on no-case submission is clear: once a Defendant makes a submission that he has no case to answer, if he elects to call no witnesses, the Claimant will have to prove his case on a

[5] CV2011-03101

balance of probabilities. If, however, the Defendant is not put to his election then the Claimant merely has to show that he has a prima facie case. Counsel relied on the authority of **Miller (t/a Waterloo Plant) v Cawley**[6] wherein Lord Justice Mance stated as follows:

> *"17. Where a defendant is put to his or her election and elects to call no evidence, the position is quite different. As I said in Boyce at para. 4:*
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> > *"First, where a defendant is put to his election, that is the end of the matter as regards evidence. The judge will not hear any further evidence which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either fails or succeeds, even on appeal."*
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> *18. The issue after an election is, in other words, not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. It is the straightforward issue, arising in any trial after all the evidence has been called, whether or not the claimant has established his or her case by the evidence called on the balance of probabilities."*

[20] Accordingly, the question that both parties have asked the Court to determine on this no-case submission is whether the Claimants have proven their case on a balance of probabilities having regard only to the evidence led by the Claimants on examination and cross-examination. Ms. Ramcharan submitted that the Claimants' case is that WASA owed the Deceased a duty of care; that this duty was breached when the Defendant permitted unsupervised access to a dangerous area which resulted in the death of two persons; that there was no adequate signage to warn an unsuspecting invitee on the premises.

[21] Ms. Ramcharan submitted that where there is a foreseeable risk of injury, there exists a duty of care by the occupier and/or controller of the premises. Counsel relied on **Barry-Laso and Quesnel v Tobago House of Assembly and others**[7] wherein the Claimants were injured by a motor boat while bathing in waters off Pigeon Point. At the time of the accident, there were no warning signs in the adjacent water in the

[6] [2002] EWCA Civ 1100
[7] CV2008-02722

vicinity of the channel or at all nor was there any part of the adjacent water roped off. Neither were there any warning signs on the beach with respect to boating activity in the channel or at all. Madam Justice Jones (as she then was) stated as follows:

> *"17. The first question to be answered here is whether in these circumstances persons bathing in the adjacent waters are persons so closely and directly affected by the omission to prevent or to warn of a foreseeable risk of injury, that is the risk of injury by boats using the channel, that they fall within the category of neighbour contemplated by Lord Atkin in Donoghue v Stevenson. In my opinion the answer to this question must be yes. It would seem to me that the fact of an obvious risk of injury suggests prima facie that a duty of care exists. The question is by whom is this duty owed? If there is no one with a sufficient degree of control over the adjacent water or its use then the duty of care which prima facie arises from the existence of the foreseeable risk exists in a vacuum and is meaningless.*
>
> *18. The next question to be answered therefore is: which, if any, of the Defendants, have a sufficient degree of control so as to put themselves under a duty of care to a user of the adjacent water? Applying the cases on the common law general duty of care, in* ***Wheat v E Lacon & Co. Ltd. [1966] AC 552*** *Lord Denning stated the relevant principle to be:*
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> > *"wherever a person has a sufficient degree of control over premises that he ought to realize that any failure to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his visitor: and the "occupier" is under a duty to his "visitor" to use reasonable care.": per Denning LJ at page 578. The test is occupational control.*
>
> *19. It cannot, I think, be disputed that had the accident occurred on the land occupied by the Park either the THA or the Company or both would have had a sufficient degree of control over the Park so as to found a duty of care towards visitors to the Park. That such responsibility can vest in more than one person or entity at the same time is not in dispute: Wheat v E. Lacon &Co."*

[22] Ms. Ramcharan submitted that the Defendant admitted that there was a foreseeable risk of injury in paragraph 11 of the Amended Defence. Paragraph 11 of the Amended

Defence stated that "*…the Defendant avers that it was not negligent at the material time or at all since it had and implemented adequate safety procedures to ensure that its premises were kept reasonably safe for all employees and/or servants and/or visitors at all times. The Defendant further avers that there is ample safety signage placed around the reservoir indicating that there was to be no trespassing and that the area was not to be used for bathing, fishing and/or swimming."*

According to Ms. Ramcharan, this constitutes an admission as the Defendant would not need signage and/or safety measures if there was no foreseeable risk of harm. Ms. Ramcharan, therefore, submitted that it is for the Defendant to prove that these measures and signs truly existed.

[23] Ms. Ramcharan submitted that the next question is whether the Defendant had occupational control over the premises such as to found a duty of care to visitors to the Dam. Ms. Ramcharan contended that since it is a WASA compound and the Defendant is both owner and in possession, it cannot be disputed that the Defendant had occupational control. Therefore, a duty of care is deemed to have existed. Ms. Ramcharan submitted that since the Defendant alleges that the Deceased did not have permission to enter the premises, this affects the duty of care since an occupier has a different duty to an invitee than it has to a trespasser. Nevertheless, there were exceptions to this general rule. Counsel relied on **British Railway Board v Herrington**[8] where Lord Reid stated as follows:

> *"The speeches in this House in Addie's case appear to me to be intended to lay down a general rule that no occupier is under any duty to potential trespassers, whether adults or children, to do anything to protect them from danger on his land, however likely it may be that they will come and run into danger and however lethal the danger may be….*
>
> *But there were already two exceptions to this rule. The first was where the occupier had put on his land something which was dangerous and was an allurement to children. That seems to me to be easy to explain. He ought to know that by putting that allurement there he was in a sense inviting children to meddle with the dangerous thing, and the law would not permit him to do*

[8] [1972] UKHL 1

that without imposing a duty on him. His liability arose from his own choice to endanger children in that way.

The second exception is not so easy to explain. If, after a certain point not easy to define, the occupier continued to stand by and acquiesce in the coming of trespassers he was held to have given a general permission or licence to trespassers to continue to do what those trespassers had been doing. Any "licence" of this kind was purely fictitious. There was no need to find any evidence that he had in fact consented to the coming of the trespassers or to the continuance of the trespassing. His inaction in suffering the trespassing might have been due to many other reasons than his being willing to allow it. He might prove that there was some other reason but that would not avail him."

[24] Ms. Ramcharan submitted that on the facts, since the Defendant has elected to call no evidence, the Deceased was permitted entry onto the compound. She submitted that Ms. Ochoa's witness statement stated that they were allowed to enter the compound by Pegasus Security Group, which was hired by the Defendant to control entry into the compound. Therefore, without evidence to the contrary, it is not open to the Defendant to say that the Deceased was a trespasser.

Nevertheless, if the Deceased and the party were trespassers, as stated in **British Railway Board (supra)**, as the occupier continued to stand by and acquiesce in the coming of trespassers, the occupier was held to have given "a general permission or "licence" to trespassers to continue to do what those trespassers had been doing". Ms. Ramcharan submitted that this would be unchanged notwithstanding that Ms. Ochoa, in cross-examination, agreed that generally visitors would require a pass and that they would be required to stay a safe distance from the water. Nonetheless, she indicated in her witness statement that on occasions, these rules would not be applied rigidly.

[25] Ms. Ramcharan, therefore, submitted that it cannot be disputed that the compound was under the control of WASA and that WASA had a sufficient degree of control over the premises so as to found a duty of care towards visitors and/or trespassers.

[26] As it relates to the issue of causation, Ms. Ramcharan contended that the danger was unusual; the Defendant knew of the danger and the danger could have been avoided with the use of reasonable care. Counsel relied on **Barry-Laso & Quesnel v Tobago House of Assembly & ors (supra)** in support of her proposition. Ms. Ramcharan submitted that the Deceased, as an employee of the Defendant, would be part of that class of people who would have knowledge of the boat and the Dam. However, the burden of proving this rests on the Defendant. The boat has been used previously to ferry people about the Dam and had not sunk. Accordingly, the danger was such a danger as is not usually found carrying out the task or fulfilling the function which the invitee has in hand.

[27] Ms. Ramcharan submitted that the Defendant pleaded at paragraph 10 of the Amended Defence that the Deceased was aware of the danger posed. In paragraph 10, the Defendant stated that the Deceased was aware of the limitations of the boat and safety procedures to be implemented. Ms. Ramcharan contended that as stated by Madam Justice Jones in **Barry-Laso (supra)**, the evidentiary onus is on the Defendant. The Defendant has to establish that (i) the Claimants knew of the danger; (ii) they fully appreciated the risk of injury; and (iii) they voluntarily agreed to accept the risk and its consequences. However, since the Defendant has elected to call no witnesses, the evidence that the danger was known and appreciated by the Deceased does not exist nor did they voluntarily accept the risk.

[28] Ms. Ramcharan further submitted that even where a breach is proved, the Claimant must show that 'but for' the Defendant's breach, the damage would not have occurred. Ms. Ramcharan relied on **Barry-Laso** where Madam Justice Jones stated that "*the test is a subjective one, it is one which gives weight to objective factors… The issue is one for "objective assessment not subjective protestations after the event." per Kirby J in Romeo v Conservation Commission (NT) (1998) 192 CLR 431 referred to in Prast v Town of Cottesloe 111 LGERA 253 at paragraph 46.*" Ms. Ramcharan therefore submitted that the failure to erect signs or to permit access unsupervised caused the damage. Having permitted people to use the Dam for recreational purposes, the Defendant had a duty to ensure that there was a sign or other measure to protect against foreseeable harm.

[29] Ms Ramcharan contended that the Claimants have proved on a balance of probabilities that there was a duty of care owed to the Deceased by the Defendant; that there was a breach of this duty; and that the damage would probably have been avoided if adequate preventative steps had been taken by the Defendant.

Defendant's reply to Claimants' response

[30] Mr. Bengochea agreed with Ms. Ramcharan as to the relevant standard to be met by the Claimants in order to defeat a no-case submission. Mr. Bengochea submitted that it is established that Claimants must have proven their case on a balance of probabilities by the evidence which they called, in order to defeat the no-case submission. Alternatively, it can be stated that in order for the no-case submission to succeed, it must be shown that the Claimants failed to prove their case on a balance of probabilities by the evidence which they called. Mr. Bengochea, therefore, submitted that the Claimants must establish on a balance of probabilities that the Defendant owed the Deceased a duty of care, that the duty was breached and that the breach caused the Deceased's death. However, the Claimants have failed to establish this by their evidence.

[31] Mr. Bengochea submitted that the duty of care owed by the Defendant to the Deceased must be assessed as that owed to a trespasser and not to a visitor. There has been no evidence adduced by the Claimants which proves that the Deceased was given permission to enter the premises. It has not been established on the Claimants' evidence that the Deceased was permitted entry to the premises. It was submitted that the alleged permission under which the Deceased gained access to the premises has not been proven on the Claimants' evidence; therefore, it remains open to the Defendant to say that the Deceased was a trespasser.

[32] Mr. Bengochea contended that the law as stated by Lord Reid in **British Railway Board (supra)** with respect to acquiescence of the occupier giving a licence to the trespasser is not the conclusion which Lord Reid came to in his judgment. Mr. Bengochea submitted that in the quoted passage, Lord Reid was giving a recap of the speeches of the House of Lords in **R Addie & Sons (Collieries) Ltd v Dumbreck**[9].

[9] [1929] All ER 1

Lord Reid acknowledged that there has not been loyal adherence to the position stated in that case. Lord Reid then took note of **Edwards v Railway Executive**[10] and stated as follows:

> *"I think Lord Goddard accurately stated the law when he said, at pp. 746-747: "... repeated trespass of itself confers no licence; ... to find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it."*

[33] Therefore, in the absence of evidence from the Claimants regarding the circumstances surrounding the Deceased's access to the premises, the Defendant cannot be said to have either given permission or conducted itself in a manner that it cannot be heard to say that it did not give permission. The Deceased may therefore be treated as a trespasser on the premises. Counsel referred to **British Railway Board (supra)**, and quoted a passage therein in relation to the occupier's duty to trespassers. However, this was incorrectly quoted in the submissions. The passage correctly quoted is as follows:

> *"... there is no duty owed by an occupier to any trespasser unless he actually knows of the physical facts in relation to the state of his land or some activity carried out upon it, which constitute a serious danger to persons on the land who are unaware of those facts. He is under no duty to any trespasser to make inspections or inquiries to ascertain whether there is any such danger. Where he does know of physical facts which a reasonable man would appreciate involved danger of serious injury to the trespasser his duty is to take reasonable steps to enable the trespasser to avoid the danger.*

[34] Mr. Bengochea, therefore, submitted that there is nothing with respect to physical facts in relation to the state of the premises in question which posed an inherent danger to the Deceased. No evidence has been adduced to the effect that the physical state of the land caused the injury to the Deceased. It has also not been established that the activities carried out on the land by the Defendant posed any danger to the Deceased

[10] [1952] 2 All ER 430

or other trespassers. Therefore, the Claimants' evidence does not establish the existence of the particular duty.

[35] Nonetheless, even if it is accepted that the Defendant owed a duty to the Deceased to take reasonable steps to enable him to avoid danger upon the land, the actions of the Deceased in overloading the boat took him outside of any reasonable steps that the Defendant could have placed to protect trespassers. Mr. Bengochea submitted that the danger which the Deceased created was not one which was inherent to the state of the land nor which was attributable to the activities carried out upon the land. Therefore, whether or not the Defendant took reasonable steps, the scope of the duty would not have extended to the wilful and reckless actions of the Deceased.

[36] Mr. Bengochea submitted that Counsel for the Claimants in establishing causation placed reliance on **Barry-Laso & Quesnel v Tobago House of Assembly & ors (supra)**. However, it was submitted that that case is distinguishable from the case at bar. Based on Justice Jones' assessment, the Claimants concluded that the failure to erect signs or to permit access unsupervised caused the death of the Deceased. However, based on the facts of the matter at bar, the activity in which the Deceased willingly engaged was inherently dangerous. Mr. Bengochea contended that the cause of the death of the Deceased was not the alleged failure of the Defendant to erect warning signs nor the granting of access to the dam and boat. Accordingly, the Claimants have failed to establish on a balance of probabilities that the alleged breach of duty by the Defendant caused the death of the Deceased.

III. Issues

[37] Based on the pleadings, evidence and submissions, the Court is required to determine whether or not, as contended in the Defendant's no-case submission, the Claimants had at the close of their evidence established to the requisite standard of proof a case in relation to the essential facts pleaded in support of the Claim. Therefore, the following issues arise for determination:

1. **What is the required standard of proof in the circumstances of a no-case submission having been made without putting the Defendant to an election?**

2. **Did the Claimants establish by that standard that the Defendant owed a duty of care to the Deceased?**
3. **If a duty of care existed, did the Claimants establish by that standard that the Defendant breached that duty of care?**
4. **If the Defendant breached the duty of care, did the Claimant establish by that standard that the breach of that duty caused the death of the Deceased and any consequential loss suffered by the Claimants?**

IV. Law and Analysis

Issue 1: What is the required standard of proof in the circumstances of a no case submission having been made without putting the Defendant to an election?

[38] The general rule is that a judge ought not to rule on a submission of no case to answer unless the party making it elects to call no evidence. This principle arose from **Alexander v Rayson**[11], **Laurie v Raglan Building Co Ltd**[12] and **Graham v Chorley Borough Council**[13]. Therefore, the relevant test to be applied in circumstances where a Defendant has elected not to call any evidence is whether or not a Claimant has established his/her case by the evidence called on a balance of probabilities. A Claimant may establish his claim on a balance of probabilities by establishing no more than a weak prima facie case which may then be strengthened to the necessary standard of proof by the adverse inferences to be drawn from the Defendant's election not to call any evidence: see **Benham Ltd v Kythira Investments Ltd and Another**[14].

[39] However, notwithstanding this established principle, the Court has the discretion to rule on a submission of no case to answer notwithstanding the fact that the party making the submission has not been put to his election. This arose in **Mullan v Birmingham City Council**[15] where the Deputy High Court Judge stated that-

> *"Given the requirements of the 'overriding objective' to deal with the case expeditiously and fairly, allotting to it an appropriate share of the court's resources and taking account of the need to allot resources to other cases*

[11] [1936] 1 KB 169
[12] [1941] 3 All ER 332
[13] [2006] EWCA Civ 92
[14] (2003) EWCA Civ 1794
[15] The Times 29 July 1999

and acting in a way designed to save expense, it did seem to me that I would be entitled to adopt a rather more flexible approach to the kind of submission made than might have been the case prior to the implementation of the Civil Procedure Rules.

The court has considerable power under the Civil Procedure Rules to dictate how a case is to be managed both pre-trial and at the trial. Rule 3.1(2)(m) gives the court power:

"to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective" over and above the specific orders and directions specified earlier in that rule. ***In my judgment, therefore, the court does have the power to hear a submission of this nature without putting the defendant to its election****".*

[Emphasis added]

[40] Mance LJ in **Boyce v Wyatt Engineering**[16] stated that where a judge decides not to put defendants to their election before dealing with a submission of no case to answer, there is a need for considerable caution for two reasons. He stated as follows:

"[4] … First, where a defendant is put to his election, that is the end of the matter as regards evidence. The judge will not hear any further evidence which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either fails or succeeds, even on appeal. ***But, where no such election is called for, the judge is required to make up his mind as to facts on the basis of one side's case, and then, if he is against the defendant, to hear further evidence and to retain and apply an open mind in relation to all the facts at the end of the trial.***

[5] In this respect, despite the objectives of the new Civil Procedure Code and the broad powers of court management which it contains, there remains force, in my view, in the general observation made in this Court in Alexander -v- Rayson [1936] 1 KB 169 at 178 that it is not right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed. There may be some cases, probably rare, in which nothing in the defendant's evidence could affect the view taken about the claimant's

[16] [2001] EWCA Civ 692

evidence or case, but this is not one of them, and care would be required in identifying them.

[6] Secondly, there is another consideration which is independent and general. If no election is extracted, then there is the risk, as here, that if the claim is dismissed, there may be a successful appeal against the judge's view of the merits, and the matter may then have to be remitted, quite likely to a different judge, for a complete retrial. That may waste far more money than might have been saved by hearing the defendant's evidence at the first trial."

[41] In **Miller (t/a Waterloo Plant) v Cawley**[17], Mance LJ considered another case which involved a no-case submission. In this case, the Claimant claimed sums due for work done in 1998 on a property in which the Defendant proposed to live. A preliminary issue was ordered as to whether or not there was a contract between the Claimant and the Defendant. At the conclusion of the Claimant's evidence, Counsel for the Claimant asked the judge to indicate whether if a submission were to be made to him, he would invite the Defendant to elect. The judge said that he would as there was authority which said that a judge should put a person submitting no case to answer on his election except in exceptional circumstances. The Defendant elected that she and her witnesses would not give evidence. On the submission of no case, the judge asked himself whether there was any or any real prospect of the claimant succeeding, or any case fit to go before a jury, or before himself wearing his jury hat. Having decided that there was such a prospect, the judge simply stated, without any further consideration of the matter, that the Claimant had proved the preliminary issue and that there was a contract with the Defendant. The Defendant appealed.

It was held that where a defendant was put to his or her election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the Claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather, it was the straightforward issue, arising in any trial after all the evidence had been called, namely, whether or not the Claimant had established his or her case by the evidence called on the balance of probabilities. In the instant case, the judge having ruled correctly that the Defendant should be put to her election, had applied a test

[17] [2002] EWCA Civ 1100

which was too favourable to the Claimant. It followed that the judgment entered against the Defendant could not stand. The matter would be remitted for the judge to hear further submissions applying the correct test and to determine the outcome of the case.

[42] Mance LJ in **Miller v Cawley (supra)** stated as follows:

> *"[12] The determination by a judge of fact of a submission of no case to answer without putting the defendant to any election to call no evidence has been likened to the determination of a pre-trial application under CPR Part 24.2 on the basis that the claimant has no real prospect of success: cf Bentley v. Jones Harris & Co. [2001] EWCA Civ 1724, per Latham LJ at para. 75. The differences in context mean that the analogy may not be precise: for example, a judge pre-trial may make allowances for the possibility of development or amendment, whereas, by the close of a claimant's case, that case and the evidence supporting it will have been definitely identified.* ***But it is clear that in some circumstances a submission of no case to answer at the close of a claimants' case can be appropriate and may, in the exercise of the judge's discretion, be entertained without the defendant being put to his or her election - cf both Bentley itself and Boyce v. Wyatt Engineering [2001] EWCA Civ 692, per Potter LJ at para. 36 (last 31 words)****. Some flaw of fact or law may, for example, have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage.*
>
> *[13]However, as I said in Boyce, considerable caution is necessary before a judge entertains such a submission or undertakes such a determination, without requiring any election. The trial is now in progress, and although the test (no real prospect) differs from that applicable after hearing all possible evidence (balance of probability), caution is dictated for reasons along the lines indicated in paras. 4-6 in my judgment in Boyce. The submission interrupts the ordinary trial process, and it is not desirable that, during that process, the judge of fact should be put in a position where he may find himself having to express first an initial view on the basis of the claimant's evidence alone and then (if he allows the claim to proceed) a further final*

view after taking into account further evidence, even though he does so by reference to different tests. There may be cases, as I pointed out in Boyce, where this consideration is of less force, because nothing in the defendant's evidence could affect the view taken of the claimant's evidence or case. But there is also the second and very important consideration that, if the judge rules that the claimant's evidence does not show a real prospect of success (whether this is for reasons of fact or law), he may prove wrong on appeal. In that event, the procedure adopted will prove to have caused much unnecessary cost, involving a re-trial (quite likely before a different judge, as was ordered in Boyce). It was considerations like these that led, as explained in Alexander v. Rayson [1936] 1 KB 169, 178-179, to the general practice of entertaining applications at the close of the claimant's case in a civil trial only on the basis of an election by the defendant to call no evidence. [14] ***Where a judge does, however, embark at the close of the claimant's case on a determination whether the claimant's case has no real prospect of success without requiring any election, the judge will, if he determines that the claimant's case has no such prospect, dismiss the claim, and this will, subject to any appeal, be the end of the matter. If, on the other hand, the judge determines that the claimant's case has a real prospect of success, he must go on to hear the defendant's evidence and thereafter to find the factual position on the whole of the evidence and on the balance of probabilities****."* [Emphasis mine]

[43] In **Benham Limited v Kythira Investments Ltd and another**[18], the Claimants claimed that they had acted as agents for the Defendants in connection with certain property transactions and that they accordingly became entitled to commission in respect of them. The trial judge dismissed the claim at the close of the Claimant's evidence. In doing so he acceded to the Defendants' submission of no case to answer without first putting the Defendants to their election. The judge accepted that although generally the Defendant would be put to his election, the judge had a discretion not to do so in an exceptional case. He thought that such an exceptional case could arise when two conditions were satisfied: first that nothing in the Defendant's evidence

[18] [2003] EWCA Civ 1794

could affect the view taken of the Claimant's evidence, and secondly that it was obvious that the Claimant's case must fail. The Claimants appealed. The appeal was allowed. It was felt that the case crossed the evidential threshold required to defeat a no-case submission. If the judge had asked himself the correct question with regard to the evidence adduced, he would have been bound to reject the defendants' no-case submission.

Brown LJ stated as follows:

> ***"The question to be resolved at that stage is whether or not the claim has a reasonable prospect of success, a question which, in a case like this where the defendants' witnesses clearly have material evidence to give on the critical issue in the action, can be re-formulated variously as follows****: **have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contend, sufficient evidence to call for an explanation from the defendants**? That it may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences to be drawn from the defendants' not calling any evidence, would not allow it to be dismissed on a no case submission."*

[44] Having regard to all of the authorities above, the Court may entertain a submission of no case to answer without requiring the Defendant to elect to call no evidence. However, this is to be rarely adopted. Nonetheless, in a case where the Court exercises its discretion to allow the Defendant to make a no-case submission without putting the Defendant to its election to call no evidence, it is clear from the leading authorities that the test to be adopted is the less onerous "*prima facie case to answer*" test or whether the Claimant has a reasonable prospect of success and not the "on the balance of probabilities" test. More specifically, the Court should ask *"is there a scintilla of evidence to support the inference for which the Claimant contends, sufficient to call for an explanation from the Defendant"*. Therefore, if a judge concludes at the end of the Claimant's evidence that there is no case to answer or there is no scintilla of evidence to support the inference for which the Claimant contends so as to call for an explanation from the Defendant, on his assessment of the evidence, he is entitled to give judgment for the Defendant and dismiss the Claimant's case. On the other hand,

if the Court finds that a *prima facie* case has been made out, in such a case where the Defendant was not put to its election, the Court can proceed with the trial and allow the Defendant to call its witnesses. At the end of the all the evidence the Court will assess the evidence on the test as to whether the Claimant has proved its case on a balance of probabilities.

[45] The Court agrees with the submission of both Counsel that the relevant test to be applied in circumstances where a Defendant has elected not to call any evidence is whether or not a Claimant has established his case by the evidence called on a balance of probabilities. However, that test is not applicable in the case at bar. On 14 March 2019, at the close of the Claimants' case, when Counsel for the Defendant intimated that he wished to make a no-case submission, the Court did not put the Defendant to its election not to call evidence.

[46] Accordingly, it is clear that the Court did not intend to apply the rigorous standard of balance of probabilities in considering the no case submission. The Court, therefore, had in mind that if the no-case submission was overruled, the Defendant would continue to give evidence in support of its case. Hence, the Court did not require the Defendant to make its election. Consequently, the requisite standard of proof to be applied in the case at bar is that laid down in **Benham (supra)**: **Have the Claimants advanced a prima facie case, a case with a reasonable prospect of success, a scintilla of evidence to support the inference for which they contend, sufficient evidence to call for an explanation from the Defendant**?

The Evidence

Glenda Joachim-Warrick

[47] Mrs. Joachim-Warrick was married to the Deceased on 1 May 1986. The Deceased died on 4 March 2013 and left surviving him Mrs. Joachim-Warrick and three children. One of the children is the Second Claimant, Justin Christian Warrick, born on 29 January 1987. Mrs. Joachim-Warrick separated from the Deceased when their children were in elementary school in or around 1992.

[48] By order of the Court dated 29 May 2002, it was ordered that the Deceased pay to Mrs. Joachim-Warrick the sum of $1,000.00 per month per child (there being two of the marriage) towards the maintenance and upkeep of their children commencing 30 June 2002 until the children attain the age of 18 years or complete full time education whichever is later. The Court also granted an Attachment of Earnings Order to the salary of the Deceased who was then an Auditor at WASA. From 30 June 2002 to 28 February 2013, the funds went directly to the Mrs. Joachim-Warrick's bank account from the WASA Paymaster. Pursuant to the above Court Order, the Deceased paid the sum of $1,000.00 in maintenance payments for the first child, Jacy Warrick, until the month of June 2007 when he completed full time education at the age of 21 years by obtaining his undergraduate degree from the University of the West Indies.

[49] However, the Deceased continued to pay $1,000.00 monthly for Justin's maintenance up to the time of his death; his last salary having been paid in February 2013. Justin remained in full time education until 31 January 2016 having obtained his Certificate of Associate Applied Science Degree in Nautical Sciences at the Caribbean Maritime Institute in Jamaica on 5 January 2016.

[50] The Deceased would give Mrs. Joachim-Warrick an additional $1,500.00 in cash monthly towards Justin's general expenses for his full time education to qualify as a Maritime Navigational Officer at the Caribbean Maritime Institute, Jamaica. Mrs. Joachim-Warrick would add money to this from her own savings and pension. Justin's brother, Jacy, took a loan from First Citizens Bank for $90,000.00 towards Justin's upkeep which Mrs. Joachim-Warrick helped to repay monthly.

[51] According to Mrs. Joachim-Warrick, despite her and the Deceased's separation, they maintained a civil relationship for the sake of their children. As a result, they forged a special relationship and often spoke about the future of their children or their own future plans. It was in one of those conversations that the Deceased told Mrs. Joachim-Warrick that he had no health or other issues which prevented him from continuing to work full time until retirement at WASA and that he intended to apply to WASA to continue to work on Contract after retirement.

[52] Following the untimely death of the Deceased, his Estate suffered losses and incurred expenses which included funeral expenses of $21,143.62, salary and allowances of $6,772.00 and back pay from the collective bargaining period of 1 January 2011 to 31 December 2013 in the sum of $41,772.84.

[53] Under cross-examination, Mrs. Joachim-Warrick admitted that she was not present on the date of the incident. Therefore, she would not be able to give the Court any details about permission and fuel in the boat. Furthermore, Mrs. Joachim-Warrick admitted that since she was not present on the date of the incident, she could not say whether the boat sank or flipped. Thus, she cannot say whether the boat capsized from her personal observation. Mrs. Joachim-Warrick agreed that her evidence relates to financial figures and not the actual incident itself. Additionally, Mrs. Joachim-Warrick admitted that she could not testify as to the Deceased being in good health since she did not accompany the Deceased to any doctor's visits and she was only aware of this based on what he said to her. This was the extent of Mrs. Joachim-Warrick's evidence in relation to the Claim against the Defendant.

Justin Christian Warrick

[54] Justin is the son of the Deceased. He was maintained by both his mother, Mrs. Joachim-Warrick, and the Deceased when his parents separated. By Court Order dated 29 May 2002, the Deceased was ordered to pay to his mother the sum of $1,000.00 monthly towards his maintenance and upkeep until the age of 18 or the end of full time education. To his knowledge, the Deceased paid the above $1,000.00 plus additional sums to his mother directly in cash for his education at the Caribbean Maritime Institute in Jamaica until his death on 4 March 2013. At that time, he was half way through his course of study. He graduated with his Associate Degree in Nautical Sciences on 5 January 2016 and began working in February 2016.

[55] According to Justin, after the death of the Deceased, his course of study involved living in Jamaica for a period of 3 years and the payment of tuition fees, books and supplies, various courses and equipment, rent, general upkeep and the cost of airfare to and from Trinidad and Tobago once a year or more often when required. During that 3 year period, as part of his course, he did compulsory certificates in different areas of training. His mother maintained him from her pension and savings in as much

as she could. However, without the Deceased's contributions, it became necessary for his mother to take loans from the Bank with his brother to pay for his maintenance and education.

[56] On 2 March 2013, he was informed by WASA personnel of the incident and he proceeded to the Navet Reservoir to identify his father's body. However, on arrival, the body had not yet been found. He was able to see the aftermath of the accident and was able to observe the premises of the Navet Reservoir in detail as he was permitted to return to the site every day until his father's body was recovered from the water on 4 March 2013.

[57] During that period, he did not see a "no trespassing" sign on any part of the Reservoir from the entrance to the water itself. He did, however, see another sign which said "no swimming or fishing". He also did not see the boat itself which had been in the accident or any part of it on the premises.

[58] Under cross-examination, Justin testified that he was not present at the dam at the time of the incident but after the incident occurred. Therefore, he could not speak about how the incident happened from his personal observations. Justin stated that his evidence relates to his dependency on the Deceased. Justin agreed that since he was not present at the dam at the time of the incident, he could not give any information on the situation involving permission.

[59] When Counsel for the Defendant put his case to Justin that WASA took all reasonable steps to ensure the safety of all persons on its compound, whether they be employees or visitors, Justin's response was "I *wouldn't know because I'm not an employee of WASA. I'm not familiar with the procedure for gaining access to the dam or its facilities*". Counsel also put to Justin that the Deceased was the author of his own misfortune because he, particularly, overloaded a boat which was not meant to carry that number of people and Justin responded, "*I don't agree. I don't think my father had the particular knowledge-set to know whether he was overloading a vessel or not*". This was the extent of Justin's evidence in relation to the Claim against the Defendant.

Deborah Ochoa

[60] Deborah Ochoa was an employee of WASA at the time of the Deceased's death and a friend of the Deceased. At the time of the incident on 2 March 2013, Ms. Ochoa was a Hospitality Attendant at the WASA South Regional Office in San Fernando.

[61] However, prior to that time, in 2009, she was a Woman Security Officer with the PRD Security Services Limited which was the private security company employed by WASA at the time. From 2009 to 2012, she was stationed at the Navet Reservoir in this capacity firstly as an employee of PRD Security Services Limited and then from 2010 as an employee of the Pegasus Security Group Limited which is the company that took over the private security for WASA from around March 2010.

[62] As a Woman Security Officer, she worked a 24 hour shift with 5 other persons of different ranks. Her functions included patrolling the compound and as Sentry, making entries in the WASA Diary and either in the PRD or Pegasus Diary. The entries in these diaries had to be identical. She was accountable to superior officers, one Corporal and one Sergeant on the compound and also the Superintendent of the Navet Reservoir.

[63] When she was not patrolling the compound, she was stationed at the Main Security Entrance of the Navet Reservoir. During her four years of employment as a Woman Security Officer, she supervised the entry onto the compound of the Navet Reservoir of many groups of persons who were either WASA workers or civilians. She was instructed that these persons were entering the compound to use the facilities for non-work related purposes.

[64] As Sentry, she would be advised by the Superintendent of the Navet Reservoir, Mr. Thomas, and later Mr. Baksh, that a particular party had been given permission to enter the premises of the Reservoir. On other occasions, she would receive instructions in writing, entered in the WASA Post Diary and the Private Security Diary, indicating that a party had received permission to enter the compound and that they were to be given access to the lake by boat. During the 4 years that she worked as Sentry, she

saw groups of people enter the premises of the Reservoir as described above more than 6 times. She also saw parties entering the premises with passes issued by the Head Office on Farm Road on two occasions only and both times the parties comprised schools and minor children.

[65] At the end of her contract term with Pegasus in late 2012, she changed her job and was employed with WASA on a contract as a Hospitality Assistant stationed at WASA Asset Maintenance on Gomez Street, San Fernando.

[66] According to Ms. Ochoa, in late February 2013, the Deceased told her that he and his friend Basdeo Ramlal were planning a social event at the Navet Reservoir and that all arrangements had been made including permission obtained from the Superintendent of the Navet Reservoir to cross the Dam by boat to the spot where a cook and overnight lime would take place. The Deceased had asked her to attend the said event and she agreed. The date was set for 2 March 2013.

[67] On 2 March 2013, a few minutes after 9:00a.m., she drove the Deceased's car to the Navet Reservoir in the company of three friends. They arrived there and were allowed to enter the compound by Pegasus Security at the gate of the Dam. She parked the car on the compound and together, they walked down to where a boat was located in the front of the Dam. The Deceased and others were loading up the boat with water and other supplies such as food and ice. She saw three life jackets on the boat, one life ring and one oar. She did not see any other flotation devices on the boat. She observed that the boat itself had panels of wood on its inside and outside. Twelve persons including 2 children boarded the boat and the Deceased started the engine. The children and one adult wore the life jackets.

[68] She was facing the Deceased and after about ten minutes, while crossing the Dam, the boat began to sink. In a matter of seconds, they were all submerged. According to Ms. Ochoa, the Deceased was a strong swimmer whereas she did not know how to swim. They were separated when the boat sank and she tried to stay afloat. She held on to a fishing net which kept her afloat until two members of the Pegasus Security pulled her out of the water and into a small fibreglass boat. She was partially drowned and

taken to the Rio Claro Health Facility and then the San Fernando General Hospital where she was admitted and stayed 5 days.

[69] Under cross-examination, Ms. Ochoa agreed that she was once employed as a Security Officer with PRD Security Services and then Pegasus Security Services at the Navet Dam and that there was a system in place by WASA to monitor persons who could access the Dam. Ms. Ochoa also agreed that not only was there a security officer at the Dam but that persons entering the Dam had to have passes. When Ms. Ochoa was shown a visitor's pass to the Navet Reservoir (an agreed document), she could not recall whether that was a visitor's pass. She, however, agreed that as a security officer, she knew that one of the rules on the visitor's pass was that "*Visitors are required to stay a safe distance away from the water and are not allowed to bathe at any of our intakes*". Ms. Ochoa was shown a photograph of a "no trespassing" sign and asked if she was familiar with that sign. She stated that she was seeing it on the photograph but she could not remember seeing it.

[70] Ms. Ochoa agreed to the following in cross-examination: (a) WASA had security officers; (b) these security officers were to patrol to ensure that there were no trespassers or persons being in places where they were not supposed to be; (c) there was someone before the Navet Dam, so not any and every one can go inside; (d) there were passes to get into the Navet Dam; (e) these passes contained rules which spoke about entering the water; and (f) there were signage on the Dam itself.

[71] Ms. Ochoa, in cross-examination, agreed that the Deceased only told her that he got permission and that she did not see a permission pass from the Deceased. She also stated that she was not involved in the acquisition of that permission. Ms. Ochoa agreed that when she arrived at the premises, the boat was already being loaded, therefore, she was not in a position to say anything concerning fuel or engine checks.

[72] Mr. Bengochea questioned Ms. Ochoa about the Particulars of Negligence pleaded in the Statement of Case and Ms. Ochoa agreed that she could not speak to any of the following Particulars of Negligence alleged against the Defendant:

a. Approving and permitting the access of the Deceased to the Navet Reservoir outside of his defined working hours.

b. Approving and permitting the access of the Deceased to the Navet Reservoir which is outside of his function as Senior Administrative Officer of the Authority.
c. Approving and permitting the access of 12 unauthorized persons onto the premises of the Navet Reservoir.
d. Allowing and permitting the Deceased unauthorized access to a motorized single engine vessel.
e. Allowing and permitting the Deceased access to the ignition keys to activate the outboard motor of the motorized single engine vessel.
f. Allowing and permitting the Deceased access to the motorized single engine vessel without examining the level of the fuel in the said vessel.
g. Allowing and permitting the Deceased access to the motorized single engine vessel without any pre-operational checks of the vessel.
h. Allowing and permitting the Deceased access to the motorised single engine vessel without monitoring the intended use to which the vessel was to be utilised.
i. Allowing and permitting the Deceased access to the motorised single engine vessel for a purpose for which the said vessel was not intended and not equipped.
j. Allowing and permitting 13 unauthorized persons to embark unsupervised upon a motorized single engine vessel equipped for the use of 4 to 6 persons only.
k. Allowing and permitting 13 unauthorized persons to embark unsupervised upon a motorized single engine vessel equipped with safety equipment for 4 to 6 persons.
l. Allowing and permitting 13 unauthorised persons to embark unsupervised upon a motorized single engine vessel equipped for 4 to 6 persons despite the known presence of potentially life threatening wildlife in and around the waters of the Navet Reservoir.

[73] Mr. Bengochea then sought to question Ms. Ochoa on the boat itself. Ms. Ochoa maintained that there were 3 life jackets and one life ring on the boat and that one adult and two children put on the life jackets; the Deceased was not one of them. Ms. Ochoa agreed that the boat was 12 feet; she, however, did not agree that this boat was meant to hold about 4 people or the number of lifejackets that were there. Ms. Ochoa also did not agree that going onto the boat without a life jacket would pose a risk. Ms. Ochoa also did not agree that because there were 3 lifejackets and one ring that was the number of persons that should go on the boat.

[74] Ms. Ochoa agreed that there was a prior trip where the Deceased dropped persons across before the trip resulting in the Deceased's death. She, however, was not sure about the number of persons but she believed that it was one person. She agreed that the Deceased was able to make that trip safely to and from and that nothing happened on the boat at that time. Mr. Bengochea then asked Ms. Ochoa whether the boat sank; whether it went down from the weight of it and Ms. Ochoa responded yes. However, Counsel for the Claimants, Ms. Ramcharan, interjected and argued that this was an unfair question to the witness since she would not be in a position to say that the boat sank because of the weight. I agreed with Ms. Ramcharan that Ms. Ochoa could not say that the boat sank because of the weight. Ms. Ochoa, nonetheless, stated that the bottom of the boat sank first, by the engine section first.

[75] Counsel for the Defendant then put his case to Ms. Ochoa. Mr. Bengochea put to Ms. Ochoa that WASA took all reasonable steps to ensure the safety of all persons on its compound, whether they be employees or visitors to which Ms. Ochoa replied no. Counsel also put to Ms. Ochoa that the Deceased was the author of his own misfortune or caused his own accident by overloading the boat and Ms. Ochoa replied no. Counsel put to Ms. Ochoa that WASA had reasonable systems in place to ensure the safety of all persons on the premises and Ms. Ochoa said that she was not sure.

Findings of Fact

Was there a duty of care?

[76] A finding of negligence requires proof of (i) a duty of care to the Claimant; (ii) breach of that duty; and (iii) damage to the Claimant attributable to the breach of the duty by the Defendant[19]. There must be a causal connection between the Defendant's conduct and the loss and/or damage. Further, the kind of damage to the Claimant is not so unforeseeable as to be too remote[20].

[77] Consequently, in the case at bar, to prove a claim in negligence the Claimants must first establish that a duty of care existed between the parties, that is, a duty of care was

[19] **Charlesworth & Percy on Negligence 7th Edition, Chap 1, paragraphs 1-19**
[20] **Clerk & Lindsell on Torts 19th Edition, Chap 8, para 8-04**

owed to the Deceased by WASA. From the Claimants' submissions, the Claimants' Claim is premised on the principles of occupiers' liability. The foundation of occupiers' liability is occupational control: control associated with and arising from presence in and use of or activity in the premises[21]. There is no dispute that WASA was the occupier of the Navet Reservoir at the time of the incident. However, it ought to be ascertained whether the Deceased was an invitee or a trespasser to the premises to determine the standard of care applicable.

[78] In **Indermaur v Dames**[22], Willes J defined the occupier's duty to an invitee to premises as to "*use reasonable care to prevent damage from unusual danger, which he knows or ought to know*." The alleged unusual danger should, in most instances, also be something that the invitee did not know of or of which he could not be aware[23]. To be considered an invitee entitled to be treated in this way, a person must, as explained in **Indermaur v Dames**, have entered upon the premises "*upon business which concerns the occupier, and upon his invitation, express or implied*." On the other hand, if the Claimants fail to establish that the Deceased was an invitee, a lesser duty of care would be owed to him by WASA. That lesser duty is defined as one of common humanity or to act in accordance with civilized behaviour. The Defendant would then have a duty to take reasonable care to keep trespassers off the unauthorised area by use of fencing or other means[24].

[79] It is the Claimants' case that the Deceased had permission to enter the Navet Reservoir and permission to use a boat, thus, the Deceased would be considered an invitee. However, the evidence led in support of the Claimants' Claim does not establish that the Deceased was in fact given permission, express or implied, to enter the Navet Reservoir and use the boat. It cannot, therefore, be said that he was an invitee to WASA's premises. The only evidence of permission came from Ms. Ochoa.

[80] As a security officer at the Navet Reservoir, she stated that she would be advised that a particular party had been given permission to enter the premises of the Dam or on

[21] **Wheat v Lacon and Co Ltd [1966] AC 552**, p 589 per Lord Pearson
[22] (1866) LR 1 CP 274
[23] **Cox v Chan, (1991) Supreme Court, The Bahamas, No 755 of 1988 (unreported)**
[24] British Railways Board v Herrington [1972] 1 All E.R. 749

other occasions, she would receive instructions in writing that a party had received permission to enter the compound and that they were to be given access to the lake by boat in the WASA Post Diary and the Private Security Diary. However, in cross-examination, she admitted that the Deceased only told her that he got permission; she was not involved in acquiring the permission nor did she see the Deceased with a visitor's pass which was the custom. Furthermore, as stated from Ms. Ochoa as to ways permission is known to the security officers at WASA, the Claimants did not call as witnesses any of the security officers who were present at the Dam at the time of the incident nor did they disclose or ask for an extract from the WASA Post Diary or the Private Security Diary to show that the Deceased was in fact given permission to enter the Navet Reservoir and use the boat.

[81] In that regard, the Court is of the view that the Claimants have failed to adduce sufficient evidence in establishing that the Deceased was an invitee to the premises and that WASA owed a duty of care to him.

Was the duty of care breached?

[82] The finding that WASA owed no duty of care to the Deceased is, by itself, dispositive of the Claimants' Claim. Notwithstanding that finding, for completeness, the Court will still go on to consider whether, in any event, there was negligence on the part of WASA.

[83] When a Claimant sets out his particulars of negligence, those particulars found the basis upon which he says that the other party was negligent. The Claimant may sometimes be able to establish some of the particulars and not others. However, when particulars are set out, the Court is required to consider all of them and where the Claimant fails in respect of proving or leading cogent evidence of those particulars, or some or any of them, then that also affects the manner in which the Court construes the Claimant's evidence from a general perspective. See the decision of Boodoosingh J (as he then was) in **Kelvin Rivers v Point Lisas Industrial Port Development Corporation**[25].

[25] CV2014-01899

[84] The only witness who could have spoken to what occurred on 2 March 2013 at the Navet Dam was Ms. Ochoa since she was present at the time of the incident. Therefore, the evidence of Mrs. Joachim-Warrick and Justin is not helpful on this issue. Consequently, I have carefully looked at the contents of Ms. Ochoa's witness statement and it does not show negligence on the part of WASA. Furthermore, Ms. Ochoa agreed in cross-examination with Counsel for the Defendant that she could not speak to any of the particulars of negligence the Claimants had supplied. Ms. Ochoa said that the boat started to sink on the engine side first. She did not say that this sinking was caused by any unsafe practice, act or omission on the part of the Defendant. In fact, she accepted that the Deceased was able to make a prior trip safely to and from and that nothing happened on or with the boat at that time.

[85] In this Court's view, none of the witnesses called in support of the Claimants' Claim led any evidence which could establish negligence from any act or omission on the part of WASA. The key factor in respect of the cause of the death of the Deceased was the sinking of the boat. However, the Claimants have failed to show that the sinking of the boat was within the control of WASA or that WASA could have reasonably taken steps to prevent this from happening.

[86] The burden of proof lies on the Claimants to prove negligence on the part of WASA. The Court is of the opinion that there is not a scintilla of evidence from which any act or omission by WASA could be attributable to negligence. In that regard, the Court finds that there is nothing to suggest that the cause of the sinking of the boat was as a result of WASA's negligence. Consequently, even if WASA owed the Deceased a duty of care (which the Court found has not been established), it cannot be said that WASA breached any duty of care owed to the Deceased. Thus, on this issue as well, the Claimants' Claim must fail.

Did the breach of the duty of care cause the death of the Deceased and any consequential loss suffered by the Claimants?

[87] It goes without saying that if there is no breach of duty, hence no negligence on the part of WASA, then there is no causal link to establish the death of the Deceased.

V. Disposition

[88] In light of the analyses and findings on the issues canvassed above, this Court holds that the Claimants have failed to establish a *prima facie* case, or a case with a reasonable prospect of success on the Claim. This translates into the inescapable inference that if the Claimants are unable to even surmount this lower standard of proof employed by the Court to assess their evidence, then it will be virtually impossible for them to cross the hurdle of the more stringent test based on the balance of probabilities to establish their Claim. Accordingly, the Claim shall be dismissed.

The Issue of Costs: Entitlement and Quantification

[89] On the question of costs, the general rule on the award of costs is that the Court must order the unsuccessful party to pay the costs of the successful party: **Part 66.6(1) of the CPR**. I can see no basis or justification for departing from this general principle that costs follow the event. The Defendant will therefore be entitled to recover costs to be quantified on the prescribed scale. On the basis that (i) the Defendant is the successful party; (ii) the Claim is for damages with no fixed monetary amount claimed; (iii) there was no agreed amount between the parties as to the value of the Claim; and (iv) the Court has not stipulated an amount as to the value of the Claim, the Claim is therefore deemed to be a claim for **$50,000.00** in accordance with **Part 67.5(2)(c) of the CPR** as amended by **Legal Notice No. 126 of 2011**. The full prescribed costs for the matter being determined at the trial are quantified in the sum of **$14,000.00** in accordance with the **Scale of Prescribed Costs in Appendix B of Part 67 of CPR**.

[90] However, the Court must take into account all the circumstances including the factors set out in **Part 66.6(4), (5) and (6) of the CPR**. On the basis that the trial did not go the full distance, in that the Claim was determined on a no-case submission without the Defendant calling any witnesses, the Court is inclined to reduce the full trial costs from 100% to 90% in accordance with **Part 67.5(4)(a) CPR** and **Appendix C of Part 67 of the CPR**. Consequently, the prescribed costs in this matter are quantified in the sum of **$12,600.00 (that is, $14,000.00 × 90%).**

[91] Accordingly, the Order of the Court is as follows:

ORDER:

1. **The Claimants' Claim and Statement of Case filed on 23 February 2017 be and are hereby dismissed.**

2. **The Claimant shall pay to the Defendant 90% of its costs to be quantified on the prescribed scale pursuant to Part 67.5(2)(c) of the CPR 1998.**

3. **The said costs have been quantified in the sum of $12,600.00 in accordance with Part 67.5(4)(a) and Appendix C of Part 67 of the CPR 1998.**

4. **Stay of execution 42 days.**

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Robin N. Mohammed
Judge