

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2007/0163

BETWEEN:

JASON THOMAS

Claimant

AND

KELVIN CHARLES

Defendant

Before:

Master Cheryl Mathurin

Appearances:

Mr. Kendrickson Kentish for the Claimant

Ms Tracy Benn for the Defendant

2008: December 10th;

2009: January 14th

RULING

- [1] **MATHURIN, M:** On the 6th March 2008 the claimant, Mr. Jason Thomas filed a claim against the defendant (Dr Kelvin Charles) for damages for Negligence and/or Breach of Contract. The issue to be determined at this point is whether the alleged causes of action are statute barred by virtue of section 13 and 16 of the Limitation Act No. 8 of 1997.

[2] The relevant sections of the Act read as follows;

" 13(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 a statute 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.

...

13(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5).

13(4) Except where subsection (5) applies, the period 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

Subsection (5) is applicable if the injured person dies and is not relevant to these proceedings

...

16(1) In sections 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-

(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;

...

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 reasonable 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."

[3] The chronology of events as pleaded in the Statement of Claim leading to the determination of this issue is as follows;

(a) **May 22nd 2004** - Mr. Thomas was examined by Dr Charles and surgery was performed on him immediately.

(b) **May 24th 2004** – Mr. Thomas was discharged from the hospital

(c) **May 26th 2004** – Mr. Thomas consulted Dr Charles about the color of his urine and was prescribed antibiotics which after three days did not assist as his urine remained unchanged, his vision was blurred and he was in extreme pain. He returned to the Adelin Clinic where he was told that his ailment was related to his common bile duct.

(d) **June 10th 2004** – Mr. Thomas traveled to Trinidad where the common bile duct was cleaned out. He remained in Trinidad for one week.

(e) **June 16th 2004** – Mr. Thomas attended Dr Charles's office for more tests

(f) **September 2004** – Mr. Thomas's symptoms returned accompanied by vomiting and fever every 3 to 4 days

- (g) **September 11th 2004** – Mr. Thomas traveled on reference from Dr Daoud to Jacobi Medical Center in New York where he was seen by Dr Narula who diagnosed him as suffering with abdominal pain, jaundice and fever as a result of the procedure performed by Dr Charles in May 2004. Dr Narula performed an exploratory surgery and found that Mr. Thomas's right hepatic duct was damaged as a result of the procedure done by Dr Charles. Dr Narula advised Mr. Thomas then that surgery was necessary to correct the procedure or he would die. He was also advised that the surgery was high risk.
- (h) **October 26th 2004** – The corrective surgery was performed and Mr. Thomas spent a further six weeks in hospital after which he was discharged.
- (i) **June 18th 2007** – Dr Narula issued a written report of his findings.

- [4] Counsel for the Claimant submits that the knowledge of Mr. Thomas can only be affixed to the date on which he received the medical report of Dr. Narula on June 16th 2007. If this is the case, it would mean that the filing of this matter on March 6th 2008 would place it within the prescribed time limit of three years from which Mr. Thomas had knowledge of the injury. Counsel submits that it is this report which forms the basis of the claim and that the particulars of injury set out in the Statement of Claim are distilled from the report. He seeks to distinguish medical negligence from the tort of negligence and asserts that the Claimant could not have been fixed with particulars of any clinical negligence by his doctor.
- [5] In support of his submissions that Mr. Thomas could not have known of his injuries before the issuing of the report by Dr Narula in June 2007, Counsel has referred to the case of **Vivian Alexander and John Hector v Richie Smith by his next friend Delicia Toussaint** Civil Appeal No 4 of 2003. I did not find that case particularly useful because the central issue was whether infancy was a factor to be considered in ascertaining whether or not a person had the requisite knowledge which would extend the period when the limitation commences and time began to run against that person.
- [6] Counsel also referred to the case of **Abbott v Hodge** Civil Appeal No 12 of 2002 where he states that Edwards JA (Ag) underscored the need for medical evidence in a claim for

medical negligence. Inasmuch as I agree with that principle, I similarly did not find that matter to be of assistance in this particular situation as the issue of the hurdle of limitation was not an issue in the proceedings.

- [7] In light of the chronology of events stated above and supported by Mr. Thomas in his pleadings, it is clear to me that Mr. Thomas had the requisite knowledge in accordance with Section 16 of the Act at the very latest as far back as September 2004 when the gravity of his condition was pointed out to him by his doctor. The fact that the doctor's findings were reported in writing in September 2007 does not, in my opinion, affix the actual knowledge to that date. In the circumstances, the claim herein is statute barred and hereby struck out with costs to be assessed if not agreed by the parties.

CHERYL MATHURIN
MASTER