COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2003

BETWEEN:

[1] VIVIAN ALEXANDER
[2] JOHN HECTOR

Appellants

and

RICHIE SMITH BY HIS NEXT FRIEND DELICIA TOUSSAINT

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal

Appearances:

Mrs. Singoalla Blomqvist-Williams for the Appellant
Miss Lisa de Freitas for the Respondent

2003: November 10;
2004: March 1.

JUDGMENT

[1] ALLEYNE, J.A.: On May 19th, 1995, Richie Smith, at the time 5 years old, suffered personal injuries as a result of an accident involving a motor vehicle admittedly owned by Vivian Alexander and driven by his servant or agent John Hector. On 10th May 2000 a writ was filed by Delicia Toussaint as next friend of Richie Smith, claiming damages for negligence. In May 2001 the Appellants filed a defence in which they denied negligence and further pleaded that the claim was statute barred by virtue of section 17 of the Law Reform (Miscellaneous Provisions) Act 1991. On 30th April 2003, Master Brian Cottle, having considered submissions on behalf of the claimant and the defendants, ruled, on a preliminary issue, that the claim is not statute barred 'as the Claimant did not have the

capacity to know due to his age.' The Appellant has appealed against this ruling. The learned Master was not expansive in expressing his reasons for decision.

[2] Counsel for the Appellant and for the Respondent presented very helpful skeleton submissions and greatly assisted the Court by their oral submissions. I wish to compliment Counsel for the quality of their presentations on this most interesting point.

[3] The relevant legislation is sections 17 and 18 of the Law Reform (Miscellaneous Provisions) Act 1991, which I quote in part:

> "17(1) This section applies to any action for damages for negligence nuisance or breach of duty whether the duty exists by virtue of a contract or of provision made by or under any enactment or independently of any contract or any such provision where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
>
> (2) An action to which this section applies shall not be brought after the period applicable in accordance with subsection (3) or (4).
>
> (3) Except where the subsection (4) applies, the period applicable is three years from -
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date of knowledge, if later, of the person injured
>
> (4) ……
>
> 18(1) In section 17 reference to a person's date of knowledge is a reference to the date on which he first had knowledge of the following facts:
>
> (a) that the injury in question was significant; and

(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any act or omission did or did not as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgement.

(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably be expected to acquire –

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

but a person is not fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain, and where appropriate, to act on that advice."

[4] Learned Counsel for the Appellant sought to demonstrate that the Act does not expressly or by necessary implication treat minority as a disability for the purpose of preventing time running against an infant claimant in an action in negligence. Counsel submitted that the provisions of the Law Reform (Miscellaneous Provisions) Act of Dominica, sections 17 and 18, are to a large extent, and so far

as they apply to the instant case, virtually identical, and *in pari materia,* with the provisions of sections 11 and 14 respectively of the Limitation Act 1980 of the United Kingdom.

[5] A comparison of the two Acts confirms that section 17(1), (2) and (3) of the Dominica Act are in substance identical to section 11(1), (3) and (4) of the UK Act, and section 18 of the Dominica Act is identical, word for word, with section 14 of the UK Act.

[6] Learned Counsel for the Appellant drew the Court's attention to section 28(1) of the Limitation Act 1980 (UK), which provides that, subject to certain exceptions not relevant to the case before this Court, if on the date when the right of action accrued the person to whom it accrued was under a disability, the relevant period of limitation commences, and time begins to run against that person, only when that person ceases to be under the disability or dies. Section 38(2) specifically provides that for the purposes of the Act, infancy is a disability.

[7] Counsel submitted that, especially in light of the fact that sections 17 and 18 of the Dominica Act are virtual copies of corresponding sections of the UK Act, the fact that the Parliament of Dominica did not also enact provisions similar to sections 28(1) and 38(2) of the UK Act, or sections with the same effect, precludes any inference that Parliament intended the fact of infancy or minority to suspend the passing of time for the purposes of the Act. I agree. If the Parliament of Dominica had wished to do so, nothing would have been easier than to replicate these sections, as it replicated sections 11 and 14 as sections 17 and 18 of the Law Reform (Miscellaneous Provisions) Act CAP. 7:99.

[8] Learned Counsel for the Respondent has urged the Court to infer from the words of the Dominica statute that infancy is a disability which brings section 17(3)(b) into play, in that an infant, and particularly an infant of 5 years of age as in the instant case, could not be attributed with knowledge of the facts set out in section 18(1),

or of the awareness necessarily implied by section 18(2) or 18(3). Learned Counsel emphasised that the knowledge referred to in the sections is knowledge on the part of the 'the person injured', not his next friend or any other person in any relationship with the person injured. Counsel also responded to a question put to her by the Court that the fact that the action was brought during the claimant's infancy did not weaken the argument, because the question is not why the action was not instituted when the person injured was 6 or 7 or 8 years old, but whether he is barred from instituting the action outside the standard limitation period of 3 years.

[9] Learned Counsel for the Respondent submitted that a minor does not in law, and certainly a minor of 5 years of age does not in fact, have the capacity to form the requisite knowledge.

[10] Counsel pointed out that the law treats persons under the age of majority as a special class, and cited as examples the presumption of *doli incapax* under section 3 of the Children and Young Persons Act CAP. 37:50, the disability of infancy for the purpose of the running of time against a dispossessed claimant under section 4 of the Real Property Limitation Act CAP. 54:07, the requirement for a next friend to conduct proceedings on behalf of an infant under Part 23.2(1) of the *Civil Procedure Rules 2000* and the control of the Court over any settlement, compromise or payment by, on behalf of or against any minor in civil proceedings before the Court, under Part 23.12(1) of the said Rules.

[11] Learned Counsel submitted that infants, in the eyes of the law, are regarded as persons of immature intellect, and cited *Halsbury's Laws of England fourth edition Volume 24 paragraph 407* in support. Counsel put the case of a minor victim of negligence who is in the charge or custody of a person who is unwilling to act as a next friend on behalf of the minor in an action, or where no one is interested in acting on behalf of the minor. In such a case the minor could be denied redress, and injustice could result in such a situation if minority is not treated as suspending

the running of time under the Act, as it does under the Real Property Limitation Act.

[12] Counsel submitted that this would be contrary to the objectives of Parliament and the Court to protect the interests of minors. It would be paradoxical, Counsel argued, for the law to deprive a minor of independent access to the Courts until he attains majority, and at the same time to allow time to run against him and extinguish his right of action in respect of a wrong committed against him during his minority.

[13] Learned Counsel cited the case of Davis v City & Hackney Health Authority[1]. This case went on appeal to the Court of Appeal, and the judgment of the trial judge was upheld. The plaintiff was the second of two children born to his mother on 15th June 1963. He was spastic. He alleged that between the birth of his elder brother and himself his mother was given an injection which caused his spasticity. The writ was issued on 1st April 1987, well outside the normal limitation period of 3 years, and almost 6 years after he had attained his majority. The question was whether the plaintiff could proceed with the action on the basis of his date of knowledge, under section 11(4)(b) of the UK Act, which is in terms *in pari materia* with section 17(3)(b) of the Dominica Act. The learned trial judge very clearly stated:

> "If this action is therefore to be allowed to proceed under section 11 of the 1980 Act it has to be because the writ was issued within a period of 3 years from the date of knowledge of the plaintiff. I refer here to subsection (4) of section 11."

[14] The learned trial judge at first instance[2] pointed out that section 11 (UK Act) provides two different limitation periods. He said this:

> "Accordingly, if one is looking at the second limitation period (paragraph (b) of subsection (4)) one does not approach it on the basis that there is first of all a three year limitation period and nothing that happens during that period should be looked at on the issue of reasonableness. The

[1] [1991] 2 Med LR 366.
[2] 88/NJ/4405, (Transcript:Marten Walsh Cherer)

> second limitation period is entirely different from the normal three year ... period; consequently the question of reasonableness has to be looked at in the context of the whole period of time since the events said to give rise to the cause of action."

Clearly, the question of knowledge, or the lack thereof, defines an entirely different limitation period independent of the date of the occurrence which gave rise to the cause of action and independent, under the UK Act, of the minority or other disability of the plaintiff. The principle is no different under the Dominica Act except that the disabilities provided for under the UK Act are not provided for under the Dominica Act.

[15] The date of knowledge, defined in the UK Act by section 14, is defined in the Dominica Act in identical terms by section 18. It has been decided that the onus of establishing that the date of actual knowledge fell within the limitation period rests on the plaintiff, but the evidential burden of proving an earlier date of constructive knowledge rests on the defendant; Nash v Eli Lilly & Co[3]. Purchas L.J. delivered the judgment of the Court of Appeal and very clearly laid down the nature of the knowledge which must be attributable to the plaintiff before the period of limitation begins to run in cases falling within the section.

[16] There can be no argument that the claimant in this case, at age 5, would not be capable of the requisite knowledge. Even at age 10, it would be unlikely to be held that he would be so capable. All the authorities seem to establish that the knowledge must be in the claimant himself or herself, and not in his or her parent, guardian or next friend. In the present case the claimant, I suspect, would have little difficulty in establishing that the time of actual knowledge fell within the limitation period established by section 17(3)(b). If he succeeds in doing so, it would then be for the defendant to discharge the evidential burden of proving constuctive knowledge on the part of the claimant at a date which would bring the claimant outside the limitation period.

[17] I am of the view that, although minority does not in itself prevent time running for the purposes of the Act, it is a factor to be taken into account in determining the date of knowledge, including the date when the claimant, applying the objective test as defined in Davis v City & Hackney Health Authority, might reasonably be expected to acquire those facts referred to in paragraph (b) of subsection (3) of section 17 and detailed in section 18.

[18] Accordingly I would dismiss the appeal, affirm the case management conference order made on the 30th day of April 2003 and entered on the 7th day of May 2003, and order the costs of this appeal in the sum of $9,333.33 to be paid by the Appellant to the Respondent.

Brian Alleyne, SC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

[3] [1993] 4 All ER 383, 396; [1993] 1 WLR 782, 796.