THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV2006/0325

BETWEEN:

YVONNE FERRIS

Claimant

And

DICKENSON BAY MANAGEMENT LTD

Defendant

Appearances:
Ms. Veronica Thomas and Ms. Samantha May for the Claimant
Mr. Vernon Tomlinson for the Defendant

……
2007: July 10
October 25
.....

DECISION

[1] Harris J: This is an application by the Defendant to strike out the Claimant's claim for personal injury as statute-barred under the provisions of Section 13 of the Limitation Act,1997, Laws of Antigua and Barbuda.

BACKGROUND

[2] The background to this matter - with some modification - is taken from the pleadings and legal submissions filed in the substantive matter and in this application to strike out the claim.

[3] The Claimant claims against the Defendant for negligence for, inter alia, failing to provide a safe place of work and safe system of work. The Claimant is employed by the Defendant as a resident Nurse; a Nurse of some 15 yrs experience at the time of the incident complained of. The Claimant alleges that on the 1st September, 1999, while acting in the course of her employment, she was about to sit on the chair at the desk at her work station when she slid and fell on the slippery tiled floor around her nurse's station. The Claimant further alleges that again on 30th December, 1999, while acting in the course of her employment, she accompanied a member of staff to hospital in an ambulance. On the way to the hospital, the Claimant alleges that the ambulance swerved and jerked suddenly, throwing her of her seat. The seat was not fitted with a seatbelt. As a result of these incidents the Claimant alleges she suffered personal injury, loss and damage for which she now claims compensation from the Defendant (also referred to as *Sandals* in the exhibits in this application). The Claimant commenced her claim on the 15th June, 2006. This is approximately 3½ and 4 years respectively, after the expiration of the standard limitation period of three (3) years from the date of the two incidents, within which she is required to have commenced her action against the Defendant.

LIMITATION

[4] The relevant statute governing the operation of limitation periods is The Limitation Act, No. 8 of 1997 Laws of Antigua and Barbuda; more specifically section 13 generally and S.13 (4), S. 16 (1) S.16 (2), S.16 (3).

[5] In essence S.13 provides for a three (3) year limitation period for actions in respect of personal injuries from the date on which the cause of action occurred; or the date of knowledge (if later) of the person injured. The "*date of knowledge*" is the limb upon which the Claimant asserts is applicable to her circumstance and is referred to in S.13 (4) (b) of the Act. The phrase "*date of knowledge*" is further defined in S.16 of the Act.

[6] The upshot of the Act is as follows: A person's date of knowledge is reference to the date on which the Claimant first has knowledge that the "*injury in question is <u>significant</u>.*" An injury is significant if the person whose date of knowledge is in question, would reasonably

have considered the injury "*sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment". "Knowledge"* includes knowledge a person may reasonably be expected to acquire from facts observable and ascertainable by him" or *"from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek."*

[7] At the outset it is clear that the Claimant has not satisfied S. 13(4) (a)[1] and that the Claimant's defence to the application to strike out her claim is founded on satisfying S.13 (4) (b) which reads: "*(b) the date of knowledge (if later) of the person injured",* as the date at which the limitation period commences running.

[8] The Claimant commenced its action on the 15th June of 2006, over 6 yrs from the date on which the cause of action occurred. The Claimant is over three (3) years late[2] unless she can establish a later *"date of knowledge*" as defined by the Act.

[9] The chronology of the relevant events are set out in paragraph 3-13 of the Affidavit and exhibits thereto in Response to Application to strike out Claim filed on November 7th 2006 .

[10] In short, the Claimant while on duty having slipped and fell on "*slippery*" tiles visited Dr. Conrad Stevens who prescribed anti inflaminatories and muscle relaxants and referred her to Dr. K.K. Singh Consultant Orthopedic Surgeon.

[11] She visited Dr. Singh in October 1999 in relation to the same injury. On the 30th December, again while on duty accompanying a patient to the Hospital on an ambulance the ambulance "*suddenly swerved and jerked*"[3] and she was thrown off the seat "which

[1] The date on which the cause of action occurred
[2] The date of "knowledge" would have had to commence no earlier than the 14th day of June 2003 if the Claimant is to avail herself of the benefit of the Act
[3] See para. 4. of the claimant's affidavit for this reference.

was not fitted with a seat belt"[1]. The Claimant claims to have exacerbated her existing back pains as a result of this incident in the ambulance.

[12] The Claimant again visited Dr. K.K Singh in January of 2000. Dr. Singh produced a report dated 20th May 2000 and concluded the diagnosis of *RIGHT SIDE SACRO –ILIAC STRAIN involving right side ILIO-LUMBER and SACRO-LUMBER LIGAMENTS*. This examination also revealed an incidental finding of SCOLIOSIS (*lumber Curve L3-5 with concavity to right side*).

[13] This incidental finding is presumably unrelated to the two incidents complained of. In any event it does not affect the Court's ultimate findings in this matter. The Claimant says that she understood the Doctors diagnosis to be that she has strained the muscles on the right side of her lower back. She was prescribed anti-inflammatories and advised to do physical therapy to rehabilitate her lower back.

[14] Dr. Singh produced another report of 17th July, 2000 in which he refers to a CT scan which was advised on account of the "second occupational injury" of Nurse Ferris, the Claimant herein. Dr. Singh indicates that the CT scan report by Consultant Radiologist revealed an '*annular disc bulge at L3-L4 and L4-L5 with normal nerve roots and marked degree of facet arthrosis'.* Dr. Singh describes the claimant as being still on a "*conservative line of treatment"* and *"temporarily disabled in the full functions of her lumbo-sacral spine*". This was some 11 months after the first incident that the Claimant is still *disabled,* albeit in the Doctor's opinion, temporarily.

[15] The Claimant says that her employer had undertaken to meet the cost of all her medical expenses and that she remained in Dr. Singh's care who "*monitored and supervised*" her condition. Further, the Claimant claims she did what ever Dr. Singh advised her to do and will visit him on occasions when she had painful episodes which did not go away with the conservative treatment he had recommended.

[1] See para. 4. of the claimant's affidavit for this reference.

[16] By this time over 2 years had elapsed since the injuries.

[17] The Claimant deposes to having more frequent episodes of pain and eventually by referral by Dr. Singh to a Dr. Bedaysie, a doctor in Trinidad and Tobago, to have a MRI Scan conducted. . Dr Singh, by letter dated 25th January 2003 had referred the Claimant to Dr. Bedaysie, the Doctor in Trinidad and Tobago. The MRI was done on 13th October, 2003 and the expenses met by the Claimant's employers. The reference to more frequent episodes of pain suggests that the Claimant up until that time was experiencing pain, albeit not as frequent. This takes the Claimants condition/injury to over three (3) years in existence by the date of Dr. Singh's referral letter of 25/1/03[1].

[18] Dr. Henry Bedaysie's report dated 14th January, 2004 and the CT scan report of the 13th February, 2004 are both exhibited to the Claimant's affidavit in response and both contain medical scientific jargon beyond a layman's understanding. However, the Claimant, an experienced Nurse, at paragraph 10 of her Affidavit in Response said that she understood Dr. Bedaysie's report of the 14th January, 2004 to mean that she would require surgery.

[19] Both Dr. Bedaysie in his report of January 14th 2004 and Dr. Singh's letter of 23/7/04 to *Sandals* maintain the recommendation that the Claimant continue physical therapy.

[20] It would be some two (2) years after this, the first report by Dr. Singh dated 23rd July, 2004 recommending surgery, before the Claimant filed her claim before the High Court of Justice St. John's Antigua.

LAW

[21] The defence to the application before the Court is based on what I will refer to as the *"date of knowledge".* Section 16 (1) provided facts upon which the reference to a person's date of knowledge can be determined. It is, I believe, useful to lay out the section at this time.

> "16. (1) In section 13 and 14 references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts –

[1] The date of Doctor Singh's referral letter to Dr. Bedaysie of Trinidad & Tobago

(a) that the injury in question was significant;

(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.

(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 13 supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions 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 judgment.

(3) For the purposes of this section a persons knowledge includes knowledge which he might reasonably have 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 shall not be 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, act on) that advice."

[22] In my view S.16 (1) (b), (c) and (d) pose no difficulty here. The act or omission to which the injury was attributed was never in dispute. The claimant from the onset was clear in her mind what caused the injury and who was responsible for it.

[23] Neither Doctor contradicted this position and indeed unlike injuries such as that caused by defective prescribed drugs, contaminated work environments and the like where the source and cause of the injury is not clear and often times requires professional scientific intervention; the cause and source of the injury in the instant case was for the most part peculiarly within the knowledge of the Claimant.

[24] This case turns on S.16 (1) (a). The issue being, whether the Claimant's injury is *significant* and at what time did she have knowledge of this fact.

[25] I have reviewed all of the authorities[1] provided the Court in the written submissions of the parties in this matter. It is important to note that the U.K cases which were provided and the U.K. Landmark cases on point, deal substantially with their statutory provisions akin to our S.16 (1) (b)[2] i.*e. the Claimant's knowledge that the injury was attributable to the particular act or omission (*emphasis mine*).*

[26] In addition to this consideration the U.K. Limitation Act of 1939 ss.2A, 2D, the U.K. Limitation Act 1975 S.1 which provides the amendments to the 1939 Act, and S.33 of the consolidated U.K. Limitation Act of 1980, have given their Court's, additional power - a discretion - to disapply the limitation period if it appears that it would be equitable to do so.

[27] It is worth noting at this time also, that it is the existence of this discretion in the U.K. that permits wider parameters of argument in their cases. It is within the powers of the U.K. Courts, upon a Claimant failing to put himself within the Act, to invoke the discretion without separate and/or further submissions on the application of the said discretion.

[28] In the McCafferty case Megaw L.J in considering the factors to apply in the exercise of the section 33 discretion, said *"I think it is proper to take into consideration factors which I have no doubt, at least sub-consciously, prevented him from starting proceedings against his employer: the nature of the injury as he regarded it then as being; his interest in his job; the insecurity of his tenure; his desire to preserve the good relations which undoubtedly existed; and so forth[3]*.

[29] In my reading of the McCafferty and the other cases, these considerations do not necessarily apply in determining the "*lack of knowledge*" and "*significance of injury*". The Claimants submission that the Defendants acceptance of liability or acquiescence on the

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[1] Adams v Brackknell Forest Borough Council (2005) 1AC 76 C.A; John Samuel v Thomas Motley and State Insurance Corporation Suit No. ANUHCV2004/0419(unrep.); Urcil Peters v William Martin Suit No. ANUHCV 2004/0318 (unrep); Mash v Eli Lilly & Co. [1993] 4 All ER 383; Mc Cafferty v Metropolitan Police Receiver [1977] 2 All ER 756; Dobbie v Medway Health Authority [1994] 4 All ER 450; Osley Baptiste v C.K. Greaves & Co. Ltd, High Court of St. Vincent and the Grenadines, Civil Suit No. 1992 of 1997 (unrep.); The Limitation Act, No. 8 of 1997

[2] However the instant case deals with another subsection; S. 16(1) **(a)** see: para 21 above

[3] At pp 769 j and see also the Dobbie case pp. 455J, 456A, 457 F-H, 458 F-G, 459 C

part of the Defendant, if that is what it is, and further, the Defendant having stood the medical expenses of the Claimant, the Claimant's trust in and her reliance on the Doctors judgment, may be central, if proven, to the exercise of the type of discretion referred to above; a discretion this Court does not have. Their relevance to this matter is peripheral.

[30] What then is the test? The test to be applied in determining whether or not the injury suffered by the Claimant was significant was formulated by Geoffrey Lane LJ in McCafferty v. Metropolitan Police Receiver [1977] 2 All ER 756. In that case the Court of Appeal considered sections 11 and 14 of the 1980 Limitation Act of England which are identical to our sections 13(4) and 16 of the Limitation Act., 1997. The McCafferty test is stated at p. 775 of the judgment as follows:

> "...it is clear that the test is partly a subjective test, namely: would this plaintiff have considered the injury sufficiently serious? And partly an objective test, namely: would he have been reasonable if he did not regard it as sufficiently serious. It seems to me that sub-s (70 is directed at the nature of the injury as shown to the plaintiff at the time. Taking that plaintiff, with that plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages."

[31] There is a context within which the Limitation Act was formulated, in Dobbie v Medway Health Authority [1994] 2 All ER 450 per Sir Thomas Bingham MR page 454 b on the purpose of limitation periods expressed the view that: *"They are no doubt designed in part to encourage potential claimant to prosecute their claims with reasonable expedition on pain of being unable to prosecute them at all. But they are also based on the belief that a time comes when for better or worse, defendants should be effectively relieved from the risk of having to resist stale claims*."

[32] Much consideration had gone into the various amendments to the U.K. Limitation Act; amendments which we have adopted here in Antigua and Barbuda.

[33] There is a distinction in that Act between the Claimant's knowledge of (i) his injured condition and (ii) of its having been caused by an act or omission of the Defendant. Sir Thomas Bingham[1] referred to the U.K. 1971 Law Reform Committee's interim report on

[1] In the Dobbie case referred to in paragraph 31. This case discusses further, the considerations entered into by the said Law Reform Committee and provide an insight into the policy considerations of the Act.

Limitation of Actions: In Personal Injury Claims ((mmd 5630)) pp 454 d-j. We are here concerned in this case with the first limb; *"(i) his injured condition".*

[34] The effect of s 13(4) (b) s 16(1) (a) "*is to postpone the running of time until the Claimant has knowledge of the personal injury on which he seeks to found his claim*". In determining, from the facts of this case, when the Claimant had the requisite *knowledge,* I take my guidance from Sir Thomas Bingham MR[1] as follows: "The word 'knowledge' should be given its natural meaning," and quoting from Lord Donaldson of Lymington MR in Hatford v Brookes [1991] 3 All ER 559 (573), [1991] 1 WLR 428 (441) he continues: *"In this context 'knowledge' clearly does not mean know for certain and beyond possibility of contradiction*". It does however, mean *'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence."*

[35] At what stage then did the Claimant have the statutory 'knowledge' based on the legal regime applicable to this case?

[36] *"This test is not in my judgment hard to apply. It involves ascertaining the personal injury on which the claim is founded and asking when the Claimant knew of it … More usually, the Claimant knows that he has suffered personal injury as soon or almost as soon as he does so[2]."*

[37] In applying the Act, the question of the knowledge of the 'significance' of the injury is pivotal in this case. When did the Claimant know of the significance of her injury?

[38] *"The requirement that the injury of which a plaintiff has knowledge should be 'significant' is in my view directed solely to the quantum of the injury and not to the plaintiff's evaluation of its cause, nature or usualness. Time does not run against a plaintiff, even if he is aware of the injury, if he would reasonably have considered it insufficiently serious to justify*

[1] Dobbie v Medway Health Authority [1994] 2 All ER 450 (455 h-j).
[2] Sir Thomas Bingham in the ***Dobbie*** case at 455 j - 456 a, see also Purchas LJ pp 391 f-j in the ***Nash*** case.

proceedings against an acquiescent and creditworthy defendant, if (in other words) he would reasonably have accepted it as a fact of life or not worth bothering about[1]*."*

[39] The Affidavits in this case point both to facts ascertainable by the Claimant and facts ascertainable by way of the medical reports and advice which were available to the Claimant over the material period.

[40] On the Claimants appreciation of the legal significance of the injury I am guided by the Dobbie case per Bingham LJ: *"She knew from the beginning that this personal injury was capable of being attributed to, or more bluntly was the clear and direct result of an act or omission of the health authority. What she did not appreciate until later was that the health authority's act or omission was (arguably) negligent or blameworthy. But her want of that knowledge did not stop time beginning to run*[2]*."*

FINDINGS

[41] I apply the simple test referred to in paragraph 36 herein and ask the question, what is the personal injury on which the Claimant, Yvonne Ferris, claim is founded?

[42] We know that Dr. Singh's report of January 2000 concluded a "*Right side sacro-iliac strain involving right side ilio-lumbar and sacro-lumber ligaments*" and that the Claimant understood this to be that she had strained her muscles on the right side of her lower back.

[43] Later, in the report of Dr. Singh, of 17th July 2000, Dr. Singh speaks of an "*annular disc bulge at L3 - L4 and L4 - L5 … and marked degree of facet arthrosis*". Dr. Singh described the Claimant as being "*temporarily disabled in the full functions of her lumbo-sacral spine."* This was the condition of the Claimant almost one (1) year after her initial injury.

[44] Up until the MRI Scan was done in Trinidad on the 13/04/2003 the Claimant was having frequent episodes of pain. The relevant time line for the commencement of the *date of knowledge* was June of 2003.

[1] pp 457 f – h in the ***Dobbie case***
[2] pp 459 b – c in the ***Dobbie case***

[45] Applying the Mc Cafferty test, the first limb, the question is, would the Claimant have by June of 2003 considered her injury sufficiently serious? and the 2nd limb, would the Claimant have been unreasonable if she did not regard it as sufficiently serious.

[46] The Claimant, in this case, was an experienced nurse, presumably, at the very least, of average intelligence[1] (my finding is the same even with considerably less intelligence), and still engaged in the practice of nursing at the time of both incidents complained of in her claim.

[47] I take the Claimant as having the capacity to understand her medical circumstances. Circumstances, which I might add, appear from the affidavit evidence to have persisted in its somewhat debilitating and disabling effects for several years. She understood the effect of the injury on her quality of life from both a personal level[2] and a professional level.

[48] The report of Dr. Bedaysie of January 14th 2004 does not add much more to the earlier diagnosis of the Claimant's condition but does go on to recommend a more substantial treatment, surgery and suggests permanence to the injury. I note here generally that the 'permanence' of an injury is not the litmus test for triggering the *knowledge* of the *significance* of the injury. A broken arm for instance is not permanent but very *significant.*

[49] Having regard to the Claimant's assertion of her experience with pain and at the very least partial disablement persisting over several years coupled with her Doctors findings as evidenced in the various reports/letters by Dr. and together with the Claimants medical training, I find it difficult to conclude that she would not have considered her injury sufficiently serious to justify proceeding against even an acquiescent and credit worthy Defendant, Dickenson Bay Management Ltd[3] from very early in the saga.

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[1] There is no evidence to the contrary.
[2] Pain and disability. See her Affidavit in Response to the application to strike out her claim.
[3] Purchas LJ in the Nash and Eli case at pp 392d-e: "…*knowledge seems to us to depend, in the first place, upon the nature of the information which the plaintiff has received , the extent to which he pays attention to the information as affecting him, and his capacity to understand it .*"

[50] To follow Sir Thomas Bingham in the Dobbie case; would the Claimant reasonably have accepted her condition over the years as *a fact of life or not worth bothering about*? I think not. Her repeated visits to the doctor and treatment over several years help answer that question.

[51] Certainly the Claimant must have by the time Dr. Singh produced his report of 17th July, 2000 must have known with "sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence[1]."

[52] The full extent of the injury need not be known, but only so much as required by the Act and the law referred to herein (see also para. 40 above).

ADMISSION OF LIABILITY

[53] The Claimant has raised the point in argument that the employer/Defendant had accepted liability for its negligence by virtue of its having undertaken the costs of all her medical expenses. In my judgment the Defendant did not accept liability in this case.

[54] This effect of the said undertaking- an admission- as it were, was alluded to in the Claimant's Affidavit in Response to the Application to Strike Out Claim filed on the 7th November 2006, at paragraph 7, but was not raised at all in her Claim Form and Statement of Claim.

[55] The documents exhibited to the Claimants Affidavit in Response as YF8 and YF9 - two letters from Caribbean Alliance Insurance - each suggest that the Claimant's medical expenses were defrayed, pursuant to a claim made for the benefit of the Claimant/ Employee, for *workmen's compensation*. YF9 is a *Without Prejudice* letter with which the Defendant has taken issue in para. 29 of its skeleton arguments filed on May 29.

[1] See quote in para. 34 above

[56] At para. 9 of the Claimant's Affidavit in Response she confirms the source of funds used to pay her medical expenses saying: "*My medical expenses and the cost of travel to Trinidad and expenses while in Trinidad were met by the Defendant through their insurers.* I inferred from this that the payment for previous medical bills were from the said insurers. There is no evidence to the contrary before me. Save as aforesaid neither party has objected to the admissibility of the exhibits in this application.

[57] If this be a matter involving the Workman's Compensation Act at all or even general public liability Insurance, then I accept the argument put forward by Counsel for the Defendant in his skeleton argument at para. 27; that the claim for and receiving of, Workman's Compensation under the said Act (or even public liability Insurance), is neither an admission nor determination of negligence and further, in any event does not in this case interrupt, delay or suspend the running of the limitation period.

[58] Under section 3 of the Workman's Compensation Act, of Antigua & Barbuda Cap. 475, an employer is liable to pay compensation to a worker if that worker "*suffers personal injury by accident arising out of and in the course of such employment."* The employer is not liable under the Act however, should the "*accident be proved to be attributable to the workman's own serious and willful misconduct …"* Several other bases for eligibility are there provided, none of which suggest negligence of the employer as the only basis.

[59] The Act (Cap. 475) goes on to provide in section 27, that a claim under the Act is not a bar to proceedings for the same injury brought independently of the Act.

[60] The said section provides further that if the Claimant were to fail in establishing its case for damages in *independent proceedings* (presumably proceedings which include a Common Law action in Negligence) a court or an appellate court in that '*independent proceeding'* could instead, there and then, make an alternate determination of liability and compensation award in favour of the employee, under the Workman's Compensation Act[1] regime.

[1] Paragraph 27(2) Workman's Compensation Act Cap. 475

[61] Section 27 read together with Section 3 in the context of the entire Workman's Compensation Act, suggests two different standards of liability between the Act and an *independent action* in Negligence. Providing for compensation under the *Workman's Compensation Act* is a statutory obligation on the employer's part arising out of that relationship between employer and employee rather than out of the fault of the employer.

[62] If the Claimant argues that she was under the misapprehension that her receipt of benefits as Workman's Compensation (whether upon her application or that of the employer/Defendant) under the said Act for her injuries did suspend or delay the running of the limitation period or did amount to an admission of liability for negligence on the part of the Defendant, then that misapprehension may be a fit and proper consideration for the exercise of the *discretion*[1] to disapply the Limitation period referred to earlier, a discretion under s. 33 of the U.K. Limitation Act which we do not have in the Antigua & Barbuda Act.

[63] The 'misapprehension', if that is what it was, may admittedly also impact on the question of the 'date of knowledge' and the subjective limb of the Mc Cafferty test referred to in paragraph 45 above. On the facts before me, I do not find that the Claimant was under this misapprehension. I note also that she does not in her Claim Form and Statement of Claim make the claim that the Defendant had accepted liability for her injury and Damage. In any event I find as a fact that the employer/Defendant did not, by it's conduct or otherwise, accept liability in this matter and that the Claimant never apprehended that the Defendant did accept liability .If the Claimant's contention is that her receipt, of what on the evidence appears may be *Workman's Compensation* benefits evidences the Defendant's acknowledgement of it's liability in Negligence and that she understood this to be so at the time, then by her reasoning , in addition to my findings in this matter above, she can also be taken to have appreciated the *significance of her injury* upon receipt of the said compensation- from as early as the year 2000.[2]

[1] See para 26 and 27 above for reference to the 'discretion'
[2] See para 6 and 7 of Claimant's Affidavit in Response for when she acknowledges receiving benefits/compensation.

CONCLUSION

[64] The Claimant was ultimately recommended for surgery. The history and development of the Claimant's condition, her report of her pain and suffering, her medical practitioner's advice and reports from the inception suggests that on the application of an objective test (see the 1st limb of the *'Mc Cafferty'* test) the Claimant would have considered her injury as significant. Applying a more subjective test having regard to all the considerations including the Claimants level of education (as inferred from her occupation), her occupation as a nurse and an experienced one at that, her admitted experience with pain and partial and temporary disablement over a period of several years, the content of the various Doctors reports and letters from the very beginning - of what has turned out to be a bit of a saga - and even with her knowledge of her employers claim on it's medical insurance and/or *Workman's Compensation* benefit regime, cumulatively, suggest to me that the Claimant would have been unreasonable if she did not regard the injury as sufficiently serious before July of 2000 and in any event before June of 2003, so as to trigger the running of the limitation period.

[65] The Defendant in this matter has applied to the Court to strike out the claim at this preliminary stage. This Court, without dispute, has the power to do so in a fit and proper case. Lord Hoffman, in the *Adams and Bracknell* case footnoted above, at paragraph 23 pp. 29 of his Judgment, reviewing the decision in Phelps v Hillingdon London Borough Council [1998] ELR 38, quoted Lord Nicholls of Birkenhead on the courts powers to deal with preemptory attacks on another litigants case that: *"The Courts, with their enhanced powers of case management must seek to evolve means of weeding out obviously hopeless claims as expeditiously as is consistent with the court having a sufficiently full factual picture of all the circumstances of the case*[1]*."*

[66] I am also cognizant of the caution one has to exercise in keeping a litigant out of court before he has had an opportunity to ventilate the real issues in controversy. Be that as it may, it is said that where a party is clearly out of time it is the court's duty to strike out the claim and I do so now. I am unable to see what other facts not now before me can, in a

[1] See also A Practical Approach to Civil Procedure 4th edit., Blackstone's Press, by Stuart Sime, pp. 220

trial, be adduced in further support of the Claimants defence to this application to strike out.

[67] I find the Claimant to have had the requisite knowledge as defined in the Act and the learning in this area by July of 2000 and in any event certainly prior to June 2003.

ORDER

[68] IT IS HEREBY ORDERED that:

(1) For the reasons given above, the claim is struck out.

(2) Prescribed costs of $5,625.00[1] to be paid to the Defendant, if not otherwise agreed between the parties.

(3) Liberty to apply for determination of Costs at the hearing for the delivery of this Judgment, or to so apply within 21 days of the date of this Order.

David C. Harris
Judge

[1] Calculated pursuant to: Part 65.5.2(b) (ii), then appendix B column "2" then, appendix C column "1". The value of the claim is stipulated as $50,000.00 failing agreement between the parties.