ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 60 OF 1993

BETWEEN:

MARGARET HAZELWOOD

Plaintiff

and

MARTIN LABORDE
ST VINCENT BREWERY LTD

Defendants

Appearances:

J Delves Esq for the Plaintiff
A Williams Esq for the 1st Defendant
S Commissiong Esq and M Commissiong with him for the 2nd Defendant

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2000: January, 17, 19

JUDGMENT

[1] MITCHELL, J: This case started as a running down case. It ended up as something else. At the commencement, all parties agreed that the only issue before the court for trial at this time would be the question of liability. The issue of quantum, if any, would be brought up subsequently in Chambers on a Summons for Assessment of Damages. The entire case, including taking the evidence and hearing argument of Counsel, took up only an afternoon. It was not a difficult case on its facts.

[2] The accident occurred on 30th December 1989 while the Plaintiff and her 15 year old niece were walking together on the left hand side of the Bay Road in Kingstown in St Vincent. She was lightly struck from behind by the Defendant's car which, I accept the Defendant's evidence on this, was inching forward through

heavy pedestrian and vehicular traffic on the last working day before the Old Year's holiday. It is notoriously safer to walk in a public road on the right hand side facing on-coming traffic. However, I find that on this occasion, the shops are on the left hand side of the road and the larger part of the pedestrian traffic on this road is on the left hand side. The Plaintiff had been walking in a thoroughfare that was commonly used by pedestrians. The 1st Defendant as an experienced Vincentian driver would be accustomed to large numbers of persons walking in both directions on this road, and would be aware of the need for vehicle drivers to be specially careful to avoid the pedestrians. I accept that the 1st Defendant was not speeding. But, he should have been more effective in avoiding having his vehicle touch the Plaintiff. I do not believe his story that she was pushed by an unknown passerby against his car. I believe that he was driving too close to the pedestrians, did not alert them that he was coming up behind them, and did not control the car so as to avoid touching the Plaintiff. She fell as a result of the car striking her, and falling on her foot she caused it to be injured, obliging it to have to be put into a cast, and rendering her relatively immobile for several months while it healed. Ligament injuries are notoriously difficult to heal. The 1st Defendant behaved very properly to the Plaintiff after the accident, taking her to the hospital, paying all her medical bills, replacing her shoes which were damaged in the incident, and providing her with groceries while she was on crutches for some 4 months. I find that at the time of the accident and following thereon, the Defendant's unqualified acceptance of responsibility for the Plaintiff's expenses arising out of the accident amount to an acceptance on his part of liability for the accident and for the injuries caused to the Plaintiff. Even if his payments of compensation to the Plaintiff did not amount to evidence of acceptance of liability, but only as he claimed to his charitable proclivity, I am satisfied from all the evidence that on the facts he is solely at fault and liable to compensate the Plaintiff.

[3] On 6th February 1993, the Plaintiff issued her writ and served it on the Defendants. The Defendants denied liability, pleaded contributory negligence, and

in addition pleaded the Limitation Act. The Limitation Act at section 13(1) provides that in cases, *inter alia*, of negligence where the claim is for damages for personal injuries, the limitation period shall be 3 years from the date on which the cause of action accrued. An action to which the section applies shall not be brought after the expiration of 3 years. Thus, the Plaintiff would ordinarily be expected to have issued her writ before the 30th December 1992. In this case, the writ was issued some 1 month and 7 days after the expiry of the limitation period. Section 13 does not provide a mandatory limitation in personal injury cases in St Vincent. Section 33 of the same Limitation Act provides a discretion for a trial judge to exclude the time limit in respect of personal injury cases. In so far as relevant, the section provides:

> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
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> (a) the provisions of section 13 … prejudice the plaintiff or any person whom he represents; and
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> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;
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> the court may direct that those provisions shall not apply to the action …
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> (2) …
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> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –
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> (a) The length of, and the reasons for, the delay on the part of the plaintiff;
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> (b) The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 13 …;

(c) The conduct of the defendant after the cause of action arose, including …

[4] At the close of the case, after hearing the Plaintiff and her witness and the 1st Defendant on his own behalf, Counsel for the 1st Defendant submitted that the case was statute barred. The court pointed out to him that the case file indicated that he had previously made an *in limine* submission to the same effect before Baptiste J on 6 October 1997, and that the trial judge had ruled against the submission. The file indicated that the 1st Defendant had applied for leave to appeal against the decision, but leave had been refused. Counsel advised the court that far from overruling the submission, Baptiste J had merely ruled that the merits of the submission would be ruled on after the evidence had been given. He advised that on 6 October 1997 Counsel for the Plaintiff had replied to his *in limine* submission by stating that the Plaintiff's Reply had raised issues of *estoppel* and conduct of the Defendant. Counsel for the Plaintiff had submitted that it would be necessary for the evidence of conduct to be given before the court would be able to rule on the 1st Defendant's submission. The judge had, therefore, ruled that the merits of the submission would be ruled on after the evidence had been given at the trial. The Plaintiff had, in the event, at the trial given no evidence at all as to why the action was brought more than 3 years after the date of the accident. She had brought no evidence of the conduct of the Defendants that caused her not to proceed with her case prior to the cut-off period of 3 years. She was, therefore, caught by the Limitation Act, and the Defendants' defence under the Limitation Act must succeed. Counsel for the 2nd Defendant limited himself to submitting that the case hinged on the Limitation Act defence.

[5] Counsel for the Plaintiff replied to the above submission of Counsel for the 1st Defendant by asserting that Baptiste J had on 6 October 1997 unreservedly overruled the very same submission of Counsel for the 1st Defendant on the Limitation Act defence. Baptiste J had not, as Counsel for the 1st Defendant alleged, left the substantive submission to be ruled on at the trial. Counsel for the

1st Defendant had subsequently applied to the judge for leave to appeal against his ruling and had had such leave denied. No application had been made to the Court of Appeal for leave to appeal against the decision. The Limitation Act defence was *res judicata* in this case and could not be raised again. Counsel for the 1st Defendant in reply protested that the interpretation of Baptiste J's decision given by Counsel for the Plaintiff was incorrect.

[6] It was surprising to the court that there could be such a difference of opinion amongst two Counsel on a matter that should have been so self evident to the Counsel who were in court before Baptist J when the submissions were argued and Baptiste J made his ruling on them. There is no written note in or on the file relating to the decision of 6 October 1997. No doubt, there is a note made by Baptiste J of the submissions of both Counsel and a note of his ruling in his notebook. But, that notebook is not before the court for the court to consult. Even worse, there is no note entered on the back of the case file of the decision on the *in limine* submission. Such a note, which is required to be made on the back of the file by the court clerk of every decision and order made by the trial judge, even if only of an adjournment, is essential for the proper management of the case file. There is under our system no more reliable method than the note on the back of the file for a judge trying a case to discover what steps have previously occurred and what rulings have been made in the proceedings, particularly where there is no written order on file, and especially when a dispute arises between counsel as to what had previously transpired at a particular hearing.

[7] There is, however, on the file a full 2 page written and signed decision of Baptiste dated 21 October 1997 and delivered to both counsel at the time. It is Baptiste J's written reasons for refusing the application by the 1st Defendant for leave to appeal against his decision of 6 October 1997. It is from that written decision of 21 October that one derives an insight into the proceedings on 6 October 1997, the matter becomes clear, and a full and complete answer is given to the question of what the judge ruled. It would appear that at the hearing on 20 October 1997,

of the application for leave to appeal, Counsel for the Plaintiff had resisted the application. In giving his reasons for refusing leave, Baptiste recapitulates the events of 6 October 1997. He says -

> When the action came up for trial on October 6, 1997, learned Counsel for the first named defendant took a point in limine. He submitted that the court had no jurisdiction to entertain the matter as the case was filed outside the statutory limitation period. He stated that in paragraph 11 of the Defence it is pleaded that the Plaintiff's claim is barred by virtue of the provisions of section 13 of the Limitation Act, Chapter 90. The cause of action accrued on the 30th of December 1989. Three years would have elapsed on the 29th of December 1992. The matter was filed on the 16th of February 1993.
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> In reply, Mr Dougan QC stated that the submission had no basis in law. Section 33(1) of the Act gave the court a discretion, and he referred to the reply of the Plaintiff, [concerning estoppel] and forbearance. He submitted that the defendant was estopped by his conduct from relying on limitation.
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> After hearing submission from both counsel the court decided as follows:
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> "The Court has a discretion under section 33(1) of the Limitation Act and has paid regard to the matters raised in section 33(3). Having regard to the matters raised in the Reply and the length of the delay, the Court is not of the opinion that the evidence likely to be adduced by the parties is likely to be less cogent than if the action had been brought within the time allowed by section 13.
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> Having regard to all the circumstances of the case, the court is of the view that it would be equitable to allow the action to proceed. The court therefore directs that the provisions of section 13 do not apply. The

submission in limine is overruled and it is ordered that the action shall proceed."

[8] From the words of Baptiste J, it is immediately apparent that Baptiste J had specifically and unconditionally exercised his discretion under section 33 of the Limitation Act to exclude from this personal injury case the time limit provision of section 13. That decision of Baptiste J had not been appealed against. This court is now *functus* as regards the issue of the applicability of the Limitation Act defence to the Defendants in this case. That issue is not before this court at this time. Counsel for the 1st Defendant must have known that this was so. The inescapable, though incomprehensible, conclusion that I must arrive at is that Counsel for the 1st Defendant, while acting in the exercise of his duties as an officer of this court, deliberately set out to mislead the court on the question of the content of an oral order of this court in a matter before the court for adjudication. Counsel's strict duty to the court as a barrister was to be perfectly honest with the court as to the order made previously by the court, regardless of how adversely that honesty affected his client's chances of success in the litigation. Additionally, Counsel would have realised that there was no real issue before the court for trial. In the presence of the overwhelming evidence of the acceptance by the 1st Defendant of his liability for the accident, the defence had forced the matter to trial based only on the hope of Counsel for the 1st Defendant that he might be able to succeed by misleading the court as to the content and effect of an earlier order of a judge in the case. This is a classic case of what lawyers call "costs thrown away." This has all been completely unacceptable behaviour for a senior Counsel, deserving of censure.

[9] There will be judgment for the Plaintiff against both Defendants for damages to be assessed.

[10] The Plaintiff is entitled to her legal costs. I award the Plaintiff her legal costs of this action to be taxed if not agreed. The question is who should pay those costs.

I order that the Plaintiff's costs are not to be paid by either of the two Defendants. The costs are to be paid personally by Counsel for the 1st Defendant for reasons that should be apparent to all and that should need no further explication.

I D MITCHELL, QC
High Court Judge