THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2015

CLAIM NO. SKBHCV2014/0002

BETWEEN:

KEVIN BURROUGHS

Claimant

And

ROSS UNIVERSITY SCHOOL OF VETERINARY MEDICINE, LTD.

Defendant

Appearances:-

Ms. Natasha Grey of Chesley Hamilton and Co. for the claimant
Mr. Emile Ferdinand Q.C with Ms. Keisha Spence of Kelsick, Ferdinand and Wilkin for the defendant

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2014: December 17
2015: June 30

JUDGMENT

[1] **CARTER J.:** This matter arises out of an incident that took place at the defendant's premises on the 13th July 2012. There is no dispute between the parties as to the how the incident unfolded. The defendant was at the material time a private medical school specializing in Veterinary Medicine at its compound at West Farm, St. Kitts. The claimant was on that date employed by the defendant as a Pasture Assistant/Large Animal Caretaker. Sometime during the morning of the 13th July, the claimant, in the course of his routine duties, was instructed to herd some thirteen (13) donkeys into the Donkey Surgery Holding Area. While the

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donkeys were in the holding area, the claimant began to remove individual halters from the faces of the donkeys.

[2] Whilst the claimant was attending to the last of the thirteen (13) donkeys, one of the other donkeys all eating from a bucket of pellets, unexpectedly turned around and started to kick the other donkeys also eating from the bucket. The claimant was still in the process of taking the halter off the face of the last donkey, when the kicking donkey kicked the claimant twice on his right knee in the area of his kneecap. The claimant's knee became swollen and he was taken to the Joseph N. France Hospital for medical attention.

[3] The claimant filed a fixed date claim form supported by a statement of claim on the 08th January 2014, in which he stated that this incident was caused solely by the negligence of the defendant, their employees or agents. The claimant particularized injuries received as a result of the incident as follows:

> *"<u>Particulars of Injury</u>*
> *(a) Pain and shock*
> *(b) Swollen right knee*
> *(c) Tear in the posterior horn of the medical meniscus*
> *(d) Tear in the anterior horn of the lateral meniscus"*

[4] At trial the claimant also described that:

> "*Since the incident at work, I have been severely limited in my daily activities and I have to use a walking stick at times in order to assist me in getting around. As a result, I have been unable to go back to work to carry out my duties with the defendant. I am unable to perform manual labour and as a young man, I am used to being active and my injuries have limited my mobility and I am no longer able to play sports. I am burdened financially as my expenses far outweigh my income.*
> *Throughout all this time whilst I am home on Leave, I have experienced pain and discomfort; some days are better than others. At times, the pain is so much; it makes it difficult to sleep at night."*

[5] The claimant further detailed the particulars of the negligence of the defendant as follows:

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"*Particulars of Negligence*

> *(a) Requiring the claimant to attend to donkeys*
> *(b) Causing or permitting the donkeys to be attended to without being secured*
> *(c)Failing to ensure that the claimant wore protective gear having regard to the nature of the work carried out*
> *(d) Causing or permitting the claimant to attend to the donkeys when they knew or ought to have known that it was not safe to do so*
> *(e) Exposing the claimant to a risk of damage or injury from unusual dangers of which they knew or ought to have known*
> *(f) Failing to take any or any adequate measures to ensure that the place where the claimant was engaged upon his work for the defendant was safe*
> *(g) Failing in all the circumstances to provide a safe system of work*
> *(h) The claimant will further contend that the fact that one of the donkeys kicked the claimant give rise to a presumption of negligence on the part of the Defendant."*

[6] The claimant's statement of claim disclosed that he sustained loss and damage as a result of the defendant's negligence and detailed special damages as well as further medical expenses. The claimant seeks the following from the defendant:

> *"(i) Damages.*
> *(ii)Interest pursuant to Section 29 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act, Cap. 3.11.*
> *(iii) Costs*
> *(iv) Any further or other relief the Court deems just and equitable."*

[7] Against this backdrop the issues which arise for the court's determination are as follows:

> (1) Did the defendant owe the claimant a duty of care?
> (2) What was the extent of the duty of care?
> (3) Did the defendant breach the duty of care owed to the claimant?
> (4) If the defendant did breach the duty of care owed to the claimant, is the defendant liable in negligence for the injuries and/or damage suffered by the claimant on the 13th of July 2012?
> (5) If the defendant did breach the duty of care owed to the claimant, what is the amount of the damages owed to the claimant by the defendant?

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Issue 1: Did the Defendant Owe the Claimant a Duty of Care

[8] Both parties agree that at common law, an employer has a duty to take reasonable care for the safety of its employees. This duty includes, but is not limited to, a duty to use reasonable care to provide a safe place of work and a safe system of work, to take reasonable care for the safety of their workmen or women. [1]

In *Clifford v Charles H. Challen & Son Ltd* [1951] 1 KB 495 at 497 Denning L.J stated:

> *'The question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself.'* ”[2]

The claimant was an employee of the defendant and the defendant did owe him a duty of care as above.

Issue 2: What is the Extent of the Duty of Care

[9] Both parties also agree that the duty owed by an employer is not an absolute one and that the duty may be executed by the exercise of due care and skill. Any breach of the common law duty may amount to negligence on the part of the employer if there was "*something that the employer should have done that he failed to do and thereby made himself liable to the employee for the loss and damage the employee had suffered*”.[3]

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[1] See Wilsons & Clyde Coal Co. v English [1937] 3 ALL ER 628 at 644 per Lord Maugham

[2] See also Winter v Cardiff Rural District Council [1950] 1 ALL ER 819 and Lester Anderson v Penngor Limited, Claim No. BVIHCV2011/0102, judgment dated 18th July 2012

[3] See The dictum of Mr. Justice I. D. Mitchell Q.C. (as he then was) in the Vincentian case of *Sharpe v. Gibson Construction Limited*, Civil Suit No. 492 of 1999, decided on 31st May 2001

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Issue 3: Did the Defendant Breach the Duty of Care owed to the Claimant

[10] The claimant pointed to a number of areas in which he asserts that the defendant breached the duty of care owed to him. The particulars are set out in full at paragraph 5 above. The claimant cites a number of areas in which he states that this Court is entitled to find evidence of the breach of the duty of care owed to him by the defendant, the result of these being that the defendant failed to provide the claimant with a safe place or system of work.

[11] Some of the aspects of the claim for negligence relied upon by the claimant are somewhat intertwined and this is reflected in the manner in which the written submissions were presented to the court. There are clearly two (2) main limbs of the claim, the first of which the court will refer to as the need for the issue of protective gear/clothing, and the other, the danger posed by the donkey as a big animal. However the court will deal with each aspect pleaded.

(i) The Need for the Issue of Protective Gear/Clothing

[12] The claimant's submission on this most relevant point was that the defendant's duty to provide a safe system of work was to ensure that it reduced the risk of injury to employees from foreseeable harm. The claimant submitted that he was never provided with protective wear to guard against injuries whilst carrying out his duties and that on the day in question he was therefore not wearing any protective clothing, which would have cushioned the blow that the claimant received from the donkey. The claimant was thereby placed in a harmful and hazardous situation.

[13] In written submissions to the court, Counsel for the claimant stated that this failure to provide the claimant with some form of protective gear, was sufficient for this Court to find that the defendant was negligent in not having provided a safe place or a safe system of work for the claimant. This failure to provide the relevant

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protective gear was sufficient evidence to illustrate that the defendant did not exercise the duty of care owed to the claimant to the relevant standard.

[14] Counsel also suggested that the defendant was also negligent in failing to take reasonable care for the safety of the claimant by causing him to come within kicking range of the donkeys without protective gear which could and did in fact cause the claimant serious injury. The defendant is therefore in breach of the duty owed to the claimant.

[15] The defendant refutes all the particulars of negligence advanced by the claimant. Specifically on this aspect of the claim, Counsel for the defendant submitted that there was no failure *to ensure that the claimant wore protective gear having regard to the nature of the work carried out* as alleged by the claimant. Counsel pointed to the fact that the only suggestion as to what "protective gear" was lacking, was a reference to cricketing pads, a suggestion that was first expressed in the oral testimony of the claimant at the trial. In particular, Counsel highlighted that there was no evidence to suggest that this is an industry standard or practice, or that the use of such gear would have made any difference with regard to the injuries sustained as a result of the donkey's actions.

[16] At the trial of the matter, the claimant gave evidence on his own behalf. His witness statement was tendered as his evidence-in-chief. On the issue of protective clothing, the claimant stated in his evidence-in-chief as follows:

> *"During my employment, the defendant has provided me with rubber boots, pants and shirts and gloves to work in, but has never provided me with any protective wear to guard against injuries whilst carrying out my duties.*

Significantly under cross-examination he stated clearly that:

> "*I was provided with leather boots and gloves which I used regularly."*

[17] The defendant relied upon the evidence of Dr. James Robinson to refute the claimant's submission. Dr. Robinson was the Manager of Animal Care and an

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Assistant Professor with the defendant at the material time. He was also the claimant's supervisor on the date of the incident. Dr. Robinson's witness statement was tendered in evidence as his evidence-in-chief and he was cross examined by Counsel for the claimant. Dr. Robinson was present at the time of the incident. His evidence on this issue of protective gear was that:

> *"Personal protective equipment including leather boots, gloves and clothing was always provided for use of the claimant when working at the defendant. No personal protective equipment would have protected the claimant from being kicked by the donkey in the manner in which he described to me that he was kicked and injured by a donkey on 13th July 2012."*

Under cross examination by Counsel for the claimant, he reiterated that:

> *"Personal protective equipment was always provided. The leather boots were 6 – 9 inches high, just below mid calf. Clothing was pants/shirts or coveralls. Gloves were also provided; nothing for the shin. It was not standard to provide anything for the shin area.*
>
> *The option of wearing cricket padding was never suggested. We do have hearing protection available and safety glasses are available.*
>
> *On the day in question, I recall he was wearing his boots but he probably would not have been wearing gloves to unbuckle the leathers.*
>
> *I am trained in veterinary medicine. No personal protective equipment standard issue for work with donkeys at Ross University or anywhere else would have normally been offered for working with donkeys."*

[18] The court notes that the claimant did not state in his evidence what other item of protective clothing/gear he expected the defendant to have provided him for protection against the donkey's kick. There was no evidence from the claimant, the only witness called in support of the claim, that there was an onus on the defendant to provide some specific item of protective gear to the claimant when he was interacting with the donkeys or that there was indeed a failure to provide some particular item of protective gear. There was no evidence that any specific item of protective gear could have prevented the claimant's injuries or that some specific item of protective gear was recommended for use by persons who were engaged in taking care of or interacting with donkeys or of the use of such gear as

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standard practice in the care of donkeys in St. Kitts and Nevis or elsewhere. There is no evidence of any protective gear/clothing being a necessary precaution when attending to the care of donkeys.[4] There is no evidence presented by the claimant that the defendant was under a duty to provide any other item of proper gear or clothing in all the circumstances of this case.

[19] Having considered the evidence of the claimant as well as that of Dr. Robinson, the court finds that the defendant did provide the claimant with proper gear and clothing during the performance of his duties. The court concludes that the claimant has not proved on a balance of probabilities that the defendant failed to "*ensure that the claimant wore protective gear having regard to the nature of the work carried out*."

(ii) Unusual Danger Posed by the Donkey as a Big Animal

[20] In written submissions presented at the end of the trial, Counsel for the claimant elaborated on the other aspects of the particulars of the negligence of the defendant. Counsel stated that as a donkey is a big animal, that there was "*danger that employees may be faced with*" and as a result that the claimant was in need of additional protection to safely carry out his duties. She cited this danger as a potential hazard that the defendant ought to have been aware of and ought to have taken steps to guard against. Her submission is that reasonable care for the safety of the claimant could have been catered for by providing at a minimum, some sort of protective clothing which would have acted as a shield in situations such as the one the claimant found himself in on 13th July 2012.

[21] Counsel for the defendant submitted that the claimant has not advanced any evidence to show that the defendant knew or ought to have known that it was not safe to permit the claimant to attend to the donkeys. Counsel pointed to the fact that this aspect of the claim had not been substantiated in either the pleading or

[4] See O'Caine Sharpe v Gibson Construction Ltd, St. Vincent & the Grenadines Civil Suit No. 492 of 1999

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the evidence adduced at trial as to what the knowledge was, that the defendant had or ought to have had in this regard and therefore submitted that this aspect of the allegation of negligence had not been proven.

[22] Likewise, Counsel for the defendant submits there is no evidence to support the allegation that the defendant knew or ought to have known of some "unusual dangers" which created a risk of injury to the claimant and stated again that neither the claimant's particular pleading, nor the evidence, specifies what the knowledge was that the defendant had or ought to have had in this regard.

[23] Counsel for the defendant submitted further that an assertion that donkeys kick is not an "unusual danger", but a commonplace fact of which the claimant admitted he was aware. The defendant's further submission is that this allegation of negligence was not proved by the claimant, as the kicking by donkeys is as much a known natural propensity as was the desire to mate by the donkey. Learned Counsel for the defendant referred the court to the case of ***McIntosh v McIntosh***[5] for support on this point.

[24] The court has already dealt with the issue pertaining to the claimant's duty to provide some sort of protective clothing above. The court notes in its consideration of this aspect of the claimant's submission, that the claimant advanced no evidence at trial to substantiate his assertion that the fact of the donkey being a big animal in and of itself, amounted to a danger to the defendant's employees and to the claimant. Rather, under cross-examination, the claimant's evidence was: "*I considered myself good at my job. The donkey that kicked me did not give me any prior warning that it would do that. It was a sudden event. The incident has not changed my attitude to large animals in any way*." Further he asserted that after the incident: "*I was prepared to continue to work but not as a large animal caretaker. My reason for that was not that I was fearful. It is not the first time I have been hit by an animal*." The court implies from this evidence that the

[5] (1963) 5 W.I.R. 398

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claimant himself, did not consider the fact of the donkey being a large animal amounted to such a danger, that he would not consider continuing to work with them even after the incident.

[25] It is critical for the court to closely examine the claimant's evidence on this point. The claimant gave very clear evidence in support of his claim against the defendant. He recalled the incident on the 13th of June 2012 in vivid detail and with regard to this issue, the breach of the defendant's duty of care in relation to whether there was a danger in the donkey kicking, stated that it was fair to say that on a daily basis he got up close to the donkeys. His evidence was: "*I fed them and watered them daily...I got up close and personal to them in my routine duties two to three times per week. My dealings with them included administering injections…You had to get close to administer injections.* ***Before I started work with Ross University, I knew donkeys kick and I knew this as a matter of common sense.*** (emphasis mine) *I learnt how to approach donkeys, the manner, from which side, there is a right and a wrong side. They teach us that. You should approach from the left and not the right. If approached from the wrong side it can be spooked and take off or kick. I learned that from the training videos and from another doctor."*

[26] Even given this evidence, Counsel for the claimant submitted to the court that the evidence of Dr. Robinson, the witness for the defence, was lacking in that he did not state in his evidence if the claimant was trained to deal with the donkeys when they are kicking. However, the evidence of Dr. Robinson was very similar to that of the claimant. Dr. Robinson clearly stated: "*Donkeys do kick from time to time and Mr. Burroughs was trained to deal with the donkeys. The surgery donkey treatment pen is a normal part of Mr. Burroughs' work environment…. In my experience I have known donkeys to kick. I would have indicated to Kevin that this was a regular occurrence. I trained him in how to avoid being kicked."* Further he expressed in cross-examination that*: "It was unexpected for donkeys to move so far to kick."*

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[27] With regard to specific danger or risk of injury caused by the donkey, the court agrees with the submission of Counsel for the defendant that the claimant did not present any evidence to support his allegation that the defendant ought to have known of some unusual dangers which created a risk of injury to the claimant. The claimant's evidence does not disclose that he was aware of any unusual danger or propensity of the donkey, the subject of the claim.

> *"The herd including the one that kicked had been in use for about 4 months before the time of the incident for training.*
> *During the entire period I did not notice anything unusual about any in the herd.*
> *There was no warning or indication before or at the time of the incident that would have indicated that one of the donkeys would have behaved the way it did."*

[28] The evidence of Doctor Robinson is again relevant on this point. His evidence was to the effect that: *" In my twelve years working with donkeys as a Veterinary Surgeon I have rarely seen a donkey move in reverse that far to kick. Such behaviour was unexpected at that time."*

[29] In cross-examination he further asserted that the domestic donkeys of the kind used by the defendant at the relevant time were tamed and not feral, that they had worked with students and that there was not a great risk of being kicked badly if you are careful of the donkeys.

[30] The court is cognizant and notes that, the scope of the employer's duty of care concerns not only the actual work of its employee(s) but also such acts as are normally and reasonably incidental in a day's work.[6] Having considered the evidence in relation to this aspect the court is satisfied that the claimant has not provided any evidence to this Court to find that on a balance of probabilities that the defendant caused or permitted the claimant to attend to the donkeys when they knew or ought to have known that it was not safe to do so. There is no

[6] Davidson v Handley Page Ltd [1945] 1 All ER 235, 236

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evidence presented of an unusual danger caused by dint of the fact that the claimant was required to attend to donkeys, that the defendant knew or ought to have known of such risk of damage or injury caused thereby or that the defendant exposed the claimant to a risk of damage or injury from unusual dangers caused by the donkey of which they knew or ought to have known.

(iii) Requiring the Claimant to Attend to the Donkeys During the Course of his Employment

[31] In **McIntosh**[7] the court applied the principle that the donkey is a domesticated animal and that as such if the donkey does something which is merely an exercise of its natural propensity, damage caused as a result is not recoverable. In the instant case, both the claimant and the defendant's witness gave evidence of natural propensity of donkeys to kick. That the donkey was non feral, was also given in evidence and aids the defendant's submission that there was nothing specific or suspicious that the defendant should have known of and from which they should have sought to protect the claimant.

[32] On this aspect of the claim, the court finds that there has been no evidence presented that the fact that the claimant was requested to attend to donkeys or causing or permitting the donkeys to be attended to without being secured, presented any danger of which the defendant was aware or ought to have been aware. The claimant has not presented any evidence in support of this part of his claim in his evidence-in-chief, nor did he seek to do so under cross-examination. Similarly, the claimant did not pursue any of these aspects of his claim by way of cross-examination of the defendant's witnesses.

[33] It is clear to this Court and this Court believes the evidence presented by Dr. Robinson on behalf of the defendant that the claimant was engaged as a Pasture Assistant/Large Animal Caretaker and that the tending to the donkeys was part

[7] Ibid., pg.9.

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and parcel of his duties. The claimant worked with the donkeys regularly from the time of his employment. The claimant handled donkeys multiple times per week in different sections of his work and was involved in all aspects of the care of donkeys, including identifying, sorting, moving, transporting, sampling, medicating and restraining donkeys. The court accepts that the claimant was well trained to deal with the donkeys.

[34] The evidence is that the defendant ensured that the claimant was fully trained to attend to the donkeys and that he had been doing so for some time without incident. Aspects of the claimant's evidence of his detailed training and interaction with the donkeys have been alluded to already in the course of this judgment. Additionally, the court notes the depth of this interaction:

> *"I had learnt how to give an injection and how to take fecal samples, how to administer medicine, how to draw blood, how to identify any sick animals, how to approach one, how to remove and install a halter."*

I do not accept that the claimant has proved on a balance of probabilities that being required to attend to donkeys amounted to a breach of the duty owed to the claimant by the defendant.

(ıv) Res Ipsa Loquitur – The Presence of Negligence

[35] There is one other aspect of the claim based on negligence that the court must consider. The claimant contends in his statement of claim that the fact that one of the donkeys kicked the claimant gave rise to a presumption of negligence on the part of the defendant. The claimant did not deal with this legal aspect of the claim at all in submissions presented to this Court. However, the court finds favour with the authority cited by the defendant in support of the submission, that in any event that this principle is not applicable in the circumstances of this case.

[36] *In* ***Lester Anderson v Penngor Limited***[8]*, Joseph-Olivetti J. stated:*

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[8] Claim No.BVIHCV2011/0102 (ante), at para.10

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"I now turn to consider how the accident happened. In his pleadings Mr. Anderson relied on ***the doctrine of res ipsa loquitur****. Mr. McKenzie, learned Counsel for Mr. Anderson is noted did not address this point, hardly a helpful stance. Nevertheless, for the reasons advanced by Mr. Neale learned Counsel for Penngor, I accept that* ***this doctrine does not apply. A fall from a scaffold does not necessarily mean that it would not have happened without negligence on the part of the owner*** *here, Penngor…" (emphasis mine)*

[37] In the circumstances of the instant case, the fact that a donkey which had not previously exhibited any behavior of a sort which could or should have alerted the defendant that it was unsafe to place the claimant in proximity to the animal, kicked the claimant, does not, without more, amount to negligence on the part of the defendant. It is clear that this was entirely unexpected behavior on the part of the donkey. It was not a regular behavior pattern of donkeys in general and it was an entirely unexpected behavior from this particular animal, an animal that the claimant himself had worked with for some months without incident.

Court's Conclusion

[38] The court in considering whether an employer is liable to an employee for an injury which occurred at the workplace must consider the pleaded allegations and the evidence adduced by both parties, and determine whether liability has been proven on a balance of probabilities. The burden of establishing such liability lies upon the claimant. The claimant is required to prove that the employer has breached the duty owed to the employee, and that such breach has caused the employee injury, loss or damage.

[39] Having considered all the evidence presented by the parties in relation to negligence and the duty of care owed to the claimant and specifically with regard to the particulars of negligence pleaded by the claimant, the court is not persuaded and finds that the claimant has not proved that in all the circumstances the defendant failed to take any or any adequate measures to ensure that the place

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where the claimant was engaged upon his work for the defendant was safe or that the defendant had failed in all the circumstances to provide a safe system of work.

[40] In paragraph fourteen (14) of his statement of claim, the claimant referred to what appears to be a contractual claim to compensation from the defendant for lost wages, he having become ill as a result of his occupation with the defendant. It appeared to the court that this matter was raised and related only to that aspect of the claim whereby the claimant stated that consequent upon the negligence of the defendant and the resulting injuries sustained by him, that he was unable to work and suffered a loss of wages. Reference to the contractual claim therefore was only to prove the extent of such loss. There is no separate claim brought in contract. The claim brought in negligence has failed. The court does not consider that it should make any determination on a contractual issue that was not the basis of the current action.

The Court's Order:

[41] The claim against the defendant for negligence is dismissed.

[42] The defendant is entitled to prescribed courts unless otherwise agreed

Marlene I. Carter
Resident Judge

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