**RTHE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2017-01102**

**BETWEEN**

**TF**

**(A minor by his mother and next friend Melissa James)**

**Claimant**

**AND**

**DR. NANDALAL DHARRIE-MAHARAJ**

**Defendant**

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Date of Delivery**: **Tuesday 21 July 2020**

**Appearances**:

Mr. Sherman M. McNicolls Jr instructed by the firm of D. Rampersad & Co for the Claimant

Mr. Gregory Pantin instructed by Ms. Debra Thompson for the Defendant

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**DECISION ON DEFENDANT'S NOTICE OF APPLICATION TO STRIKE OUT CLAIM/SUMMARY JUDGMENT**

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## I. Introduction

[1] This action was commenced by Claim Form and Statement of Case filed on 31 March 2017 against the Defendant. In short, the Claimant claimed damages for personal injuries and

consequential loss caused by the negligence of the Defendant, his servants and/or agents during a dental procedure at his office located at Green Street, Arima on 3 July 2013. On 11 April 2017, the Defendant entered his appearance indicating an intention to defend the Claim. The Defendant, subsequently filed his Defence on 4 July 2017.

[2] At the first Case Management Conference (CMC) on 16 October 2017, all directions were put on hold pending the outcome of settlement negotiations between the parties. The first CMC was preserved and adjourned to 15 December 2017. However, on that date, the first CMC continued to be preserved and the directions continued to be on hold to allow the parties to continue their discussions more particularly on the issue of causation. The first CMC was adjourned to 23 February 2018.

[3] On 23 February 2018, the Court gave directions for disclosure and inspection to be completed on or before 26 March 2018 as well as for the filing of an agreed and un-agreed bundle of documents by the Claimant on or before 30 April 2018 and all witness statements on or before 21 May 2018. The Defendant filed his List of Documents on 23 March 2018 whereas the Claimant filed his List of Documents on 27 March 2018.

[4] On 18 May 2018, the Court ordered by consent that the Claimant's Claim and all directions given be stayed pending the re-evaluation of the Claimant by Dr. E. Scipio and, if possible the retrieval of the lodged needle in his jaw. The Claimant was also granted relief from sanctions for failing to comply with the Court's direction to file an Agreed and Un-Agreed Bundle of Documents on or before 30 April 2018. The CMC was adjourned to the 22 June 2018 which did not materialise on account of the joint request of the parties for the matter to be rescheduled.

[5] The matter was again convened on 12 October 2018 whereupon both sides agreed to attend an all-parties conference on the 31 October 2018 to explore all possibilities of a resolution without a trial. The return date to report to the Court on the settlement conference was the 3 December 2018. However, on account of the illness of Mr. McNicolls Jr, the matter was not convened until the 1 February 2019.

[6] By this time, the Defendant's attorneys had filed an application pursuant to **Part 15.2(b) of the Civil Proceedings Rules 1998 ("the CPR")** and **Part 26.2(1)(b) and (c) of the CPR** seeking an order that the Claimant's Claim and/or paragraphs 11(b), 12 and Particulars of Personal Injuries of the Statement of Case be dismissed or struck out. The Court was informed at the hearing on 1 February 2019 that this application was filed because the Defendant's attorneys had not heard anything from the Claimant's side for what they considered to be an unreasonable time since the last meeting. The Court was also informed that the proposed re-evaluation of the Claimant by Dr. Scipio and the proposed attempt to remove the needle from the Claimant's jaw were not carried out because the Claimant's parents were not in a position to finance the operation. Additionally, Mr. Pantin lamented that no proposals for settlement were received by them (Defendant's attorneys) and so the Defendant was left with little choice but to file his application to strike out/summary judgment bearing in mind that the Claimant's side was not moving the matter forward and a CMC upon him.

[7] In obedience to the directions given by the Court on the 1 February 2019, an affidavit in response to the Defendant's application was filed on 29 March 2019 on behalf of the Claimant. The Defendant filed his written submissions on 29 March 2019. The Claimant filed his written submissions on 24 June 2019.

## II. Factual Background

[8] The Claimant, is a minor, born on █ October 2009 and is represented by his mother and next friend, Melissa James (Ms. James). On the date in question, 3 July 2013, he was 3 years old. The Defendant is a dental surgeon who was charged with the responsibility of carrying out a root canal on the Claimant. The Claimant visited the Defendant's office at 48 Green Street, Arima after complaining to his mother of constant toothaches. The Defendant determined that the Claimant had an exposed nerve that needed to be surgically corrected.

[9] The Statement of Case averred that at all material times, the Claimant was in the care of the Defendant, his servants and/or agents. In these premises, the Defendant owed a duty of care

to the Claimant including all matters arising out of and incidental thereto. It was further averred that the duty of care comprised of the following:

(i) a direct, non-delegable duty of care to ensure that reasonable care was at all times taken in relation to the dental procedure and other care with which the Claimant was provided by or on behalf of the Defendant, his servants and/or agents; and

(ii) a duty at all times to take reasonable care to ensure that there was a safe system of dental care provided at the said office.

[10] After the root canal procedure, the Claimant was released into the care of his mother. However, upon arriving home, the Defendant's office contacted the Claimant's mother and informed her that the needle used during the root canal was not found in studio. It was believed that the Claimant may have swallowed the needle during the root canal procedure. Two days later, the Claimant visited the Defendant's Woodbrook office to undergo an x-ray procedure. This revealed that the needle was embedded in the Claimant's left jaw since undergoing the root canal on 3 July 2013. As a consequence of the Defendant negligently leaving the needle inside the Claimant's left jaw, the Claimant suffered personal injuries, losses and damages.

[11] The Claimant's Particulars of Negligence and/or Breach of Duty of the Defendant, its servants and/or agents were listed as follows:

(i) Failed to exercise reasonable care and skill in treating the Claimant;

(ii) Caused or permitted the said needle to be improperly embedded into the Claimant's left jaw;

(iii) Failed to use reasonable care and diligence during the dental procedure on the 3rd July 2013;

(iv) Caused or permitted the surgical needle to break during surgery;

(v) Failed to remove the surgical needle from the Claimant's jaw;

(vi) Failed to take any reasonable steps to adequately monitor the Claimant while he was being operated on.

[12] The Claimant averred that as far as may be necessary, he will rely on the doctrine of *res ipsa loquitur*. The Claimant also indicated that he will rely on the following reports which particularized the Claimant's injuries and were available at the time of filing of the Claim:

(i) Medical Report of Dr. A.K. Ashraph dated 2 April 2016;

(ii) Medical Report of Dr. Sharna Singh dated 20 November 2015;

(iii) Medical Report of Dr. C. Naraynsingh dated 19 November 2013; and

(v) Speech Evaluation of Kiara Matthews dated 2 and 9 October 2015.

[13] The Particulars of Injuries of the Claimant were listed as follows:

(i) Presence of broken needle in jaw;

(ii) Pain in the lower left region of the buccal sulcus near the molars;

(iii) Limited neck movement;

(iv) Headaches and bouts of fever and sickness;

(v) Development of asthma, sinus problems, persistent diarrhoea and weight loss;

(vi) Speech and learning difficulties;

(vii) Gross caries of the deciduous molar teeth in maxilla and left mandible;

(viii) Infection of deciduous molar dentition;

(ix) Possibility of the life-threatening "Ludwig's Angina" and possibility of needle travelling into neck and chest; and

(x) Possible development of Autism Spectrum Disorder.

[14] After the needle was discovered to be embedded inside the Claimant's jaw, he was referred to Dr. Marcus Daniell who referred him to Dr. Naraynsingh, Consultant Surgeon of the Oral Surgery Department at the Eric Williams Medical Sciences Complex. Dr. Naraynsingh along with Dr. Goddard and Dr. Bandera advised the Claimant that the removal of the needle was too difficult considering its location, the risk of general anaesthetic and the possible damage to facial structures. As a consequence, a course of conservative treatment and close follow up were taken.

[15] However, 3 years later in or around February 2016, Dr. Chase was recommended to the Claimant's mother. Dr. Chase examined the Claimant and advised that she could remove

the needle without much fuss since it had moved during those 3 years and became accessible. Dr. Chase attempted to remove the needle on 12 February 2016 but the surgery was unsuccessful; she could not see the needle after opening the Claimant's gums. Thereafter, the Claimant was sent to Dr. Scipio's office to have an x-ray done which revealed that the needle was still in fact present in the Claimant's jaw. The Claimant subsequently visited Dr. Ashraph who examined him and recommended that the surgery could be performed to remove the needle with minimum complications at a cost of $25,000.00 excluding follow up care.

[16] As a result of the injuries sustained, the Claimant could not keep up in school and had to constantly change schools in order to find one where he could fit in. As a consequence, the Claimant's mother was forced to become a stay-at-home parent and forego her earnings as a Pre-School Teacher. The Claimant has found it difficult to eat as well as brush his teeth because of the pain and discomfort.

[17] At the time of the filing of the Claim in 2017, the Claimant was 7 years old and had manifested signs of delayed speech development since the needle was embedded in his jaw tissue. In or around September 2014, the Claimant was enrolled into Maguerite Educational Centre where his mother paid $450.00 monthly for his special learning. In or around October 2015, the Claimant's mother had the Claimant assessed by Kiara M. Matthews, Speech Language Pathologist, whose findings indicated that the Claimant's overall scores placed him at a 3 year old age group. The Claimant was at that time one month shy of being 6 years of age.

[18] The Claimant, at the time of filing of the Claim in 2017, was attending public school and sat in infant classes as he had fallen way behind of his age due to this medical condition. According to the Claimant's mother, Ms. James, he needs to be placed in a private institution to aid in his development but it has not been financially possible.

[19] After the incident on 3 July 2013, the Claimant is somewhat limited in the activities that he once enjoyed before the accident, for example, riding his bicycle and playing with toy

vehicles. This is as a result of restricted and painful neck movement. The Claimant also keeps to himself because other children have trouble understanding what he is trying to say. The Claimant has also been severely affected psychologically as he has not developed physically, intellectually or socially.

[20] The Defendant, in response, admitted that he attended to the Claimant on 3 July 2013 and that a duty of care was owed to the Claimant as stated in paragraph [7] above. He averred that reasonable care and skill was taken in relation to the dental procedure on 3 July 2013.

[21] According to the Defendant, the Claimant's father gave a history of the Claimant complaining of constant toothaches. On examination, it was found that the Claimant had 4 cavities, namely one in the upper left first primary molar, the second in the upper second primary molar and the third and fourth in the upper right primary and secondary molars. It was also found that the lower left secondary primary molar tooth was grossly carious (decayed) and that tooth may have had an exposed nerve. As a result, the Defendant proposed a course of treatment to the Claimant's father that involved treating the lower left second primary molar which was grossly carious by performing a pulpotomy, also known as a root canal. This was designed to repair and save a tooth that is badly damaged and infected. This treatment was agreed to by the Claimant's father.

[22] On 3 July 2013, preparatory steps were taken to perform the root canal. The Defendant applied a small amount of gel to numb the superficial area around the tooth. After a few minutes, the Defendant started to inject the area with a local anaesthetic. As the Defendant started to insert the needle into the area numbed by the gel, the Claimant bit down on the syringe and the needle snapped. The root canal was then abandoned.

[23] From the Defendant's observations, his preliminary view was that the snapped needle was within the tissue. In the presence of the Claimant and his father, the Defendant consulted with Dr. Marcus Daniell who recommended certain radiographs be taken to precisely image the position of the lodged needle. The Defendant, subsequently, recommended to the Claimant's parents that an Ortho-Pantomograph (OPG) or x-ray film be performed on

the Claimant at the Defendant's Port of Spain office where the OPG equipment was located. The OPG was scheduled for 5 July 2017. The Claimant was discharged into the care of his parents.

[24] After abandoning the root canal as previously arranged, on 5 July 2013, Dr. Daniell attended to the Defendant's Port of Spain office where the OPG of the Claimant was taken. This confirmed the presence of the needle in the Claimant's jaw tissue. Dr. Daniell made arrangements to see the Claimant on 8 July 2013 at the Port of Spain General Hospital.

[25] According to the Defendant, the medical care, treatment and attendance of the Claimant was then taken over by other medical professional with specific expertise. There was no further communication between the Claimant's mother or father and the Defendant after the Claimant's visit at the Defendant's office on 5 July 2013.

[26] The Defendant denied that he or his servants and/or agents were negligent as alleged or at all. The breakage of the surgical needle and its embedding in the Claimant's jaw tissue is a rare complication and is not indicative of negligence. The Defendant averred that he exercised reasonable care and skill in providing his medical care, treatment and attendance of the Claimant and acted in accordance with a practice accepted as proper by dental practitioners. In particular, by firstly applying topical anaesthetic (numbing gel) in advance of seeking to administer local anaesthetic. The Defendant took all reasonable steps to adequately monitor the Claimant while taking the preparatory steps for administering local anaesthetic for the planned root canal.

[27] It is the Defendant's case that the Defendant's relationship of doctor and patient ended after abandoning the root canal and arranging and taking necessary steps to assist the Claimant by (i) confirming the location of the needle and (ii) referring the Claimant to other independent medical professionals to provide care, treatment and advice relative to the lodged needle in the Claimant's jaw tissue.

[28] It was not within the scope of the Defendant "to remove the surgical needle" since a further surgical procedure for the needle was the subject of medical care, treatment and advice to be provided by the independent medical professionals attending to the Claimant for that concern. Accordingly, any recommendation to embark upon surgery to remove the needle or not was in the purview of the independent medical professionals attending to the Claimant for that concern and therefore, any decision to pursue such surgery was a decision for the Claimant acting through his parents and not the Defendant. Furthermore, the Defendant was not responsible for the further management and care of the health of the Claimant's teeth, good dental hygiene practices and regular dental visits. The Defendant bears no responsibility for the medical advice dispensed by other medical professionals who attended to the Claimant subsequent to the abandoned root canal.

[29] The Defendant averred that the personal injuries, damages and losses that the Claimant claimed to have suffered did not occur as a result of any negligence on his part. In addition, in the circumstances of injuries, damages and loss alleged and claimed, the doctrine of *res ipsa loquitur* is not available to the Claimant. It is the Defendant's case that:

(a) the pain in the lower left region of the buccal sulcus near the molars, headaches, bouts of fever and sickness, gross caries of the deciduous molar teeth in maxilla and left mandible, infection of deciduous molar dentition and Ludwig's Angina cannot be caused by the presence of the needle in the Claimant's jaw tissue as reported by Dr. A.K. Ashraph in his medical report dated 2 April 2016 and attached to the Claimant's Statement of Case.

(b) Limited neck movement, development of asthma, sinus problems, persistent diarrhoea and weight loss, speech and learning difficulties including possible development of Autism Spectrum Disorder, if experienced by the Claimant are independent and unrelated ailments to which neither a causal link has been asserted by the Claimant nor established medically.

**III. The Defendant's Application for Summary Judgment on the Claim and/or alternatively to strike out the Claim**

[30] By Notice of Application dated 30 November 2018 together with an affidavit of Jeanelle Pran, attorney-at-law for the Defendant, sworn to and filed on even date, the Defendant applied to the Court pursuant to **Part 15.2(b) of the CPR** and **Part 26.2(1)(b) and (c) of the CPR** for an order that -

(i) the Claimant's Claim filed on 31 March 2017 and/or paragraphs 11(b), 12 and the Particulars of Personal Injuries of the Statement of Case be dismissed; or

(ii) paragraphs 11(b), 12 and Particulars of Personal Injuries of the Statement Case be struck out.

[31] The Defendant bases his application on the grounds that -

1) the Claimant has no realistic prospect of success on his Claim against the Defendant and/or that part of the Claim as set out in paragraphs 11(b), 12 and Particulars of Personal Injuries of the Statement of Case; and

2) paragraphs 11(b), 12 and Particulars of Personal Injuries disclose no grounds for bringing the Claim. The Claimant has not provided any medical evidence to support an action in medical negligence and/or abuse of the process of the Court.

[32] Ms. Pran contended that the Claimant has sought to discharge the burden of proving causation through the evidence contained in the medical reports attached to the Statement of Case (as stated in paragraph [10] above). However, the intended evidence in these medical reports do not in any way wholly or partially attribute the causes of the Claimant's injuries to the alleged negligence of the Defendant. In particular, these medical reports neither expressly state nor imply that the embedded needle has caused the Claimant's injuries as pleaded in paragraphs 11(b), 12 and Particulars of Personal Injuries of the Claimant.

[33] Ms. Pran deposed that in Dr. Ashraph's medical report, he specifically highlighted that the "*area where the needle is located was normal healthy and without discomfort on palpation. There was gross caries of the deciduous molar teeth in the maxilla and left*

*mandible… There are caries and apical areas of infection of the deciduous molar dentition"*. He also addressed the fever by clearly stating that the "*'bouts of fever' can be due to the infected teeth and not the needle as there is no infective signs in the area of the needle*".

[34] Ms. Pran further stated that in Dr. Sharna Singh's medical report, she wrote "*Intra-oral examination showed multiple carious lesions due to Early Childhood Caries from breastfeeding at night. Patient localized pain at the lower left to the region of the buccal sulcus near the molars and the grossly deciduous second molar.*" Ms. Pran also stated that Dr. Naraynsingh stated that "*an ultrasound was requested and done the same day, which reported no focal mass or fluid collection and normal soft tissue*" in relation to the Claimant's visit for a small palpable lump on the left temporal region.

[35] Ms. Pran contended that the medical reports emphasize numerous factors independent of the care, treatment and attendance of the Defendant contributed to and/or caused the Claimant's injuries. The medical reports do not support the Claimant's claim that the alleged negligence of the Defendant caused the injuries. Consequently, the Defendant has failed to demonstrate how the embedded needle has caused his negligence.

[36] Ms. Pran deposed as follows:

1) The area where the needle is located is normal and healthy.
2) The Claimant has multiple gross caries and areas of infection stemming as far back as when the Claimant was a breastfeeding infant.
3) In the area in which the needle is embedded, there is no focal mass or fluid collection.
4) There is normal soft tissue in the area where the needle is embedded.

[37] This is all consistent with the medical report of Dr. Marcus Daniell dated 16 January 2017. Dr Daniell in his report stated that (i) the needle is in the original location; (ii) there is no sign of infection associated with the needle; (iii) any pain from the head or mouth region is attributable to dental caries; and (iv) there is nothing in the Claimant's medical

history (fever, feeling unwell, asthma, sinus problems, persistent diarrhoea, weight loss) that is attributed to the presence of the needle. Dr. Daniell's report also made it clear that the needle is easily accessible to be removed and removal of the needle does not pose a medical risk to the Claimant.

[38] Ms. Pran further deposed that there is no purported evidence linking the Claimant's alleged symptoms and loss to the embedded needle and alleged negligence of the Defendant. The medical reports suggest that the embedded needle is producing no adverse reaction to the Claimant and, therefore, cannot be the cause of the injuries pleaded in paragraphs 11(b), 12 and Particulars of Personal Injuries. Furthermore, the following factors, independent of the care, treatment and attendance of the Defendant, stand out as being contributing factors to the Claimant's injuries:

(i) numerous caries of apical areas of infection of the deciduous molar dentition;
(ii) gross caries of the deciduous molar teeth in the maxilla and left mandible;
(iii) multiple carious lesions due to Early Childhood Caries from breastfeeding at night;
(iv) grossly deciduous second molar;
(v) poor hygiene and dental care;
(vi) untreated early childhood caries; and
(vii) poor nutritional care.

[39] She further deposed that the other injuries namely, the limited neck movement, development of asthma, sinus problems, persistent diarrhoea and weight loss, speech learning difficulties including possible development of Autism Spectrum Disorder, are independent and unrelated ailments. The Claimant has failed to assert and/or establish a causal link medically. Evidently, the presence of the needle in the Claimant's jaw tissue has not caused the injuries claimed at paragraphs 11(b), 12 and Particulars of Personal Injuries.

[40] Ms. Pran contended that the Claimant has not, whether through facts or competent medical opinion, provided any factual or evidential basis to assert that the alleged negligence of the Defendant caused the injuries as pleaded. The Claimant's Claim is

unsupported by the intended evidence relied upon and such intended evidence does not sufficiently discharge the burden of proof as to causation of the injuries by the alleged negligence of the Defendant. Furthermore, the intended evidence does not establish that any alleged breach by the Defendant caused the injuries pleaded. Consequently, the Claimant has no realistic prospect of success on his Claim against the Defendant and ought to be dismissed or struck out as disclosing no grounds for bringing the claim.

[41] Mr. McNicolls Jr, attorney-at-law for the Claimant, in response stated that the Claimant does have a realistic prospect of success on his Claim and/or any part thereof and that the Defendant's application is premature. He further stated that the Defendant cannot at the pleading stage or immediately thereafter, assess the strength of the Claimant's claim based only on the evidence by way of medical reports attached to the Claimant's pleadings. The Defendant's application ought to have been made after the filing and/or hearing of all the evidence in the matter.

[42] Mr. McNicolls Jr deposed that the medical reports attached to the Claimant's Statement of Case do not form the entirety of the evidence the Claimant intends to rely on since witness statements have not been filed yet. Furthermore, if the Claimant chooses to rely on the doctrine of *res ipsa loquitur* and succeeds at trial in making out its prima facie case (that the Claimant would not have been injured had it not been for the Defendant), the burden of proof would then shift to the Defendant.

[43] Mr. McNicolls Jr highlighted that "bouts" imply that the Claimant suffers from fever periodically and not on a perpetual basis. Furthermore, Dr. Ashraph stated that these bouts "*can be due to the infected teeth and not the needle*", this suggests the possibility that the cause of these bouts might be something other than the needle or in conjunction with the needle. In addition, Dr. Ashraph's finding that there were no infective signs in the area of the needle represents what he saw at the time when he examined the Claimant.

[44] Mr. McNicolls contended that the Defendant's reference to the medical reports is expert evidence which ought to be explained and/or amplified at trial. Additionally, whether the

Claimant suffered the ailments as a result of the embedded needle still needs to be proven and they are not yet at the stage of evidence. It was further stated that the factors as listed by the Defendants in paragraph [36] above may be co-existing and not necessarily the cause of the ailments endured by the Claimant.

## IV. Issues for Determination

[45] Before the Court is the Defendant's application seeking summary judgment against the Claimant or that the Claimant's Claim be struck out. The Court is empowered under **Part 15.2(b) of the CPR** to give summary judgment on the whole or part of the Claim if the Claimant has no realistic prospect of success on the Claim or part of the Claim. **Part 26.2(1) of the CPR**, on the other hand, empowers the Court to strike out a statement of case or part of thereof: (a) for failing to comply with a rule or practice direction or with an order or direction of the Court; (b) if it is an abuse of process of the Court; or (c) if it discloses no reasonable grounds for defending a Claim. The test, which the Court is to apply under each rule, is different. The question therefore arises as to which test should be applied first.

[46] In **University of Trinidad and Tobago (UTT) v Professor Kenneth Julian and Ors**[1], Kokaram J (as he then was) summed up the difference in the approach under the two respective rules which this Court respectfully adopts as:

> *"6. There is of course a fundamental difference between the two tests under CPR rule 26 and rule 15. When invoked simultaneously by a party the Court is engaged in an exercise of testing and assessing the strengths of the Claimant's case on what I will term a "soft" and then a more rigorous standard. If a claim discloses some ground for a cause of action it is not "unwinnable" and should proceed to trial. It may be a weak claim but not necessarily a plain and obvious case that should be struck out and the claimant "slips past that door". The Court is however engaged in a more rigorous exercise in a summary judgment application to determine of those*

[1] CV2013-00212

*weak cases, which may have passed through the "rule 26.2 (c) door" whether it is a claim deserving of a trial, whether the evidence to be unearthed supports the claim and whether there is a realistic as opposed to fanciful prospect of success. If there is none, the door is closed on the litigation and brings an end to its sojourn in this litigation"*

[47] I agree with Kokaram J in **UTT v Professor Kenneth Julien (supra)** where he stated as follows:

*"I agree with the observations made in Swain v Hillman [2001] 1 All ER 91 that there is an obvious relationship between CPR rule 26.2 (c) and rule 15. They are both summary proceedings that seek to bring a premature end to proceedings without the opportunity being given for the parties or the Court to fully investigate the facts and the law at a trial. The premise of both applications is that it would be a waste of the parties' and 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. The approach maintains the equality of arms between a litigant spared the further expense of a hopeless or weak case and a Defendant's right not to be harassed by such cases. The assessment in both cases is an exercise of the Court's case management powers to give effect to the overriding objective. See CPR rules 1.2, 25.1 (a) (b) and (h). See also the judgment of Jamadar JA in Real Time Systems Ltd v Renraw Investments Ltd CA Civ. 238 of 2011. The Court makes a broad judgment after considering the available possibilities and concentrates on the intrinsic justice of a particular case in the light of the overriding objective. See Walsh v Misseldine [2001] CPLR 201. In examining the tests in a rolled up application one may look at the individual trees but then must step back to "look at the forest" in making an overall assessment of the case."*

[48] The Defendant's main contention in his Application is that the Claimant's Statement of Case does not have a realistic prospect of success. However, in adopting the approach

taken by the Court in **UTT v Professor Kenneth Julien (supra)**, I shall first deal with the Application to strike out ("the soft approach") to determine whether the Claim discloses some ground for a cause of action. If there is, I will then consider whether that Claim has a realistic prospect of succeeding if to goes to trial ("the more rigorous approach").

[49] Consequently, the Court finds that the issues for determination and the order in which they will be determined are as follows:

1. ***Should paragraphs 11(b), 12 and Particulars of Personal Injuries of the Statement of Case be struck out pursuant to Part 26.2 of the CPR?***

In answering this question, the Court will consider:

(i) ***Do paragraphs 11(b), 12 and Particulars of Personal Injuries of the Statement of Case disclose no grounds for bringing the claim?***

(ii) ***Are paragraphs 11(b), 12 and Particulars of Personal Injuries of the Statement of Case an abuse of process of the Court?***

2. ***If that part of the Claimant's Statement of Case is not struck out, should the Court award summary judgment pursuant to Part 15.2(b) of the CPR against the Claimant on the basis that the Claimant has no realistic prospect of success on his Claim and/or paragraphs 11(b), 12 and Particulars of Personal Injuries of the Statement of Case?***

In answering this question, the Court will consider:

(i) ***Has the Claimant shown in his Statement of Case and/or any medical report before the Court, any reasonable evidence upon which negligence could be attributed to the Defendant for his injuries and losses as particularised to sustain an action in medical negligence against the Defendant?***

(ii) ***Does the principle of res ipsa loquitur apply in medical negligence cases?***

(iii)***If so, does it apply in this case to raise an inference of negligence against the Defendant?***

(iv)***Are the matters pleaded in paragraphs 11(b), 12 and Particulars of Injuries a consequence of the alleged negligence on the part of the Defendant?***

## V. Law and Analysis

**Application to Strike out the Claim**

[50] The Court's power to strike out a Statement of Case is set out in **Part 26.2(1) of the CPR** which states as follows:

> *"26.2(1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –*
>
> *(a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the Court in the proceedings;*
>
> *(b) that the Statement of Case or the part to be struck out is an abuse of the process of the Court;*
>
> *(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or*
>
> *(d) that the Statement of Case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."*

The Defendant seeks to rely on limbs (b) and (c) of **Part 26.2(1) of the CPR**.

[51] According to **Zuckerman on Civil Procedure Principles of Practice Third Ed. at page 373, para 9.36**:

> *"The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence or abuses the court process. There is no justification for investing court and litigant resources in following the pre-trial and trial process where the outcome is a foregone conclusion...In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay."*

***Do paragraphs 11(b), 12 and Particulars of Injuries of the Statement of Case disclose no grounds for bringing the Claim?***

[52] **The White Book on Civil Procedure 2013** considers what constitutes a Statement of Case that discloses no reasonable grounds for bringing or defending the claim. At page 73, the authors of The White Book state that Statements of case which are suitable for striking out (on the basis that they disclose no reasonable grounds for bringing or defending the claim) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides.

[53] In **Brian Ali v The Attorney General**[2], Kokaram J explained as follows:

> *"12. The principles in striking out a statement of case are clear. A court will only seek to strike out a claim pursuant to Rule 26.2(1)(c) of the CPR 1998 as amended on the basis that it discloses no ground for bringing the claim. The language and wording of our Rule 26.2(1) is very generous in that so long as the Statement of Case discloses a ground for bringing the claim, it ought not to be struck out. See UTT v Ken Julien and ors CV2013-00212.*
> *13. It is a draconian measure and is to be sparingly exercised always weighing in the balance the right of the Claimant to have his matter heard and the right of the Defendant not to be burdened by frivolous and unmeritorious litigation. The Court in the exercise of its discretion to strike out a claim must always ensure to give effect to the overriding objective. See: Real Time Systems Ltd v Renraw Investment Ltd Civ. App. 238 of 2011.*
> *14. It is for the Defendant to demonstrate that there is no ground for bringing the claim. The Defendant can demonstrate for instance that the claim is vague, vexatious or ill-founded. Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ. 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bringing a claim include:*

[2] CV2014-02843

*"(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides: Harris v Bolt Burden [2000] CPLR 9; (b) Where the statement of case does not raise a valid claim or defence as a matter of law."*

[54] In the case at bar, the allegations of negligence against the Defendant are set out in paragraph 8 of the Statement of Case. The general nature of the Claimant's case is that the Claimant suffered losses and injuries as a result of medical negligence on the part of the Defendant during a dental procedure on 3 July 2013. It is alleged that the Defendant owed a duty of care to the Claimant and the Defendant breached that duty which resulted in the injuries and losses sustained by the Claimant. Consequently, it is evident that the Claimant's Statement of Case discloses some ground for a cause of action.

[55] Paragraphs 11(b), 12 and Particulars of Injuries as pleaded refer to the losses and injuries that the Claimant allegedly sustained as a result of the Defendant's alleged negligence which is one of the limbs in a medical negligence claim. Accordingly, the Court is of the view that the Claimant's Statement of Case discloses grounds for bringing the Claim and ought not to be struck out. The Defendant is therefore unsuccessful on this ground of the Application.

***Are paragraphs 11(b), 12 and Particulars of Injuries of the Statement of Case an abuse of process?***

[56] The term "abuse of the court's process" is not defined **in the CPR 1998** or the English Counterpart or in any practice direction. Lord Bingham in **Attorney General v Barker**[3] albeit in a different context, explained "abuse of the court's process" as "*using that process for a purpose or in a way significantly different from its ordinary and proper use*". I am of the view that this is a fitting explanation for the concept of "abuse of the process of the court".

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[3] [2000] 1 FLR 759

[57] The categories of abuse of process are many and are not closed or exhaustive. The Court has the power to strike out a prima facie valid claim where there is abuse of process. However, there has to be an abuse and striking out has to be supportive of the overriding objective[4]. Jamadar J (as he then was) in the case of **Danny Balkissoon v Roopnarine Persaud & Another**[5] stated as follows:

> *"While the categories of abuse of the process of the court are many and depend on the particular circumstances of any case, it is established that they include: (i) litigating issues which have been investigated and decided in a prior case; (ii) inordinate and inexcusable delay, and (iii) oppressive litigation conducted with no real intention to bring it to a conclusion."*

[58] **The White Book on Civil Procedure 2013**, recognise in case law the following categories of abuse of the process of the court: (i) vexatious proceedings; (ii) attempts to re-litigate decided issues; (iii) collateral attacks upon earlier decisions; (iv) pointless and wasteful litigation; (v) improper collateral purpose; and (vi) delay.

[59] Having regard to the different categories of abuse of process of the Court and the fact that the Statement of Case does disclose a ground for bring the Claim, the Court is of the opinion that the Statement of Case does not amount to an abuse of process of the Court. Accordingly, the Statement of Case ought not to be struck out and the Claimant is also not successful on this ground of the Application.

**Application for Summary Judgment**

[60] The application for summary judgment is governed by **Part 15.2 of the CPR** which 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—*

[4] Jamadar J (as he then was) in Danny Balkissoon v Roopnarine Persaud and another CV2006-00639
[5] CV2006-00639

*(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) <u>on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of the claim or issue.</u>"*

[61] The basic principles of summary judgment have been well established and settled in case law. The authority of **<u>Western United Credit Union Co-operative Society Limited v Corrine Ammon</u>**[6] which referred to the decisions of **<u>Toprise Fashions Ltd v Nik Nak Clothing Co Ltd and ors</u>**[7] and **<u>Federal Republic of Nigeria v Santolina Investment Corp.</u>**[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 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 E.W.C.A. 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 statements 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 supra 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 Hammond No. 5 2001 E.W.C.A Civ 550****;*

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

*(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without 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 to a trial judge and so affect the outcome of the case:* ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd 2007 F.S.R. 63****."*

[62] The principles at (iv), (v) and (vi) have particular relevance to the case at bar and when applied, guide the Court as follows:

(i) The Court will not take at face value every allegation pleaded by the Claimant and will examine same with the affidavit evidence and the documentary evidence to test its veracity;

(ii) The Court will also consider, in addition to the above, the evidence that will likely be available to the Claimant at trial; and

(iii) The Court must consider the extent of the facts in dispute and thus, whether the matter is one that is ripe for a fuller investigation by trial.

[63] Lord Hope in the case of **Three Rivers District Council v Governor and Company and Bank of England No 3**[9] explained a judge's duty in respect of the test in summary judgment applications in the following way:

*"The rule… is designed to deal with cases which are not fit for trial at all'; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary*

[9] [2001] UKHL 16

> *power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt 24 [our Rule 15] is not one of probability; it is the absence of reality."*

[64] Lord Woolf MR in the case of **Swain v Hillman**[10] opined that the term "*no realistic prospect of success*" was self-explanatory and needed no further amplification. What the Court must determine is whether there was a "realistic" as opposed to a "fanciful" prospect of success.

[65] Accordingly, the Court is concerned with *whether the Claimant's claim of medical negligence on the part of the Defendant has a realistic prospect of success*. Although the Court is not tasked to conduct a mini trial, consideration of the evidence before the Court on the Application, including any contemporaneous documents, and the evidence that can reasonably be expected to be available at trial is important.

***Has the Claimant shown in his Statement of Case and/or any medical report before the Court, any reasonable evidence upon which negligence could be attributed to the Defendant for his injuries and losses as particularised to sustain an action in medical negligence against the Defendant?***

[66] To prove a claim in negligence, it must firstly be established that a duty of care existed between the parties, that is, the Defendant owed a duty of care to the Claimant. 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. It is not disputed that the Defendant owed 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 Defendant on 3 July 2013 during the attempted root canal procedure.

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[10] [2000] 1 All ER 91

[67] The law is clear that in medical negligence cases, the burden of proof rests on the Claimant to prove, on a balance of probabilities, negligence or breach of the duty of care on the part of the Defendant at the trial: **Wilsher v Essex Area Health Authority**[11]. However, the standard of care owed to the Claimant by the Defendant is not that of the reasonable person but that of the ordinary skilled medical person exercising and professing to have that special skill. The well-known legal test was established in the seminal case of **Bolam v Friern Hospital Management Committee**[12] and is now commonly referred to as the ***Bolam*** test. In this case McNair J stated as follows:

> *"How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge that by the conduct of the man on top of the Clapham omnibus. He is the ordinary man. 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. [Emphasis mine]"*

[11] [1998] All ER 879
[12] [1957] 2 All ER 118

[68] The essence of the ***Bolam*** test was distilled by Lord Scarman in **Sidaway v Governors of Bethlem Royal Hospital**[13] 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."*

[69] The ***Bolam*** test was applied with approval in this jurisdiction by the Court of Appeal in **Dr. Patricia Deonarine v Rana Ramlal**[14]. Therefore, 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 Defendant's duty of care owed to the Claimant fell below the professional standard required of him in all the circumstances. Accordingly, 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. 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. As such, it is for the Claimant to not only show that the needle was left in his jaw tissue, but further, that it was as a result of medical negligence on the part of the Defendant in his treatment, care and management of the Claimant.

[70] In this case, there is no intended medical evidence by any responsible body of medical opinion on behalf of either party to suggest that the care which the Claimant received fell below the standard of care to be expected from that observed in the medical profession to which the Defendant belongs. The Claimant did not attach any such medical evidence to his Statement of Case nor to his affidavit in response to the Defendant's Application which will show that the Defendant's conduct fell below the standard of care expected of a dental practitioner. The medical reports before the Court, which are attached to the Statement of Case, all relate to the treatment and examination of the Claimant after the

[13] [1985] AC 871
[14] Civil Appeal No. 28 of 20032

needle was embedded in his jaw tissue. They do not expressly state or imply how the needle broke and became embedded in the Claimant's jaw tissue.

[71] Dr. Ashraph's medical report only provided a review of the Claimant's condition upon presentation on 2 April 2016 without any comment as to what should have been the appropriate care or standard of care to be observed by the Defendant. Dr. Ashraph also recommended surgery to have the needle removed from the Claimant's jaw tissue. Dr. Singh's report also provided a review of the Claimant's condition upon examination on 20 November 2015 as well as relayed the history of the Claimant concerning the presence of the needle in his jaw tissue. The report does not mention what should have been the appropriate care or standard of care to be observed by the Defendant. Dr. Naraynsingh's medical report is the same as the two previous mentioned reports. It provided a review of the Claimant's position upon presentation on different dates at the Oral Maxillofacial Clinic in the year 2013. Dr. Naraynsingh neither commented nor made any findings as to what should have been the appropriate standard of care observed by the Defendant. Furthermore, the Speech and Language Evaluation of the Claimant done by Kiara Matthews comments on the Claimant's speech and language abilities and development. Ms. Matthews also does not comment on the appropriate standard of care to be observed by the Defendant.

[72] It is evident that these medical reports do not state what should have been done in the circumstances surrounding a routine root canal of a child, that is, the appropriate standard of care expected of the Defendant. The reports also do not state that what was done by the Defendant fell below this standard. In this regard, these medical reports are effectively of little use to the Claimant's Claim in seeking to establish negligence on the part of the Defendant. 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 awarding summary judgment.

[73] It has been contended on behalf of the Claimant, however, that the Defendant's Application is premature since parties are not yet at the evidence stage; witness statements

have not been filed. However. **Part 15.5(2) of the CPR** states that the Respondent in an Application for summary judgment may file evidence which he wishes to rely on. In that regard, medical evidence on behalf of the Claimant ought to have been presented to the Court establishing what was the appropriate standard of care and that that standard of care fell below what was expected of the Defendant, thereby demonstrating that his Claim has a realistic prospect of success. However, he failed to do so.

[74] As it stands, therefore, there is no medical evidence before the Court demonstrating that the treatment the Claimant obtained from the Defendant fell below the standard expected of the reasonable medical practitioner in the relevant area of expertise. It is important in medical negligence cases for there to be evidence of the medical standards to which the medical profession is to be adjudged. However, the Claimant's Statement of Case averred that as far as may be necessary, the Claimant will rely on the doctrine of *res ipsa loquitur*. Thus, it is likely that the Claimant may not be able to adduce such evidence stating what the appropriate standard of care is and that the Defendant fell below that standard.

***Does the principle of res ipsa loquitur apply in medical negligence cases?***

[75] The best known definition of the maxim *res ipsa loquitur* is propounded by Erle CJ in **Scott v London and St Katherine Docks Co**[15] as follows:

> *"There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."*

[76] From the well-known authorities of **Ng Chun Pui v Lee Chuen Tat**[16], **Henderson v Henry E. Jenkins & Sons**[17] and **Lloyde v West Midlands Gas Board**[18], they establish

[15] (1865) 159 ER 665
[16] [1988] TRT 298 PC
[17] [1970] RTR 70
[18] [1971] 1 WLR 749, 755

that the general proposition that the fact a particular accident occurred may in the circumstances establish a *prima facie* case of negligence to be answered by the Defendant. However, the burden of proving negligence still lies on the Claimant throughout.

[77] While it is recognised in medical negligence cases that there must be some medical evidence to satisfy the ***Bolam*** test, the maxim *res ipsa loquitur* can still be applicable in obvious cases. In **Ratcliffe v Plymouth and Torbay Health Authority and another**[19] Brooke LJ opined that it is theoretically possible to apply the maxim *res ipsa loquitur* in medical negligence cases as was recognised by the Court in **Cassidy v Ministry of Health**[20] (plaintiff's hand rendered useless after a surgical operation on it: inference of negligence not rebutted) and **Roe v Ministry of Health**[21] (plaintiff developed spastic paraplegia following lumbar puncture: inference of negligence rebutted).

[78] Therefore, the Court accepts that the maxim *res ipsa loquitur* is applicable in medical negligence cases as opined by Brooke LJ in **Ratcliffe (supra)**.

***If so, will it apply in this case to raise an inference of negligence against the Defendant?***

[79] Brooke LJ in **Ratcliffe v Plymouth and Torbay Health Authority**[22] **(supra)** explained the relevance of the maxim *res ipsa loquitur* to medical negligence cases in the following terms:

> *"(1) In its purest form, the maxim applies where the plaintiff relies on the 'res' (the thing itself) to raise the inference of negligence, which is supported by ordinary human experience, with no need for expert evidence.*
> *(2) In principle, the maxim can be applied in that form in simple situations in the medical negligence field (surgeon cuts off right foot instead of left; swab left in operation site; patient wakes up in the course of surgical operation despite general anaesthetic).*

[19] [1998] 42 BMLR 54
[20] [1951] 2 KB 343, [1951] 1 All ER 574
[21] [1954] 2 QB 66, [1954] 2 All ER 131
[22] Paragraph 49 of the Judgment of Brooke LJ

*(3) In practice, in contested medical negligence cases the evidence of the plaintiff, which establishes the 'res', is likely to be buttressed by expert evidence to the effect that the matter complained does not ordinarily occur in the absence of negligence.*

*(4) The position may then be reached at the close of the plaintiff's case that the judge would be entitled to infer negligence on the defendant's part unless the defendant adduces evidence which discharges this inference.*

*(5) This evidence may be to the effect that there is a plausible explanation of what may have happened which does not connote any negligence on the defendant's part. The explanation must be a plausible one and not a theoretically or remotely possible one, but the defendant certainly does not have to prove that his explanation is more likely to be correct than any other. If the plaintiff has no other evidence of negligence to rely on, his claim will then fail.*

*(6) Alternatively, the defendant's evidence may satisfy the judge on the balance of probabilities that he did exercise proper care. If the untoward outcome is extremely rare, or is impossible to explain in the light of the current state of medical knowledge, the judge will be bound to exercise great care in evaluating the evidence before making such a finding, but if he does so, the prima facie inference of negligence is rebutted and the plaintiff's claim will fail. The reason why the courts are willing to adopt this approach, particularly in very complex cases, is to be found in the judgments of Stuart-Smith and Dillon LJJ in Delaney v Southmead Health Authority [1995] 6 Med LR 355.*

*(7) It follows from all this that although in very simple situations the 'res' may speak for itself at the end of the lay evidence adduced on behalf of the plaintiff, in practice the inference is then buttressed by expert evidence adduced on his behalf, and if the defendant were to call no evidence, the judge would be deciding the case on inferences he was entitled to draw from the whole of the evidence (including the expert evidence), and not on the application of the maxim in its purest form."*

[80] Lord Griffiths in the seminal case of **Ng Chun Pui and others v Lee Chuen Tat (supra)** observed that in an appropriate case, the Claimant establishes a *prima facie* case by relying on the fact of an accident (which by its unusual nature raises an inference of negligence) and if there is no evidence led by the Defendant to rebut the inference of negligence the Claimant would have proved his case. If the Defendant, however, does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. However, resort to the burden of proof is a "poor way to decide a case", the Court must examine all the evidence at the end of the case and decide whether on the facts proven an inference can be drawn that negligence has been established.

[81] In **Darlington Francois v Well Service Petroleum Company Limited**[23], Seepersad J quoted the learned authors of **Charlesworth and Percy on Negligence 13th edition** wherein the learned authors summarised the tenet of *prima facie case* under the maxim *res ipsa loquitur* as follows:

> *"**A prima facie case**. It has been said that "a prima facie case" should be the preferred terminology. It means essentially a case which calls for some answer from the Defendant and will arise upon proof of: (1) the happening of some unexplained occurrence; (2) which would not have happened in the ordinary course of things without negligence on the part of somebody other than the Claimant; and (3) the circumstances point to the negligence in question being that of the Defendant, rather than that of any other person."*

[82] As indicated above, the maxim *res ipsa loquitur* is a useful evidential aid to a Claimant who is unable to establish how an accident occurred. Therefore, the issue to be considered is whether there will be a sound basis for the application of the maxim in the circumstances of this case. As gathered from the authorities above, the applicability of *res ipsa loquitur* is one which is applied only where the cause of the incident is unknown. Where there is direct evidence as to what occurred, there is no need to rely upon

[23] CV2017-00103

inferences. However, where there is no direct evidence, the maxim *res ipsa loquitur* is applicable.

[83] In this case, when the Claimant was being injected with a local anaesthetic during the dental procedure on 3 July 2013, the needle broke and became embedded in his jaw tissue. There is no pleading on how the needle may have become embedded in the Claimant's jaw tissue nor is there any evidence in the Claimant's affidavit in response to the Defendant's application concerning what may have caused the needle to become embedded in the Claimant's jaw tissue. Thus, it is apparent that the Claimant is unable to prove precisely what was the relevant act or omission on the part of the Defendant that led to the chain of events leading to the accident.

[84] The incident which occurred, a broken needle becoming embedded in the Claimant's jaw tissue, is not one that in the ordinary course of things happens. Although the preparatory steps of the root canal performed on the Claimant was under the management and control of the Defendant, the occurrence of a broken needle being embedded in a patient's jaw during that procedure is a rare complication. The Defendant, in fact, pleaded same in his Defence. However, this incident, in the ordinary course of things, *prima facie*, would not have happened without negligence.

[85] In that regard, the Court is of the view that this case at bar falls fairly and squarely within the statement of Erle CJ quoted above in paragraph [74]. This is a case where the Claimant himself, or no one else on his behalf, is in a position to give an account of what occurred. The situation was under the control of the Defendant and the relevant facts of what the Defendant did or did not do is exclusively within the direct knowledge of the Defendant. This situation is a simple medical one in the medical negligence field. Therefore, the Latin maxim *res ipsa loquitur* will be applicable in this case before the Court. In such a simple situation like this, the '*res*' (the thing itself) may speak for itself at the end of the lay evidence before the Court on behalf of the Claimant.

[86] The fact that the broken needle became embedded in the Claimant's jaw tissue, during the preparatory steps of the root canal which was under the control of the Defendant, is likely to raise an inference of negligence on the part of the Defendant. In other words, a broken needle would not become lodged in a patient's jaw tissue during a dental procedure if those conducting the procedure have used proper care. Therefore, there is a realistic prospect of success on that part of the Claim that a *prima facie case* of negligence can be raised for which the Defendant must answer. Furthermore, expert evidence is not required in a case like this to raise an inference of negligence on the part of the Defendant.

[87] The maxim *res ipsa loquitur* was also explained by our Court of Appeal in **<u>Adriana Ralph and Lee Ralph v Weathershield Systems Caribbean Limited et al</u>**[24]. *Res ipsa loquitur* is but a convenient expression to describe the state of evidence at the close of a Claimant's case that there is sufficient evidence to raise an inference of negligence. Smith JA, at paragraph 4, stated the following:

> *"The maxim res ipsa loquitur is not a rule of law but merely a latin maxim to describe the state of evidence from which an inference of negligence can be drawn. Specifically, it is called into play on the evidence "AS IT STANDS" at the close of a claimant's case and not on the evidence that might have been available before this.*
> *Both parties accept the law as approved in the Privy Council case of Ng. Chun Pui [1988] UKPC 7 which affirmed the dicta of Megaw LJ in Lloyde v West Midlands Gas Board [1971] 2 All ER 1240 as follows:*
>
> > *"I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where : (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the*

[24] Civil Appeal No. 98 of 2011

> *events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible which act or omission constitutes a failure to take proper care for the plaintiff's safety. (Emphasis added)*
> *I have used the words 'evidence as it stands at the relevant time'. I think that this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, res ipsa loquitur. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter may rebut the inference. The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."*

[88] Having decided that the Claimant has a realistic prospect of success in raising an inference of negligence, the Defendant would now have to adduce evidence to rebut this inference. The Defendant has pleaded in his Defence that when he was injecting the Claimant with the local anaesthetic, the Claimant bit down on the syringe and the needle snapped. The Defendant did not adduce any evidence in his affidavit in support of his Application expanding on this rebuttal.

[89] Where the maxim *res ipsa loquitur* has been invoked, it is the duty of the Court, most times at the conclusion of trial, to decide whether upon all the evidence adduced, the Court is satisfied, on a balance of probabilities, that the Defendant was negligent and that his negligence caused the Claimant's injuries. The Court can only judge after all the

evidence has been put before the Court. Although the Defendant is likely to adduce evidence to rebut, that evidence must still be evaluated to determine if it is reasonable to draw the inference of negligence from the mere fact of the accident.

[90] As stated above, the Court must be satisfied on a balance of probabilities that the Defendant was negligent **and** that his negligence caused the Claimant's injuries. Although the Court has found that there is a realistic prospect of success in raising an inference of negligence on the part of the Defendant, there ought to also be a realistic prospect of success on that part of the Claim that shows that the Defendant's negligence caused the Claimant's injuries.

[91] Consequently, in order to be successful at the conclusion of trial, the Claimant must prove to the Court that the injuries that he sustained and the losses he has suffered are as a direct consequence of the Defendant's negligence during the preparation for the root canal procedure.

***Are the matters pleaded in paragraphs 11(b), 12 and Particulars of Injuries a consequence of the alleged negligence on the part of the Defendant?***

[92] Having established that the Defendant owed a duty of care to the Claimant and that the Defendant is likely to be in breach of duty, the Claimant will then have to prove that he has suffered injuries and losses for which the Defendant is liable. The onus is on the Claimant to prove that the negligence of the Defendant caused his injuries and the consequential losses.

[93] The Defendant, in his Application, contended that the medical reports attached to the Claimant's Statement of Case do not support the matters pleaded in paragraphs 11(b), 12 and Particulars of Injuries of the Claimant. It was further contended that none of the reports either wholly or partially attributes the Claimant's injuries to the embedded needle in his jaw tissue but rather the reports demonstrate that the Claimant's injuries were sustained from other factors separate and apart from the embedded needle. As a result,

the Claimant has failed to show that any injuries sustained was as a result of the alleged negligence of the Defendant.

[94] **Part 8.10 of the CPR** provides special requirements applicable to Claims of personal injuries. **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) 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.*

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

[95] While the Claimant has complied with **Part 8.10(3) of the CPR** insofar as attaching medical reports to his Statement of Case, these reports do not support his Claim that the injuries sustained are as a result of the negligence on the part of the Defendant.

[96] Dr. Ashraph in the medical report dated 2 April 2016 stated that the Claimant suffered from bouts of fever and feeling unwell. He stated that the Claimant's general medical history was of "asthma, sinus problems, persistent diarrhoea and weight loss". However. Dr. Ashraph did not indicate whether this was as a result of the embedded needle in the Claimant's jaw tissues. In fact, Dr. Ashraph stated that the area where the needle is located was normal, healthy and without discomfort on palpation. Dr. Ashraph added that there was gross caries of the deciduous molar teeth in the maxilla and left mandible.

[97] Dr. Ashraph, in his report, described what the radiograph of the Claimant's jaw tissue showed in relation to the lodged needle. He then added that there were caries and apical areas of infection of the deciduous molar dentition. He does not specify whether this was as a consequence of the embedded needle in the Claimant's jaw tissue. However, as it

related to the embedded needle, Dr. Ashraph stated that the "bouts of fever" experienced by the Claimant can be due to the infected teeth and not the needle as there is no infective signs in the area of the needle. This, therefore, contradicts the Claimant's pleaded case. Furthermore, as it relates to the possibility of Ludwig's Angina and a possibility of the needle traveling into the neck and chest of the Claimant, this is only a possibility and has not yet occurred. The Claimant ought to only plead that which has happened as a result of the negligence of the Defendant.

[98] Consequently, Dr. Ashraph's medical report does not support the Claimant's pleaded case that the injuries he is experiencing are because of the Defendant's negligence that resulted in an embedded needle in his jaw.

[99] Dr. Singh in the medical report to Dr. Scipio dated 20 November 2015 indicated that the Claimant had a history of pain in the area and the week prior experienced fever, pain on the left side neck, limited neck movement for two days, headaches localised to the left side, left ear pain and pain in the mouth. However, Dr. Singh does not indicate whether these are associated with the presence of the lodged needle. Dr. Singh further stated that an intra-oral examination showed multiple carious lesions due to Early Childhood Caries from breastfeeding at night. She added that there was localized pain on the lower left region of the buccal sulcus near the molars and grossly deciduous second molar. She also specified that the Claimant had asthma and speech problems. However, in Dr. Singh's report, there is no indication that these injuries were associated with the presence of the needle in the Claimant's jaw tissue.

[100] Accordingly, Dr. Singh's medical report also does not support the Claimant's pleaded case that the injuries he is experiencing is because of the Defendant's negligence which resulted in an embedded needle in his jaw. In fact, Dr. Singh in her report specified that the gross caries lesions was as a result of early childhood caries from breastfeeding at night.

[101] Dr. Naraynsingh's medical report dated 19 September 2013 constituted summaries of the different times the Claimant was examined at the Oral Maxillofacial Clinic at the Eric Williams Medical Sciences Complex. This report does not state nor refer to any of the particulars of injuries of the Claimant in the Statement of Case. Thus, it is apparent that this medical report does not support the Claimant's Claim that the negligence of the Defendant caused the injuries as pleaded.

[102] As it relates to paragraph 11(b) – Domestic care and attention required - there is no intended evidence before the Court to support this allegation that as a result of the Defendant's negligence, the Claimant could not keep up in school. The Speech and Language Report by Speech-Language Pathologist, Kiara Matthews, does not expressly state or imply that the presence of the needle in the Claimant's jaw tissue has affected his learning abilities and/or development. The Court is of the opinion that the contents of the Speech and Language Evaluation does not support the Claimant's pleaded case; it only identifies the Claimant's difficulties in speech and does not state that this as a consequence of the Defendant's negligence. The Court is of the opinion that the Claimant does not have a realistic prospect of success on this part of the Claim.

[103] As it relates to paragraph 12 – other adverse effects and loss of amenity - again, there is no intended evidence before the Court to support the allegation that the Claimant had manifested signs of delayed speech development. In fact, Kiara Matthews in her report does not state that the Claimant's speech issues are associated with the embedded needle. Furthermore, there is no intended evidence attached to the Statement of Case or affidavit in response demonstrating that the Defendant's negligence has affected the Claimant's social life (playing with his toys and riding his bicycle) or that it has had a psychological effect on the Claimant as he has not developed physically, intellectually or socially. The Court is of the opinion that such allegation ought to be supported by medical evidence. It is likely that such evidence would not be available at the time of the trial. Accordingly, the Court is of the view that the Claimant does not have a realistic prospect of success on this part of the Claim.

[104] Ms. Pran, in the affidavit in support of the Defendant's Application for summary judgment, referred to and exhibited a report of Dr. Marcus A. Daniell dated 16 January 2017. However, the Court wishes to highlight that this report of Dr. Daniell dated 16 January 2017 was not mentioned in or attached to the Defendant's Defence filed on 4 July 2017. **Part 10.8 of the CPR** is applicable in this instance and reads as follows:

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

*(2) Where the claimant has attached to his claim form a report from a medical practitioner on the personal injuries, which he is alleged to have suffered, the defendant must state in his defence—*

*(a) hether he agrees with the medical report; and*

*(b) where he disputes any part of the medical report, give his reasons for doing so.*

*(3) Where the defendant intends to rely on a report from a medical practi ti oner to dispu te any part of the clai mant's clai m for personal injuries and the defendant has such a report in his possession the defendant must attach that report to the defence."*

[105] Consequently, the fact that the Dr. Daniell's report is dated 16 January 2017, it was available to the Defendant at the time of filing his Defence on 4 July 2017. Therefore, in accordance with **Part 10.8(3) of the CPR**, the Defendant ought to have attached Dr. Daniell's report to his Defence. As a result of the Defendant's failure to mention or attach Dr. Daniell's report to his Defence, the Defendant will likely not be permitted to rely on that report as evidence at trial in support of his case.

[106] Nonetheless, **the CPR** requires that applications for summary judgment are to be supported by evidence. The Court cannot consider an application for summary judgment without evidence. **Part 15.5 of the CPR** reads as follows:

*"(1) The applicant must—*

*(a) file evidence in support with his application; and*

*(b) serve copies on the party against whom he seeks summary judgment."*

[107] **Part 11.8 of the CPR** provides that evidence in support of an application is adduced by affidavit. Accordingly, the Court, on this application for summary judgment, can consider the report of Dr. Daniell in deciding this issue before the Court.

[108] Dr. Daniell indicated that he first became aware of the Claimant when the Defendant brought the case to his attention in early July 2013. Dr. Daniell arranged to review the Claimant along with various radiographs to assess the position of the needle. He stated that the radiographic evaluation confirmed the presence of a linear radiopacity in the (L) infra-temporal region, lateral to the ascending mandibular ramus. He further indicated that the parents were informed that a minor procedure could be performed to remove the needle from the Claimant's face.

[109] Dr. Daniel made arrangements to have the needle removed from the Claimant's jaw at the Port of Spain General Hospital (POSGH). However, the POSGH did not provide paediatric ward facilities, therefore, surgery on a child under 12 years of age could not be facilitated. All paediatric management would have to be performed at the Eric Williams Medical Sciences Complex (EWMSC). Dr. Daniell contacted Dr. Candi Narinesingh, Consultant Oral Surgeon at the EWMSC and arrangements were made for the Claimant to be reviewed at the facility along with all pertinent radiographs.

[110] According to Dr. Daniell, Dr. Goddard, an Oral and Maxillofacial Surgeon visiting from the United Kingdom, was in attendance when the Claimant and his parents were at the EWMSC. After clinical and radiographic examinations, Dr. Goddard told the Claimant's parents that surgery was not necessary because the needle did not pose a risk and that its removal could be difficult.

[111] Dr. Daniell, however, did not share Dr. Goddard's opinion in its entirety. Dr. Daniell found that the needle did not pose a risk to the Claimant because the soft tissue would form a capsule to retain the needle in its position and prevent migration and that no acute inflammatory process or infection would occur because of the inert nature of the material and because the incident occurred under hygienic conditions. However, Dr.

Daniell recommended that the needle should be removed because the needle was easily accessible/retrievable via a minor procedure to be performed under general anaesthesia (since it involved a child) and to give the parents a peace of mind.

[112] Dr. Daniell, however, indicated that the last he heard of the Claimant was in July 2013 when Dr. Dharrie-Maharaj requested that he provide a report/opinion on the matter. Dr. Daniell made it clear that he had not examined the Claimant since July 2013. However, based on Dr. Ashraph's report dated 2 April 2016, the following was obvious to Dr. Daniell: (i) the needle is in the same location; (ii) there is no sign of inflammation or infection associated with the needle; (iii) any pain from the head/mouth region is attributable to dental caries; and (iv) there is nothing in the patient's medical history (fever, feeling unwell, asthma, sinus problems, persistent diarrhoea, weight loss) that is attributed to the presence of the needle.

[113] Dr. Daniell added that the fact that Dr. Ashraph's clinical exam is unremarkable in the area of the foreign body/needle confirms that the needle is producing no adverse reaction and does not necessitate removal for medical reasons. Dr. Daniell, however, maintained that there is no medical risk to the Claimant if the needle were left in situ and that the needle may be removed via a minor surgical procedure to alleviate the parents' anxiety.

[114] Consequently, Dr. Daniell's report disputes the Claimant's pleaded case that the injuries and losses that he sustained are as a result of the Defendant's negligence.

[115] Nevertheless, the burden of proof is on the Claimant to prove that the resulting injuries and loss he suffered are as a result of negligence on the part of the Defendant. Having examined the medical reports and Speech and Language report before the Court, the Court finds that these reports do not support the Claimant's pleaded case as to the injuries and/or losses he has sustained as a result of the negligence of the Defendant. Negligence is not actionable *per se*, therefore, without proof of any damage, there can be no Claim. In this regard, it is not difficult to see that the Claimant would not have a realistic prospect of success on this part of the Claim.

[116] In this regard, the Court finds that the Claimant does not have a realistic prospect of success on that part of his Claim filed on 31 March 2017 in proving any loss and/or injury that he sustained as result of the Defendant's alleged negligence. The Court also finds that to grant summary judgment at this stage will further the overriding objective of **the CPR**. In other words, on the evidence as it stands, it would not be proportionate to conduct a full trial of this Claim and it appears right to put a halt to further litigation expenses for both sides when it is clear to this Court that the Claimant will not be able to sustain this Claim with the supporting evidence which effectively is more in favour of the Defendant's case. However, taking all of the circumstances into account, particularly that the parties attempted to settle this Claim on few occasions, and the medical predicament in which the young Claimant (a minor) and his parents have found themselves, I propose to order that they be not penalised in costs of the application as well as costs of the claim. Each party shall therefore bear its own costs of the proceedings.

## VI. Disposition

[117] Given the analyses and findings above, the Order of the Court is as follows:

**ORDER**:

1. **Summary Judgment be and is hereby entered in favour of the Defendant against the Claimant pursuant to CPR Part 15.2(b) on the basis that the Claimant has no realistic prospect of success on his Claim filed on 31 March 2017.**
2. **Both parties shall bear their own costs of the Notice of Application filed on 30 November 2018 as well as costs of the Claim.**

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**Robin N. Mohammed**
**Judge**