EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**:** **ANUHCV 2013/0510**
Between

EDNA PARKER

Claimant/
Respondent

AND

HAWKSBILL LIMITED trading as
HAWKSBILL BY REX RESORTS HOTEL

Defendant/
Applicant

Before:

Raulston Glasgow — Master

Appearances:
Jose Laurent along with Kamaria Looby for the Claimant/Respondent
Nelleen Rogers – Murdoch along with Fiona Murphy for the Defendant/Applicant

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2014: December 2
2015: March 4;
March 10
May 20

RULING ON APPLICATION TO STRIKE OUT CLAIM

[1] **GLASGOW, M:** On July 15, 2014 the defendant herein (hereinafter the applicant) filed an application requesting the exercise of the court's case management powers to strike out the claim on the grounds that it amounts to an abuse of the court's process. The abuse, it is contended, arises from the fact that the claimant (hereinafter the respondent) commenced her claim after the expiration of the statutorily stipulated period of (3) years within such claims must be brought.

BACKGROUND

[2] In 1981, the respondent started working as a maid in the housekeeping department of the applicant's hotel. On May 26, 2010 she reported to the applicant that she fell while walking along an uneven, raised walkway leading to a beach bar. The respondent complained of pain. She visited a medical doctor on June 25, 2010 who recommended (8) days leave from work due to a torn ligament, muscle pain and a pinched nerve. In early July 2010, the respondent returned to work but she continued to complain of pain. Her employers, the applicant, referred her to the NSA Medical Surgical Rehabilitation Centre (hereinafter NSA). On July 7, 2010 the respondent's condition was evaluated by medical experts at the centre. The results of this evaluation revealed disc dessication and disc herniation at L2/3, L4/5 and L5/S1. The respondent then began a course of physiotherapy geared towards remediating the damage from her injuries. On July 12, 2010 an MRI was performed on the respondent's lumbar spine by Dr. Eumel Samuel at the Belmont Clinic. The results of the MRI also disclosed disc dessication in the lower lumbar spine; disc herniation at the L2/3; disc herniation at L4/5; disc herniation at L5/S1. The respondent took this report back to NSA and continued the physiotherapy sessions which lasted until November 2010. The applicant underwrote the costs of NSA's evaluation, the MRI and physiotherapy.

[3] The respondent continued to complain of pain in spite of the visits to NSA for therapy. In fact for several periods during this time the respondent was granted leave of absence from work due to the pain suffered from her injuries. The situation progressed to such a state that her employers referred her to Dr. Kunwar K. Singh in February 2011 for a further evaluation of her injuries. In the referral to Dr. Singh, the applicant instructed that the respondent has undergone *"a series of treatments from the NSA Medical Centre, but is still unable to perform her duties*."[1] Dr. Singh produced his report on March 14,2011 in which he states that

"*Clinical and radiological examination has confirmed the diagnosis of lumbar inter-vertebral disc bulge at L3/L4, L4/L5 and L5/S1 for which she was treated along conservative lines*. *Presently looking at her medical diagnosis and nature of working in housekeeping I will recommend her to retired* (sic) *on medical grounds...* "

[1] Letter dated February 1, 2011

Dr. Singh's conclusion was that "*Edna S. Parker has multiple level of disc bulge as mentioned in the above medical report disabling her permanently 9% as a whole person. This percentage of permanent physical impairment will increase as she grows older. She may require surgery in the future to decrease her further disabilities and even to maintain the current levels of her abilities.*[2]"

I must point out that Dr. Singh's statement is the only detailed medical report that has been disclosed to this court. The initial evaluation at the NSA on July 7 or 9, 2010 is encapsulated in the invoice sent by NSA to the applicant in respect of the physiotherapy received by the respondent. The report of the MRI dated July 12, 2010 relates the technical output of the scan performed on the respondent.

[4] The applicant acted on Dr. Singh's medical report and terminated the respondent's employment sometime during the period March to April 2011. The respondent filed a claim against the applicant on July 31, 2013.

ARGUMENTS

Applicant

[5] The applicant's arguments rest on sections 13 (1) to (4) and 16 of the Limitation Act, 1997 (hereinafter the Act) which state -

> *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.*
>
> *(2) None of the time limits given in the preceding provisions of this 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 –*

[2] Medical report of Dr. Kunwar K. Singh dated March 14, 2011

*(a) the date on which the cause of action accrued**;** or*

(b) the date of knowledge (if later) of the person injure

Section 16 states –

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;

(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 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 person's 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.

[6] In terms of the respondent's knowledge for the purposes of section 16 of the Act, the applicant urges that the court considers the following extract from the case of **Nash v Eli Lily & Co**[3]

> *'Knowledge' in the meaning of s 14 is a state of mind experienced by the plaintiff actually existing or which might have existed had the plaintiff, acting reasonably, acquired knowledge from the facts observable or ascertainable by him or which he could have acquired with the help of medical or other appropriate expert advice which it was reasonable for him to obtain.*
>
> *(3) The period of limitation begins to run when the plaintiff can first be said to have had knowledge of the nature of his injury to justify the particular plaintiff taking the preliminary steps for the institution of proceedings against the person or persons whose act or omission has caused the significant injury concerned.*
>
> *(4) By s 14(3) 'knowledge' for the purposes of 14(1) includes knowledge reasonably expected to be acquired. There will be cases in which a firmly held belief actually held by the plaintiff precluded consideration of any further steps which he might reasonably have taken to acquire from knowledge of further facts before initiating proceedings. In other cases the state of the plaintiff's belief would make it reasonable for him to make the further inquiries envisaged in s 14(3). The temporal and circumstantial span of reasonably inquiry will depend on the factual context of the case and the subjective characteristics of the individual plaintiff involved.*
>
> *(5) It is to be noted that a firm belief held by the plaintiff that his injury was attributable to the act or omission of the defendant, but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, medical or legal, or others, would not be regarded as knowledge until the result of his inquiries was known to him or, if he delayed in obtaining that confirmation, until the time at which it was reasonable for him to have got it. If negative expert advice is obtained, that fact must be considered in combination with all other relevant facts in deciding when, if ever, the plaintiff had knowledge. If no inquiries were made, then, if it were reasonable for such inquiries to have been made, and if the failure to make them is not explained, constructive knowledge within the terms of s 14(3) must be considered. If the plaintiff held a firm belief which was of sufficient certainty to justify the taking of the preliminary steps for proceedings by*

[3] [1993] 4 ALL ER 383, 395 to 396. The case of **Nash** pronounced on sections 11 and 14 of the United Kingdom Limitation Act, 1980. Sections 11 and 14 are similar to sections 13 and 16 of the Limitation Act, Antigua and Barbuda.

obtaining advice about making a claim for compensation, then such belief is knowledge and the limitation period would begin to run

[7] Utilising the foregoing principles, the applicant submits that it must be assumed that, based on the facts available, the information regarding her ailment was readily available to the respondent and were easily obtainable by her since July 2010. Those suppositions, when coupled with the fact that the respondent continued to suffer pain and discomfort, would produce only one rational conclusion and that is that the respondent was aware that her injuries were significant and attributable to the applicant.

[8] The applicant also relied on the words of Lord Hoffman in the case of **A v Hoare & Others**[4] where his Lordship had this to say regarding the *"knowledge that the injury was significant"* test propounded in **McCafferty v Metropolitan Police District Receiver** [5]

"I respectfully think that the notion of the test being partly objective and partly subjective is somewhat confusing. Section 14(2) is a test for what counts as a significant injury. The material to which that test applies is generally "subjective" in the sense that it is applied to what the claimant knows of his injury rather than the injury as it actually was. Even then, his knowledge may have to be supplemented with imputed "objective" knowledge under section 14(3). But the test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would "reasonably" have done so. You ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would 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.

It follows that I cannot accept that one must consider whether someone "with [the] plaintiff's intelligence" would have been reasonable if he did not regard the injury as sufficiently serious. That seems to me to destroy the effect of the word "reasonably". Judges should not have to grapple with the notion of the reasonable unintelligent person. Once you have ascertained what the claimant

[4] [2008] UKHL 6
[5] [1977]1 WLR 1073 at 1081

knew and what he should be treated as having known, the actual claimant drops out of the picture. Section 14(2) is, after all, simply a standard of the seriousness of the injury and nothing more. Standards are in their nature impersonal and do not vary with the person to whom they are applied

[9] Applying the foregoing dictum, the applicant submits that the court should enquire whether *"a reasonable person, given the facts of the claimant's case, would have considered the injuries/medical condition serious enough to institute proceedings?"*[6] The applicant answers this question in the positive. It is the applicant's view that the respondent's symptoms were considered serious enough to render her incapacitated and unable to work on a number of occasions. This state of affairs coupled with the evaluations done at NSA and the Belmont Clinic were sufficient to inform the reasonable person that the injuries were serious enough to warrant the commencement of proceedings.

[10] Some reliance is placed on the respondent's answers to several questions raised by the applicant in a request for further information dated March 17, 2014 in which the respondent states that when she received the MRI from the Belmont clinic on July 12, 2010, it was returned to the physiotherapist at NSA who informed her of the results. The applicant asks the court to conclude that when one takes all these matters into account, there is more than ample evidence that the respondent *"knew or must be taken to have known by July 12, 2010 the full nature and extent of her injuries with the effect that time commenced running for the purposes of the Limitation Act..."*[7]

Respondent's arguments

[11] The respondent submits that for the purposes of this case, the court should examine (3) three legal propositions which emerge from the conjoint reading of sections 13 and 16 of the Act –

(a) that the respondent's injury must have become serious or significant to her;
(b) that she considered the injures sufficiently serious to warrant instituting legal proceedings; and

[6] Paragraph 19 of the applicant's submissions filed on February 13, 2015
[7] Ibid at paragraph 34

(c) the knowledge which she reasonably acquired came from facts she obtained with the help of medical or other appropriate expert advice, she having taken all steps to find this out and act on the advice.[8]

[12] The respondent is firm in her assertion that she did not know or appreciate the seriousness of her injuries until the visit to Dr. Singh on February 2, 2011. In this regard, it is argued that the respondent is a layperson who was not placed in the position to know the results of the MRI report. She laboured under the impression that her injuries were restricted to a torn ligament, muscle pain and a pinched nerve. She was not in possession of or comprehended that the injuries were more significant. The respondent was throughout acting on the instructions of her principals who commissioned the said report. Indeed, she returned the report to NSA as instructed but that entity did not pronounce on her injuries or advice her as to prognosis; specifically there was no advice that surgery would be necessary to redress the damage caused by her injuries. Indeed there is no evidence that the applicant themselves appreciated the gravity of the injuries since they did not act on the MRI report until Dr. Singh's intervention in February 2011. The seeking out of Dr. Singh's assistance exemplified the lack of appreciation of the gravity of the injuries by both sides. It is submitted that both parties continued in their relationship until February 2011 when it became obvious that the respondent's injuries were quite substantial. Throughout that time the applicant instructed and the respondent followed the medical regiment arising from those instructions. It was only after Dr. Singh's medical assessment that the applicant took steps to bring the respondent's employment to an end. Accordingly, the respondent could not be fixed with knowledge for the purpose of section 16 of the Act until Dr. Singh's report in February 2011.

REVIEW

Striking out a statement of claim

[13] The procedural rules set out in CPR 26.3 recite explicit grounds on which the court may strike out a statement of case -

> *26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –*

[8] Paragraph 16 of the respondent's submissions filed on March 2, 2015

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[14] It has been stated that the power to strike out a claim is a draconian step that should be reserved for cases or pleadings that are bound to fail for glaringly obvious reasons. Michel J.A explained in **Tawney Assets Ltd v East Pine Management Ltd**[9] that the jurisdiction is cautiously employed since it may deprive a party of his right to trial or the occasion to bolster his case through such procedures as disclosure or a request for further information. His Lordship advised that *" the court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial*". The process is also ill-suited for and should not be applied in cases that raise serious live issues of fact which can only be resolved by hearing oral evidence.[10] Blenman J also provides a fulsome exposition of the law in this regard in the case of **English Haven Limited v The Registrar of Lands et al**[11] and issues the reminder that it is the applicant who must prove that the respondent's statement of case discloses no reasonable cause of action.

[15] On this application, the request to strike out is hinged on CPR 26.3(1) (c) which permits the court to strike out proceedings as an abuse of its process. In respect of the abuse of the court's process, Lord Blackburn said the following in **Metropolitan Bank v Pooley**[12]

"From early time ... the Court had inherently in its power the right to see that its process was not abused by any proceeding without reasonable grounds so as to be vexations and harassing - the

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[9] HACAP 2012/007 (BVI)

[10] Per Pereira C.J in Ian Peters v Robert George Spencer, Civil Appeal No 16 of 2009 (Antigua and Barbuda). See also Baldwin Spencer v Attorney General, Civil Appeal No. 20 of 1997 (Antigua and Barbuda).

[11] Claim Number ANUHCV 2007/0277 at paragraph 64 et seq.

[12] [1885] LR 10 App. Cas. 210, 220-221.

Court had the right to protect itself against such abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstance as to be an abuse of the process of the Court; and in a proper case they did stay the action."

In this context, courts will ensure that rules of practice and procedure (for instance, in this case, procedures as to the time for bringing claims) are not flouted. In **Connely v Director of Public Prosecutions**[13] Lord Morris of Borth – Y- Gest expressed the view that

"There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process."

The limitation point

[16] The answer to the challenge on limitation rests on the application of section 13 (4) (b) of the Act as it is mostly accepted by both sides that the respondent's action was not commenced within (3) years of the date of her fall on the applicant's property. The applicant alluded to section 13(4) (a) in the defence and on the affidavit in support of the application to strike out the claim. This position was not maintained in the submissions to the court, both oral and written. Section 13(4)(b) therefore requires an examination as to the date of the respondent's knowledge. The date of the respondent's knowledge is determined by the several conditions in section 16 (1) set out above in this judgment. For the purposes of this ruling, section 16(1) (d) is not relevant. Accordingly the (3) conditions to be examined in this exercise are – (1) the date the respondent was aware that her injuries were significant. A significant injury is explained as one which an injured person would reasonably consider sufficiently serious to justify commencing proceedings against a defendant who does not dispute liability and is in a position to satisfy a judgment[14]; (2) that the injury was

[13] [1964] AC 1254, 1301
[14] Section 16(2) of the Act

attributable in whole or in part to the act or omission of the defendant which act or omissions it is alleged constitutes negligence or a breach of duty; and (3) the identity of the defendant.

[17] There is no dispute in this case as to the identity of the defendant or the facts attributing the respondent's injuries to the applicant's alleged negligence in respect of the upkeep of the walkway in question. The complaint in this case centres on section 16 (1), that is say, when did the respondent become aware or is presumed to have become aware that her injuries were significant enough to warrant instituting legal proceedings. The applicant asserts that time began to run, at the latest, from July 12, 2010 when the respondent received the MRI results which she took to the NSA. It is their view that the results disclosed very serious impairments. The results of the MRI coupled with the respondents' lengthy treatment at NSA and continuing pains would propel any reasonable person to seek redress in the courts. The respondent rejoins that the relevant date is February 2, 2011 when Dr. Singh's medical examination revealed not only the nature of the injuries but the extent of the impairment. It was not until Dr. Singh's assessment that the gravity of the situation was explained to the respondent. The information disclosed, for instance, the extent of the respondent's future disability and advocated the necessity of remedial surgery. The respondent also makes much of the fact that the applicant was similarly circumstanced in that neither party appreciated the seriousness of the illness until Dr. Singh's report. Her retort is, in essence, why else would her employers keep paying for medical reviews and physiotherapy? In fact, she strongly contends that her employer's decisive conduct ensued only from the time of Dr. Singh's report which is the same time that she became fully cognisant that her injuries were quite significant.

[18] In deciding the date of the claimant's knowledge the court is to assess not only actual knowledge as may be said to be the case with section 16(2) of the Act but what may be deemed constructive or imputed knowledge. As Lord Hoffman said in **A v Hoare**[15] in respect of sections 14(2) and (3) of the English provision which are similar to sections 16 (2) and (3) of the Act,

> *"Section 14(2) is a test for what counts as significant injury. The material to which that test applies is generally "subjective" in the sense that it is applied to what the claimant knows of his injury rather than the injury as it actually was. Even then, his knowledge may have to*

[15] Supra, note 4

be supplemented with imputed "objective" knowledge under section 14(3). But the test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would "reasonably have done so. You ask what the claimant knew about the injury he had suffered, you may add knowledge about the injury which may be imputed to him under section 14(3) and you then ask whether a reasonable person with that knowledge would 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."

[19] The foregoing distillation of the principles underpinning sections 16(2) and (3) departed from the approach articulated in **Nash v Eli Lily & Co** which followed **McCafferty** where it was advised that the test includes a subjective element that ought to have regard to such idiosyncratic qualities as the claimant's level of intelligence. Lord Hoffman was of the view that *"judges should not have to grapple with the notion of the reasonable unintelligent person. Once you have ascertained what the claimant knew and what he should be treated as having known, the actual claimant drops out of the picture. Section 14(2) is after all, simply a standard of the seriousness of the injury and nothing more. Standards are in their nature impersonal and do not vary with the person to whom they are applied".*[16]

[20] Further commentary on the test for reasonableness is found in the case of **Adams v Bracknell Forest Borough Council**[17] . Lord Hoffman commented that the word "reasonable" is

"generally used in the law to import an objective standard, as in 'the reasonable man' But the degree of objectivity may vary according to the assumptions which are made about the person whose conduct is in question. Thus reasonable behaviour on the part of someone who is assumed simply to be a normal adult will be different from the reasonable behaviour which can be expected when the person is assumed to be a normal young child or a person with a more specific set of personal characteristics. The breadth of the appropriate assumptions and the degree to which they reflect the actual situation and characteristics of

[16] Supra, note 4
[17] [2004] 3 ALL ER 897 at paragraph 33

the person in question will depend upon the reasons why the law imports an objective standard".

His lordship therefore exhorted that the claimant's particular "*character or intelligence"* are not relevant. He admonished that

"section 14(3) requires one assume that a person who is aware that he has suffered a personal injury, serious enough to be something about which he would go and see a solicitor if he knew he had a claim, will be sufficiently curious about the causes of the injury to seek whatever expert advice is appropriate." [18]

[21] The case of **Adams** involved a claim instituted against a local education authority for failing to provide the claimant with a proper education. The claimant complained that the educators were negligent in their duty to properly assess his learning disabilities and provide him with suitable treatment. It appeared from his evidence that the claimant was aware at some time prior to instituting his claim that he was dyslexic. He explained in his evidence that he failed to inform his doctors of this condition because he wished to conceal his illness. Lord Scott in agreeing with Lord Hoffman that an objective rather than a subjective approach should be taken had this to say on the matter –

"*the reference in s 14(3) to 'knowledge which he might reasonably have been expected to acquire' should ... be taken to be a reference to knowledge which a person in the situation of the claimant, ie an adult who knows he is illiterate, could reasonably be expected to acquire. Personal characteristics such as shyness and embarrassment, which may have inhibited the claimant from seeking advice about his illiteracy problems but which would not be expected to have inhibited others with a like disability, should be left out of the equation.* ***It is the norms of behaviour of persons in the situation of the claimant that should be the test."*** (Emphasis mine) His Lordship put the question thusly – *"what would a reasonable person placed in the situation in which the claimant was placed have said or done."* [19]

[18] Supra, note 17 at paragraph 47
[19] Ibid at paragraphs 71 to 74

[22] Baroness Hale of Richmond agreed with Lords Hoffman and Scott that the test should be one that is objective. Baroness Hale, however, cautioned that in regards to situations where the law expects persons to make inquiries or seek professional advice, *"personal characteristics may be relevant to what knowledge can be imputed ... under s 14(3). There is a distinction between those personal characteristics which affect the ability to acquire information and those which affect one's reaction to what one does. A blind man cannot be expected to observe things around him, but he may sometimes be expected to ask questions. It will all depends upon the circumstances in which he finds himself... a factor or attribute which is connected with the ability of a claimant to discover facts which are relevant to an action should be taken into account; but a factor in the make - up which has no discernible effect upon his ability to discover relevant facts should be disregarded...*[20]

[23] For the purposes of this decision the court must approach the assessment in respect of the respondent's knowledge utilising the objective standards admonished in the cases of **Hoare** and **Adams.** The parties have argued none of the allegedly disabling traits presented in the cases of **Hoare** and **Adams** or attributes to which Baroness Hale alluded as being relevant in distilling the matters to be considered in this assessment. The respondent, from all accounts, is a person of reasonable intellect and who seems to handle her affairs with competence. It is, in my view, however relevant to consider the position of the respondent and decide whether a reasonable claimant similarly situated would have waited until the report of Dr. Singh to take action or whether the applicant is correct that the reasonable claimant would have been propelled into action from the time of the MRI report, at the latest.

[24] I am constrained to agree with the respondent. The respondent was at all material times employed as a hand maid with the applicant. There is no evidence in this case that she did anything other than follow the instructions of her employers. I do not find that it is entirely unreasonable for a person in her circumstance to so do. Additionally, as I have stated above, there is no evidence placed before this court that anyone explained the gravity of the respondent's circumstances to her until Dr. Singh's intervention. The fact that the physiotherapist at NSA may have told her what the MRI scan found is not sufficient to have brought the seriousness of the situation to a person of her station. It is not an insubstantial matter that the applicant was in the same boat as the respondent.

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[20] Supra, note 17 at paragraph 91

The respondent was, throughout, acting under the instructions and guidance of the applicant. The applicant paid for her medical assessments and treatments up until her termination. In fact, the evidence indicates that the applicant was in possession of all the medical information available to the respondent. Yet the applicant did not form a view of the severity of the respondent's injury until Dr. Singh's involvement. There is therefore great difficulty with the argument that the respondent ought to have known of the seriousness of her injury sufficient to propel her to bring proceedings prior to that date when her superiors were plagued with the almost similar degree of ignorance about the severity of the situation.

[25] I would, however, hasten to add, hopefully not parenthetically, that I am not saying that the position of the employer ought to have been that of the employee. If nothing else, the employee is the one who suffered the injuries and continued to ail therefrom. It would certainly be reasonable to extrapolate that the respondent may have had or should have held strong suspicions that her situation was dire especially since she continued to suffer debilitating pain. The prolonged period in which she suffered from pain, remained off of work and under the care of the physiotherapist alone may have excited the reasonable person's suspicion that things were not going well. Mere suspicion, without more, is insufficient for these purposes. As was said In **Nash,**

"... whether a claimant has knowledge depends both upon the information he has received and upon what he makes of it. If it appears that a claimant, while believing that his injury is attributable to the act or omission of the defendant, realises that his belief requires expert confirmation before he acquires such a degree of certainty of belief as amounts to knowledge, then he will not have knowledge until that confirmation is obtained…"[21]

[26] It is apparent that the respondent might have suspected that her injuries were serious. That the applicant equally shared those suspicions is also evident on the facts. It was therefore reasonable for the respondent to seek further confirmation of the true state of things. Medical assessments were sought in 2010 at the NSA and Belmont clinic. For obvious reasons, these assessments were conducted with the applicant's blessings. But it would appear that the interventions at that time did not assist either party adequately or place the respondent in a position of enlightenment about her

[21] Supra, note 3 at page 395

true condition. This is entirely the reason that the parties persisted with the palliative recourse until February 2011. My view is that a reasonable person aware that his or her injuries were sufficiently serious to institute proceedings would not, in all likelihood, persist with such "conservative" arrangements. It was not until February 2011 when Dr. Singh gave his comprehensive assessment that the respondent received the requisite expert confirmation to clothe her with knowledge sufficient to inform her future course of dealings with the applicant. In fact, the report propelled both parties to take action regarding their future relations. Accordingly, I do not agree that at July 2010 the respondent appreciated that her injuries were sufficiently significant to justify instituting legal proceedings. The time within which she ought to have commenced proceedings for the purpose of section 13 of the Act only started to run from the date that she received Dr. Singh's medical report.

Conclusion

[27] I note that the date of the respondent's knowledge is specifically pleaded at paragraph 7 of the amended statement of claim where it is averred that the respondent "*was only made aware of the extent of her injuries in or about February 2011 by reason of particular specialist information."* Based on my assessment as set out above in this judgment, I am satisfied that this pleaded fact is borne out on the evidence available. Accordingly, I must dismiss the application on the grounds that the respondent has shown her claim was brought within (3) years of the date of the knowledge of her injuries in accordance with section 13(4) (b) of the Act, that is say, from February 2011 and as such there is no abuse of the process of the court. The respondent is awarded costs of $1000.00 on this application. The matter is to be returned to the case management track for further case management.

Raulston Glasgow
Master