EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2014/0625

BETWEEN:

KEITHROY CORBETT

Claimant

And

ST. JOHN'S DEVELOPMENT CORPORATION

Defendant

Appearances:
Mr. Lawrence Daniels for the Claimant
Mr. Hugh Marshall and Ms. Kema Benjamin for the Defendant

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2018: December 11, 20, 21
2019: January 16
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JUDGEMENT

(Employment law- employee assaulted by a third party- whether employee injured in the course of his employment- whether breach of duty on employer's part giving rise to injury and liability)

[1] **Joseph-Olivetti J (ag)** :- In these Caribbean islands J'ouvert morning carnival celebrations usually signal a time of unrivalled fun and frolic for many of us. However, in August 2011 this was not true for the Claimant, Mr. Keithroy Corbett as he was injured during those festivities. In this action Mr. Corbett alleges that during the course of his employment as a liaison officer collecting licence fees from roadside vendors on J'ouvert morning 1 August 2011 in the City of St. John's, Antigua, a vendor kicked him on his right knee. And, he is seeking compensation for this injury from his employers, the St John's Development Corporation on the basis, *inter alia,* that they are liable as they failed to provide him with a safe method of work in that he did not have a Police escort at the time or protective clothing. The Corporation denies liability in the main on the ground that Mr Corbett was not acting in the course of his employment and that he was injured by a third party over whom the Corporation had no control and whose intervention the Corporation could not reasonably have foreseen.

Issues Arising.

[2] At trial the court was of the view that it was more expedient to restrict the trial to issues of liability and so directed. The issues touching on liability are:-

1) Whether the claim is statute barred, and,
2) Whether Mr. Corbett was injured during the course of his employment with the Corporation as a result of the Corporation's breach of duty and entitled to compensation.

[3] Mr. Corbett testified on his own behalf and called two witnesses, Mr. Lionel Nedwell, the human resources manager of the Corporation at the time, now retired and Mr Anthony Stuart the then executive director of the Corporation. Mr. Winston Perry, Mr. Corbett's supervisor at the time was listed as a witness but he did not attend and Mr Corbett chose to do without his evidence.

[4] The Corporation called Ms. Bonnilyn De Silvia-Joseph, Mr. Corbett's senior who was working with him when the incident occurred. The current executive director of the Corporation, Mr Neil Butler also testified. However, the only witnesses to the incident were Mr Corbett and Ms. De Silvia-Joseph.

Factual Findings

[5] Mr. Corbett was at all relevant times employed with the Corporation as a liaison officer. His duties on the morning of1st August 2011 involved collecting licence fees from roadside vendors in the City of St. John's during the carnival J'ouvert morning celebrations. To facilitate this he and Ms. De Silvia -Joseph were housed the night before at the Heritage Hotel by the Corporation. Both commenced work collecting licence fees at about 4 a.m. They went about on foot.

[6] Mr. Corbettt, in his evidence in chief simply said that, "*while I was at work on behalf of the Defendant I sustained a kick to my right knee… .*" He did not give any details of the circumstances which gave rise to him being thus assaulted and the first impression was that his assailant was **a vendor from whom he was seeking to collect fees** as he claimed in paragraph 3 of his Amended Statement of Claim. The true picture only emerged from the evidence of Ms. De Silvia -Joseph who I found to be frank and honest and wherever their evidence differed I have no hesitation in saying that I preferred her evidence as she gave a clear, truthful and compelling account of the circumstances which led to the assault and of the actual assault.

[7] That morning as Ms. De Silvia - Joseph and Mr Corbett went about their duties they were not accompanied by a Police officer as it appears they sometimes were. At or in the vicinity of Pigotts Mall some young women were engaged in an altercation and Mr Corbett bravely intervened and parted the incipient fight. They continued with their work and I find that they had actually completed their assignment when the assault took place later. At about 9 a.m. they were standing on the corner of St. Mary's Street and Independence Avenue. Mr. Corbett crossed over to the eastern side of Independence Avenue to talk to one of the young women who had been involved in the altercation. Ms De Silvia -Joseph followed him. As Mr Corbett was talking to the woman three men approached him. One, who appeared to be inebriated, told him to leave his woman alone and an argument ensued. Ms De Silvia -Joseph who was now only a few feet away told Mr Corbett that they should leave. Mr Corbett ignored her, he pulled out a knife and then the same man kicked him on the leg. Mr Corbett, when taxed with this in cross-examination, admitted that he did drew a knife and he

would have us believe that he only did so after the man kicked, him as he was protecting the Corporation's money which he had custody of. However, Ms De Silvia-Joseph was adamant that he drew a knife after the man spoke to him and then the man kicked him.

[8] Mr Corbett reported the matter to the Police shortly after. He told the Police that his assailant had tried to rob him, which was patently untrue. The man was arrested but it appears that subsequently no charges were laid against either of them. Mr Corbett offered no explanation as to why he did not press charges against his assailant or sue for assault.

[9] Mr. Corbett and Ms. De Silvia -Joseph reported the assault to the Corporation through their supervisor Mr Perry on the following Wednesday as the workplace was closed it being the Carnival holidays. The Corporation arranged for him to consult Dr. Delrose Christian. It is not clear what took place as despite the Corporation's policy to assist with medical help for persons allegedly injured on the job in a timely manner, Mr Corbett only saw Dr. Christian about 9 months afterwards, on 19th May 2012. Dr Christian found it difficult to attribute the pain Mr Corbett complained of to an injury which took place nine months before and determined that possibly his pain was due to the symptoms of osteoarthritis, the natural ageing process of wear and tear. Mr Corbett was born on 3 July, 1965.

[10] Mr. Corbett continued to perform his normal duties but he said, and I accept, that his leg continued to trouble him and he used the buses instead of walking. On 12 August, 2014 he consulted on his own volition another physician, Dr. Fouad Naffouj who obtained an MRI report and on the basis of that referred him to Dr. K.K.Singh, an orthopaedic surgeon. Dr Singh diagnosed him with serious injuries to the right knee and recommended surgery. The Corporation assisted Mr. Corbett with the costs of the MRI but to date he has not had the recommended procedure. On 27th November 2014 Mr Corbett filed suit and he subsequently amended his statement of claim on 1st June 2015.Prior to trial the parties embarked on an unsuccessful attempt at mediation. I now turn to the first issue arising.

Is the claim statute barred?

[11] I have considered the pleaded case on this issue first. In paragraph 9 of his amended statement of claim Mr. Corbett pleads that he only became aware of the nature and extent of his injuries when he visited Dr. Naffouj and Dr. K. K. Singh in August and September 2014.He is thus clearly relying on the date of knowledge as provided for in s.13.4(b) of the Limitation Act. And in paragraph 9 of the Defence to the amended statement of claim the Corporation pleads that the action is statute barred by virtue of the Limitation Act but the relevant provisions were not cited. However, from the written submissions of the Corporation's counsel it is plain that the Corporation is relying on the usual 3 year limitation period under the Limitation Act.

[12] Learned counsel for the Corporation, Mr Marshall in support of his argument that the claim is statute barred relied on the pertinent provisions of the Limitation Act 1997 and ***Nash v Eli Lilly & Co***[1].

[13] Mr Daniels, learned counsel for Mr. Corbett, did not address this issue which is to be deplored as clearly it is a significant matter and it is Counsel's duty to put forward his or her client's case to the best of his or her ability and to assist the court. He has failed to do either.

[1] [1993] 1 WLR 782

[14] The relevant sections of the Limitation Act are sections 13 and 16 as this is an action for damages for personal injuries arising from an alleged breach of duty on the part of the Corporation as employer.

[15] Section 13 provides-

> "**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-
>
> (a) the date on which the cause of action accrued; or
>
> (b) **the date of knowledge (if later) of the person injured.** (Emphasis supplied).
>
> **(ss.13(5)- (7) are** not relevant here as they speak to the situation where the injured person dies).

[16] Section 16 concerns the concept of knowledge. It is helpful to set out the section in full.

> "**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;
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> (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. (Emphasis supplied).
>
> **(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 be expected to acquire –
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

but a person 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."

[17] Having regard to this pleadings and to the foregoing provisions of Section 16 the requisite knowledge for the purposes of this action that Mr. Corbett must be found to have had is two-fold. He must be found to have had first knowledge within three years prior to filing his action that (1) the injury to his knee was significant in that he would have considered it reasonable to sue the Corporation for damages and that (2) the injury was due in part or in whole to the act or omission of the Corporation which allegedly constituted breach of duty.

[18] The pleaded acts or omissions on the part of the Corporation which allegedly amount to negligence or breach of duty on the part of the Corporation are set out in paragraph 11 of the Amended statement of claim. They are- failure to refer Mr. Corbett to a knee specialist; failure to ensure the company doctor was sufficiently qualified to determine his injury; failure to provide him with a police officer when collecting revenue; exposing him to foreseeable risk of harm without protective clothing, failure to protect him from harm and failure to have him covered by medical insurance.

[19] However, apart from actual knowledge s16(3) imputes constructive knowledge to a claimant, that is, such knowledge as he could have reasonably be expected to have acquired in all the circumstances. Here Mr Corbett will be deemed to have had knowledge which he might himself reasonably be expected to have acquired from facts that he could have observed or ascertained or from facts he could reasonably have ascertained from a medical expert.

[20] In ***Nash v Eli Lilley & Co***[2], Purchas LJ, in considering the issue of "knowledge" for the purpose of the UK Limitation Act 1980 which is similar to ours on this issue concluded, inter alia, at page 396 -

> "(2) "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 the proceedings against the person or persons whose act or omission has caused the significant injury concerned.
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> (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 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 reasonable inquiry will depend on the context of the case and the subjective characteristics of the individual plaintiff involved".

[2] [1993] 1 WLR 782

[21] I am of the view that this interpretation applies equally to our Act having regard to the wording of the relevant section in particular s16.3 which alludes specifically to knowledge which the injured person might reasonably be expected to acquire from facts observable or 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.

[22] Mr. Corbett, if he is to rely on time running only from the date of knowledge as being August or September 2014 as pleaded must show that he did not know that his injury was significant prior to that date and that he acted reasonably in obtaining medical advice in trying to ascertain the cause and extent of his injuries.

[23] Mr. Corbett although he was aware that he had been injured on 1st August 2011 and suffered pain and discomfort in his knee almost immediately thereafter and continued to so suffer did not see Dr. Christian until May 2012, some 9 months after the incident. He did not give any explanation for not consulting a doctor on his own accord rather than await the referral made by the Corporation for him to consult Dr Christian who in any event made no significant findings. And then he waited some considerable time thereafter before he obtained a second opinion although he continued to suffer from the injured knee. Did he act reasonably in all the circumstances? In my view he was not obliged to wait on his employers as it is common knowledge that public health facilities at minimum costs are available in the State and at the very least Mr Corbett could have attended at a public hospital or clinic much earlier instead of waiting see Dr. Christian and then waiting months thereafter to consult Dr. Naffouj.

[24] I find that it was unreasonable for him to wait for almost 9 months to see a doctor and then another two years to get a second opinion. We cannot fix him with knowledge as at the date of the incident as he was not aware that he had sustained a significant injury then. However, I am of the view that in all the circumstances it would have been reasonable for him to have sought an initial opinion within a month of being assaulted and then if not satisfied a second opinion from a specialist within six months thereafter at which time it would have been reasonable to expect that he would have learnt of the significance of his injury and that it most likely arose from the assault. Time would therefore be deemed to have begun to run from February 2012 and to have expired three years later. Fortunately, the action is not statue barred as he filed suit on 27 November 2014 within that three year period. I now turn to the final question.

Was Mr. Corbett injured during the course of his employment with the Corporation as a result of the Corporation's breach of duty and is he entitled to compensation?

[25] I have considered the written submissions on behalf of both parties on this issue. However, having regard to my factual findings it is evident that when he was assaulted Mr Corbett although dressed in the Corporation's uniform was not actually engaged in the performance of his duties nor was he doing anything within the scope of or in any way connected with or incidental to the performance of his duties. He was not collecting licence fees from anyone at the time or endeavouring to do so; instead, he was having a social interlude with a woman whom he had assisted earlier in a matter wholly unrelated to his duties. In legal parlance he can be said to have gone off on a frolic of his own both when he intervened at the Mall earlier and when he went off to speak to the woman

subsequently at which time he was assaulted. And indubitably he was not injured in trying to protect the Corporation's property as he would have us believe.

[26] I therefore find that the Corporation cannot be held liable in such circumstances. The Corporation could not reasonably have foreseen that Mr Corbett would intervene in an altercation which did not arise from or was in no way associated with his employment and then be assaulted later in a social setting related to the earlier occurrence. Mr. Corbett is to be commended for preventing a potential fight among the women but he cannot seek to make his employers liable for him being assaulted by a third party over whom the Corporation had no control and further a party whom the Corporation could not have foreseen would interact with Mr. Corbett in the way that he did. See **Hartwell v Laurent and the Attorney General.**[3] In fact, Mr Corbett's 'Sir Galahad's frolic' was the underlying cause of him being assaulted and cannot be attributable to any negligence or breach of duty as pleaded on the part of the Corporation. Accordingly, the case is dismissed with prescribed costs to the Corporation.

[27] I must register my thanks to Mr. Marshall for his assistance with his very helpful submissions.

[28] This is indeed an unfortunate case as Mr. Corbett up to the date of the incident was an exemplary employee and his injuries are serious. It is a pity that neither the Corporation on behalf of Mr Corbett nor Mr Corbett himself had seen it fit to take action against his assailant

Rita Joseph-Olivetti
High Court Judge Ag.

By the Court

Registrar

3 BVIHCV 24/2000 Redhead J a para 27 Redhead JA

Para 27-" In Smith v Leurs 1995 7 CLR 261 at 262 Dixon said: "...One man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. ....the general rule is that one man is under no duty of controlling another to prevent him doing damage to a third. There are, however, special relations which are the source of a duty of this nature."