



[2019] JMSC CIV 176

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2019 HCV 00846

BETWEEN	E.K.A., (By her father and Next Friend, IBRAHIM ST. JUDE ALDER	1 ST CLAIMANT
AND	IBRAHIM ST. JUDE ALDER	2 ND CLAIMANT
AND	ST. ANDREW PREPARATORY SCHOOL	1 ST DEFENDANT
AND	DR. DYER	2 ND DEFENDANT
AND	MS. TAYLOR	3 RD DEFENDANT

IN CHAMBERS

Ms. Nancy Anderson for the Claimant /Respondent

Mrs. Riley Dunn and Mrs. Deborah Mathews instructed by Nelson Brown for the Applicant/Defendant.

Heard: 29th May and 30th July, 2019.

*Application to strike out Claim - Whether the Claimants failed to set out their case-
Claimants served Amended Fixed Date Claim Form with Notice of Application for
Court Orders with one affidavit - Whether the Claimants failed to serve Affidavit in
Support of the Fixed Date Claim Form - Certificate of Next Friend not served-
Whether Appropriate case for striking out - Whether the Claimant's Statements of
Case discloses any reasonable Ground for bringing the Claim.
Rules;5.2;8.1;8.2;8.8;8.9,23.3;23.6-9;56.9;56.13*

THOMAS, J.

INTRODUCTION

[1] The Claimants have brought an action by way of Amended Fixed Date Claim Form dated March 8, 2019 seeking constitutional redress against the Defendants for breach of the 1st Claimant's rights under sections **13 (3) (i) (ii)**, and **(iii)**, as well as **13 (3) (k) (i)** of the ***Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act***, 2011. They allege that on several occasions in mid-February 2019, the 3rd Defendant took videos and photographs of the 1st Claimant, the minor child of the 2nd Claimant without the consent or permission of the 2nd Claimant. Additionally, the Claimants allege that in breach of the said constitutional rights the Defendants failed to deliver up the said photographs and videos, remove them from social media and stop taking any further images of the 1st Claimant. A notice of application for court orders was also filed in which the Claimants are seeking interim reliefs. In this application, before the court the 1st Defendant is seeking to have the Claimants' statement of case struck out on the following ground:

- (a) The Claimants have failed to set out their case in that the Claimants having served an Amended Fixed Date Claim failed to file and serve an affidavit along with the Fixed Date Claim Form setting out their case in accordance with Part 8 of the CPR.
- (b) The Fixed Date Claim Form fails to disclose any reasonable grounds for bringing a claim pursuant to **sections 13 (3) (j) (ii)** and **(iii)**, as well as **13 (3) (k) (i)** of ***the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act***, 2011 in that it failed to disclose that:
 - (i) The 1st Claimant had a reasonable expectation of privacy while in a classroom with other

students which is located on the premises operated by the 1st Defendant.

- (ii) Any photographs or videos containing the image of the 1st Claimant have been published on any social media platforms or any other medium by the 1st Defendant or its agents or servants
- (iii) The 1st Defendant or its agents or servants have breached the 1st and 2nd Claimants' right to protection of family life or privacy of communication;
- (iv) The 1st Defendant or its agents or servants have breached the 1st Claimant's right to protection by virtue of her status as a minor or part of the family, society and the State;
- (v) The Claim is frivolous or vexatious and an abuse of process.

The Procedural Issues

[2] I will first address the issues that relate to the procedure for the filing and serving of the Fixed Date Claim Form that are raised in this application. That is;

- (a) Whether the Claimants have failed to comply with the requirement of the Rules for the filing and service of the Fixed Date Claim Form;
- (b) Whether they have failed to set out their case in the documents they have served in accordance with Part 5 and 8 of the rules.

- (c) If I find that they have failed to comply with the requirements of the relevant rules, whether the breach is of such a nature that their statement of case should be struck out.

WHETHER THE CLAIMANTS HAVE FAILED TO COMPLY WITH THE RULE RELATING TO THE FILING AND SERVICE OF THE FIXED DATE CLAIM FORM

[3] **Rule 5.2** of the **Supreme Court of Jamaica Civil Procedure Rules, 2002** (herein after refers to as **the Rules**) read as follows;

- “(1) *The general rule is that the claimant’s particulars of claim must be served with the claim form.*
- (2) *However the claim form may be served without the particulars of claim in accordance with rule 8.2 (particulars of claim to be issued and served with claim form).*
- (3) *In this Part reference to service of the claim form requires that -*
- (a) *the particulars of claim; or*
- (b) *where these Rules so require, an affidavit or other document; and*
- (c) *a copy of any order or the certificate and application made under rule*

[4] **Rule 8.2** makes provision for the service of the claim form without the particulars of claim or an affidavit. However, it specifies the conditions under which such service is permissible. It reads:

8.2 (1)” A claim form may be issued and served without the particulars of claim (or affidavit or other document required by rule

8.1 (1)(b)(ii)) only if -

- (a) *the claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8, 8.9 and 8.10;*

(b) the court gives permission.

[5] (2) *However in a case of emergency when it is not practicable to obtain the permission of the court a claimant may issue and serve the claim form without the particulars of claim (or affidavit or other document required or permitted by rule; 8.1(1)(b)(ii)) provided that the claimant -*

(a) certifies in writing that the issue and service of the claim form is a matter of emergency, stating why; and (b) serves a copy of –

(i) the certificate; and

(ii) the application for permission, with the claim form.

(2) *Where a claim form is issued under paragraph (2) the claimant may take no further steps except to serve the claim form until permission is granted. The contents of relevant rules that are referred to in **Rule 8.2** are as follows:*

Rule 8.8 reads: *“Where the claimant uses form 2, the claim form must state –*

(a) the question which the claimant wants the court to decide; or

(b) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;

(c) where the claim is being made under an enactment, what that enactment is”;

Rule 8.9 reads:

“(1) The claimant must include in the claim form or in the particulars of claim

a statement of all the facts on which the claimant relies.

(2) Such statement must be as short as practicable.

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case”

[6] **Rules 8.1 (1)** read as follows:

“A claimant who wishes to start proceedings must file in the registry of the court at The Supreme Court, King Street, Kingston (or at such other place as the Rules Committee may determine) the original and not less than one copy for each defendant (for sealing) of -

(a) the claim form; and

(b) unless either rule 8.2(1)(b) or 8.2(2) applies-

(i) the particulars of claim; or

(ii) where any rule or practice direction so requires or allows,

an affidavit or other document giving the details of the claim required under this Part”.

[7] Rule 8.9A reads, “The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission”.

Submissions

On behalf of the Applicant

[8] On this issue the submissions of Mrs. Riley-Dunn, counsel for the Applicant, are summarized as follows;

- (i) It is an absolute requirement of Rule **8.1** that every claim (which includes Fixed Date Claim Forms) must be supported by Particulars of Claim, or as in this case an Affidavit in Support of the Fixed Date Claim Form. **Rule 8.2** provides for a Claimant to seek permission to have it filed at a later date. The rules do allow or permit for the Claim form to be served without the accompanying Affidavit provided that the issue of the claim form was a matter of emergency and it was impractical for a supporting affidavit to be secured in a timely manner.
- ii) The Claimants have breached **Rule 8.2(3)** when they took further action in this claim without first obtaining permission from the Court to serve the affidavit supporting the Fixed Date Claim Form separately. When they filed a Notice of Application with supporting Affidavit for injunctive relief, this further step would be invalid.
- iii) In breach of **Rule 8.2** of the CPR the 1st Defendant was served with this Fixed Date Claim Form without an accompanying Affidavit. Neither was there any certification that the issue and service of the claim form was a matter of emergency, nor an application for permission nor an order granting permission to file the Claim without an accompanying Affidavit.

On behalf of The Claimant /Respondent

[9] Ms Anderson submits that:

Both the Fixed Date Claim Form and the Notice of Application for Court Orders request the same orders. Those are;

- (a) To instruct the third Defendant to;
 - (i) cease and desist from producing or collecting such Media concerning the first Claimant.
 - (ii) deliver copies of all photographs and videos taken of the first Claimant to the second Claimant on a jump drive as promptly as physically possible;
 - (iii) Direct and ensure the permanent destruction, erasure or deletion of any and all such media collected concerning the first Claimant on all personal electronic devices and school IT equipment or other devices capable of data storage;
- (b) Instruct the third Defendant to remove all occurrences and traces of any such media from any social media platforms; and
- (c) Further ensure that the media is not used by the first Defendant or personally for any purpose whatsoever;
- (d) The Fixed Date Claim Form also claims damages for breach of the Claimants' constitutional rights: These are;

The respect of and protection of family life and privacy of communication as set out in **sections 13 (j) (ii) and (iii) and**

as a child to the right to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State; as set out in section **13 (k) (i). Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.**

- (e) The claim is supported by an affidavit dated March 3rd, 2019 and filed on Mach 5, 2019. Dr. Dyer's allegations in his Affidavit in support of the application to strike out states that he was not personally served with the documents in this action. An Affidavit of Service dated March 11, 2019, was filed and deponed to by the process server, Jermain Hartley-Chin. He states that Dr. Dyer identified himself and was handed the documents on March 11, 2019. Also, on the said day of March 11, 2019, the second Defendant, Dr. Dyer, attended a hearing in this matter in Chambers before Justice A. Nembhard, (Ag).

ANALYSIS

- [10] The Amended Fixed Date Claim Form was filed on the 8th of March 2019. EKA by father and next friend, Ibrahim St Jude Alder is named as the 1st Claimant and Ibrahim St Jude Alder as the second Claimant. The Claimants seek damages and injunction for breaches of their right under the constitution in respect of (a) protection of family life and privacy of communication in accordance with **Section 13 (j), (ii) and(iii) of the Constitution** and (b) A Child rights to this measure of protection as are required by the status of the Child being a minor or a part of the family, society and the state as set out in Section **13 k (i)**.
- [11] Jermain Hartley-Chin by way of Affidavit filed on the 11th of April 2019 and dated the 11th of March 2019. indicates that he effected service of the Amended Fixed Date Claim Form, the Notice of Application for Court Orders and the Affidavit of Mr. Alder sworn to on March 4, 2019 on Mr. Dyer the Principal of the 1st Defendant on behalf of the Claimants. An Acknowledgement of Service was filed on the 14th of March 2019 on behalf of the 1st Defendant in which it was acknowledged that the Amended Fixed Date Claim Form was in fact served on the 1st Defendant on the 11th of March 2019. However, it is denied that an affidavit in support of the Amended Fixed Date Claim Form was served on the 1st Defendant. Nevertheless, it is important to note that despite denying that he was served in his personal capacity, Mr. Andrew Dyer in his Affidavit filed on behalf of the 1st Defendant has

indicated that he received from his secretary a package containing the Amended Fixed Date Claim Form, the Notice of Application and the Affidavit of Mr. Alder that was left at the school.

[12] Whereas counsel for the 1st Defendant/Applicant is not denying that these documents were in fact served on the 1st Defendant she asserts that no affidavit was served in support of the Amended Fixed Date Claim Form as the only Affidavit the 1st Defendant was served with is an Affidavit headed “ ***Affidavit in Support of Notice of Application for Court Orders*** ”. She contends that the Claimants having failed to file an affidavit in support of the Fixed date Claim form, would have failed to comply with **part 8** of the rules. She further insists that on this basis the Claimants’ case should be struck out. On this issue, I will proceed by first examining the documents that were served on the Applicant.

THE AMENDED FIXED DATE CLAIM FORM

[13] The Amended Fixed Date Claim Form was filed on the 8th of March 2019. The claim is outlined as follows;

“The Claimants, E.K.A. (a minor) and Ibrahim St. Jude Alder, claim against the defendants, St. Andrew Preparatory School, Dr. Dyer and Ms. Taylor, all of St. Andrew Preparatory School damages and an injunction for breaches of the following:

- (a) *Their rights under the Constitution of Jamaica and the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011;*
- (b) *To respect of and protection of family life and privacy of communication as set out in sections 13 (j) (ii) and (iii);*
- (c) *As a child to the right to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State; as set out in section 13 (k) (i);*

In that on several occasions in mid-February 2019, the 3rd Defendant, a third grade teacher of the first defendant school took videos and photographs of the first claimant without the permission of the second claimant, and the defendants have failed to comply with the second claimant's request to Instruct the third defendant to cease and desist from producing or collecting such media concerning the first claimant; (Deliver copies of all photographs and videos taken of the first and second claimant on a jump drives promptly as physically possible;

- (i) Direct and ensure the permanent destruction, erasure or deletion of any and all such media collected concerning the first claimant on all personal electronic devices and school IT equipment or other devices capable of data storage.*
- (ii) Instruct the third defendant to remove all occurrences and traces of any such media from social media platforms; and*
- (iii) Further ensure that the media is not used by the first defendant or personally for any purpose whatsoever”.*

The Notice of application for Court Orders

[14] The Notice of Application for Court Orders was also filed on the 8th of March 2019. The relief sought are as follows:

“The Applicant, Ibrahim St. Jude Alder, the Second Claimant seeks the following orders that the defendants, jointly and severally:

- (i) Instruct the third defendant to cease and desist from producing or collecting such media concerning the first Claimant;*
- (ii) Deliver copies of all photographs and videos taken of the first Claimant to the second Claimant on a jump drive as promptly as physically possible;*

- (iii) *Direct and ensure the permanent destruction, erasure or deletion of any and all such media collected concerning the first claimant on all personal electronic devices and school IT equipment or other devices capable of data storage;*
- (iv) *Instruct the third defendant to remove all occurrences and traces of any such media from social media platforms; and*
- (v) *Further ensure that the media is not used by the first defendant or personally for any purpose whatsoever”.*

Affidavit with Heading “Affidavit in support of Notice of Application for Court Orders.

[15] The relevant contents of the affidavit are as follows;

- (i) *“During the night of the 13th of February, 2019 my daughter informed me that Ms. Taylor, my daughter’s main grade three teacher, had been taking videos and photographs of my daughter. My daughter further informed me that when Ms. Taylor saw my daughter was confused by what was happening she stopped for a moment and said, “Don’t tell you daddy, ok? Don’t tell your daddy”. When I asked my daughter why she did not inform me sooner, my daughter then explained that she took a while to tell me because she was afraid of how Ms. Taylor would treat her.*

When asked if other children were being photographed and videoed, my daughter told me that she knew that she was the one being videoed even if other children happened to be there.

- (ii) *My reaction to what my daughter told me was to make arrangements for my representative in meetings with the school. These arrangements were made with Khadine Dixon, Attorney-at-Law. I then drafted letter dated February 14, 2019 which was signed by me and delivered to the main office of*

the school by me by hand on the morning of February 14, 2019. A copy of the said letter is annexed hereto and marked "JA 1" for identification.

(iii) Among other things, the said letter defined the photographs and videos as "the media" and demanded that the school take the following immediate action at minimum:

-Instruct the third defendant to cease and desist from producing or collecting such media concerning the first Claimant

-Deliver copies of all photographs and videos taken of the first Claimant to the second Claimant on a jump drive as promptly as physically possible;

-Direct and ensure the permanent destruction, erasure or deletion of any and all such media collected concerning the first claimant on all personal electronic devices and school IT equipment or other devices capable of data storage.

-Instruct the third defendant to remove all occurrences and traces of any such media from social media platforms; and

-Further ensure that the media is not used by the first defendant or personally for any purpose whatsoever.

(iv) Letter dated February 14, 2019 also requested the school arrange for a meeting with my representative in respect of the matter, Khadine Dixon, Attorney-at-Law. I am informed my Ms. Khadine Dixon that she received no calls or correspondence from the School, even to date.

(i) During the late afternoon or evening of February 15, 2019 my daughter reported to me that the taking of photographs and videos continued for the remainder of the school week ending February 15, 2019.

- (ii) *I have asked my daughter whether or not the videoing and photographing of her has continued past the week ending February 15, 2019 and she informed me that he was “not sure” and that the said teacher might be doing it secretly.*
- (iii) *The first response that I received from the school was by the way of email dated 25 February, 2019, sent at 6:14 p.m. by the Principal, Dr. Dyer. A copy of the said email and all replies thereto is annexed hereto and marked “JA 2” for identification.*
- (viii) *Rather disturbingly to me, the email dated February 25, 2019 contains no assurance in terms of cessation of the activity complained of, or even the results of any necessary investigations among other things. Further this email states that the “next and earliest date” for a meeting in respect of the matter is March 12, 2019, the principal continued by writing that he “will inquire if all the parties mentioned above are available for the proposed date in the interim of awaiting” my reply. I have taken this to mean that even the proposed meeting date of March 12, 2019 has not been confirmed by the principal insofar as school representatives are concerned*
- (ix) *I replied to email dated February 25, 2019 by way of two emails each dated February 27, 2019 which form part of the email chain annexed hereto and marked “JA 2” for identification. My emails speak for themselves to (a) communicated opinion as to the unacceptability of the treatment of the matter (b) my desire that the school contact my representative as a matter of urgency, and (c) intention to resort to formal channels should the school fail to respond appropriately.*

Dr. Dyer’s email dated February 24, 2019 refers to two other letters which I do not believe are connected with the matter of whether or not the school has consented to photograph or video my daughter. The said email fails to account for why a serious matter is being

treated with such delay. One of the two other letters I sent to school are described by Dr. Dyer in email dated February 25, 2019 as "Letter to Ms. Edwards regarding an at home scenario with Elina". Copies of the said letters are annexed hereto and marked "JA 3" and "JA 4", respectively, for identification.

As at March 4, 2019 the school has made no further contact with me or any representative of mine in respect of the matter".

[16] When I examine the Affidavit that was in fact served on the 1st Defendant, in spite of the heading, there is a clear indication that it relates to the Amended Fixed Date Claim as it carries the same claim number, and the parties named are the same as on the Fixed Date Claim Form. When I examine the Amended Fixed Date Claim certain facts and relevant allegations on which the Claimants intend to rely are not included therein. That is, the allegations that the 3rd Defendant told the minor child not to tell her father about the taking of some of the pictures and videos. Therefore, there would have been a necessity to file and serve an affidavit with the Amended Fix Date Claim Form to include this information. This information is contained in the Affidavit that was served. Both sides agree, that this affidavit was in fact served with the Amended Fix Date Claim Form. Counsel for the Applicant contends that the fact that this affidavit is headed "*Affidavit In Support of Application for Court Orders*", it cannot be treated as an affidavit in support of the Fix Date Claim Form. Therefore, the Claimants have failed to comply with Part 8 of the Rules.

[17] However, in light of the fact that the Applicant was served with an Affidavit with the Amended Fixed Date Claim Form, which includes the information required to be served with the Fixed Date Claim Form, I must now decide whether it was absolutely necessary for the Applicant to be served with an affidavit headed "***Affidavit in Support of Amended Fixed Date Claim Form***". I must make this determination, by first determining the purposes of the rules under examination, always bearing in mind the objectives of these rules. **Rule 1.1** states "*These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.* **Rule 1.2** states "*The court must seek to give effect to the*

overriding objective when interpreting these rules or exercising any powers under these rules” In this regard I now examine the purpose of the Rules in part 5 and 8.

[18] On my examination of the contents of Rules, **8.1, 8.2. 8.8 8.9**, I discover that there is a cumulative intent for all of the fact on which a Claimant intends to rely to be clearly stated in the documents initiating the claim. In the event that all the information or facts or the sum total of these facts, are not included in the Fixed Date Claim Form (or Claim Form) they should be included in the particulars of claim or the affidavit. Therefore, the purpose of the Rules in my view is more concerned with substance over form. Hence the reason why the general the rule for the serving of both the Fixed Date Claim Form and Affidavit (or Particulars of Claim) would not apply where a single document, that is the Fixed Date Claim contains all the information Specified in **Rules 8.8 and 8.9**

[19] In the affidavit that was served on the Applicant there is a clear outline of the allegations as they relate to the Amended Fixed Date Claim. The question I must address at this juncture is whether the Claimant would be required to file and serve an additional affidavit containing the same information substituting the heading “*Affidavit in Support of Notice of Application for Court Orders*” with “*Affidavit in support of Amended Fix Date Claim Form*”

[20] The requirement with regards to the service of the Affidavit is outlined in Rule **5.2 (3)** It states:

“In this Part reference to service of the claim form requires that -

(a) the particulars of claim; or

*(b) where these Rules so require, **an affidavit or other document**....*

must be served with the claim form unless the particulars of claim

is contained in the claim form.”

[21] The rule refers to “*an affidavit*”. Therefore, it is my view that where an affidavit is served along with the Fixed Date Claim Form with all the information required by **Rule 8.9** the Claim is not rendered null and void due to the absence of the heading “*Affidavit in Support of Fixed Date Claim Form*”. However, for completeness and the avoidance of controversy, the Claimants could have indicated that they intend to rely on this affidavit in support of the Amended Fix Date Claim Form and also the Notice Of Application For Court Orders. However, as I have previously indicated, it is my view that the absence of this statement does not at this stage render the amended Fixed Date Claim Form null and void.

[22] Additionally, I take this position in light of the provisions of **Rule 56.9** This rule specifically outlines the procedure for the application of administrative orders which includes application for redress under the Constitution. **Rule 56.9 (1) to (5) states that;**

“An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for -

- (a) judicial review;*
- (b) relief under the Constitution;*
- (c) a declaration; or*
- (d) some other administrative order (naming it), and must identify the nature of any relief sought.*

(2) The claimant must file with the claim form evidence on affidavit.

*(3) **The affidavit** must state –*

- (a) the name, address and description of the claimant and the defendant;*
- (b) the nature of the relief sought identifying -*

- (i) **any interim relief sought**; and
- (ii) whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;

(c) *in the case of a claim under the Constitution, setting out the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;*

(d) *the grounds on which such relief is sought;*

(e) *the facts on which the claim is based;*

(f) *the claimant's address for service; and*

(g) *giving the names and addresses of all defendants to the claim.*

(4) *The general rule is that the affidavit must be made by the claimant or where the claimant is not an individual by an appropriate officer of the body making the claim.*

(5) *Where the claimant is unable to make the affidavit it may be made by some other person on the claimant's behalf but must state why the claimant is unable to make the affidavit."*

[23] In light of the above provisions, and in particular **Rules 56.9 (2), 56.9 (3)(b)(i)** and **(ii)** which relate directly to applications for administrative orders which includes proceedings under the constitution, it is clear that in relation to these matters the affidavit can contain evidence relating to both interim and substantial

relief. On this interpretation there is no necessity to file two affidavits where all the necessary evidence is contained in one.

Whether the Claimant has Complied with the Procedure for The Appointment of a Next Friend.

[24] **Rule 23.3** indicates that:

(1) *“A minor or patient must have a next friend in order to issue a claim except where the court has made an order under rule 23.2(2).*

(2) *A person may not -*

(a) make any application against a minor or patient before proceedings have started; or

(b) take any step in proceedings except -

(i) issuing and serving a claim form against a minor or patient; or

(ii) applying for the appointment of a next friend under rule 23.8, until the minor or patient has a next friend”.

[25] **23. 6** and **7** outline the procedure for becoming a next friend without a court order. **Rule 23.6** states that:

“A person may act as a next friend if that person -

(a) can fairly and competently conduct proceedings on behalf of the minor or patient; and has no interest adverse to that of the minor or patient”

[26] **Rule 23.7**, states:

(1) *“Where the court has not appointed a next friend, a person who wishes to act as next friend must follow the procedure set out in this rule.*

(2) A person authorised under the Act must file an official copy of the order or other document which constitutes that person's authorisation to act.

(3) Any other person must file a certificate that that person satisfies the conditions specified in rule 23.6.

*(4) A person who is to act as a next friend for a claimant must file –
a) the authorisation; or*

(b) the certificate under paragraph (3), at the time when the claim is made.

*(5) A person who is to act as a next friend for a defendant must file –
a. the authorisation; or
b. the certificate under paragraph (3), at the time when the next friend first takes a step in the proceedings on behalf of the defendant.*

(6) The next friend must -

- c. serve a copy of the certificate under paragraph (3) on every person on whom in accordance with rule 5.10 (service of claim form on minors or patients) the claim form should be served; and*
- d. file an affidavit of service”.*

[27] The Counsel for the Applicant submits that:

The 1st Claimant is a minor and as a minor she is not allowed, without a court order, to bring or conduct this hearing on her own. No application was made pursuant to **Rule 23.8** which outlines that a person wishing to be appointed next friend of a minor ought to make an application, supported on affidavit, to this court seeking an order to be appointed. An Amended Fixed Date Claim Form was filed, and no certificate was filed and served separately upon the Defendants in this Claim. Therefore, the claim ought not to be permitted to stand

[28] Counsel for the Claimant points out that the certificate of next friend was in fact filed with the Amended Fixed Date Claim Form and served on the Defendant. However, I must refrain from treating counsel's submission as evidence. That is, there ought to be evidence in support of this submission. On my perusal of the statement of case of the Claimants a certificate of next friend was in fact filed with the Amended Fixed Date Claim Form on the 8th of March, 2019. However, the affidavit of service does not indicate that the certificate of next friend was served. Therefore, whereas there was no bar to the issuing of the Amended Claim Form as **Rules 23.3;23.6 and 23.7 (1) -(5)** appear to have been complied with; it appears that **Rule 23.7 .6** has not been complied with.

[29] **Rule 26.3 (1) (a)** clearly gives the court the discretion to strike out a statement of case where it appears that a rule has not been complied with. It states:

“In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -

“that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings”

[30] However, the current state of the law in this area is that striking out should only be applied in the obvious cases.(See **S & T Distributors Limited and another v CIBC Jamaica Limited and another (unreported)**, Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007)It is my view that the failure to serve the certificate of next friend or the absence of the evidence of service in the circumstances, is voidable , subject to a court ordering otherwise .This is in light of **Rule 23.3,(4)** which reads ;

“Any step other than an application -

(a) under rule 23.2(2);

(b) *for the appointment of a next friend under paragraphs (2)(b) or (3), taken before a minor or patient has a next friend is of no effect **unless the court otherwise orders***".

[31] An examination of the documents on the file indicates that the Certificate of Next Friend was filed with the Amended Fixed Date Claim Form. It bears the same date as the Amended Fixed Date Claim Form and was Filed on the same date as The Amended Fixed Date Claim Form. There is evidence on both sides that the Amended Fixed Date Claim Form was in fact serve. Therefore, in these circumstances I do not detect a deliberate intention to disregard the rules or an obvious neglect on the part of the Claimants. The failure to comply appears to be inadvertence on the part of the Claimants. The circumstances outline does not present an obvious case for striking out. Therefore, I order that the steps taken in the Amended Fix Date Claim Form in the absence of the evidence of service of the Certificate of Next Friend are not invalid. I will make subsequent orders for service after I have outlined my decisions and reasons on the other aspects of this Application that are in issue

[32] Incidentally, I notice that there is an omission in relation **Rule 56.9 (4)** and **(5)**. **Rule 56.9 (4)** states that:

"The general rule is that the affidavit must be made by the claimant or where the claimant is not an individual by an appropriate officer of the body making the claim".

[33] **Rule 56.9 (5)** states that: *"Where the claimant is unable to make the affidavit it may be made by some other person on the claimant's behalf but must state why the claimant is unable to make the affidavit"*.

[34] The above mentioned rules clearly permit The 2nd Claimant to depone on behalf of the 1st Claimant. However, he must state in his affidavit why the 1st Claimant is unable to make the affidavit. This information in clearly missing from the 2nd Claimant's affidavit. However, in light of the fact that this point was not raised by

counsel for the Defendant, Counsel for the Claimant did make an oral application for permission to file a Supplemental Affidavit, there is no specific sanction for failure to comply with the above mentioned rules; it is my view in these circumstances, that this defect is not fatal to the claim. Additionally, provisions within **Rule 56.13** give the court certain powers at the First hearing of the Fixed Date Claim Form. These provisions read as follows;

56.13 (1) *At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.*

(2) *In particular the judge may -*

(a) *make orders for -*

(i) *witness statements or affidavits to be served;*

(ii) *cross-examination of witnesses;*

(iii) *disclosure of documents; and*

(iv) *service of skeleton arguments;*

(b) *allow the claimant to -*

(i) *amend any claim for an administrative order;*

(ii) *substitute another form of application for that originally made”;*

[35] Additionally, **Rule 26.9** gives the court a general power to rectify matters where there has been a procedural error, where there is no sanction provided in the rules for the particular error. It reads:

“26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party”.

[36] In light of the above mentioned provision the court is empowered to make orders for the filing of a supplemental affidavit to include this information required by Rule **56. 9**. This will essentially cure the defect that I have identified. Therefore, as it relates to procedure I take the position that the Amended Fixed Date Claim Form does not fail.

Whether the Claimant’s Statements of Case discloses any reasonable Grounds for bringing the Claim.

Submissions

[37] On this above mentioned issue counsel for the Defendant submits that;

- (i) The Fixed Date Claim Form fails to disclose any reasonable ground for bringing the Claim pursuant to. **Sections 13 (3) I ii and iii** and **13 (3) k** of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment)** Act 2011 in that it failed to disclose that:

- (a) the 1st Claimant had a reasonable expectation of privacy while in a class room with other students which is located on the premises operated by the 1st Defendant.
 - (b) Any photographs or video's containing the image of the 1st Claimant has been published on any social media platform or any other medium by the 1st Defendant nor its agent or servants.
- (ii) Privacy in the home is strictly and specifically protected under the Charter. However, when persons are outside of their home, it is the dissemination/communication of private information which is protected by the Charter. A common feature in the Anglo-American formulations of privacy protection is the concept of 'private facts'. In the United States, where the tort of invasion of privacy is recognized, it has been established that a truthful publication which does not commercially exploit someone's name or likeness is only actionable if it reveals matters which are 'private'. The test for breach of private rights is a reasonable expectation of privacy. (She refers to the case of **Campbell v MGN Ltd [2004] UKHL 22,**)
- (iii) A picture taken at school by a person who is a member of that school cannot amount to a breach of privacy which the constitution would have contemplated. Upon examination of cases across multiple jurisdictions, not one single case could be located in which the courts held that such a breach had occurred in the absence of a publication of the photograph even where the picture is taken without expressed consent from the Claimant. Publication is defined as:
- (a) *The action of making something generally known;*
 - (b) *The act of offering something for the general public to inspect or scrutinize. (She refers to the case of **Weller and others v Associated Newspapers Ltd [2016] 3 All ER 357**).*

- (iv) The Claimants' statement of case has failed to divulge that the 1st Claimant suffered any injury or loss as a result of the allegations made against the Defendants. There is nothing to guide the Court to practically assess the damages claimed. The claim discloses no reasonable ground for bringing the claim. Therefore, the claim should be struck out. (She also refers to the case of **James Brown v Karl Rodney and others [2017] JMSC Civ.**)

[38] Counsel Ms. Nancy Anderson gave the following responses on behalf of the Claimant;

- (i) There are admissions by the Defendants which support the Claimant's request for restraint, particularly in view of the First Defendant's 'culture' of taking photos and video images without informing parents or requesting and receiving their consents. It is clear that no written consent was obtained for the enactment of this 'custom' nor has any written policy been exhibited. The issue before the Court is whether this is in breach of the Claimants' rights to privacy and family life. The admissions indicate that there is the possibility that other photographs and video-recordings may have been taken of the First Claimant without the Second Claimant's permission, as a part of the "school's culture". **Section 13 (3) (j) (ii) and (iii)** of **The Jamaican Charter of Fundamental Rights and Freedoms** explicitly contain a right to privacy
- (ii) Privacy is a very profound and foundational right that permeates and enhances all other human rights. *"It is founded on the autonomy of the individual and the right to make choices is at the core of human personality. Its inviolable nature is manifested in the ability to make intimate decisions about oneself with legitimate expectation of privacy. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the*

*human. The Jamaica privacy provision does not have the word 'unreasonable' in section 13 (3) (j) (i) which emphasizes how extensive the legislature intended the right to privacy to be. The Jamaica Charter is saying to all concerned that privacy rights must be taken very serious. The privacy right is an absolutely foundational right and includes the right to be left alone, be anonymous, unless there is some compelling reason for coercive measures being used to demand of Jamaican citizens that they must give up private and personal biometric information to anyone including the state. In substance, privacy means freedom from intrusion. It is an element of human dignity which is protected by the Charter and therefore must be protected by the Courts. Privacy recognizes the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so, privacy. (She refers to the recent decision of the **Robinson v AG [2019] JMFC Full 04**)*

- (iii) The Claimants in this case are seeking to establish that their right to privacy has been violated. It is admitted that at least one photo was taken without their consent. There is evidence of a likelihood that, due to the Defendants' 'custom', their right is highly likely to be contravened. In relation to education in Jamaica no policy document on privacy has been revealed. In New Zealand, the policies are worded to the effect that students and parents need to know that you wish to take photographs and video images, why and where the images will be published and who will have access to them and to also give prior notice with the ability for them to decline. This is similar to the measures requested by the Claimants to be put in place for the protection of their privacy and family life.
- (iv) The Defendants/Applicants cannot demonstrate that the claim is unsustainable and bound to fail. This is therefore not a proper case for the court to strike out the claim and this is an appropriate case for

constitutional relief under **section 19** of the Charter. **Part 26.3 (1)** of the **Civil Procedure Rules** provides that the court may strike out a statement of case or part of a statement of case if there has been a failure to comply with a rule, practice direction or order or direction. It is settled law that the power to strike out is one that should be used sparingly and only in the clearest cases which are plain and obvious, where it is clear beyond doubt that the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable. The striking out of a case is to be ordered by the court's discretion, as a measure of last resort. Striking out ought not to be used as an instrument of punishment, for example, the failure of the opposing party to comply with a particular rule of the court, on a single occasion. (She refers to the case of **Smith and Another v J.N. Small Business [2016] JMSC Civ 175**)

(iv) The claim raises serious issues of fact and law to be tried. It is not bound to fail as it amounts to more than a mere allegation. Under **section 19** of the **Constitution**, in order to invoke your right under **section 13 (2)** by way of a claim the "Claimant must show that his or her right has been violated or is likely to be violated". The burden of proof is on a balance of probabilities but at the lower end of the scale since this would enable any Claimant to have the full and best possible protection guaranteed by the fundamental rights and freedoms. The starting point for the court is always that the fundamental rights and freedoms are not to be restricted and are to be given their fullest meaning having regard to the words used. The standard of proof for the violator is on the balance of probabilities but on the higher end closer to the fraud end of the spectrum of proof. (She again refers to the case of **Robinson v AG, Supra**)

ANALYSIS

[39] The substantive claim surrounds the issue of the photographing and videoing of the 1st Claimant, a minor child, and student of the School of the 1st Defendant without the consent of the parent, the 2nd Claimant. Whereas there is denial of the allegations in relation to many or any other photograph, the 3rd Defendant, Ms. Taylor in her affidavit filed on behalf of the 1st Defendant has admitted taking at least one photograph. There is admission that Ms. Taylor was at the relevant time and now is a teacher at the school of the 1st Defendant. Therefore, there is material on which a trial court can find that at the material time the 3rd Defendant was acting as the agent of the 1st Defendant. Some of the issues that a court will have to address in relation to the substantive claim are;

- (i) Whether the taking of that one photograph amounts to breach of the Claimants' right guaranteed by **s. 13 j (ii) and (iii)** of the Constitution. That is, whether the taking of an individual's photograph, in a group or singularly without the prior knowledge and consent of the individual, amount to a violation of the right to privacy.
- (ii) Whether, the extent of this constitutional protection, extends to a right of choice not only to the taking of the photograph but also its use.
- (iii) Whether by enrolling in the school the parent and child are deemed to have accepted all the practice and policies of the school. That is whether this amounts to implied consent.

[40] Despite the fact that there exists traditional practice and policies within the school community, that many Jamaicans citizens have never questioned or challenged a relevant issue is whether, this precludes an individual from objecting to these practices by virtue of his or her belief that they violate a right given to him or her under the constitution. I take note of the fact that Counsel for the Defendant submits that, it is the tort of the breach of privacy that is enshrined in the

constitution. She also raised the issue that when one is outside the home it is only the dissemination or communication of private information that is protected.

[41] However, Ms. Taylor indicates that the photograph she took was taken on her cell phone of a group activity of integrated studies. She further indicated that the 1st Claimant was one of five (5) students included in that photograph. She went on to say that it was the school's custom to take such photographs, for open day or other school events, to showcase photographs of various class activities in which the students have participated; and that 2nd Claimant did not indicate that he had any concerns. It is also her evidence that in the past photographs have been viewed by representatives from the Early Childhood Development Department of the Ministry of Education and displayed at Open Day; an event that is done for the benefit of the parents

[42] In light of these assertions of the 3rd Defendant, it is open to a trial court to find that the reason for taking the photograph was not limited to educational purposes between students and teachers but also for "Open Day". Therefore, another question to be determine by a trial court is whether the display on "Open Day" could be deemed as publication as other members of the public who are neither students nor teachers nor members of the particular educational institution, that is other parents have access to the image of the 1st Claimant without consent.

[43] Counsel for the Defendant has indicated she could not locate authorities in this Jurisdiction that addressed the constitutional issues raised in the claim. Consequently, she he had to resort to other jurisdiction to find persuasive precedents. In the case of **Campbell v. MGN Limited**, [2004] UKHL on which counsel for the Defendant relies, the court determined that the issue to be decided was whether the Claimant had a reasonable expectation of privacy in circumstances where she sued a media company for publishing an article to include a photograph about her and the use of drugs. The Claimant in that case was a celebrity who had given previous public interviews to media houses. She made public assertions through these media houses that unlike many fashion

models, she did not take drugs. However, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated. The information that was published related to of Miss Campbell's drug addiction; and the fact that she was receiving treatment; and details of that treatment. There was also a photograph of her leaving a meeting with other drug addicts. It was within that context that the court was asked to decide whether the information that was published was indeed private. It was argued before the court that by repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private.

[44] The House of Lords agreed with the Court of Appeal that “where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight: (See paragraph 21-24 of the Judgment of the House of Lords and the page 658 of Judgment of The Court of Appeal ;[2003] QB 633, 658.)However, it is also important to recognize the legislative provision that was applicable to the circumstances and relevant facts that were before the court in that case. This information is to be found in paragraphs 20 and 21 of that Judgment which reads;

“Article 8(1) recognises the need to respect private and family life. Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. Article 10(1) recognises the importance of freedom of expression. But article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life.

*Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the **disclosed facts the person in question had a reasonable expectation of privacy** (emphasis mine).*

[45] In that case the court had to address and balance the competing rights of the Claimant and that of the media house. Consequently, the reasonable expectation of privacy test was applied. At paragraph 24, of the Judgment the House of Lord found that It was common ground between the parties that in the ordinary course the information in all categories in which it was placed would attract the protection of article 8. However, the court appeared to agree with the position that 'public lies' precluded the Claimant from claiming protection for the categories.

[46] The following provisions of the Jamaican Constitution would be comparable and relevant provisions in addressing the issues in relation to the scenario outlined in the case of Campbell *v. MGN Limited*. These are:

Section 13 (1) (c) and 13 (.3) (c) and (d) of the Constitution of Jamaica, the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011; Section 13. (1) (c) states;

“All persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter. The following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

Sections 13. (3) (c) and (d) (3) state

“The rights and freedoms referred to in subsection (2) are as follows;

(c) the right to freedom of expression;

(d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;

[47] It becomes apparent, on a reading of these provisions, that the privacy rights afforded under the Jamaican Constitution are not necessarily absolute. They are subject to the rights of others. In this Application, the Defendant has not specifically raised the issue that the act complained of is one that is also a guaranteed right under the constitution. However, even if they did, where the court has to deal with the issue of competing rights it is my view, that it is only a trial court that should ultimately determine the issue of proportionality in order to arrive at a decision as it relates to infringement.

[48] In reviewing the relevant sections of the Constitution on which the Claimants rely; some relevant questions come to mind with regards to the interpretation of these provisions. These are (i) whether on a proper construction of the provision of **Section 13 (3) (j) (ii), and (iii)**, the protection offered by the provisions are twofold. That is whether with regards to family life and property in relation to **Section 13 (3) (j)(ii)** the protection is limited to the environs of the home. As it relates to **Section 13. (3)(j)(iii)**, whether the right to the protection of the privacy of “other property” is guaranteed by virtue of its very nature, of being the private property of the citizen, thereby restricting public access to it; as also the right to prevent the dissemination of information in relation to “other property” outside of the home without the permission of the citizen. That is whether though physically in a public space, a citizen, retains the right of access to her image, and thereby has a right or a choice to object to his or her photograph being taken.

[49] Bearing in mind that issues of conflict on the evidence are to be determined at a trial, at this stage the questions I need to address are

:(i) Whether there are clear, established principles of law derived from judicial pronouncement on the aforementioned issues;

(ii) Whether these principles have become trite law so that any juxtaposition between the claim and these principles engenders a pellucidity, that the Claimants' case is bound to fail.

[50] Counsel for Defendant has not denied that, there has been limited judicial pronouncement on similar issues involved in the substantive matters of the claim. However, when one examines the allegations in the Claim in light of the recent decision in the case of **Julian Robinson v The Attorney General of Jamaica [2019]** JMFC Full 04 relied on by counsel for the Claimants, it becomes patently clear that in the instant claim there are serious issues to be tried. In the case of Julian **Robinson v The Attorney General of Jamaica** the court was called upon to decide whether or not certain provisions of the **National Identification and Registration Act** were likely to violate certain of the Claimant's rights under the Constitution of Jamaica.

[51] **The National Identification and Registration Act** was passed on December 8th 2017, awaiting for gazette date to be brought into operation. One of the stated objectives was to:

“facilitate the collection and compilation analysis, abstraction and publication of statistical information relating to the commercial, industrial, social, economic and general activities and condition of citizens of Jamaica and individuals who are ordinarily resident in Jamaica;”

[52] **Section 20** of the afore-mentioned legislation mandated registration of citizens and ordinary residence and made the failure to register a criminal offence. Part B, of the third schedule stipulated the core biometric information that were to be collected and must be included in the Database. Item 1 defines biometric

information to include the photograph of facial image of the individual. Therefore, the effect of the relevant provisions was that a choice with regards to the collection, storage and usage of the individual's biometric information to include photographs was essentially taken away by the State. Some of the issues that the court had to discuss and determine related to this compulsory collection storage, and use of biological and biometric information of the individual and how these processes would affect the rights of the Claimant guaranteed by **S. 13 (3) j (ii) and (iii) of the Charter of Fundamental Rights and Freedom in the Constitution of Jamaica**. In his discourse on the impact of the relevant provisions of the legislation on the aforementioned rights, Chief Justice Sykes made the point that the privacy that is protected in the relevant provisions of the constitution includes the privacy of choice. At Paragraph [247]. (B) (4) and 248 of that Judgment he said:

*“Let me say at the outset that I adopt the taxonomy established by the Supreme Court of India regarding the right to privacy in the **Puttaswamy** case (August 24, 2017). I accept that the wording of the right in Jamaica embraces privacy of the physical person, informational privacy, and **privacy of choice**”. (my emphasis)*

[53] Chief Justice Sykes also examined the Canadian perspective on the issue of the privacy rights. At paragraph 26(B) (29) he observed that between 1998 and 2014 the Canadian Supreme Court refined its analysis of the informational privacy right to such an extent that it could make bold proclamations in the case of **R v Spence [2014] 2 SCR 212**. A portion of that judgment reads;

*“Westin identifies anonymity as one of the basic states of privacy. Anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance: pp. 31-32;(see A. Slane and L. M. Austin, “What’s in a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations” (2011), 57 Crim. L.Q. 486, at p. 501. The Court’s decision in **R. v. Wise, [1992] 1 S.C.R. 527 (S.C.C.)**,*

*provides an example of privacy in a public place. The Court held that the ubiquitous monitoring of a vehicle's whereabouts on public highways amounted to a violation of the suspect's reasonable expectation of privacy. It could of course have been argued that the electronic device was simply a convenient way of keeping track of where the suspect was driving his car, something that he was doing in public for all to see. But the Court did not take that approach. (extracted from the judgment of Chief Justice Sykes in case of **Julian Robinson v The Attorney General of Jamaica [2019] JMFC Full 04** at paragraph 246(B) (29))"*

[54] At paragraph 246 (B) (30) in the case of **Julian Robinson v The Attorney General of Jamaica (Supra)**, commenting on the Canadian Charter and the above -mentioned discourse in the case of **R v Spence(Supra)** Chief Justice Sykes said;

"So there it is. All this in a Charter without an express right to privacy. How much more so that these observations are apposite to a Charter that has an express privacy provision".

[55] He further stated at paragraph 250 that the

"Compulsory taking of biographical and biometric data is a violation of privacy rights under section 13 (3) (a), (j) (i), (ii) of the Charter. Therefore, section 20 of NIRA violates 13 (3) (a), (j) (i), (ii) of the Charter".

[56] At paragraph 350, Justice Batts states that,

"The collection of biometric data categorized in B1, B2 and B3 all involve an infringement on the privacy and security of the person rights. B1 describes core biometric information that must be included; the photograph or other facial image of the individual, the fingerprint of the individual, the eye colour of the individual and the manual signature of the individual. B2 outlines core biometric

information that may be included in the database: the retina or iris scan, the vein pattern, if either of them cannot be had then, the footprint, the toe print and the palm print of the individual. B3 outlines other biometric information as any distinguishing feature including physical features of the individual and the blood type of the individual. Manifestly, provisions that mandate verification of such information will necessitate an impact to security of the person and privacy. One may ask how, for example, is a blood type to be verified except by the collection and testing of blood. The collection of biometric data categorized in B1, B2 and B3 all involve an infringement on the privacy and security of the person rights.

- [57] Essentially. I form the view that it is necessary for a trial court to make pronouncements as to whether the same principles stated in the **Robinson** case would apply to the issue of choice in relation to the taking and use of a student's photograph by the authorities in the school community.
- [58] It may very well be argued that because the 1st Claimant has voluntarily placed herself in a space, occupied and operated by the 1st Defendant School, allowing her image to be viewed by that particular section of the public, that can be construed as her choice to give that particular sector of the public access to her image. However, in my view, this is not a settled position in our jurisdiction at this stage. It is only an argument or a position that a trial court may accept or reject. The next question is the extent of the permission in relation to view of the 1st Claimant's image. That is whether the permission to view in the absence of any further permission can be extended by the viewer to permission to collect, to keep, and reproduce, and view at their pleasure and convenience even when the Claimant's wish is that the image be no longer available to them. That is, does consent to view automatically translate into consent to record and retain. Despite the fact that there is an assertion on behalf of the 1st Defendant that the 1st Defendant never assumed the responsibility of guarding the image of the students, at the time the image was taken it was taken by a teacher Ms. Taylor

during class activity. Therefore, in these circumstances a court is likely to find that at the relevant time Ms Taylor was acting as the agent of the 1st Defendant. In light of that a court can determine that the actions of Ms Taylor are the actions of the 1st Defendant.

[59] The issue as to whether more than one images were taken turns on the credibility of the parties. Additionally, the issue as to whether the 1st Claimant was instructed by the 3rd Defendant not to tell her father about the alleged taking of these photographs and videos is a matter of credibility for a trial court. If as a question of fact the court were to find that Ms Taylor took more than one photographs or videos the issue would have to be resolved as to whether or not, it was for any educational purpose. This is in light of the denial that they were taken, and the allegations that the child was instructed not to tell her parent that they were taken. Any finding of an attempt to conceal the information may be a basis of drawing an inference that the photographs and videos were intended to be used for purposes other than those related to education. The court would also be at liberty to grant the injunction sought in relation to the possession, use and publication of these videos or photographs. That is in the event that the court found that any consent that existed in terms of use was limited to educational purposes. At this stage I recognize that there is no affidavit evidence from the minor child. However, the proceedings are still at the interlocutory stages. There is still time for orders for all affidavits to be filed. If after such orders are made no affidavit evidence is forthcoming from the child there may be a basis to strike out a portion of as it relates to the taking of photographs and videos on several occasions.

[60] However, the fact that the 3rd Defendant admitted taking one photograph, there would still be an issue for a court to determine. That is whether this amounts to a breach of the right guaranteed under **sections 13 (3)(j) (ii) and (iii) Constitution of Jamaica and the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011**. A teacher taking photographs of her students during an activity, on the face of it may appear harmless. However, it

may very well be held as a violation of a human right. In some cultures, and religions, for example the Amish, there is a belief that photographs are "graven images" and considered a sin. Considering the diverse culture of Jamaica, any one or more of the students enrolled could share this similar belief. One could not then say that because of a basic 'culture' of taking photographs in school constitutional protection should not be preserved.

[61] If one were to adopt defence counsel's approach and examine the development of the law in other jurisdictions the state of Illinois in the USA has recognized the individual's right to privacy of not only the publication but also the collection and storage of private information. In 2008, the state of Illinois implemented the **Biometric Information Privacy Act**. By virtue of this legislation private organizations are precluded from collecting, capturing, purchasing, or receiving, whether through trade or other means a person's biometric identifier or biometric information unless certain conditions are satisfied. These conditions include, (i) informing the person in writing that their biometric identifier is being collected or stored, (ii) the purpose for the collection (iii) and the duration of the storage. Additionally, the organization must obtain consent for disclosure; develop a publicly available written policy about a retention schedule and the destruction of biometric identifier. It is worthy of note that the Act defines a biometric identifier as a "*retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry.*"

[62] The parameters of this legislative provision and whether the protection extended to the collecting, capturing, purchasing, or receiving of the photographs of individuals was tested in 2017 in the case of ***Monroy v. Shutterfly, 16 CV 10984 (N.D. Ill. September 15, 2017)***. Shutterfly operates websites that allow users to upload, and share digital photos. The company stores maps of face geometry in its database. A photograph of the plaintiff was up loaded, with the plaintiff's name tagged, and stored in the company's data base without the plaintiff's consent. There was a similar application as in the instant case urging the court to dismiss the Plaintiff's claim at the preliminary stages. The court found, inter alia that, biometric identifiers covered by the relevant legislation include information from

photographs, and that there was enough to find that the information was collected and stored in cyber space.

[63] In all the circumstances and in light of the contending views in the instant Claim, I find that there are conflicts to be resolved between the parties on the issues identified. It is not for me to resolve the conflict on the evidence between the parties. It is the purview of a trial court. Additionally, in developing our local jurisprudence, I am of the opinion that there should be judicial pronouncement in our courts on the issues identified. The courts may very well be persuaded by the persuasive authorities presented by the Defendant. However, I take the position that the most suitable arena for this to take place is not during interlocutory proceedings but in a trial court.

DAMAGES

[64] Counsel for the Applicant has taken the position that the claim is defective as it lacks any evidence of damages. I examine these protestations against the background of S. **19 of the Constitution of Jamaica**. The section clearly indicates that in order to invoke a right under **section 13** by way of a claim under the constitution the Claimant must show that his or her right has been violated or is likely to be violated. The case of **Robinson** clearly indicates that a Claimant does not have to prove damages in order to receive a prohibitive injunction. That is he can approach the court in the absence of injuries where his right is not yet breached once he can demonstrate to the court that the right is about to be violated. The Amended Fixed Date Claim Form and the affidavit contain sufficient information on which the court can grant the injunction that the Claimants seek, despite the fact that they are also seeking other consequential orders. Essentially the Claim would not necessarily be void due to a lack of sufficient information in relation to some of the reliefs claimed.

[65] In the case of **S & T Distributors Limited and another v CIBC Jamaica Limited and another (unreported)**, Court of Appeal, Jamaica, Supreme Court Civil

Appeal No 112/2004, judgment delivered 31 July 2007. Harris JA, at page 29 of the judgment, opined that “*The striking out of a claim is a severe measure*”, and that “*the striking out of an action should only be done in plain and obvious cases*”. In the case of James ***Brown v Karl Rodney and others [2017]*** JMSC Civ. Justice Anderson, in recognition of this principle stated at paragraph 12 that:

“The defence counsel and the defendant may be of the view that to strike out the claimant’s claim would be a fair and just way to dispose of the claim, without this matter proceeding to trial. It would only though, be fair and just to do so, if this is a plain and obvious case, in respect of which, the claimant’s claim should be struck out”

[66] Further at paragraph 37 he stated that “to put it at its highest, the claimant’s amended statement of claim, is confusing”. However, in the instant case I do not find that a state of confusion exists. As it relates to the substance of the claim I find that this is not a plain and obvious case for me to exercise my discretion under ***Rule 26(3)*** to strike out the claim. (See also Rochlani (***Raj***) v ***Jamaica Mortgage Bank Ltd [2011] JMCA Civ 27***) It is my view that there are serious constitutional issues to be determined by the trial court.

Whether the Second Claimant has any Locus Standi to bring the Claim

[67] Counsel for the Applicant submits that the Amended Fixed Date Claim Form in its present form cannot stand. She posits that the second Claimant cannot bring a claim in his personal capacity as there are no allegations of pictures being taken of him. There are no allegations of breach of his personal constitutional rights. On my perusal of the Amended Fixed Date Claim Form and the affidavits, the issue surrounds the photographing and videoing of the 1st Claimant. I agree with counsel for the Applicant that there is nothing on the allegations to indicate a breach of the 2nd Claimant’s constitutional rights. Therefore, whereas he is allowed to file an affidavit under ***Rule 56. 9*** on behalf of the 1st Claimant and

whereas he is allowed to file the Claim as next friend on behalf of the 1st Claimant, there is no basis for the Claim in the 2nd Claimant's personal capacity. Therefore I find that in its present form the Fixed Date Claim Form cannot stand. It is defective in so far as it does not reveal any alleged acts by the Defendants against the 2nd Claimant in his personal capacity nor any allegations of pictures being taken of him that would breach his personal constitutional rights.

[68] However, **Rule 26.3 (1)** gives the court the option to strike out a part of a statement of case instead of the entire statement of case. It reads:

“In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -

c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim”;

[69] Therefore, I take the position that the portion of the statement of case that relates to the 2nd Claimant as a party to the Claim in his personal capacity should be struck out.

CONCLUSION

[70] In light of the foregoing discussion I conclude that the Affidavit filed and served with the Amended Fix Date Claim Form is deficient only in so far as it fails to comply with **Rule 56.9**. I find that the Amended Fix Date Claim Form is defective in part. That is, in so far as the 2nd Claimant is named as a Claimant in his personal capacity. While there is evidence that the certificate of next friend was filed with the Amended Fixed Date Claim Form there is no evidence that it was served on the Defendant. In view of the court's decision in the case of **Julian Robinson v The Attorney General of Jamaica (Supra)** and the foregoing discussion, I find that there is sufficient on the allegations to form the basis of a trial before a constitutional court. That is for the court to make a determination as to whether

there was breach of the right to privacy, to include the right of choice, and more specifically whether there is a necessity for a prohibitive order for the protection of personal/private property, that is the image /photograph/video recording of the 1st Claimant. If court so finds, even in the absence of an award for damages the court is empowered to grant an injunction. Consequently, from my vantage point there is no basis for me to hold that the Claim is frivolous or vexatious and an abuse of the process of the court. Consequently, is my view that the Claim does not fail it its entirety.

ORDERS

[71] In exercising my powers under **Rules 26** and **Rules 56**, I make the following Orders. :-

- (i) The application succeeds in part. The portion of the Amended Fixed Date Claim Form as it relates to the Second Claimant in his personal capacity is struck out.
- (ii) The 1st Claimant is ordered to File and served Further Amended Fixed Date Claim Form reflecting the aforementioned order.
- (iii) Mr. Alder is ordered to file and serve supplemental affidavit on behalf of the 1st Claimant to include the information required in **Rule. 56. 9**. In that affidavit it should be indicated that the 1st Claimant intends to rely on that Affidavit and the Affidavit headed "*Affidavit in support of Application for Court Orders*" in support of the Further Amended Fixed Date Claim Form and the Notice of Application for Court Orders.
- (iv) The Claimant is to serve the Certificate of Next Friend on the 1st Defendant.
- (v) The 1st Defendant is permitted to files its Defence within 42 days from the date hereof.

- (vi) The Claim is to be served on The Attorney General.
- (vii) No order for Cost
- (viii) The Applicant is granted leave to appeal.