BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 936 of 2013

BETWEEN

FRANK ERROL GIBSON **CLAIMANT**

AND

VICTOR EASTMOND **DEFENDANT**

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: March 30
April 12
May 11
2018: August 31

Appearances:

Mr. Larry A.C. Smith, Mr. Ajamu Boardi, Ms. Kamisha N. Benjamin and Ms. Shanna C. Goddard, Attorneys-at-law for the Claimant

Mr. Francis G. DePeiza, Attorney-at-law for the Defendant

DECISION

INTRODUCTION

[1] This is a matter brought by the Claimant Frank Gibson seeking damages against the Defendant Dr. Victor Eastmond for the "negligent and/or fraudulent misrepresentation of himself as a forensic odontologist and/or an expert in the field of bite mark analysis to the Crown in his investigation and reporting of his findings which linked him to the murder of Francine Bolden,

deceased, and for causing the Claimant to suffer and to be confronted with the stigma, loss of privacy, anxiety, distress, humiliation, inconvenience, anguish, mental and bodily pain and stress that accompanies exposure to criminal proceedings, wrongful imprisonment and/or deprivation of his liberty and being greatly injured in his credit, character and reputation.

FACTUAL BACKGOUND

[2] It is necessary at the outset to outline the facts of the case and they are these. The Claimant's statement of claim was filed on June 3, 2013, after which on February 24, 2016 an amended statement of claim was filed by the Claimant and on April 13, 2016 a re-amended statement of claim was filed. The Claimant submits therein that on or about the 18 January, 2002 while at Bridge Street in the City of Bridgetown, he was requested by Police Constable No. 137 Phillips to accompany him to Central Police Station on suspicion of the alleged murder of Francine Bolden, deceased. He complied and accompanied the said officer to the Police Station.

[3] Whilst there he was interviewed and examined about his body by two Police Constables including the said P.C. Phillips and Station Sergeant Garnett Cossey. He claimed that measurements and photographs were taken of marks on his body.

[4] He further contends that on or about the 19 January, 2002, the Defendant examined his body at the Oistins Police Station, taking measurements of

various parts of his upper body, in particular a wound on his right arm. The Claimant noted that the Defendant took impressions of some injuries and lesions on his body.

[5] The Claimant also contends that on January 20, 2002, the Defendant interviewed him about the wound on his right arm and he expressed that he told the Defendant that the wound was sustained whilst climbing a breadfruit tree. He noted that photographs were then taken of him and the Defendant placed a branch from a breadfruit tree against the injury along with models of teeth of the deceased.

[6] It is the Claimant's position that after the Defendant examined the deceased's body and performed a full dental examination that he prepared a report of his findings, which findings linked the Claimant with the deceased's death. The Defendant signed that report as a forensic odontologist.

[7] The statement of claim revealed that on or about the 23 January, 2002 the Claimant was arrested and charged with the murder of the deceased and remanded to prison – he was on remand from on or about the 23 January, 2002 until the 8 November, 2012 with the exception of a ten month period between the 16 December, 2006 and mid 2007 while he was on bail.

[8] The statement of claim goes on to state that at the Claimant's preliminary inquiry, during examination in chief, that the Defendant stated that he was a

dentist and had done some training in forensic odontology. He also stated that he was a registered dental practitioner but he did not state that he was a forensic odontologist and/or an expert in bite mark analysis.

[9] The Magistrate ruled that a prima facie case was made out against the Claimant and he was committed to stand trial on or about the 4 April, 2005.

[10] The matter was scheduled to be heard in the July 2005 Assizes but was stopped and traversed to the October, 2005 Assizes due to an objection by the Claimant's former attorney Michael Lashley regarding the veracity of the Defendant's qualifications and expertise in the field of forensic odontology and/or bite mark analysis.

[11] The Claimant's attorney at the time then sought funding from the Government of Barbados for a forensic odontologist based in the United Kingdom to assist the Claimant in his defence. A constitutional application was filed and came on for hearing on the 6, 8 and 9 November, 2006.

[12] On the 2 February, 2007 **Blackman J** ordered, inter alia, that funding be provided for a forensic odontologist for the Claimant but he did not award damages or dismiss or stay the criminal charge.

[13] This decision was appealed by the Attorney General and the Court of Appeal later held that the Claimant could not have a fair trial without the services of an expert but that the Crown could not be compelled to provide funding for such an expert.

[14] It was on this basis that the Claimant's attorney appealed to the Caribbean Court of Justice (CCJ) where the case was heard on the 10 June, 2010 and the court declared that the Claimant was entitled to an expert to assist in the preparation of his defence since he could not have a fair trial without an expert.

[15] The Claimant obtained the services of Professor David Whittaker Emeritus.

[16] By way of letter dated the 18 June, 2010 the Solicitor General informed attorney-at-law Mr. Smith that the DPP indicated that he was prepared to forward the report prepared by the Defendant via FedEx under seal to a competent and reasonable forensic odonotologist of his choice along with the model and photographs the Defendant took in order for him to examine them, review the Defendant's report and deposition and prepare and submit a report of his findings based on and with reference to the examination and review and to give evidence if required at trial.

[17] The Claimant submits that Professor Whittaker forwarded his report and findings of the Defendant's report to Mr. Smith, indicating that there serious shortcomings in the preparation of the evidence and the methodology of the odontologist which did not necessarily meet internationally agreed standards. Mr. Smith subsequently forwarded this report to the Solicitor General.

[18] The Claimant applied for bail and on 8 November, 2012 the matter was heard before **Crane-Scott J.** It was at this juncture that the DPP submitted to the court that he was no longer proceeding with the prosecution of the Claimant for the murder of the deceased on the ground that the Defendant did not have the requisite expertise in the field of forensic odontology and/or bite mark analysis. He further submitted that the only evidence against the Claimant was the alleged bite mark evidence and concluded that the Defendant's report was inadequate for a criminal trial. According to the Claimant, the decision not to proceed with the prosecution was based on advice received from a forensic odontologist and bite mark expert Dr. Blitz and a discussion the DPP had with the Defendant in relation to Dr. Bernitz's and Dr. Whittaker's findings about the inaccuracies in his report.

[19] It is the Claimant's contention that the Defendant ought to have known that the purpose of the report and the findings contained therein would lead to the Claimant being charged and if charged prosecuted.

[20] He further contends that if the Defendant held himself out to be a forensic odontologist, he ought to have known the level of care needed when conducting the examination and that the Claimant would rely on it to instruct his attorney and/or in determining whether he needed to have his own forensic odontologist should he be charged in connection with the deceased's death.

[21] The Claimant also noted that the Defendant ought to have known that he was not qualified neither through academic qualification, experience or possession of the requisite skill needed to give evidence as an expert in forensic odontology or bite mark analysis.

[22] Therefore, the Claimant alleged that the Defendant's representations in his report of findings contributed to the Claimant's injury and suffering and that the Defendant was reckless and/or negligent in the circumstances. Additionally the Claimant alleged that it was due to the Defendant's misrepresentation of himself as a forensic odontologist and an expert in bite mark analysis and his findings in his report that led to the Claimant's arrest and charge for the murder of the deceased.

[23] Finally the Claimant contended that it was due to the Defendant's conduct that he was wrongfully imprisoned; deprived of his liberty; injured to his credit, character and/or reputation and/or suffered considerable mental and/or bodily pain and/or anguish; suffered inconvenience and/or humiliation and/or distress; and/or anxiety and has suffered loss and damage.

[24] He therefore claims the following against the Defendant:

(1) General damages for pain, suffering and loss of amenities caused by the negligent and/or fraudulent misrepresentation made by the Defendant;

(2) Interest pursuant to section 35 of the Supreme Court of Judicature Act, Chapter 117A of the Laws of Barbados;

(3) Costs; and

(4) Such further or other relief as this Honourable Court deems fit.

[25] On the 30 July, 2013, the Defendant filed an Ancillary Claim Form for an indemnity in respect of the Claimant's claim against him from the Attorney General (AG) and the Director of Public Prosecutions (DPP) on the ground, inter alia, that at all material times he was engaged under a contract for services by the Commissioner of Police of the Royal Barbados Police Force (RBPF) to provide forensic services to assist with the examination of evidence obtained against the Claimant.

[26] The Defendant filed a Defence on 3 July, 2013 and an amended Defence on 23 March, 2016 where he alleged that the Claimant failed to state a cause of action against him that is capable of being adjudicated by this Honourable Court and also that he is a third party or none at all since the Crown employed him.

[27] It is the Defendant's position that the only duty he owed was to the court since at all material times he was engaged under a contract for services by the Commissioner of Police of the RBPF to provide forensic services for the RBPF to assist with the examination of evidence obtained against the Claimant, therefore he claimed the privileges and immunities from criminal and civil prosecution attaching to witnesses in respect of evidence they provide at trials.

[28] The Defendant submitted that at all material times he possessed the requisite certification from the International Organization of Forensic Odono-Stomatology (IOFOS) and was at all material times a credential member of the IOFOS.

[29] He further submitted that at least through 2010 a specialist dental register in forensic odontology did not exist in England, Wales or any part of the Caribbean. He also stated that the forensic odontology specialization was in its embryonic stages in 1998 and others qualified in the area had the same or similar qualifications.

[30] In addition the Defendant noted that his competency to express an opinion on evidence in the matter was not challenged at the stage of the preliminary enquiry and further that any information which he provided to the court was his opinion and any weight given to his opinion was a matter for the Magistrate.

[31] The Defendant contends that at the time he conducted the examination, technology, information and protocols available to assist in bite mark analysis were yet to be implemented. He further contends that when he conducted the examination he used the materials, methodologies and techniques employed in the analysis of the evidence that were consistent with those employed and accepted by other professionals in the field in

Barbados and elsewhere in 2002 and he was of the view that he exercised due diligence and care.

[32] According to the Defendant, Dr. Whittaker's report not only confirmed his conclusion that the injury to the Claimant was probably caused by an adult human bite and not a breadfruit branch or leaf but that the comparative similarity of the Claimant's bite mark injury to the dentition of the deceased was over and above the assessment and conclusion drawn by the Defendant.

[33] The Defendant therefore questioned the credentials of Dr. Whittaker and recommended to the DPP to consider securing professional services of another expert to review and confirm his opinion.

[34] He later travelled to South Africa to meet with a Dr. Bernitz to discuss his report and findings. He stated that Dr. Bernitz intended to inform the DPP that in his opinion the bite mark analysis alone was insufficient to secure a criminal conviction to the applicable standard of beyond reasonable doubt especially in light of the current bite mark protocols.

[35] In referring to paragraph 36 of the Claimant's statement of claim, the Defendant noted that he was engaged by the Crown through the RBPF for the sole purpose of assisting whether the Claimant's injury to his right biceps muscle was consistent with a human bite and if so to identify through comparative analysis whether the injury was consistent with a bite mark that would have been made by the deceased.

[36] The Defendant referred to the Claimant's pleading that he contributed to his injury and suffering and was reckless and/or negligent in the circumstances and noted that the Claimant was already arrested and in custody for the deceased's murder at the time he conducted the examination.

[37] The Defendant denied causing any loss or damage as alleged by the Claimant in any way related to any act or omission or representation made by him. It is his position that the report prepared by him was merely a conduit of the facts and evidence of the case and that it was up to the RBPF to determine what steps were to be taken in respect of the report.

[38] The Defendant therefore concluded that the Claimant is not entitled to recover from him any loss or damage as claimed in the Claimant's statement of claim.

THE CLAIMANT'S SUBMISSIONS:

[39] The Claimant's submissions were similar to what was contained in his re-amended statement of claim. He submitted that if the court finds the Defendant to be an expert witness he should not be immune from suit – he based this on the equitable principle that no wrong shall go without a remedy.

[40] The Claimant also submitted that the Defendant owed a duty to the court by virtue of Rule 32, Part 32.3 of the Supreme Court (Civil Procedure) Rules (CPR). It was his submission that this rule ought to apply to both civil and

criminal cases, as there is no distinction between the role of an expert in a civil case and the role of an expert in a criminal case. He noted that if the duty is breached it causes harm to the court initially then to the Claimant or Defendant in the matter.

[41] The Claimant further submitted that the Claimant perpetrated a fraud by holding himself out as a forensic odontologist when he was not, which resulted in him producing a substandard report. As a result of that report, the Claimant contended that it led to him being imprisoned. He further submitted that the Defendant breached his duty of care to the Claimant which caused him to suffer harm and which must be remedied by the Defendant.

THE DEFENDANT'S SUBMISSIONS:

[42] In relation to the Claimant's contention that the Defendant made fraudulent representations to him, the Defendant submitted that privity of contract only existed between the Defendant and the RBPF. It was the Defendant's submissions that for an obligation to extend to the Claimant, the RBPF would have to be the Claimant's agent and that the RBPF could not be the Claimant's agent since it did not owe any fiduciary duties to him and also that any representation made by the Defendant about his qualification was made by the Defendant about his qualification was made to the RBPF and

not to the Claimant. In support of this contention, counsel for the Defendant relied on *Swift v. Winterbotham (1873) LR8QB 244*.

[43] He noted that public policy considerations would have made it unlikely for the RBPF to be acting as agent for the Claimant at the time it requested the Defendant to examine the evidence.

[44] Counsel for the Defendant also noted that in terms of fraud, there is no evidence indicating or alleging that the Defendant was fraudulent or dishonest about his qualifications. He further submitted that whether a witness is competent to give evidence as an expert is for the trial judge to determine. Furthermore that once the qualifications of the expert witness was established, the methodology of the expert adopted will be relevant to the weight of the evidence and not to the competence of the witness to express an opinion.

[45] He maintained that the Defendant's credentials were accurately stated and the Defendant believed them to be true. The Defendant did not knowingly, recklessly and/or carelessly make out himself to be an expert in odontology and bite mark analysis. Therefore, in the absence of any evidence or indication that the Defendant forged or falsified his academic and professional certificates, there is no basis for any finding that he misrepresented himself to be an expert in odontology and bite mark analysis.

[46] The Defendant's counsel also submitted that the Claimant's charge for murder, subsequent arrest and ten year incarceration on remand cannot be attributed solely or reasonably to the nature of the evidence provided by the Defendant.

[47] It was submitted that the Defendant owed no duty of care to the Claimant in his analysis of the evidence to the court as a forensic odontologist and bite mark analysis since there was no overriding relationship between the Claimant and the Defendant.

[48] Counsel also submitted that the necessary degree of proximity between the contents of the report in question and the Defendant's qualifications on the one hand and the Claimant's charge for murder and subsequent arrest and incarceration on the other hand does not exist.

[49] In relation to the issue of negligence, counsel submitted that mere foreseeability does not give rise to liability in negligence and even though he admitted that the Defendant's report could potentially determine how the DPP and the RBPF treated with the Claimant's prosecution, such potential does not in itself give rise to an action in negligence.

[50] He stated that public policy dictates whether it would be just and reasonable to impose a duty of care on the Defendant in the circumstances and that the principal policy grounds militating against the imposition of the duty of care are (1) to impose such a duty would create a conflict of interest between the

RBPF and the Defendant and (2) that it would encourage both defensive practices by forensic odontologists and vexatious and costly litigation.

[51] Finally in his supplemental submissions filed on 11 April, 2016, the Defendant noted that the Claimant's statement of claim even after the amendment disclosed no cause of action and therefore the claim should be struck out if the court is satisfied that there is no amendment to cure the defect.

THE ISSUES FOR DETERMINATION:

(1) Whether the Defendant was at all material times an expert in bite mark analysis

(2) If yes, whether the Defendant should enjoy protection of witness immunity in the circumstances where he made a report on finding about the Claimant in the capacity of an expert in bite mark analysis.

(3) Whether in the circumstances the Defendant owed a duty of care to the Claimant.

(4) Whether the Defendant negligently/fraudulently misrepresented himself to the Claimant as a forensic odontologist.

(5) If found that the Defendant does not owe a duty of care to the Claimant, whether the application should be struck out.

LAW AND ANALYSIS:

Issue 1

[52] The first issue for the court's determination is whether the Defendant was at all material times an expert in bite mark analysis.

An "expert" is defined in *Black's Law Dictionary Deluxe Ninth Edition* as –

> "A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that that will assist the fact-finder."

"Expert evidence" is defined as –

> "Evidence about a scientific, technical, professional or other specialized issue given by a person qualified to testify because of familiarity with the subject or special training in the field."

The Defendant who is a trained and qualified dental practitioner was hired by the RBPF for the purposes of performing an examination on the Claimant regarding a bite mark. With respect to his qualifications the Defendant's position is that he attended and completed a course called "Personal Identification with Dental Methods" arranged by the Nordic Society of Forensic Odonto-Stomatology under the auspices of the International Organisation of Forensic Odonto-Stomatology in Stockholm, Sweden on 9 June to 14 June, 1998, after which he was awarded a certificate of participation.

According to the IOFOS, the course curriculum "did not include bite mark analysis, the focus was on the identification of victims in mass disasters." A representative of the IOFOS further noted that the course was intended to teach the Interpol technique of identification but problems of tooth mark examination and comparisons were not addressed.

The representative however noted that:

> "The technique of analyzing and comparison of tooth marks has a lot in common with identification. In comparison one has to find common details in the marks and suspected teeth. Finally, one has to access the chance that another person could have left the marks. This is the same as what has to be done in identification. Therefore the principles learnt in the IOFOS course should also be applied to tooth mark examination and comparison...all dentists without any qualification in forensic odontology would have been less able than Dr. Eastmond to perform a scientific examination and comparison of the tooth marks in this case."

The secretary of the IOFOS also stated the following:

> "1. The International Organisation for Forensic Odonto-Stomatology, IOFOS does not allow individual memberships...
>
> 2. There is not any society from Barbados among the IOFOS member societies. As far as IOFOS does not allow individual memberships we cannot say that Dr. Eastmond is a member of IOFOS.
>
> 3. There is since a long time a strong debate in many countries all over the world about the matter of qualifications of Forensic Odontologist and the requirements to be fulfilled of it...
>
> 4. I can say that there is not an official recognized and shared international standard for expertise in the field of forensic odontology."

Based on the response from the representatives of the IOFOS, the Defendant does not qualify as a forensic odontologist. From a perusal of the professionals registered in Barbados for the period 2002 to present there are no registered forensic odontologist. The Defendant took a course and obtained a certificate of participation from IOSOF however the course undertaken did not include bite mark analysis for the purposes of

identification, although it was recognized that the principles learnt in the course could also be applied to tooth mark examination and comparison.

Issue 2

[49] The next issue to engage the court's attention is this, if the Defendant is found to have qualified as an expert witness, should he be immuned from suit.

In the case of *Darker v. Chief Constable of the West Midlands Police [2000] 4 All E.R. 193; [2001] 1AC 435* their Lordships identified the following justifications for witness immunity: (i) to protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims; (ii) to encourage honest and well-meaning persons to assist justice; (iii) to secure that the witness will speak freely and fearlessly.

Counsel for the Claimant however relied on the case of *Jones v. Kaney [2011] 2 All E.R. 671* to show that the Defendant should not be immune from suit if found to be qualified as an expert witness. The majority of the House of Lords in this case rejected the rationale in *Darker's* case supra. They found that there was no evidence that experts would be reluctant to act as such without immunity. They pointed out that experts engage in many different roles where they face the possibility of being sued, outside of being an expert in litigation, and they are not dissuaded from doing so.

In *Jones v. Kaney* the appellant sued an expert hired by his attorney in the conduct of his case, for negligently signing a statement of matters agreed to with the expert instructing by the opposite side, which resulted in a reduced statement. In the instant case however the Defendant was hired by the RBPF to conduct a bite mark analysis.

Issue 3

[50] In order to answer issue 2, one has first to ascertain whether or not the Defendant owed the Claimant a duty of care.

It is well settled that in order to determine negligence, a Claimant must prove (1) that the Defendant owed the Claimant a duty of care in the circumstances of the case; (2) that the Defendant breached this duty in the sense that he failed to conform to the standard of care required; (3) that the Claimant suffered injury or less or damage as a result of the Defendant's actions; (4) that this breach of duty caused the injury or damage which is the subject of this claim.

In determining whether a duty of care applies in a particular situation, the court must consider (1) whether it was reasonably foreseeable that the Defendant's conduct will caused harm to the Claimant; (2) whether there was a relationship of proximity between the parties; (3) whether the imposition of such a duty is fair, just and reasonable – see *Caparo Industries plc v. Dickman [1990] 1 All E.R. 568*.

The test for foreseeability was laid down in *Donoghue v. Stevenson [1932] A.C. 562* and is this – a person is under a duty to avoid acts or omissions which he ought reasonably to foresee, would be likely to cause injury to his neighbour also referred to as the neighbour principle. Neighbour in this context refers to "persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being affected when you are directing your mind to the acts or omissions which are called into question."

As to proximity, a relationship is akin to contract where two parties are in contract with one another either directly or through their agents, and where, but for the lack of payment, a contract would have existed between them. There could be sufficient proximity provided that the person who is ultimately affected by the information or the ultimate recipient is identifiable and is somebody who will foreseeably suffer loss if the information is inaccurate: *Smith v. Eric S. Bush [1990] 2 Ac 831* per **Lord Jauncey**.

Whether it is fair, just and reasonable depends on the circumstances of the particular case. In the case of *McFarlance and Another v. Tayside Health Board [1999] 4 All E.R. 961* where medical negligence resulted in an unwanted pregnancy and the birth of a healthy child, the court held that the mother was entitled to recover damages for the pain and distress suffered

during the pregnancy and in giving birth and for financial loss associated with the pregnancy.

However it was not fair, just or reasonable to extend that duty to include the costs of raising that child on a doctor or his employer on the grounds that "reasonableness includes a consideration of the proportionality between the wrongdoing and the loss suffered thereby" and that such a loss would be "wholly disproportionate to the doctor's culpability" and would not accord with the idea of restitution".

In applying the above principles to the instant case one can conclude that the Defendant's duty is to the court and his client. He was employed under a contract of services by the RBPF for a specific purpose, namely, to prepare a report on findings after examination of the deceased and the Claimant. In the circumstances, even if it can be said that it was reasonably foreseeable that what was contained in the report would have an adverse effect on the Claimant, the degree of proximity between him and the Claimant was insufficient to state that a relationship existed between them.

Issue 4

[51] The fourth issue for consideration is whether the Defendant negligently/fraudulently misrepresented himself as a forensic odonatologist.

According to Cheshire, Fifoot & Furmston's Law of Contract, Fifteenth Edition, 2007 at page 332,

> "A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract is yet one of the reasons that induces the representee to enter into the contract.
>
> A misrepresentation is simply a representation that is untrue. The representor's state of mind and degree of carefulness are not relevant to classifying a representation as a misrepresentation but only to determining the type of misrepresentation, if any."

What then is negligent misrepresentation? Where a person who has or professes to have special knowledge or skill, makes a representation to another by way of advice, information or opinion, that person is under a duty of care to use reasonable care to see that the representation is correct and that the information or opinion is reliable. If he fails in that duty and gives unsound advice or misleading information or express an erroneous opinion and the representee suffers economic loss, he will be liable for damages in negligence. See **Justice Crane-Scott** in *Kinch v. Bank of Nova Scotia BB 2012 HC 5*.

For a successful claim in negligent misrepresentation five requirements must be satisfied – (1) there must be a duty of care based on a "special relationship" between the representor and the repesentee; (2) the representation in question must be untrue, inaccurate or misleading; (3) the representor must have acted negligently in making the representation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the

representee in the sense that damages resulted. See *Hedley Byrne v Heller [1964] A.C. 465; Queen v. Cognos Inc. [1993] 1 SCR 87*.

The courts have placed emphasis on the need for reliance in that they consider it a necessary ingredient of negligent misrepresentation. A Claimant should therefore plead actual reliance on specific statements.

With respect to fraudulent misrepresentation, it was held in *Derry v. Peek (1889) 14 APP Cas 337* that a false statement made carelessly without reasonable belief in its truth did not amount to fraud but may furnish evidence of it. This case illustrates that four principal elements of the tort of deceit must be established: (1) there must be a false representation of fact by word or conduct; (2) the representation must be made with knowledge that it is false or made in the absence of belief or truth; (3) the false statement must be made with the intention that the Claimant should act on it causing him damages; (4) it must be shows that the Claimant acted upon the false statement and sustained damages in so doing. If fraud is proved there is no need to establish that there was an intention on the part of the Defendant to injure or defraud the Claimant.

From the facts in this case it seems that the Defendant honestly believed himself to be an expert in the field of bite mark analysis because of the course he undertook. The Claimant has not shown that the Defendant knew that he was not qualified as a forensic odontologist. Furthermore it can be

stated that if any negligent and/or fraudulent misrepresentation was made by the Defendant, it was made to his employer and the court and not the Defendant, as he did not owe the Claimant any duty of care.

Issue 5

[52] Finally the court has to determine whether in the circumstances where the Defendant does not owe a duty of care to the Claimant, the case should be struck out?

The courts will move sparingly and will only in exceptional circumstances strike out a statement of claim as this is seen as a draconian measure which deprives a party of its rights to a fair trial. However they are circumstances where it is necessary and this is set out at Rule 26.3 of the CPR which provides that a court may struck out a statement of case or part of a statement of case where:

> "...(a)...the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.
>
> (b) the statement of case or the part to be struck out discloses no reasonable ground for bringing a claim; or
>
> (c) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

In *Citco Global Custody NV v. Y2K Finance Inc.*; ECSC Civil Appeal No. 22 of 2009 [BVI], **Edwards JA** set out the principles which ought to

guide a court when considering an application to strike out a statement of case. The learnt Judge stated:

> "[13] On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of claim are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny.
>
> [14] Among the governing principles stated in Blackstone's Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other procedures such as requests for information; and the examination and cross-examination of witness often change the complexion of a case...

However where there is an obvious and plain case for striking out, the courts will**.** **Lindley M.R.** in *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86* noted in reference to striking out a claim:

> "The...procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks..."

It is therefore the court's duty to examine the particulars in order to make an informed decision for as **Lord Diplock** said in *Letang v. Cooper [1965] 1QB 232* at page 242:

> "When dealing with such applications the court's function is limited to the scrutiny of the statement of claim. It tests the particulars, which have been given in each averment to see whether they are sufficient to establish a cause of action. It is not the court's function to examine the evidence to see whether the plaintiff can prove his case or to assess its prospects of success..."

DISPOSAL

[53] Based on the above it is submitted that the claim should be struck out because it discloses no reasonable cause of action against the Defendant. The court is by no means suggesting that the Claimant may not have a cause of action against someone for any loss which he has sustained, however that person is not the Defendant.

PAMELA A. BECKLES
Judge of the High Court