EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2011/0410

BETWEEN:

CLAUDIA GUY

Claimant

and

RICARDO WATSON

Defendant

Appearances:

Mr. Bertram Commissiong Q.C with him Ms. Mira Commissiong
of Counsel for the Claimant
Ms. Zinga Horne of Counsel for the Defendant

2013: January 29th; March 22nd
April 4rd

DECISION

Introduction

[1] TAYLOR-ALEXANDER, M: Section 13 (1) of the Limitation Act Cap 129 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009 provides for a statutory limit of three years to initiate a claim in damages calculated from the date when the cause of action in negligence arose, or

the date of knowledge if later of the person injured, where such action includes an action for personal injury.

[2] The claimant Claudia Guy of Carrier Hill, Mesopotania Valley in the parish of Charlotte, claims to have suffered injury loss and damage in the evening of the 5th August 2006 at about 5:30 pm when, crossing a public road at Beachmont in Richmond Hill, she was hit by motor truck registration number TJ 246 driven by the defendant. She was propelled into the air and then onto TJ 246, then onto the ground. She was comatose by the impact and was admitted to the emergency ward of the Milton Cato Memorial Hospital. She was examined by Dr. Hughes Dougan on the 14th August 2006 who reported that she had suffered a fracture of the left vault; fracture of the radius and ulna; fracture of the tibia and fibula; fracture of the left clavicle; fracture of the left wrist; fracture of the left leg; and abrasion to the right shoulder. Dr. Dougan recommended that the claimant undergo a CT scan and that she see a neurologist or neurosurgeon.

[3] The claimant flew to Trinidad and on the 18th August 2006 she undertook a CT scan of the brain and spine. She was seen by Dr. Godfrey Araujo a Consultant Orthopedic Surgeon who summarised his findings in his medical report dated the 21st August 2006 stating that the claimant's X-rays showed a minimally displaced left clavicular fracture; a displaced, comminuted, intra-articular fracture of the distal left radius and; a displaced short oblique fracture of the mid-shaft of the left tibia and fibula. Additionally, the claimant had consultations on or about the 14th August 2006 and on the 14 of December 2009 with Neurosurgeon Dr. Henry Bedaysie who in 2009 reported that the claimant showed impairment of the short term memory, planning; attention, language, logic and visual search, which findings were consistent with Organic Brain Syndrome, secondary to head injury. She was assessed as having

a permanent partial disability of 55% and he recommended that she was unfit to continue in her profession as a nurses' aid.

[4] Unfortunately, Ms. Guy only initiated proceedings on the 25th of October 2011 in respect of the negligence and damage she suffered, at which time, approximately five years two months and three weeks had expired from the accrual of the cause of action. This prompted an oral application by the defendant at the case management conference to strike out the proceedings as being filed beyond the period allowed by Section 13 of the Limitation Act Cap 129 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009, (the Act). The claimant, in response filed an application for an order that the limitation of action shall not apply to the claimant's cause of action and that the cost of the application be costs in the cause.

The Application

[5] The application of the claimant was filed on the 14th of November 2012. The grounds stated in the application were largely a restatement of the averments in the statement of case, and offered an explanation for the delay in initiating the proceedings, summarised as follows:—

(a) The claimant's injuries required repeated visits to medical practitioners both in Saint Vincent and in Trinidad;

(b) The claimant had been negotiating with the insurer of the defendant who had been awaiting the medical reports and the outcome of the criminal proceedings brought by the state against the defendant in relation to the accident;

(c) Following the outcome of the criminal proceedings the defendant had falsely informed his insurer that he had not been convicted,

resulting in the insurer refusing to entertain the claim until they were advised otherwise;

(d) The insurer was written to on the 23rd of August 2010 and they responded in February 2011, avoiding liability, on the basis that the claim was statute barred;

(e) The claimant is impecunious and this delayed her timely initiation of the proceedings;

(f) The claimant has a considerable claim, her injuries were severe and she is now disabled. She will be prejudiced and suffer greatly if she is not allowed to proceed with her claim.

[6] The application is supported by affidavits of Claudia Guy and Bertram Euston Commissiong Q.C filed on the same day. The exhibits supporting the affidavit of Bertram Commissiong are of the medical reports of the doctors who had examined the claimant and are dated between the periods 14th August 2006 to 21st December 2009.

[7] The defendant objects to the application, and the affidavit of Richard Watson the defendant offers reasons why the application ought not to be granted, summarised as follows:—

(a) The accident occurred on the 5th August 2006; at which time the defendant was 49 years old. He is now 55;

(c) The moments leading up to the accident was fleeting and as such his memory has faded significantly, affecting his recollection of certain events of the accident, like the condition of the road, the weather at the time and the actions of the claimant prior to being struck;

(d) The claimant was not hospitalised for an extended period, nor was she confined to a bed. She also had free legal representation

and therefore had the means and ability to bring her claim. Her failure to do so has prejudiced the defendant in that, with the passage of time his recollection of events has been compromised;

(e) The likely date of trial may well be toward the end of the year 2013, further compromising the cogency of the evidence.

[8] Both parties provided the court with filed submissions and authorities on the exercise of the court's statutory discretion.

The Law

[9] Section 13 (1) of the Act relevant to this application provides as follows:—

> *"(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.*
>
> *(2) None of the time limits given in the preceding provisions of the Act shall apply to an action to which this section applies.*
>
> *(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).*
>
> *(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."

[10] In acting under Section 13, regard is to be had to Section 33 (1) which runs thus:—

"*If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which:—*

(a) The provisions of Section 13 or 14 prejudices the plaintiff or any person whom he represents and

(b) Any decision of the court under this subsection would prejudice the defendant or any person whom he represents

The court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates."

[11] In acting under this section the court shall have regard to all the circumstances of the case but identifies the following criteria for particular consideration: —

"(a) the length of, and the reasons for the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence 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 or, as the case may be, section 14;

(c) The conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[12] In having regard to all the circumstances of the case the overriding objective set out in Rule 1.1 and 1.2 of the CPR 2000 provides guidance as to factors that ought to guide the court's consideration.

Analysis of the law and facts

[13] I have reviewed the authorities provided me, from our jurisdiction, the wider Caribbean and the United Kingdom. All of which jurisdictions share legislation of equivalent wording in relation to provisions on limitation of action for personal injury. The consistent reasoning espoused by them all with which I am of the same mind, is that it is unfair to a defendant and it weakens the certainty of the administration of justice if litigation is delayed. Undoubtedly the force of the defence is undermined by the

fading of memories; the passage of time results in the loss of evidence and of witness; the costs of litigation increases and the likelihood of injustice inevitably is amplified. The statutory bar is therefore a manner of legislative control, ensuring equity between parties to maintain the credibility of the administration of justice.

[14] I have found favour with the dicta of Smith LJ in the consolidated appeals of Cain v Francis and Mc Kay v Hamlani [2009] 3 WLR 551 summarizing the mischief of an equivalent provision to section 33(3) of the Act. He said thus:—

> *"Any limitation bar is arbitrary. It cannot always be fair and just to permit a claimant to proceed with his action if he commences it two years and 364 days after the relevant injury. Significant prejudice and unfairness might already have arisen, even long before the expiry of three years, for example by the death of an important witness. But the rule is that the claimant can proceed, notwithstanding any unfairness to the defendant. On the other hand, the expiry of the three year term does not automatically create unfairness. Yet what was deemed fair on Tuesday is deemed unfair on Wednesday. There might be no unfairness to the defendant even if he is required to answer the claim, say, five years after the accident. The three year limit is Parliament's best guess as to when prejudice can be expected to have arisen such that it is unfair to expose the defendant to the claim. The imposition of an arbitrary limit could only ever hope to do rough justice.*"

[15] The period of limitation does not provide a defendant an absolute defence, but only in so far as the degree of prejudice he suffers would make it unjust to allow the claim to continue. In Firman v Ellis [1978] 1

Q.C 886, Lord Denning Master of the Rolls (as he then was) interpreting an equivalent section of the UK Act said thus:—

> *"Although those committees [Law reform committees] did not accept the proposal for a general discretion, nevertheless, when parliament passed the Act of 1975, it did give the court a general discretion. Section 2D as I read it, gives a wide discretion to the court which is not limited to a "residual class of case" at all. It is not limited to "exceptional cases". It gives the court discretion to extend the time in all cases where the three year limitation has expired before the issue of the writ. It retains three years as the normal period of limitation ... but confers on the court an unfettered discretion to extend the three-year period in any case in which it considers it equitable to do so." [emphasis supplied]*

[16] I proceed to examine the grounds and evidence provided in support of the application and the degree of prejudice to the claimant and or the defendant, and the criteria provided in section 33(3) of the Act.

Length and reason for delay

[17] It was accepted in Donovan v Gwentoys Limited [1990] WLR 472 that the relevant period for the consideration of delay was the period after the limitation period had expired. In this case the delay in question is a period of approximately two years and two months and three weeks.

[18] The evidence of the claimant concentrates largely on the period during which she could have pursued her claim but had not. She stated that she was informed by her children immediately after the accident that she had had an accident, but she herself has no recollection. She recalls the defendant being prosecuted at the magistrate's court for the accident. She

claims that whatever money she and her children had was used initially, pursuing her medical expenses. She continues to require medical attention but has not been able to maintain any treatment because she has no money and her financial situation is precarious. Her children have been a source of assistance in helping her meet her mortgage payments currently in arrears as she is no longer able to work.

[19] Her application was assisted by affidavit evidence of Bertram Commissong Q.C her legal representative. In earlier proceedings the court had directed Mr. Commissiong to have other counsel continue the representation for the claimant in this application, so as to avoid the apparent conflict, he having given affidavit evidence. On a previous hearing Mr. Julian Jack had held for Counsel Mr. Commissiong. The last hearing in which Mr. Commissiong himself appeared together with Ms. Mira Commissiong was one only for the presentation of regional authorities and I was satisfied it raised no issues of conflict.

[20] The evidence of Mr. Commissiong is that his firm had been working with the claimant for three years without payment and in 2008 had asked her to sign a contingency fee agreement. She got agitated and left without signing. Her family later explained her behavior as consequence of the accident, such that she becomes easily agitated. She returned at a later date to execute the fee agreement. He also stated that he contacted the insurance company of the defendant at which time the action had accrued and the insurer had promised to assist, to no avail.

[21] The defendant supplied an affidavit of Kim Gun-Munro agent of the insurer whose evidence of the history leading up to the initiation of the proceedings vastly differs from that of the claimant. The insurer alleges that as early as the 7th August 2006 their offices were contacted by the defendant informing of the accident, following which efforts were made to have a meeting with the claimant. She had promised to come in to their

offices and never did. The insurer states that they recall Mr. Commissiong coming to their offices in September 2009 informing them that he acted for the claimant. He was asked to submit documentation for consideration of the principals of the insurer, but this documentation came only one year later.

[22] The evidence both by the claimant and the defendant suggests that there was some hesitation on the part of the claimant in prosecuting the proceedings. The claimant submits that this was as a result of her financial constraints and as a result of the impact of the accident on her medical condition. I agree with the defendant that despite her financial constraints the claimant had had attorneys from early on in the process who were available to assist her with her claim.

[23] The difficulty I face is that the claimant's evidence is extremely sketchy and provides little information as to the period after the expiry of the three year limitation, such that I am forced to speculate. I am satisfied that there is evidence of lethargy in pursuing the claim. I do not know the basis for it. The medical evidence of Dr. Bedaysie suggests some impairment of the claimant's short term memory, attention and logic, which may well have accounted for the claimant's approach to the litigation. Although I may be speculating, it would be remise of me to not consider the impact of this on her readiness to proceed with a claim.

The Effect of the delay on the cogency of the evidence

[24] The affidavit of Richard Watson alleges that he is now 55 years old and has slowed down considerably since the accident. He claims that his memory has dimmed and that while he remembers the date, place and time of the accident with no difficulty, his memory with regard to the condition of the road, the effect of the weather for instance and the actions of the claimant prior to being struck is now fuzzy.

[25] The claimant's counsel in oral submissions attacked this evidence stating that the prejudiced suffered if any, would be minimal as there was evidence collected during the criminal proceedings which evidence spoke to those issues and would be admissible in these proceedings.

[26] In Cain v Francis and Mc Kay v Hamlani at paragraph 69 Smith LJ summarizing the obligation of the court when exercising its discretion stated:−

> *"… the claimant had the right to pursue his cause of action which he has lost by the operation of section 11. The defendant, on the other hand, had an obligation to pay the damages due; his right was the right to a fair opportunity to defend himself against the claim. The operation of section 11 has given him a complete procedural defence which removes his obligation to pay. In fairness and justice, he only deserves to have that obligation removed if the passage of time has significantly diminished his opportunity to defend himself (on liability and/or quantum). So the making of a direction, which would restore the defendant's obligation to pay damages, is only prejudicial to him if his right to a fair opportunity to defend himself has been compromised."* (my emphasis)

[27] I am not convinced from the evidence before me that there has been prejudice to the defendant beyond a fortuitous or windfall defence. I find that his prosecution at the magistrate's court and the claimant's communication with him via his insurers ought to have alerted the defendant of an impending action and allowed him the time and opportunity to investigate and collect evidence relevant to his defence. In any event the affidavit evidence of the defendant does not convince me that the opportunity to defend the claim on its merits has been significantly diminished by the delay of two years and two months and three weeks.

Conduct of the Defendant

[28] There is nothing on the evidence to suggest that the defendant impeded the initiation of the claim, although the evidence of the claimant is that on the completion of the criminal proceedings the defendant had informed his insurer that he had not been convicted. Even if that were true, it seems that the decision taken by the insurer not to entertain any settlement of the claim was based primarily on the position that the matter had become statute barred.

The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action.

[29] No submission was advanced by the parties as to any disability of the claimant arising after the date of the accrual of the cause of action. I however referred earlier to the findings of Dr. Bedaysie.

The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

[30] I had earlier, at paragraphs [18] to [23] dealt with this consideration, and it is a ground I do not intend to revisit except to say that the evidence adduced did not satisfy me of promptitude. I accept the evidence of the insurer that reasonable attempts were made to meet the claimant and to facilitate her attorney in referring her claim for consideration, but these attempts were frustrated by inactivity on the part of the claimant. Despite this I do not discount the impact of the accident on the claimant's medical condition which the claimant alleges interfered with her ability to initiate action in a timely fashion. This to me, it seems, would have made the delayed start of the proceedings reasonable in the circumstances.

The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

[31] I am satisfied that in so far as it was within her means the claimant sought and obtained medical and expert advice, and the evidence suggest that from early stages she had had the assistance of counsel although without a formal fee arrangement.

[32] Having considered all of the relevant criteria, and Part 1.1 and 1.2 of the CPR 2000, I am of the view that it would be equitable, fair and just that the action is allowed to proceed. There has been little evidence of prejudice to the defendant such that I can conclude that his ability to defend himself in these proceedings has been compromised. In contrast I am satisfied that the claimant will be prejudiced as the quality of her life has changed significantly, affecting her ability to work and to get further much needed medical attention. Allowing the action to proceed is the most equitable stance that this court can assume in the face of the evidence presented.

[33] In consequence therefore I accede to the application of the claimant and allow this action to continue with costs in the cause, and direct the matter to be scheduled for the next available case management conference before the master.

V. Georgis Taylor-Alexander
High Court Master