OFFICE OF THE ST. GEORGE WEST COUNTY
PORT OF SPAIN CORONER

FINDINGS OF INQUEST

CITATION: Inquest into the death of Ojo Moyo Oliver

TITLE OF COURT: Port of Spain's Coroner's Court

COR FILE NO(s): INQ 10 of 2008

DELIVERED ON: 22nd April 2009

FINDINGS OF: Nalini Singh
St. George West County
Port of Spain Coroner

REPRESENTATION:

Police Corporal Samuel appeared to assist the Coroner

Ms. Geeta Maraj appeared for Home Construction Limited (HCL)

Ms. Natasha Dean appeared for the Water and Sewerage Authority (WASA)

Mr. Ashook Balroop appeared for the Environmental Management Authority (EMA).

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PREFACE

On the 28th January 2009 an inquest was formerly opened into the death of Ojo Moyo Oliver. He died from asphyxia associated with drowning on the 15th April 2007 at a pond located on the HCL Quarry premises Morne Coco Road, Petit Valley.

These are the findings of that inquest. They are divided into five parts.

Part 1 contains an introduction and sets out the extent of a coroner's jurisdiction in relation to such matters. This part also describes the inquest proceedings.

Part 2 deals with the law as it relates to the findings of this inquest.

Part 3 contains a summary of my findings as Coroner in relation to Ojo Moyo Oliver's death.

Part 4 contains my observations about the need in our jurisdiction for safety regulations governing landowners with artificial bodies on water on their premises. Recommendations have been made in this regard in an attempt to avoid future deaths from occurring by drowning in unsecured artificial bodies of water.

Part 5 contains my concluding remarks in this inquest and a formal conclusion of same.

PART 1

INTRODUCTION

1. The Preliminary Investigation and the Inquest

I conducted a preliminary investigation into this matter as per section 10 (2) of the Coroners Act Chap 6:04 (hereinafter referred to as "the Act"). I did this by perusing all the material relating to this matter which was forwarded to the Coroner's office. I then decided to conduct an inquest in relation to this matter and same commenced on the 28th January 2009.

During the course of this inquest evidence was taken from a number of witnesses and exhibits have been tendered into evidence as well. Additionally, the court made a site visit in this matter and this was done after being invited onto the HCL Quarry premises by HCL employees.

It is against this background that the following facts have emerged.

Sometime around 6:30PM on Sunday the 15th April 2007 the deceased 20 year old Ojo Moyo Oliver along with his friends Kern Thompson and Leo Hamilton trespassed onto the HCL Quarry premises in Morne Coco Road Petit Valley. They made their way to the pond area and were bathing in same when Ojo Moyo Oliver got into some difficulty and drowned. After the HCL staff was alerted to this fact, a search was made to recover the body of Ojo Moyo Oliver but this proved unsuccessful due to the lighting conditions at

the time. Ojo Moyo Oliver's body was recovered on Monday 16th April 2007 when it was observed to be bareback, and clad only in red boxers. The body itself bore no marks of violence. The body was lifeless and its face was covered entirely in mud. Ojo Moyo Oliver was pronounced dead by the District Medical Officer and his body was taken to the Port of Spain Mortuary where, on Tuesday 17th April 2007 he was identified by his mother Ida Oliver. An autopsy was then performed under Dr. Jankey's supervision. The cause of death was found to be asphyxia associated with drowning. The body was later disposed of by burial under Spiritual Baptist Rites on Friday 20th April 2007 at the Mucurapo Cemetary Port of Spain.

This incident clearly demonstrates that the manner in which artificial bodies of water are secured is something which must be strictly controlled and scrutinized. Citizens are conferred with the right to the enjoyment of their property. This right is tempered by the fact that trespassers must be treated with ordinary humanity and if a trespasser is killed because an artificial body of water is not properly secured, the landowner of such premises will be held accountable for this grave omission.

Tragic incidents such as this are traumatic for the deceased person's family as well as the landowners involved but at the end of the day, the deceased person's family members are entitled to a thorough and impartial examination of the circumstances of the death to determine whether there is evidence of the commission of a criminal offence. In fact the community needs to be satisfied as to whether or not the landowner took such steps as common sense or common humanity would dictate to exclude or warn or otherwise

within reasonable practicable limits, so as to reduce or avert danger -if it is to maintain its trust and confidence in our legal system. And so, if the death was avoidable, the public is entitled to expect that those responsible will be held accountable and that changes will be made to reduce the likelihood of similar deaths occurring in future.

It is also in the interests of the landowners involved that these maters be scrupulously and independently investigated and publicly reported on so that there can be no suggestion of a "cover up."

The Act recognizes and responds to this need for public scrutiny and accountability by requiring deaths in custody for instance, to be brought to the attention of the Coroner[1] and by mandating that an inquest be held into all such deaths[2].

JURISDICTION

1. The scope of the Coroner's inquest and findings

A Coroner has jurisdiction to inquire into the cause and the circumstances of a reportable death[3]. I understand this to mean that if it is possible, a Coroner is required to find:-

[1] Section 4 (3) states that "The Keeper of any prison within which a prisoner dies shall forthwith give notice of the death to the Coroner and the District Medical Officer within whose respective districts the prison is situated".

[2] Section 11 states that "A Coroner, where there is in his district the body of any person who died in any prison or as to whose death an inquest is prescribed, shall hold an inquest as to the cause and circumstances of the death, whether the District Medical Officer does or does not make a report thereon".

[3] Section 10(1) states that "A Coroner having received the report of the District Medical Officer as to the cause of death of any person, shall carry out a preliminary investigation as to the cause and circumstances of the death".

- whether a death in fact happened;
- the identity of the deceased;
- when, where and how the death occurred; and
- what caused the person to die.

Ojo Moyo Oliver's death was reportable because it was unnatural in that it occurred in an unnatural manner[4].

As required by the relevant legislation, I have made findings in relation to the particulars of this death. This is out in Part Three of these findings.

I have also thought it best to make some comments on existing legislation because they relate to public safety, the administration of justice and ways to prevent deaths from happening in similar circumstances in the future. These recommendations can be found in Part Four of these findings.

An inquest is not a trial between opposing parties but an inquiry into the death. In **R v. South London Coroner; ex parte Thompson (1982) 126 S.J. 625** it was described in this way:

[4] Section 2 defines an unnatural death as including "every case of death of any person (a) which occurs in a sudden, violent, or unnatural manner". Additionally, section 4(1) states that "Every person who becomes aware of an unnatural death shall forthwith give notice thereof to the District Medical Officer of the district in which the body is or to a constable, and the constable shall forthwith cause information to be given to the Medical Officer".

> "It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends… The function of an inquest is to seek out and record as many of the facts concerning the death as the public interest requires".

The focus of an inquest is on discovering what happened, but in the process of doing this, the Act authorizes a Coroner to issue a warrant for the apprehension of any person once the Coroner is of the opinion that sufficient grounds are disclosed for making a charge on indictment against that person[5].

2. The standard of proof

Before arriving at such a finding, the Coroner must be satisfied on the necessary facts to the required standard of proof. For a finding of unlawful killing the standard is the same level set in a criminal court, that is to say "beyond reasonable doubt" as was made clear in **R v. Wolverhampton Coroner ex parte McCurbin (1990) 1 WLR 719**.

Accordingly, the findings I have made in this case have been made after being satisfied of the necessary facts beyond reasonable doubt.

It is also clear that a Coroner is obliged to comply with the rules of natural justice and to act judicially. This is set out at page 994 in **Harmsworth v. State Coroner [1989] VR**

[5] Section 28 states that "If, during the course or at the close of any inquest, the Coroner is of opinion that sufficient grounds are disclosed for making a charge on indictment against any person, he may issue his warrant for the apprehension of the person and taking him before a Magistrate, and may bind over any witness who has been examined by or before him in a recognisance with or without surety to appear and give evidence before the Magistrate".

989. This means that no findings adverse to the interest of any party may be made without that party first being given an opportunity to be heard in opposition to that finding. In fact **Annetts v. McCann (1990) 65 ALJR 167 at 168** is authority for the point that this opportunity to be heard actually includes being given an opportunity to make submissions against findings that might be damaging to the reputation of any individual. In arriving at my findings in this case, I have endeavored to ensure the rules of natural justice and procedural fairness were applied as the particular circumstances warranted.

To this end I have invited submissions on all legal issues as they arose. I have provided HCL with the opportunity to give evidence in these proceedings and to call witnesses on its behalf. Finally a copy of all documents forming the bundle submitted to this court for consideration have been forwarded to HCL and in so doing I have relied upon the authority of **R v. Southwark Coroner, ex p. Hicks [1987] 1 W.L.R. 1624.**

PART II

THE LAW

It is stated in **Archbold 2008 at para 19-110** that where an allegation of manslaughter is based on an omission to act (not itself being unlawful), the issues to be left to the jury are whether a duty of care was owed to the deceased, whether there has been a breach of that duty; whether the breach caused death; and whether it should be characterised as gross negligence and, therefore a criminal act.

Charlesworth & Percy on Negligence (London: Sweet & Maxwell, 2006) is also useful in this regard since it is stated at para 1-16 under the rubric "Criminal Negligence" that "it must be proved, to the criminal standard, that the conduct of the accused was, in the first instance, such as to amount to a beach of duty of care towards the victim. The Crown must then show that the negligence in question caused the victim's death and should be characterised as gross negligence and therefore a crime. It is for the judge to direct the jury whether the facts are capable of giving rise to a duty of care and for the jury to decide, in light of the judge's directions, whether there was indeed such a duty on the particular facts. The jury must then consider whether, having regard to the risk of death, the accused conduct was so bad in all the circumstances as to amount to a criminal act or omission".

The following matters have therefore arisen for determination at this inquest:

1. Did HCL owe Ojo Moyo Oliver a duty of care?

2. Did HCL breach that duty of care towards Ojo Moyo Oliver?

3. Has Ojo Moyo Oliver's death resulted from that breach?

4. Was the breach grossly negligent and therefore a criminal act?

I turn now to the resolution of each of these matters.

1. Did HCL owe Ojo Moyo Oliver a duty of care?

Duty of care of one person towards others flows from millennia of social customs, philosophy and religion. Serving as the glue of society, duty of care is the thread that binds humans to one another in the community. Duty of care constrains and channels behavior in a socially responsible way before the fact, and it provides a basis for judging the propriety of behavior thereafter.

Essentially, negligence law assesses human choices to engage in harmful conduct as proper or improper. Because choices are deemed improper only if they breach a preexisting obligation to avoid and repair carelessly inflicted harms to others, duty of care gives definitional coherence to the negligence inquiry. Serving in this manner as the foundational element of a negligence claim, duty of care provides the front door to recovery for the principal cause of action in the law of tort: in that every negligence claim must pass through the "duty portal" that bounds the scope of tort recovery for accidental harm[6].

[6] David G. Owen, *The Five Elements of Negligence,* Volume 35 No.4 Hofstra Law Review 1671, 1676-77 Volume 35 No.4 (2007).

A duty of care could therefore be said to connote a relationship by which an obligation is imposed upon one person for the benefit of another to take reasonable care in all the circumstances.

It follows from this that before one can say whether HCL owed Ojo Moyo Oliver a duty of care in this case, one must necessarily determine whether there was first of all, a relationship between HCL and Ojo Moyo Oliver at the material time which was capable of giving rise to such a duty.

A. Relationship between HCL and Ojo Moyo Oliver

(a) Status of HCL

From the evidence which emerged during this inquest, HCL was at all material times the owner of the land upon which the pond is located. It is also evident that HCL did not only have an interest in the land at the time but, they also had exclusive occupation of those premises as well. HCL can therefore be said to be the occupier of those premises.

(b) Status of Ojo Moyo Oliver

According to **Charlesworth & Percy on Negligence (London: Sweet & Maxwell, 2006) at para. 7-141** a trespasser is one who wrongfully enters on land in the possession of another and has neither right nor permission to be there. According to Lord Dunedin in **Robert Addie & Sons (Collieries), Ltd. v. Dumbreck [1929] A.C. 358 at 371** he is one "who gets on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to". The term trespasser

covers "the wicked and the innocent: the burglar, the arrogant invader of another's land, the walker, blithely unaware that he is stepping where he has no right to walk or the wandering child…"[7].

A trespasser can be distinguished from a lawful visitor in two main respects. First "…he has no right to enter on the land, or, having entered, to remain there". Second "…so long as he is an unknown and merely possible trespasser, his presence and his movements are unpredictable. The lawful visitor, coming and remaining as of right, is expected to come and be there, also he is likely to come at a normal hour, and to enter by the proper entrance, and to go to, and normally to remain at, the part of the premises where he has business or with which he is concerned. By contrast, the unknown and merely possible trespasser may come at any time or may never come at all; if he does come, he may walk, break, creep or climb into the premises at any place and go by any route to any part of the premises and remain for any length of time"[8].

The evidence at this inquest makes it clear that Ojo Moyo Oliver was, at all material times, a trespasser on the HCL Quarry premises.

As far as the law is therefore concerned, Ojo Moyo Oliver was a trespasser and HCL was the owner and occupier of the HCL Quarry premises upon which the pond was located.

[7] Herrington v. British Railways Board [1972] A.C. 877 at 904, *per* Lord Morris
[8] Videan v. British Transport Commission [1963] 2 Q.B. 650 at 679, *per* Pearson L.J.

Having identified the status of the parties concerned in this matter, the issue which must be determined before it can be said that HCL owed Ojo Moyo Oliver a duty of care is whether the relationship of trespasser and occupier gives rise to the creation of an obligation upon an occupier to take reasonable care in all the circumstances for the benefit of the trespasser. This is critical because unless the existence of a duty of care can be established, an action in negligence will fail: **Black v. Fife Coal Co. Ltd [1912] A.C. 149 at 159 *per* Lord Kinnear.**

B. Does the relationship between HCL and Ojo Moyo Oliver create a duty of care?

Trespassers, as a class, were not recognized as capable of suing occupiers of dangerous premises for injuries caused by negligence, although they could sue if their injuries were inflicted willfully or recklessly, for example by the laying of a spring gun. This is borne out in the case of *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck (supra) at 365* where Lord Hailsham L.C. laid down the proposition that "the trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser". This stern rule was followed for decades and the Occupiers' Liability Act 1957 did not alter the law.

This initial position was greatly modified however as a result of case of **Herrington v. British Railways Board [1972] A.C. 877** where the House of Lords declared that an occupier did owe a duty of care towards a trespasser, albeit not the same duty owed to a lawful visitor, but *a duty to take such steps as common sense or common humanity would*

dictate to exclude or warn or otherwise, within reasonable practicable limits, reduce or avert danger. (emphasis mine). Thereafter statute intervened and the Occupiers' Liability Act 1984 and subsequent cases have elaborated on the duty owed.

Since Trinidad and Tobago has no legislation governing possible causes of action trespassers may have against land occupiers for damage incurred from negligence, I must turn to the common law position. I therefore address my mind to the law as it is stated in the case of *Herrington v. British Railways Board (supra).* The facts of this case are that in June 1965, the plaintiff, a child aged six, and his two older brothers had been playing lawfully in a meadow, on National Trust property and open to the public, at Mitcham, Surrey, when suddenly he was discovered to be missing. He was found seriously burnt lying against the electrified rail of the defendants' single line railway. The track was separated from the public footpath by chain link fencing, some four feet high and supported by concrete posts. At a point opposite to where the injured boy was found, the fence had become detached from the posts and had been trodden down to within about 10 inches of the ground by people leaving the footpath and taking a short cut across the railway line to the meadow. The defendant's station master, who was responsible for that stretch of railway, had been notified two months previously that children had been seen on the lines and had requested the police to investigate but the fence had not been repaired. The first instance judge held the defendants liable the Court of Appeal affirmed that decision and the House of Lords dismissed a further appeal. Indeed their Lordships refused to follow *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck (supra)* which was considered to be decided wrongly. In its place they substituted a test of liability which

they described in various terms. Lord Reid described it as requiring the occupier to do that which was humane or decent (at 899). Lord Pearson described it as requiring that a trespasser be treated with ordinary humanity (at 927) and Lord Morris of Borth-y-Gest described it as requiring such steps as ordinary thought and intelligence, exercising common sense would dictate (at 909).

In particular their Lordships held that although as a general rule a person who trespassed on the land of another did so at his own risk, and the occupier of the land did not owe him the common law duty of care owed to persons lawfully on the land, it did not follow that an occupier was never, in any circumstances, under a duty to take steps to protect a trespasser from potential danger; nor was the occupier's duty limited to refraining from acting with the deliberate intention of doing harm to a trespasser actually on the land or with reckless disregard to his presence there. Where an occupier knew that there were trespassers on his land, or knew of circumstances that made it likely that trespassers would come onto his land, and also knew of physical facts in relation to the state of his land or some activity carried out on the land which would constitute a serious danger to persons on the land who were unaware of those facts, the occupier was under a duty to take reasonable steps to enable the trespasser to avoid the danger. That duty would only arise in circumstances where the likelihood of the trespasser being exposed to the danger was such that, by the standards of common sense and common humanity, the occupier could be said to be culpable in failing to take reasonable steps to avoid the danger. It was accordingly held that the Board was in breach of their duty to the plaintiff for they had brought onto their land in the electrified rail something that was lethal to a small child

and was a concealed danger as well. It would have been easy for them to have maintained and enforced a reasonable system of inspection and repair of the boundary fence and it was known to them that children were entitled and accustomed to playing on the other side of the fence and they must therefore have known that a young child might easily cross a defective fence and run into grave danger. Although in failing to take any steps to maintain the fence in good repair the board could not be said to have acted with reckless disregard of the plaintiff's presence on the track, they had failed to act with due regard to humane considerations and were, in the circumstances culpable.

I have found the case of **Kirton v. Rogers (1972) 19 W.I.R. 191** which came out of the High Court of Barbados to be instructive in this regard. The facts of this case are that the plaintiff was an eight year old boy. He brought an action against a quarry claiming damages for an injury received by him when he was struck on his forehead by a stone. He claimed that the stone was expelled from the defendant's quarry where explosives were being used at the time for the purposes of quarrying. His action was founded on the absolute liability rule in Rylands v. Fletcher and in the alternative, on negligence. The defence was a denial of the allegation and, in the alternative, implied consent and negligence of the plaintiff.

It was held that there was no evidence that the explosives or its results ever escaped from the place over which the defendant had control to a place where he had no control and therefore the case did not lie within the rule in Rylands v. Fletcher. It was further held that on the evidence it could not be decided whether the plaintiff at the time when he

sustained the injury was outside the boundaries of the defendant's land or was a trespasser on the defendant's lands. However, in either case the defendant was liable in negligence. The law imposed on the defendant, as an employer, not only the duty to take care, but also the duty to see that the proper care was taken by anyone employed by him to use the explosive. In a case such as the present it ought to have been anticipated that potential trespassers were likely to arrive and the duty to take reasonable steps to avoid the danger could only be fully discharged by posting someone in a position to continue the warning and thereby keep those approaching out of range until the danger was past. In the circumstances the court gave judgment for the plaintiff.

In arriving at this decision the High Court of Barbados not only discussed the development of the law as it relates to the duty of care owed to trespassers but, it also referred to and applied the case of *Herrington v. British Railways Board (supra)* in arriving at its decision. Of particular interest is what the court had to say at pages 196-197:

> "In British Railways Board v. Herrington (7), decided by the House of Lords in February this year, the draconian rule of Addie's case was not followed, and the House recognized and explained a duty in the occupier towards trespassers on his land as well as trespassers likely to come there in certain circumstances.
>
> To quote the headnote in part: "Circumstances where the likelihood of the trespasser being exposed to the danger was such that, by the standards of

common sense and common humanity, the occupier could be said to be culpable in failing to take reasonable steps to avoid the danger." .

Then later at para H of page 197

"In applying the decision in Herrington, in a case such as the present one the defendant ought to have anticipated that potential trespassers were likely to arrive and in my opinion that duty to take reasonable steps to avoid the danger could only be fully discharged by posting someone in a position to continue the warning and thereby keep those approaching out of range until the danger is past. Such steps would not involve any considerable work, staff or expense and in the circumstances of the instant case would in my opinion have been reasonable.

In the words of Lord Reid in Herrington's case "By trespassing they [the trespassers] force a 'neighbour' relationship on him [the occupier]. When they do so he must act in a humane manner –that is not asking too much of him- but I do not see why he should be required to do more". Lord Reid also said at pg. 759 "I think that current conceptions of social duty do require occupiers to give reasonable attention to their responsibilities as occupiers, and I see nothing in legal principles to prevent the law from requiring them to do that".

This last passage is in my opinion most apt in relation to the instant case which has arisen in our densely populated Island with its maze of

footpaths and thousands of adults and children daily walking along them and in many instances in the vicinity of quarries which are in operation."

Counsel for HCL has urged this court to apply the law as it is laid out in the case of *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck (supra)* but in light of the developments in the law in *Herrington v. British Railways Board (supra)* where it was specifically stated that *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck (supra)* was incorrectly decided, and *Kirton v. Rogers (supra)* which applied *Herrington v. British Railways Board (supra),* I find that I am unable to accede to the request of counsel. In the circumstances the law as stated in *Herrington v. British Railways Board (supra)* will be followed. It follows from this that HCL as occupier, owed Ojo Moyo Oliver as trespasser, a duty to take such steps as common sense or common humanity would dictate to:

-exclude or warn or otherwise

-within reasonable practicable limits

-reduce or avert danger.

Put simply, I find that there are sufficient grounds for concluding that HCL owed Ojo Moyo Oliver a duty of care.

2. Did HCL breach the duty of care owed to Ojo Moyo Oliver

The second matter which arises for determination as per the guidelines in *Archbold 2008 at para 19-110* is whether HCL breached its duty of care owed to Ojo Moyo Oliver.

A breach of the duty of care occurs with an improper act or an omission. Breach implies the pre-existence of a standard of proper behavior to avoid imposing undue risks of harm to other persons and their property, which circles back to duty. In early law, the standard of care imposed on one person for the protection of another depended heavily on the formal relationship between the parties such as doctor patient and the like. As society grew more complex, a general standard of care became necessary to govern the conduct of persons and enterprises who unavoidably imposed risks of injury on a daily basis on other persons. And so negligence law developed a standard for defining and assessing proper behavior in a crowded world. While the standard of care must be adjusted for certain special relationships, as classically was the norm, modern negligence law imposes a duty on most persons in most situations to act with reasonable care, often referred to as due care, for the safety of others and themselves. A person who acts carelessly – unreasonably, without due care –breaches the duty of care[9].

Using the test as set out in *Herrington v. British Railways Board (supra)*, a determination of whether HCL breached its duty of care owed to Ojo Moyo Oliver entails an examination of whether HCL took such steps as common sense or common humanity would dictate to:

1. Exclude or
2. Warn or otherwise
3. Within reasonable practicable limits

[9] David G. Owen, *The Five Elements of Negligence,* Volume 35 No.4 Hofstra Law Review 1671, 1676-77 Volume 35 No.4 (2007).

4. Reduce or avert danger.

The answer to this is hinged upon an examination of the HCL Quarry premises: if at the material time, there was any danger in respect of which HCL ought to have taken such steps as common sense or common humanity would dictate, to exclude or warn or otherwise within reasonable practicable limits, reduce or avert same, and they failed to do this, then HCL would have breached its duty of care to Ojo Moyo Oliver.

A. <u>The danger to be reduced or averted based on the state of the HCL Quarry premises</u>

Evidence of the state of the HCL Quarry premises emerged during this inquest from witness testimony, photographs which were tendered into evidence, as well as a site visit which was made by the court upon invitation of employees of the HCL Quarry. From this, the following has become apparent.

The HCL Quarry site is located on acres of land in the Petit Valley area. It is close in proximity to the Petit Valley Boys and Girls Roman Catholic Schools. The premises are directly bounded by residential property.

There is a dispute of fact as the whether at the material time the entire HCL Quarry premises was fenced or not. Leo Hamilton testified that the property was unfenced at the material time. P.C. Perry contends that the property was actually fenced to the south western side alone and not entirely so either as there was a gate belonging to an adjoining residential home that lead onto the HCL Quarry site. On both accounts it is clear that the

entire HCL property was not fenced and certainly the entire pond area was not fenced either.

The pond is located to one end of the HCL Quarry premises. It is not a natural formation on the land but is a reservoir which was constructed to serve as a catchment area for water pulled by a pump from a natural spring. This water is used to wash stones and this process is a necessary part of the day to day operations of the quarry. The pond is about 60 foot by 120 foot in diameter and is about 40 foot deep. The water is green in color and weeds can be seen to be growing in the pond. On its face the pond appears to be an attractive feature and it certainly is understandable why it would serve to entice trespassers to swim in same. Indeed, from the evidence which emerged at this inquest, this pond has proven to be a popular venue for youths from the area.

HCL has prohibited swimming in this pond and there are three signs posted about the HCL Quarry property. They state:

1. PRIVATE PROPERTY NO TRESPASSING
2. NOTICE PRIVATE PROPERTY KEEP OFF
3. DANGER NO TRESPASSING NO BATHING IN ANY POND KEEP OFF

Upon being invited onto the HCL Quarry premises, the court was able to get a clear idea of not only the appearance of these signs but, their locations in relation to the pond area as well. Signs one, two and three can be seen as one approaches the entryway to the HCL Quarry. Sign one is to the right front of the guard booth which is located at the entrance

of that property. Sign two is to the left front of the guard booth and sign three is to the right back of the guard booth. It is also apparent that these signs can not be seen from the pond area.

The problems which therefore arise from the state of this property are twofold. One is that the pond area was at the material time not entirely fenced or totally unfenced depending on which witnesses' evidence is accepted on this issue. This made it easier for trespassers to enter the HCL Quarry premises and in so doing have access to the pond situated therein. In fact the evidence which emerged during the inquest was that from time to time HCL employees would see trespassers swimming in the pond. Evidence also came to light that when this happened, HCL employees would chase them away.

The second problem arising out of the state of the premises is that the pond is extraordinarily deep and there are no signs posted in the vicinity of the pond area notifying trespassers of this fact. This means that swimmers would be unaware of the actual dept of the pond.

The combined effect of both these problems is this. HCL knew that there were trespassers on its land. They also knew of physical facts in relation to the state of its land which constituted a serious danger to persons on the land who were unaware of those facts. This being the case, the authority of *Herrington v. British Railways Board (supra)* states that HCL was therefore under a duty to take reasonable steps to enable the trespasser to avoid the danger.

The facts of this matter can accordingly be distinguished from the facts as set out in **Tomlinson v. Congleton Borough Council [2004] 1 A.C. 46.** This case concerned diving into a pond formed from a disused gravel pit. The property was purchased by the local authorities who landscaped it and opened it to the public for their use as a recreational park. The pond was 40 foot deep at its deepest point towards which the shore shelves at varying degrees. Swimming was prohibited in this pond and the prohibition was made clear by notices posted to the entrance of that park as well as other locations about the park. Mr. Tomlinson waded into the water until it was a little above his knees, probably no deeper than mid-thigh level. He then threw himself forward in a dive. He intended it to be a shallow dive but it went wrong. He went deeper than he intended. His head struck the sandy bottom and he broke his neck. He claimed damages alleging that the accident had been caused by a breach of a duty of care owed to him.

The House of Lords found that the claimant had failed to establish that there was any risk to himself due to the state of the premises or to things done or omitted to be done on them. The court felt that he had voluntarily engaged in an activity which involved a degree of risk and it was the activity of diving into too shallow water rather than the premises itself, which gave rise to that risk. There being no danger attributable to the state of the premises, no duty arose to protect him from it.

The same cannot be said for the state of the pond located on the HCL Quarry premises. This is because the danger to be averted in the matter at hand does not arise from swimming per se but from the state or condition of the pond itself.

Another case which makes the distinction between the danger arising out of an activity which carries with it an inherent risk, as opposed to risk arising from special characteristics of land itself is **Bartrum v. Hepworth Minerals and Chemicals Ltd (unreported) 29 October 1999.** It was held in this case that the activity in question - rather than the state of the premises, was a dangerous one and the landowners were not in breach of their duty towards the claimant who ought to have appreciated that not diving far enough out from the cliff to enter the water was hazardous.

The facts of the instant matter are also in the view of this court, distinguishable from the case of **Darby v. National Trust [2001] EWCA Civ 189.** In this case the defendant owned land which was open to the public. A pond on the land was shallow around the edges but 10 foot deep in the middle and was used by visitors for swimming. The claimant's husband, who had swum in the pond previously, fell into difficulties while swimming there. A passer-by dragged him from the water, but he failed to regain consciousness and subsequently died. The claimant alleged that the defendant had breached its common law duty of care.

It was held on appeal that an occupier was only under a duty to warn visitors where they would be unaware of the risk without such a warning. If the danger was obvious, no

warning was required. It was felt that the risk of swimming in the pond was perfectly obvious, so that the absence of warning signs regarding the danger of drowning was not a causative breach of duty. A notice warning against swimming would have told the deceased no more than he already knew and the appeal was allowed. (emphasis mine).

This court is of the view that in light of the peculiar condition of the pond on the HCL Quarry premises, a warning sign would have told trespassers more than they could have been taken to know about the actual dangers inherent in swimming in this particular pond. This is because the extraordinary dept of this man made pond presents a danger which is not an obvious one. This means that one cannot equate the risks attendant on swimming in the HCL Quarry pond as being the same as that incurred by a person swimming in a body of water which is open to the public for that precise purpose. In these circumstances this court is of the opinion that the *Darby v. National Trust (supra)* case is distinguishable because of its own peculiar factual matrix which is diametrically opposed to the facts before this court.

Another point which is apparent in *Darby v. National Trust (supra)* and a line of cases such as **Cotton v. Derbyshire Dales District Council The Times 20 June 1994**[10] is that they all concern natural features on land and the law in respect of this is clear: it is contrary to common sense, and therefore sound law, to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature such as a

[10] In Cotton v. Derbyshire Dales District Council (supra) the Court of Appeal upheld the decision of the trial judge dismissing the plaintiff's claim for damages for serious injuries sustained from falling off a cliff. The Court of Appeal found that occupiers were under no duty to provide protection against dangers which are themselves obvious.

lake or a cliff and to impose a duty on him to do so[11]. In fact May LJ stated at p 378 of *Tomlinson v. Congleton Borough Council (supra)* that: "it cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious. The same would apply to all inland lakes and reservoirs. In my judgment there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased. That, in my view, applies as much to the risk that a swimmer might get into difficulties from the temperature of the water as to the risk that he might get into difficulties from the mud or sludge on the bottom of the pond".

The incident before this court relates to an artificially created pond and so the law relating to natural formations on land is wholly inapplicable.

B. Steps taken by HCL

Having identified that the danger or risk to be reduced or averted on the HCL Quarry premises is one of drowning in the pond, and, having distinguished the matter at hand from the aforementioned cases on the basis that:

1. The HCL Quarry pond itself was dangerous
2. The danger was a concealed danger and
3. The pond was an artificial feature in respect of which the rule concerning natural formations does not apply

[11] **Tomlinson v. Congleton Borough Council [2004] 1 A.C. 46 at 89 paras a-b**

I turn now to an examination of the steps taken by HCL to reduce or avert this danger. In evaluating the steps taken by HCL to exclude and/or warn trespassers of same, I bear in mind the principle stated in **Charlesworth & Percy on Negligence at para 6-10** which is to the effect that the degree of care to be taken depends on the magnitude of the risk; the greater the risk the more care should be taken. This principle has been voiced by Lord Macmillan in **Glasgow Corp v. Muir [1943] A.C. 448 at 456** where he said that "The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life". Then this same judge said in the later case of **Read v. J. Lyons & Co. Ltd [1947] A.C. 156 at 173** that "the law in all cases exacts a degree of care commensurate with the risk created". It follows that at one end of the spectrum, where dangerous things, such as explosives, are handled "the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety": **Donoghue v. Stevenson [1932] A.C 562** *per* Lord Macmillan. At the other extreme, the degree of risk may be so small that no care may be taken.

The risk in this case is death by drowning and this court is of the view that, in terms of magnitude of risk, the loss of life is the greatest risk to incur. It follows that the steps taken to reduce or avert this danger must be on par with this magnitude of risk involved.

I come now to the steps actually taken by HCL to exclude or warn in an effort to reduce or avert the danger of drowning.

(i) Steps taken to exclude

With respect to the matter of the steps which were taken to exclude trespassers from coming onto the HCL quarry and therefore engaging in an unlawful user of the pond, evidence has emerged at the inquest of the fact that at the material time the pond area was unfenced, or not entirely fenced –depending on which version of the facts is accepted on this issue.

HCL contends that the lack of complete fencing is immaterial since access to the pond area was in any event hindered by the presence of thick bushes and private residences bounding the HCL Quarry property making access to the quarry extremely difficult. HCL therefore submits that for trespassers to gain access to the HCL Quarry premises, they would not only have to trespass onto neighboring properties, but, they would then have to trek through a substantial amount of tall thick elephant grass and this deterrence was as good as if a fence had in fact been erected around the HCL Quarry premises.

HCL further argues that there was adequate patrol of the pond area. Evidence emerged during this inquest of the fact that at the material time, there was a loader who lived on the HCL Quarry premises and he would often chase trespassers from the property once he saw them. His testimony was to the effect that he would use dogs which he kept on the premises to achieve this end. Also submitted for consideration was the fact that at the

material time, HCL had in their employ, two security guards who were stationed at the security booth to the entrance of the quarry. They testified that at any time there would always be two security officers on duty on those premises. Additionally, when the quarry operations ceased for the day, the security officers managed to patrol the pond area about 2-3 times per day. They further stated that if during their patrol of the grounds they came across trespassers swimming in the pond, they would chase them away.

It is against this background that HCL contends that they took all the steps within reasonable practicable limits to exclude trespassers from their property so as to reduce or avert the danger of drowning in the HCL Quarry pond.

(ii) Steps taken to warn

I now turn to the steps which were taken by HCL to warn trespassers of the dangers associated with coming onto the HCL Quarry premises and engaging in an unlawful user of the pond.

Evidence has emerged at the inquest that at the material time, HCL had three warning signs posted about their property. The specifics of these signs were alluded to previously.

C. <u>The court's view of steps taken to exclude or warn</u>

(i) Fencing

Regarding the fencing of the pond itself, this court concludes that HCL must be taken to be aware of the possibility of drowning in this case. The evidence of the efforts made by

the security guards employed at the HCL Quarry to chase trespassers from the pond whenever they were spotted makes this knowledge of danger beyond question. This is all the more reason why proper fencing should have been installed on the property and at the very least, certainly in the vicinity of the pond area.

The importance of adequate fencing is something made apparent in the case of **Jones v. Mobil Oil Canada Ltd. [2000] 1WWR 479.** The plaintiff rancher raised cattle herd on land where oil and gas operations were conducted by the defendant company. Some cattle died, became ill or failed to breed. The plaintiff brought an action for damages against the defendant for negligence causing injury to the cattle herd. The action was allowed. It court felt that the defendant's knowledge of the harmful effects of the oil and gas contaminants on livestock raised the standard of care owed to the plaintiff to effectively prevent access by cattle to the contaminants. It was held that the defendant was in breach of the duty of care by failing to erect adequate fencing.

The same point was made in the case of **Vogel v. Canadian Roxy Petroleum Ltd [1995] 3 WWR 49.** In this case the plaintiff held a grazing lease which required that he fence the leased lands prior to livestock entry. The lease was also subject to a mineral surface lease granted to the defendant. Under the lease the defendant was obliged to comply with the Mineral Surface Lease Regulations. Those regulations did not require well sites to be fenced but they did provide that a lessee would be liable for all damage caused to persons or stock. A calf belonging to the plaintiff was killed after becoming caught in the pump jack on the defendant's well site. The well site was fenced in a rudimentary fashion

which did not enclose the entire base of the pump jack. The plaintiff successfully sued the defendant for damages in negligence, the trial judge finding that the defendant had breached the common law duty of care owed by an occupier in failing to properly fence the area. The defendant appealed and the appeal was dismissed. It was the view of the court that there was ample evidence to support the trial judge's findings of a duty, breach and damage.

(ii) Signs

With respect to the existing signs, it is the view of this court that the duty to take care can not be discharged by the mere display of warning notices. It must be placed where it can be perceived as being likely to have the required effect. This court is of the opinion that the warning signs in this case could not have had any effect because of their locations and positioning away from the pond area itself. Both factors combined to ensure that none of these signs would have been seen or read by trespassers making an unlawful user of the pond located on those premises if they had used the route taken by Ojo Moyo Oliver and his friends that fateful day. Furthermore, they would not have even seen any of the warning signs from the pond area itself either.

In these circumstances there is an obvious need to resort to alternative preventative measures. The duty to take care remains one to do that which is practicable in the circumstances to prevent the occurrence of accidents and the signs located where and how they are, do nothing more than merely warn people -who come in the vicinity of the guard booth, that accidents might occur. Since the trespasser must be presumed by

definition to be unpredictable in that "he may walk, break, creep or climb into the premises at any place and go by any route to any part of the premises"[12], this court is of the view that warning signs ought to be posted at the site of the danger itself.

In this regard the case of **Roles v. Nathan, Roles v. Corney [1963] 2 All ER 908** is useful. It applies the principle that so long as warnings are enough to enable one to be reasonably safe the duty of care will be discharged. The facts of this case are that a building was centrally-heated by a boiler in which coke was used as a fuel, there being an old system to carry away the smoke and fumes, which included a horizontal flue running from the boiler under the floor to a vertical flue which went up a chimney. The smoke and fumes had to descend about two feet four inches into the horizontal flue and then pass along it for 70 feet. In the vertical flue there was a sweep-hole, about twelve inches in diameter and nine feet above the ground. It was sometimes difficult to get the bolier lighted up, the difficulty being to get a draught going along the flues. In December 1958, a fire was lit and there was a lot of smoke. A boiler engineer was consulted, who said that the flues needed cleaning. Two chimney sweeps were called in, and ignoring the engineer's warning of the danger from fumes, one of them crawled into the horizontal flue. The fire was let out and the chimney sweeps cleaned out the flues, but when the fire was relit there was further trouble with the fumes and smoke. Another expert was called in who advised that the fire should be withdrawn and told everyone present to get out into the fresh air. The chimney sweeps said that they did not need any advice, but eventually were more or less dragged out by the expert. Later the expert made his inspection and

[12] Videan v. British Transport Commission [1963] 2 Q.B. 650 at 679, *per* Pearson L.J.

gave his advice, and, in the presence of the chimney sweeps, advised that the sweep-hole was to be sealed up before the boiler was lit again, and that the chimney sweeps, while doing the sealing, ought not to stay too long in the alcove. The following day, the fire was re-lit by the caretaker. By the evening, the chimney sweeps had not finished sealing up the sweep-hole, and it was arranged that they would finish the work the next morning. The next morning, both the chimney sweeps were found dead by the sweep-hole. Apparently they had retuned the previous night to complete their work and had been overcome by the carbon monoxide fumes.

It was held on appeal that the warnings given to the chimney sweeps by the expert on behalf of the occupier of the danger which in fact killed them were enough to enable them to be reasonably safe, and therefore the occupier was discharged from his common law duty of care he owed to the chimney sweeps.

In the matter at hand, this court is of the view that HCL did not do enough to enable would be trespassers to be reasonably safe. This conclusion is borne out by the poor location of the warning signs as well as the poor positioning of those very signs.

Compounding this is the fact that HCL never had at any material time any sign warning would be trespassers of the extraordinary dept of the pond. Since the pond is murky, one cannot fully appreciate the true dept of this pond. This serves to make this pond a concealed danger which highlights the need for not only effectively located and properly positioned signs but informative ones as well. In this regard the case of **Breslin and**

Breslin v. Droscoll [1956] SCR 64 is instructive. In this case, the respondent with another truck driver was instructed by a fuel company to deliver two truck loads of coal to the appellants' premises. On arrival they were told by one of the appellants' employees to put the coal through a window in the east wall of the appellants' building. The east wall was separated from the street curb by a 16-foot concrete strip and a station wagon was parked near the window. After it was moved by the appellants' employees, the respondent's companion moved his truck close to the window. The appellants knew, but the respondent did not, that the truck was then over a part of the cellar which extended under the strip and that the latter formed part of the city sidewalk. The respondent was between the truck and the wall when the concrete collapsed causing the loaded truck to tilt and pin him against the wall. In an action in damages for injuries sustained the appellants were liable for failing in their duty to give notice of this concealed danger.

This court accordingly finds that the steps taken by HCL to exclude or warn trespassers, within reasonable practicable limits, so as to reduce or avert the danger of drowning, were inadequate. And in all of these circumstances, the inescapable conclusion must be that HCL failed to ensure that would be trespassers would be reasonably safe on its property.

I have had regard to the dicta of Asquith L.J. in **Daborn v. Bath Tramways Ltd. [1946] 2 All E.R. 333** where he states that "In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the

circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk". This court is of the view that the end to be served is the saving of a life and this justifies the taking of abnormal measures and at the very least, measures which would have passed the common humanity test.

In this light it is felt that the following steps could have been adopted by HCL to exclude or warn or otherwise within reasonable practicable limits reduce or avert the danger of drowning from an unlawful user of the pond:

1. At least one sign located at the pond area itself, warning trespassers that swimming in the pond is prohibited;
2. At least one sign located at the pond area itself warning trespassers of the dept of the pond; and
3. A fence around the entire pond.

This it is felt, would have sufficed as what was humane or decent in the circumstances (per Lord Reid) or, put another way, if these steps were taken by HCL, then it could have been said that Ojo Moyo Oliver was treated with ordinary humanity (per Lord Pearson) or, then it could have been said that HCL had taken such steps as ordinary thought and intelligence, exercising common sense would have dictated in the circumstances (per Lord Morris of Borth-y-Gest).

D. Was what was done by HCL within reasonable practicable limits?

The third matter which arises for consideration in determining whether HCL breached its duty of care to Ojo Moyo Oliver is whether the steps taken by HCL could be considered to be all that could have been done within reasonable practicable limits.

In the view of this court the poor placement of warning signs, the sporadic patrols made by HCL's compound security guards and its resident laborer and the lack of adequate fencing are wholly unsatisfactory measures to adopt in the circumstances. This is compounded by the fact that the recommended steps would not have imposed an unduly harsh financial burden on HCL were they to implement same. Indeed the correlation between risk and the financial burden of remedying it is often illustrated by reference to the dicta of Lord Reid in **Overseas Tankship (UK) Ltd. v. The Miller Steamship Co. Pty. [1967] 1 A.C. 617** where he said at 642 that: "… it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it".

If one balances the risks involved in this case against the steps which could have been taken to prevent it from occurring, it is clear that no realistic financial burden would have been imposed on HCL to adopt same. This point is reinforced by the fact that at the

material time, HCL was a company with resources. Indeed the evidence which has emerged at this inquest is that for all intents and purposes, HCL is still a viable company.

This brings up an interesting question as to the extent to which in other cases limited resources should be taken into account. In *British Railways Board v. Herrington (supra)* the court was considering the standard of care to be required of an occupier with considerable financial resources, who, it was suggested, by relatively small expense, could have reduced or prevented the possibility of a child trespasser coming into contact with a potentially lethal electrical installation. The House of Lords agreed that it was carelessness on the part of the defendants not to take the steps suggested: Lord Reid opined that "… an impecunious occupier with little assistance at hand would often be excused from doing something which a large organization with ample staff would be expected to do".

The test in *British Railways Board v. Herrington (supra)* is a subjective test. Accordingly matters such as an occupier's wealth, "ability and resources" are relevant in determining liability (at pg. 899). With this in mind the inescapable conclusion must be that the erection of well placed and more informative signs as well as a fence enclosing the entire pond, would have been within reasonable and practicable limits in the circumstances.

So taking all these matters into account, I find that there are sufficient grounds for concluding that HCL breached its duty of care towards Ojo Moyo Oliver.

3. Has Ojo Moyo Oliver's death resulted from this breach?

The third matter which arises for determination as per the guidelines in *Archbold 2008 at para. 19-110* is whether HCL's breach of its duty of care caused Ojo Moyo Oliver's death.

Before a court can assign responsibility to an individual for another's harm, it demands that that some cause and effect relationship between the breach and the harm be established. Causation thus provides the central negligence element that links one party's wrong to another's harm. Thousands of people everyday are injured or killed in car collisions, slip and fall accidents and myriad other kinds of accidents. While many such incidents are attributable to the negligence of one or more persons, many others result from simple bad luck or the careless behavior of the victims themselves. Negligence law will hold individuals responsible for breaches if it can be shown that such an individual was at least partially responsible for the incident. In other words there must be some connection between the negligence and the harm.

A. <u>The "but for" test</u>

One mechanism which is used by the courts in this regard is the "but for" test, which requires that a defendant's negligence be a sine qua non of the plaintiff's harm, a necessary antecedent without which the harm would not have occurred. Put otherwise, the defendant's negligence is a cause of the plaintiff's harm if the harm would not have occurred but for the defendant's negligence. In other words, reference is made to a fact but for which the accident would not have occurred; or to facts which caused the accident

as opposed to merely set the scene. Lord Hoffmann in **South Australia Asset Management Corp. v. York Montague Ltd (SAAMCO) (1997) A.C. 191 at p. 214** gave a classic example: "A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee". The doctor's negligence does result in the mountaineer running a risk which he otherwise would not have done, but this is insufficient to incur liability. The purpose of the doctor's duty to take care is to protect the mountaineer against injuries caused by the failure of the knee, not rock falls. Even though the injury might be reasonably foreseeable, the doctor is not liable.

Similarly, in **The Empire Jamaica** (1955) 1 All E.R. 452, the owners sent their ship to sea without properly licensed officers. The pilot fell asleep, and a collision occurred. Though the pilot was negligent at the time, he was generally competent. Thus the question for the courts was: were the owners liable for the collision because they sent their ship to sea without properly licensed officers, or, was the factual precondition superseded by the question as to the competence of the pilot? There was no question that sending the ship to sea was "a cause" of the collision. The legal question was whether it is "the cause". This is a question that the courts treat as objective, addressed by evidence and argument. Hart and Honore (1985)[13] describe the process for establishing legal

[13] Hart, H. L. A. & Honore, A. M. (1985). "Causation in the Law". Oxford: Clarendon Press.

causation as constructing a parallel series of events (counterfactual situation), and comment: "the parallel series is constructed by asking what the course of events would have been had the defendant acted lawfully". Thus, the owners were not liable. Although they sent the ship to sea without licensed officers (what actually transpired) rather than with licensed officers (the lawful course), the cause of collision was failing to navigate a safe passage. As to the pilot, his lack of licence did not bear on his general competence. The significant factor was the pilot's negligence at the time, and the pilot's lack of license made no difference there. Had the pilot been licensed, he would have been no less likely to sleep. The license would not have awoken him. The owners were, therefore, exonerated on grounds that whether or not the pilot held a license made no difference to the real cause, which was not the pilot's general level of competence, but rather his negligence at the time.

B. The "substantive cause" test

In cases where there are a number of actual or potential causes operating either consecutively or concurrently, the substantive cause test will have to be adopted. In **Robinson v. Post Office (1974) 1 W.L.R. 1176** following an accident at work, the claimant had an anti-tetanus injection. Nine days later, there was an adverse reaction to the serum and brain damage resulted. No matter what tests the doctor might have performed, there would have been no sign of an adverse reaction within a reasonable time. The doctor's reasonable decision to provide the standard treatment was therefore not the relevant cause of the brain damage because the claimant would not have been injected "but for" the defendant's negligence. Thus, in deciding between sequential

contributions to the final result, the court had to decide which the more substantial cause of harm was.

Similarly in **Bonnington castings Ltd v. Wardlaw [1956] A.C. 613** it has been held sufficient that the claimant prove that the defendant's breach of duty was a material, rather than exclusive, cause of any injury sustained. The facts were that a pursuer complained that, in the course of his work over many years, he had inhaled minute particles of silica, which accumulated in his lungs and caused pneumoconiosis. It was found that he had been exposed to two different sources of dust, against one of which no complaint could be made, and one arising from a breach of statutory duty. Such circumstances were sufficient to establish liability. Liability would be established if the breach materially contributed to the damage. Lord Reid said at p. 621 that "the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other… and the real question is whether the dust from the swing grinders materially contributed to the disease…A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material".

HCL has put forward two contentions which they say go towards breaking the chain of causation in this case.

C. The acts of the deceased and causation

The first point they make is that Ojo Moyo Oliver caused his own death. He knew he was trespassing and was prohibiting from going into the pond so, it is his own negligence which has caused his death.

The law on this is clear. It is no defence, where the death of the deceased is shown to have been caused in part by the negligence of the defendant, that the deceased was also guilty of negligence and so contributed to his own death:

R v. Swindall and Osbourne (1846) 2 C. & K. 230; 1 Russ. Cr., 12th ed., 418

R v. Dant (1865) L. & C. 567

R v. Hutchinson (1864) 9 Cox 555

R v. Jones (1870) 11 Cox 544

R v. Kew and Jackson (1872) 12 Cox 355

So, without deciding whether the actions of the deceased were negligent actions, I am guided by the aforementioned principle of law and I accordingly find that there is no merit in this point.

D. The acts of the deceased man's friends and causation

The second submission advanced by HCL is that the delay in Ojo Moyo Oliver's friends acting to save him, operated as a *novus actus interveniens*. The law on this point is also clear.

The law is that where, after the defendant has been negligent and created a foreseeable and unreasonable risk of harm to another and a third person has the opportunity to avert

the threatened harm by taking positive action and, had such action been taken, it would have prevented the defendant's negligence from causing the harm which has in fact occurred, it will not be a superseding cause of that harm.

I start with a consideration of the case of **Knightley v. Johns [1982] 1 All E.R. 851 (C.A.)** where Stephenson L.J. ventured the view that "negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction"[14].

I also consider the fact that if I proceed on the basis that the conduct of Ojo Moyo Oliver's friends in hesitating before they sought assistance, amounts to negligence, it cannot be said that such a negligent omission by a third party will break any chain of causation. The general rule is that the original defendant will be held responsible for harm caused by a third party as a direct result of his or her negligence, provided it was a highly likely consequence. So, where the third party is faced with a dilemma created by the defendant, the chain of causation is unlikely to be broken and the defendant will normally be liable to the claimant for the damage caused: **Home Office v. Dorset Yacht Co Ltd. [1970] A.C. 1004.**

Support for this proposition can also be gathered from the dicta of L.J. Goff in **Muirhead v. Industrial Tank Specialities Ltd. [1986] Q.B 507 (C.A.) at p. 533** where he opines that if the intervening conduct consists of a negligent failure to prevent damage caused by

[14] Ibid at p.865.

the defendant's negligence, it may not constitute a *novus actus interveniens*[15]. This may be due to the fact acknowledged by the Privy Council in **Attorney General v. Hartwell (British Virgin Islands) [2004] UKPC 12 para 25 (23 February 2004)** that liability for omissions is less extensive than for positive negligent acts.

At any rate the law is that there is no general duty to render aid to someone who is in trouble. Thus in **Haynes v. Harwood [1935] 1 KB 146** a plaintiff police constable sued for negligence after he was injured while attempting to stop the defendant's runaway horses on a street on which a large number of people, including children, were present. In that case it was held that the defendant's negligence was the cause of the accident because: "If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence"[16].

What then is the result when these principles are applied to the question of whether the death of the deceased was a consequence of his own negligence? The evidence at the inquest clearly shows that the requirements of the first principle were satisfied in that it can be said that but for HCL's breach of its duty of care towards Ojo Moyo Oliver, he would not have died by drowning. Furthermore, there is no real question of the access to the pond being the substantial cause of death. Additionally the acts of the deceased man himself and that of his friends do not serve to break this chain of causation.

[15] His Lordship did qualify this, however, by adding that a negligent omission has no causative effect unless it is "a wholly independent cause of the damage, i.e. a novus actus interveniens.
[16] Per Greer L.J. at 156.

Accordingly I find that there are sufficient grounds for concluding that HCL's breach of its duty of care towards Ojo Moyo Oliver caused his death.

4. WAS THE BREACH GROSS NEGLIGENCE AND THEREFORE A CRIMINAL OMISSION?

I turn now to the final matter which arises for consideration as per the guidelines in *Archbold 2008 at para. 19-110.* This relates to whether the breach should be characterized as gross negligence and therefore a crime. This is eminently a jury question to decide whether, having regard to the risk of death involved, HCL's conduct was so bad in all the circumstances as to amount to a criminal omission: **R v. Adomako [1995] 1 A.C. 171** following **R v. Bateman 19 Cr. App. R. 8** and **Andrews v. DPP [1937] A.C. 576.**

On the evidence before this court I find that there are sufficient grounds for concluding that HCL's omissions were grossly negligent and consequentially criminal.

Before moving off the issue of the law in this inquest, I must say that I have analyzed the facts of this matter bearing in mind the words of Lord Steyn in **Jolley v. Sutton London Borough Council [2000] 1 WLR 1082 at 1089.** It is to the effect that "…in this corner of the law the results of decided cases are inevitably very fact sensitive. Both counsel nevertheless at times (invite comparison of) the facts of the present case with the facts of

other decided cases. That is a sterile exercise. Precedent is a valuable stabilizing influence in our legal system. But comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, viz, to identify the relevant rule to apply to the facts as found". As much as possible, principles enunciated in precedents were applied but in the final analysis it was found that the facts of this case lent itself to the application of no one decided case.

I move now to my findings of fact in this matter.

PART 3

FINDINGS

Findings pursuant to the Coroners Act Chap. 6:04

Section 10(1)

I am required to find, so far as has been proved, the cause and circumstances of the death of Ojo Moyo Oliver. As stated previously I understand this to encompass who the deceased person was and when, where and how he came by his death.

As a result of considering all of the evidence which came out during the course of this inquest, I am able to make the following findings:

IDENTITY OF THE DECEASED

The deceased person was Ojo Moyo Oliver

PLACE OF DEATH

He died in a pond at the HCL Quarry site, Morne Coco Road, Petit Valley in the county of St. George West

DATE OF DEATH

He died on 15th April 2007

CAUSE OF DEATH

The cause of death was asphyxia associated with drowning.

Section 28

In so far as it is relevant to this inquest, the Act provides in section 28 that "if during the course or at the close of any inquest the Coroner is of the opinion that sufficient grounds are disclosed for making a charge on indictment against any person, he may issue his warrant for the apprehension of the person…".

It is not my role as coroner to decide whether any person is guilty of an offence in connection with the death or indeed, even whether the prosecutorial discretion should be exercised in favor of presenting an indictment and bringing the matter before a jury. Rather, I only have the jurisdiction to determine whether there are sufficient grounds disclosed for making a charge on indictment against any person.

I understand this to require me to consider whether a properly instructed jury could, on all of the material I have considered reasonably convict any person of a charge on indictment.

Section 6 of the Offences Against the Persons Act Chap. 11:08 provides that any person who is convicted of manslaughter is liable to imprisonment for life or for any term of years, or to pay such fine as the Court shall award.

On the evidence as it unfolded in this inquest, it is evident that

- HCL has a duty of care towards persons trespassing onto their HCL Quarry property.
- Ojo Moyo Oliver was a trespasser on that property at the material time.
- There are sufficient grounds for concluding that HCL breached that duty of care.
- The result was that Ojo Moyo Oliver died by drowning in an unsecured pond situated on the HCL Quarry site.
- There are sufficient grounds for concluding that the gross negligence in this case amounts to a criminal omission on the part of HCL.

This brings me to a consideration of whether HCL as a corporation could be charged for the offence of manslaughter.

I find authority for the point that a corporation may be convicted of manslaughter in a number of cases. They include cases such as **R v. P&O European Ferries (Dover) Ltd. 93 Cr. App. R. 72, R v. H.M. Coroner for East Kent, ex p. Spooner 88 Cr. App. R. 10** and **Att.-Gen.'s Reference (No. 2 of 1999) [2000] a Cr. App. R. 207.** The important caveat running through these cases is that a corporation can indeed be convicted of manslaughter –but only if the acts or omissions relied upon are those of someone who can be said to embody the company in that his mind and will can be said to be the mind and will of the company. This principle is referred to as the identification theory.

The identification theory, attributing to a company the mind and will of senior directors and managers, was developed in order to avoid injustice: it would bring the law into

disrepute if every act and state of mind of every individual employee was attributed to a company which was entirely blameless:

Tesco Supermarkets Ltd. v. Nattrass [1972] A.C. 153, 169, per Lord Reid,

Canadian Dredge & Dock Co. Ltd. v. The Queen (1985) 19 D.L.R. (4th) 314, 342 per Estey J. of the Supreme Court of Canada.

Its origins lay in the speech of Viscount Haldane L.C. in **Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705, 713**; and it was developed by the judgment of Denning L.J. in **H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd. [1957] 1 Q.B. 159, 172** and **Tesco Supermarkets Ltd. v. Nattrass [1972] A.C. 153, 170** in which Lord Reid said: "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company".

The speech of Lord Hoffmann in **Meridian Global Funds Management Asia Ltd. v. Securities Commission [1995] 2 A.C. 500** is also informative on this point. It was a

case in which the chief investment officer and senior portfolio manager of an investment management company, with the company's authority but unknown to the board of directors and managing director, used funds managed by the company to acquire shares, but failed to comply with a statutory obligation to give notice of the acquisition to the Securities Commission. The trial judge held that the knowledge of the officer and manager should be attributed to the company, and the Court of Appeal of New Zealand upheld the decision on the basis that the officer was the directing mind and will of the company. The Privy Council dismissed an appeal. Lord Hoffmann, giving the judgment of the Privy Council, said, at p. 506, that the company's primary rules of attribution were generally found in its constitution or implied by company law. But, in an exceptional case, where the application of those principles would defeat the intended application of a particular provision to companies, it was necessary to devise a special rule of attribution. Lord Hoffmann said, at p. 507: "For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself," as opposed to his servants or agents. This is generally true of the rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company? One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases

in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy". Lord Hoffmann then referred to **Tesco Supermarkets Ltd. v. Nattrass [1972] A.C. 153** and in **re Supply of Ready Mixed Concrete (No. 2) [1995] 1 A.C. 456,** Viscount Haldane's speech in **Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705** and Denning L.J.'s judgment in **H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd. [1957] 1 Q.B. 159.** Having referred to the concept of directing mind and will, he went on to say [1995] 2 A.C. 500, 511: "It will often be the most appropriate description of the person designated by the relevant attribution rule, but it might be better to acknowledge that not every such rule has to be forced into the same formula. Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be as straightforward as it did to Heron J. The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers . . . what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the

company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated . . . the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice". Lord Hoffmann went on to comment that it was not necessary in that case to inquire whether the chief investment officer could be described as the "directing mind and will" of the company. He said, at p. 511: "It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company".

In **Tesco Supermarkets Ltd. v. Nattrass [1972] A.C. 153, 173** Lord Reid said: "the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company". In **R v. Coroner for East Kent, Ex parte Spooner, 88 Cr.App.R. 10, 16** Bingham L.J. said: "for a company to be criminally liable for manslaughter . . . it is required that the mens rea and the actus reus of manslaughter should be established . . . against those who were to be identified as the embodiment of the company itself". In **R v. P. & O. European Ferries (Dover) Ltd. (1990) 93 Cr. App. R. 72, 84** Turner J., in his classic analysis of the relevant principles, said that: "where a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter".

The issue recently arose as to whether it is still necessary to attribute the offending omission to a high level company employee before a charge of manslaughter by gross negligence can be sustained. The case was the **Attorney-General's Reference (No. 2 of 1999) 2000 3 W.L.R. 196.** The facts of this case are that in September 1997 a high speed train operated by the defendant company collided with a freight train, killing seven passengers and injuring many others. At the outset of the defendant's trial, on an indictment containing seven counts of manslaughter by gross negligence, the judge ruled that it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty mind to be proved and that where a non-human defendant was prosecuted it might only be convicted via the guilty mind of a human being with whom it might be identified. Following that ruling verdicts of not guilty were entered in relation to those seven counts. The defendant subsequently pleaded guilty to count 8 on the indictment, an offence of failing to conduct an undertaking in such a way as to ensure that members of the public were not exposed to risks to their health and safety, contrary to the Health and Safety at Work Act 1974. The Attorney-General referred two questions for the opinion of the court, namely: (1) Can a defendant be properly convicted of manslaughter by gross negligence in the absence of evidence as to that defendant's state of mind? And (2) Can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime?

On the reference the first question was answered in the affirmative in that evidence of a defendant's state of mind was not a prerequisite to a conviction for manslaughter by gross

negligence, although there might be cases where his state of mind was relevant to the jury's assessment of the grossness and criminality of his conduct, so that a defendant who was reckless might well be the more readily found to be grossly negligent to a criminal degree; and that, accordingly, the judge's ruling on the first issue was wrong. Regarding the second question it was held that a corporation's liability for manslaughter was based solely on the principle of identification, which was just as relevant to actus reus as to mens rea so that unless an identified individual's conduct, characterisable as gross criminal negligence, could be attributed to the corporation, the corporation was not in the present state of the common law liable for manslaughter.

From the evidence which emerged at this inquest, it is a fact that the responsibility for the security of the HCL Quarry rested with the quarry manager Mr. Roger Blanch. It is the finding of this court that the omissions of Mr. Roger Blanch can be considered to be the omissions of HCL. It follows that the gross failure in the management of safety on the quarry will result in HCL as a company being liable to prosecution for gross negligence manslaughter.

Before I turn my attention to matters of procedure I will deal with a submission made by HCL concerning the lack of mens rea on the part of HCL as this too could impact on my findings as per section 28 of the Act. It is submitted that HCL lacks mens rea, this is an essential ingredient to sustain a charge of manslaughter and since it is lacking HCL ought not to be charged.

This point was dealt with conclusively in *Attorney-General's Reference (No. 2 of 1999) (supra).* It was submitted in this case that since **R v. Adomako [1995] 1 A.C. 171**, a defendant can be found guilty of gross negligence manslaughter in the absence of evidence as to his state of mind. The dictum of Lord Mackay of Clashfern L.C., at p. 187 was relied upon to support this point: in particular where he said that "the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal". As a result of *R v. Adomako (supra)* it was submitted that gross negligence manslaughter can be proved without the need to enquire into the state of the defendant's mind. Further support for this proposition was found in **Smith & Hogan on Criminal Law, 7th ed. (1992), at pp. 90 and 91**, where the learned author not only dealt with the issue but culminated the discussion by contrasting crimes requiring mens rea with crimes of negligence.

The court in *Attorney-General's Reference (No. 2 of 1999) (supra)* accepted this argument and held that although there may be cases where the defendant's state of mind

is relevant to the jury's consideration when assessing the grossness and criminality of his conduct, evidence of his state of mind is not a prerequisite to a conviction for manslaughter by gross negligence.

This court is guided by this finding and in the circumstances I find that there is no merit in HCL's argument to the effect that there must be evidence of mens rea for a charge of gross negligence manslaughter to stand.

Accordingly, I make the finding pursuant to section 28 of the Act that sufficient grounds are disclosed for making a charge on indictment against HCL for the common law offence of manslaughter.

Ordinarily I would now proceed to issue a warrant for the apprehension of individuals against whom I have concluded that sufficient grounds have been disclosed for making a charge on indictment against them but I cannot arrest HCL or any other company.

However, when I have regard to the contents of the coroners warrant, I note that the coroners warrant is directed to the police and it authorizes and in fact requires the police to bring persons (against whom it is concluded that sufficient grounds have been disclosed for making a charge on indictment against them after an inquest) before a magistrate for examination on the charge in question. It follows that as Coroner I do have the power to authorize and require the police to bring HCL before a magistrate for examination on the charge of manslaughter.

Accordingly, I direct the Commissioner of Police to institute proceedings against HCL for the common law offence of manslaughter in light of my findings that sufficient grounds have been disclosed for making a charge on indictment against HCL for the common law offence of manslaughter. I further direct that HCL be brought before a magistrate for examination on this charge by way of a defendant summons which is form 3 issued under section 42 of the third schedule of part II of the Summary Courts Act Chap. 4:20.

I have drafted the defendant summons and an affidavit of service and same are annexed to this ruling for the guidance of the Commissioner of Police.

I have made these findings bearing in mind the fact that it is extremely important that companies and other organisations take safety seriously. Failure to do so can have devastating consequences and this is all the more reason why there must be proper accountability when very serious management failings lead to people being killed. This is not about over-regulation. Businesses should see this decision as a warning from the courts of our country that they must ensure that proper arrangements are put in place for managing safety. Indeed it is crucial for our country that companies are responsible and successful corporate citizens.

In making these findings I am also mindful of the provisions of **section 14** of the **Criminal Procedure (Corporations) Act Chap. 12:03.** It states that "where a

corporation is charged with an indictable offence or a summary offence, any summons or other document requiring to be served on the corporation in connection with the proceedings shall be served by leaving it at or sending it by post to the registered office of the corporation, or if there be no such office in Trinidad and Tobago, by leaving it at or sending it by post to the corporation at any place in Trinidad and Tobago at which it trades or conducts its business". This suggests that any defendant summons issued for HCL will have to be served on HCL by posting it to them at their registered address or, by leaving same at their registered address.

What then will be the ramifications of the issuing charges against HCL? For this I turn to the following provisions of the **Criminal Procedure (Corporations) Act Chap. 12:03:**

"4. Where a corporation is charged before a Magistrate with an indictable offence, a representative of the corporation may, on behalf of the corporation—

(a) make a statement before the Magistrate in answer to the charge;

5. Where a representative appears before a Magistrate as provided in section 4, any requirement of any law that anything be done in the presence of the accused, or be read or said to the accused, shall be construed as a requirement that that thing be done in the presence of the representative or read or said to the representative.

9. A representative is not, by virtue only of being appointed as such, qualified to act on behalf of the corporation before any Court for any purpose other than those authorized by this Act.

10. For the purposes of this Act a representative need not be appointed under the seal of a corporation, and a statement in writing purporting to be signed by a managing director of the corporation, or by any person (by whatever name called) having, or being one of the persons having, the management of the affairs of the corporation, to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this Act is admissible in evidence as *prima facie* proof that the person has been so appointed.

11. Nothing in this Act renders a representative liable to fine or imprisonment for any offence for which the corporation is convicted.

12. A corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, or where no fine is prescribed—

(a) to be fined in an amount that is in the discretion of the Court, where the offence is an indictable offence; or

13. Where a fine that is imposed under section 12 is not paid forthwith the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in the High Court, and that judgment is enforceable against the accused in the same manner as if it were a judgment entered against the accused in the High Court in civil proceedings.

15. (1) Sections 28 to 37 of the Indictable Offences (Preliminary Enquiry) Act do not apply to a corporation.

(2) Subject to this Act, the provisions of any law relating to the inquiry into and trial of indictable offences or to the trial of summary offences apply to a corporation as they apply to any person who is sixteen years of age or over."

A reading of these sections suggests that HCL will in the ordinary scheme of things appoint a representative to attend court. At any rate once charges have been laid, proceedings will commence by way of a preliminary enquiry in very much the same way as one does where the accused is a natural person. If there is a committal and the matter goes to the High Court and HCL is convicted by a jury, HCL will be punished by being mandated to pay a fine and this is enforceable as a civil debt. The representative will not be subject to imprisonment. Finally the issue of bail will not arise as a company as opposed to a natural person is arrested and so I find that the usual provisions relating to the setting of bail on a coroners warrant are inapplicable in the circumstances.

PART 4

RECOMMENDATIONS

It is traditional for Coroners where they deem it appropriate, to add to the findings a "rider" in which recommendations or suggestions are made, and these are directed toward reducing the likelihood that similar circumstances will occur and lead to avoidable deaths. Nyland J. reflected in **Perre v. Chivell [2000] SASC 279 at para 4** that the "coroner's office now is much different to its early form. Today, particularly in Australia, New Zealand and Canada, the overt emphasis of many coroners is upon making recommendations to help prevent injury and death, as well as providing accurate statistical information as to causes of death". As Evans noted in 2004 "If Coroners are to serve a useful purpose in an increasingly complex and tightly regulated society there is a need for probing at depth and the taking of a "wide brush" approach towards the question of how and why a death occurred and how the repetition of such a death in the same or similar circumstances might be prevented"[17].

Historically, coroners have had the right to append to the inquisition "riders" that made recommendations or suggestions of measures which should be taken to reduce the incidence of needless deaths similar to that which was the subject of the inquest.

The power to make a "rider" of censure or blame was formerly abolished in England in 1980. All that now remains is a power under Rule 44 of the Coroners Rules 1984 (UK).

[17] G Evans, "The Chain of Causation leading to Death, Attribution and Blame and the Coroner's Jurisdiction" (2004) 11 *The New Zealand Coroner (The Newsletter of new Zealand Coroners)* 1.

It states that a coroner who believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held may announce at the inquest that he is reporting the matter in writing to the person or authority who may have the power to take such action and he may report the matter accordingly.

No such legislation has been implemented in this jurisdiction and I accordingly make the following recommendations.

Crucial information regarding the need for the securing of settling ponds (i.e. artificial bodies of water on sites such as quarries) has been placed before this court. I am therefore in a position to make some definitive recommendations regarding same.

I make the following recommendations and request that such recommendations be provided to all government departments responsible for quarrying operations and settling pond security in the hope that each and every recommendation will be taken positively and acted upon with a view to preventing any further waste of life and further distress to families and friends. These recommendations are as follows:

1. Different regulations apply to settling ponds depending on whether applications are made for certificates of environmental clearance before 2001 or after 2001. Applications made for certificates of environmental clearance after 2001 are subject to the Environmental Management Authority rules and regulations. These regulations provide that no certificate will be granted

unless measures are put in place for the public safety (as opposed to occupational safety) in relation to settling ponds and it is to be noted that these measures include the installation of proper fencing and the adoption of proper security measures such as the erection of warning signs especially when such sites are in close proximity to communities. Applications made before 2001 were applications for town and country approval simplicter. Such approvals were granted without any requirement for certificates of environmental clearance.

It has also become clear at this inquest that quarries less than 150 acres do not have to comply with the security and fencing measures relating to settling ponds as EMA's authority does not extend to quarries less than 150 acres. This means that HCL which is give or take 90 acres would not have been under EMA's purview because of their size as well as the fact that their application was a pre 2001 one.

I recommend that the Trinidad and Tobago Parliament consider providing a single piece of legislation containing a uniform set of rules and requirements relating to the fencing and security of settling ponds, irrespective of the dates of filing of applications for certificates of environmental clearance/applications for town and county approval, or the acreage of land upon which settling ponds are located.

2. Legislation to require routine compulsory inspection of all properties with settling ponds on them to ensure continued compliance with rules and requirements established under recommendation 1 (above).

3. That legislation clearly set out the right of enforcement officers to enter private property to monitor compliance.

4. That local authorities be conferred with legislative powers to issue on the spot fines in order to create an awareness by property owners of their obligations to comply with settling pond security legislation.

5. Legislation giving local authorities appropriate powers to have serious defects attended to immediately as any legislation allowing time to rectify defects will have the effect of allowing a dangerous situation to remain an unacceptable risk. This is in relation to the powers of inspection suggested in recommendation 2 (above).

6. That the government through WASA, institute a system to identify all properties with settling ponds on them. For example, a highlighted tick box on water rate notices requiring each rate payer to identify whether a settling pond is on that particular property to which the water rate notice relates, which may ensure an accurate or a better database than currently exists.

7. I recommend that the Trinidad and Tobago Law Society review the standard form of contracts for the sale of land with a view to including a mandatory provision that a certificate of environmental clearance be obtained from the EMA before any premises with a settling pond can be conveyed and that such conveyance not be able to be effected until there has been full compliance with this rule.

In this regard, I also recommend that this be reinforced by legislation, requiring the certificate to be produced before a registration of a transfer is perfected.

8. Evidence came out during the course of this inquest that the existing rules and requirements regarding the security and fencing of settling ponds leave it at the land owner's discretion when it comes to deciding on the location and content of warning signs. It is felt that this be updated and upgraded to include precise specifications relating to the locations of warning signs as well as the actual text of those warning signs.

9. An awareness campaign to be undertaken by local authorities to promote awareness by landowners of the liability they could incur for failing to ensure that settling ponds are properly secured.

10. That local authority websites provide information or links to the relevant information relating to settling pond security legislation and requirements.

11. That legislation similar to England's Corporate Manslaughter and Corporate Homicide Act 2007 be enacted in our jurisdiction. Presently corporate liability for manslaughter depends on the identification principle so if an individual can not be said to embody the mind and will of a company then his grossly negligent actions or omissions will go unpunished as a charge against that company will not be sustainable. If legislation similar to that in England is implemented in our jurisdiction it would mean that our courts can look at a wider range of management conduct than at present as the focus will be on responsibility for the working practices of the organization rather than limiting investigations to questions of individual gross negligence by management.

I have approached the making of these recommendations with a view to introducing measures which I believe will assist to minimize the possibility of a re-occurrence of a death such as Ojo Moyo Oliver's. The recommendations are not intended to attribute blame: as that is not the function of the coronial system.

PART 5

CONCLUDING REMARKS

Finally, I would like to express my personal sympathy and condolences, as well as those of the Court to the deceased person's family. This is something which is done by this Court at the conclusion of each and every inquest and preliminary investigation carried out by this Court as constituted.

In this case it would be Ojo Moyo Oliver's mother Ida Oliver, other members of Ojo Moyo Oliver's family as well as his friends, at their sad loss. Mrs. Oliver, I cannot begin to imagine what a painful experience it must have been. I can only thank you for the dignity and courtesy you displayed to this court during the proceedings. I am certain that the pain of loosing Ojo Moyo Oliver will never pass but I hope that the completion of this inquest will, in some manner, allow you some form of closure.

I wish to place on record my thanks to my court staff and Corporal Samuel for their valuable assistance in this inquest. I also take this opportunity to thank all parties and their legal advisors for their contribution to this inquest.

All manner of persons who have had anything to do at this court before the Coroner for this County touching the death of Ojo Moyo Oliver, having discharged your duty may depart hence.

I now declare this inquest closed.

…….

Her Worship Ms. Nalini Singh
St. George West County Coroner.

Magistrate-3

REPUBLIC OF TRINIDAD AND TOBAGO

SUMMONS TO A DEFENDANT UPON COMPLAINT IN THE COURT OF SUMMARY JURISDICTION

IN THE MATTER OF THE SUMMARY COURTS ACT, CHAP. 4:20
(FORM 3, S. 42, THIRD SCHEDULE, PART II)

2009 No. ---------- COUNTY OF ST GEORGE WEST
at **PORT OF SPAIN MAGISTRATES' COURT**

---------- **COMPLAINANT**

V.

HOME CONSTRUCTION LIMITED (HCL) **DEFENDANT**

TO HOME CONSTRUCTION LIMITED (HCL)
OF LEVEL FOUR LONG CIRCULAR MALL, ST. JAMES

WHEREAS Complaint has this day been made before me, the undersigned Magistrate/Justice for the said District, for that you on the 16th April 2007 in the island of Trinidad and Tobago, unlawfully killed Ojo Moyo Oliver
CONTRARY TO COMMON LAW.

This is to require you to be and appear at the **Port of Spain Magistrates' Court on ---------- ---------- the ---------- of ---------- 2009 at ------** o'clock a.m. before the Magistrate/Justice of the said Court, to answer the said Complaint and to be further dealt with according to Law.

Dated this ---------- day of ----------2009.

Magistrate/Justice

AFFIDAVIT OF SERVICE OF SUMMONS

IN THE MATTER OF THE STATUTORY DECLARATIONS ACT, CHAP. 7:04

I, ...

Constable/Transport Officer of .....

Do solemnly and sincerely declare as follows:

That on the ..... day of ..... 20 ..... at .....

..... a.m./p.m., I duly served the Defendant .....

with a summons, of which the within on the reverse side is a true copy, by delivering the summons to the said Defendant/by leaving the summons with

.....

state name of person and relationship

.....

state address

I make this declaration conscientiously believing the same to be true and according to the Statutory Declarations Act, and I am aware that if there is any statement in this declaration which is false in fact, which I know or believe to be false or do not believe to be true, I am liable to fine and imprisonment.

Signed .....

Declarant

Declared before me this ..... day of ..... 20 .....

Signed .....

Magistrate/Justice