

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2023/0442

BETWEEN:

[1] GRETCHEN SAUNDERS CHRISTOPHER
[2] RODY CHRISTOPHER

Claimants

and

[1] SIR LESTER BIRD MEDICAL CENTRE
(MOUNT ST. JOHN'S MEDICAL CENTRE)
[2] DR DARYEN EPHRAIM

Defendants

Appearances:

Mr. Wendel Alexander, Counsel for the Claimant
Ms. Kamilah Roberts, Counsel for the 1st Defendant
Ms. Sherrie-Ann Bradshaw, Counsel for the 2nd Defendant

2024: May 16th.

REASONS FOR DECISION

[1] **MICHEL, M.:** On 16th May, 2024 the Court heard an application by the 1st Defendant to strike out the Claimant's claim form and statement of claim as an abuse of process on the basis that the claim is statute barred having been filed after the expiration of the six-month limitation period as set out in section 2(a) of the **Public Authorities Protection Act ("PAPA")**.¹ I refused the strike out application and ordered that the issue of costs on the application be considered at the next hearing of the matter if not earlier agreed. I further indicated to the Parties that I would provide reasons for my decision. I do so now.

Background

[2] The Claimants are husband and wife. The 1st Defendant was at all material times a hospital and provides primary medical and health care for citizens and residents of Antigua and Barbuda. The 1st Defendant is administrated by a Board of Directors established in accordance with section 3 of **The Mount St. John's Medical Centre Act, 2009**² as amended by section 4 of **The Mount St. John's**

¹ Cap. 352, Laws of Antigua and Barbuda.

² Act. No. 2 of 2009.

Medical Centre (Amendment) Act, 2023.³ I will refer to the 1st Defendant as “the Hospital” from hereon. The 2nd Defendant is an Obstetrician-Gynecologist (OB/GYN) and at all material times was a Consultant Obstetrician and Gynecologist at the Hospital.

- [3] The 1st Claimant was pregnant and attended the Hospital on or about 22nd October, 2022 and again on 25th October, 2022 to have her unborn child delivered. It appears that on or about 25th October, 2022 the 1st Claimant was admitted to the Hospital. On 1st November, 2022 whilst under the care of the Hospital and awaiting the delivery of their unborn child, the Claimants were informed by the Hospital that the unborn child had died.
- [4] On 4th December, 2023 the Claimants commenced these proceedings against the Defendants seeking damages, inclusive of exemplary and aggravated damages, for loss, damage and injury suffered by the Claimants as a result of the Defendants’ alleged negligence that led to the death of the Claimants’ unborn child.
- [5] The 2nd Defendant filed a defence denying the Claimants’ claim. The Hospital applied for an extension of time to file its defence and subsequently filed the present application to strike out the claim. The Hospital requested and the Claimant agreed that the Court should first determine the Hospital’s strike out application before it determined the Hospital’s application for an extension of time to file its defence. I acceded to this request and gave directions for the hearing of the Hospital’s strike out application.
- [6] The Hospital filed its present application to strike out the Claimants’ claim form and statement of claim pursuant to rule 26.3(1)(c) of the **Civil Procedure Rules (Revised Edition) 2023** (“CPR”). The sole ground of the application is that the claim is an abuse of process of the Court having been brought after the expiration of the 6-month limitation period as set out under section 2(a) of the **PAPA**. The application is supported by affidavits of the Chairman of the Board of the Hospital. The Claimants filed a notice of opposition to the application and affidavits in opposition. The Hospital and the Claimants filed written submissions together with authorities in relation to the application and made oral submissions at the hearing of the application. The 2nd Defendant did not participate in the hearing of the application.

The Court’s Power to Strike

- [7] CPR 26.3(1)(c) empowers the Court to strike out a claim that is an abuse of the Court’s process. An abuse of the Court’s process is a use of the Court’s process

³ Act. No. 10 of 2023.

in a way which differs from or is contrary to its intended ordinary use. In the case of **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49**, Barrow JA [Ag.] opined that the issuance of a claim after the expiration of a limitation period could amount to an abuse of process as contemplated by CPR 26.3(1)(c), which would warrant the striking out of the claim.

- [8] Although CPR 26.3 gives the court the power to strike out a party's statement of case, it has been stated and re-stated in several decisions of the Court of Appeal that striking out a party's statement of case is a drastic step and the Court's power to do so should be used sparingly.⁴ The power to strike should therefore only be exercised in the clearest and most obvious cases. Notably, in **Hazeline Maynard et al v The Saint Christopher and Nevis Solid Waste Management Corporation et al**,⁵ whilst acknowledging that the Court may strike out a claim filed after the expiration of a limitation period as an abuse of process, Pereira CJ also expressed doubt as to the appropriateness of a strike out application where the defence of limitation has been raised (as in present case), save in the clearest of cases. These principles were therefore kept in mind in considering the Hospital's strike out application.

The Public Authorities Protection Act

- [9] Section 2(a) of the **PAPA** provides that:

"Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

- [10] The crux of the Hospital's application to strike is its contention that the Hospital is a public authority as contemplated by the **PAPA** and that in caring for the 1st

⁴ See: Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina ANUHCV2016/0009 heard together with Cedar Valley Springs Homeowners Association Incorporated v Kenneth Meade et al ANUHCV2016/0010 (delivered 18th January 2017, unreported); Tawney Assets Limited v East Pine Management Limited et al BVHCVAP2012/0007 (delivered 17th September 2012, unreported).

⁵ SKBHCVAP2015/0006 (delivered 1st October 2015, unreported).

Claimant and the delivery of the Claimants' unborn child, it was exercising its public duty. Accordingly, the Claimants having filed their claim against the Hospital and its Doctor after the expiration of the 6-month period after the alleged negligent acts by the Hospital and its Doctor were said to have occurred, the Claimants' claim is statute barred and ought to be struck out as an abuse of process.

- [11] The Claimants on the other hand argue that the Hospital is not protected by section 2(a) of the **PAPA** in the circumstances of this case and the claim is accordingly not statute barred.

Issues arising on the Hospital's Strike Out Application

- [12] I agreed with the Hospital that the following three issues arose on its application:

- (1) Whether the Hospital is a public authority within the meaning of the **PAPA**.
- (2) Whether the acts in respect of which the Claimants have complained were acts done in pursuance or execution of any public act, or of any public duty by the Defendants.
- (3) Assuming (1) and (2) are answered in the affirmative, from what date does the time period indicated in the Act start to run.

- [13] Both the Hospital and the Claimants filed substantial written submissions together with authorities on these three issues which were read and considered. I also considered the oral submissions of learned Counsel on their behalf. In deciding this application.

- [14] Much of the argument by the parties centered on the second issue above identified by the Hospital, that is, whether the acts in respect of which the Claimants have complained were acts done in pursuance or execution of any public act, or of any public duty by the Defendants. I therefore first focused my consideration of the application on this issue. I pause to note that in **Arinna Nazli v Mount St. John's Medical Centre Board and Uretha Gasper**,⁶ a case referred to by the Hospital, a master held that the Hospital was a public authority within the meaning of the **PAPA**. However, based on the submissions of the parties, it was clear that the issue of whether the Hospital is a public authority within the meaning of the **PAPA** remains in dispute. Simply for my consideration of the issue of whether the acts in respect of which the Claimants have complained were acts done in pursuance or execution of any public duty by the Defendants, I proceeded on the assumption that the **PAPA** applies to the Hospital. I reiterate, however, that the issue as to whether the Hospital is a public authority remains a live issue on the application and I revisit the point briefly later in these reasons.

⁶ ANUHCv2013/0006 (delivered 28th August 2013, unreported).

[15] The leading case from the jurisdiction of the Eastern Caribbean Supreme Court on public duties under Public Authorities Protections Acts and which was referred to by both Parties, is the judgment of the Judicial Committee of the Privy Council in **Daphne Alves v The Attorney General of the Virgin Islands**.⁷ The Board's decision emanated from the High Court's consideration of section 2 of the **Public Authorities Protection Act** of the Virgin Islands⁸ which is almost identical to section 2 of the **PAPA** of Antigua and Barbuda.

[16] Paragraph 12 of the Board's decision in relation to the ambit of the Public Authorities Protection Act is instructive:-

"It is plain that it is possible to read PAPA literally as applying to everything done by any person in either actual or purported discharge of either a duty or authority (i.e. power) conferred by statute, or for that matter under public authority existing independently of legislation. Thus construed literally, PAPA would apply (a) to private persons or bodies given statutory authority and (b) to virtually every action of a public body. All would attract the very short six month limitation period. The cases show, however, that Acts in these terms have limitations to their ambit; those cases are less clear about what those limitations are."

[17] After canvassing the history of the authorities on Public Authorities Protection Acts and specifically the case of **Bradford Corp v Myers**,⁹ at paragraph 23 of the Board's judgment, Lord Hughes stated:

"A public duty is owed to the whole world, or in some cases to a section of it, and all the members of the relevant section of the public can enforce its performance, in modern times by way of judicial review. A private duty is owed to an individual, and arises from the specific relationship between the parties. The duty to take reasonable care of employees is a good example of such a private duty. So, one would say today, is the duty to an individual passenger on the tram to take care not to injure him. It is a different duty from the duty owed to local inhabitants generally to furnish the tramway, and the fact that the private duty arises in the course of the performance of the wider public duty does not alter that essential difference. In Lord Shaw's language, the private right of a passenger or employee to have reasonable care taken for his safety is not correlative to the public right of the inhabitants generally. The private duty owed to employees, or to passengers, is

⁷ [2017] UKPC 42.

⁸ Cap. 62, Laws of the Virgin Islands.

⁹ [196] 1 AC 242.

closely akin to the private contractual obligation entered into by the Guardians in Sharpington. Just as in that case, the only relevance to it of the statutory authorisation or duty is that what is being done is *intra vires*.

[18] The Board went on to consider the difference between a public duty and private duty of care and at paragraphs 35, 36, and 37 the Board concluded as follows:

“36. By contrast, where there is a general common law or statutory duty of the kind which is the same for a public authority as it would be for a non-public person or company, there is no reason for a much-abbreviated limitation period, indeed every reason why the period should be no different for a public body defendant as for anyone else. The duties of an employer to his employees, or of a transport undertaker to his passengers, or of any contractor to his contractual counterparty, are classic examples of particular duties. They may of course arise in the course of performing public functions, but they are not public duties owed generally to the world or to a section of the public.

37. Despite the potentially wide words of PAPA, it must, as has consistently been held, be construed restrictively. It only applies to public authorities, and not to all persons acting under statutory authority. It does not apply to all actions performed by public authorities, but only to those where the obligation sued upon is owed generally to the public or to a section of it. Where the obligation sued upon arises simply out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application. The duty of care which the government is admitted to have owed to Mrs. Alves qua employer was accordingly a private obligation exactly the same as is owed by any employer, and not a public obligation for the purposes of PAPA. The six month limitation period did not apply.”

Discussion

[19] Turning back to the present case, considering the principles in **Alves**, if the Hospital is a public authority within the ambit of the **PAPA**, the issue that arises is whether the Hospital owed a private duty to the Claimants in caring for the 1st Claimant and in the delivery of the Claimants' unborn child.

[20] At paragraph 24 of their statement of claim *et seq.* the Claimants plead various alleged breaches of duty by the Defendants as it relates to the standard of care owed to the 1st Claimant in the treatment of the 1st Claimant when she attended the Hospital to deliver the Claimants unborn child. At paragraph 31 of the statement of claim, the Claimants plead:

“31. The Claimants further claim that as a result of the breach of the duty owed to them by the 1st Defendant through its servants or agents and the 2nd Defendant to provide the requisite medical care, the fetus of the “baby” was stillborn.

Particulars of Negligence of the Defendants

- “1) The Defendants owed a duty of care and breached the same to the 1st Claimant to provide appropriate medical care;
- 2) The standard of care the Defendants provided to the 1st Claimant fell below what was expected of reasonable professional medical care providers;
- 3) A sufficient degree of foreseeability and proximity existed between both claimants and the Defendant;
- 4) The Defendant foresaw and ought to have foreseen that failure to exercise the requisite duty of care to the 1st Claimant in all the circumstances of this case could also result in harm to the Claimants and their unborn child.
- 5) Negligent and or reckless failure to perform the 1st Claimant’s induction as scheduled or within a short period as soon as practicable in all the circumstances, resulting in the loss of the 1st Claimant’s fetus (“the baby”);
- 6) Reckless disregard for the health, safety and care of the 1st Claimant and her unborn child.
- 7) Failure to appropriately examine and or assess the 1st Claimant’s condition, resulting in the Defendants unreasonably delaying the 1st Claimant’s induction.
- 8) Causing stress, and psychiatric injury to the Claimants due to them realizing that the 1st Claimant’s fetus (“the baby”) had died.
- 9) The Defendants’ breach of their duty of care to the requisite standard of the 1st Claimant caused injury, loss, financial loss, depression and psychiatric injury to the Claimants.
- 10) The Defendants owed a duty of care to the Claimants and failed to act reasonably in exercising that care.”

[21] When one considers the entirety of the Claimants’ pleaded case and the allegations levelled against the Defendants and the particulars of negligence pleaded in the context of the Hospital’s statutory duty, I am of the view that it is

not clear and obvious that in caring for the 1st Claimant when she attended at the Hospital to deliver the Claimants' unborn child that the Hospital was solely exercising a public duty that would fall within the ambit of section 2 of the **PAPA** (thus entitling the Hospital and its employees to enjoy the 6-month limitation period under the **PAPA**) as opposed to exercising a private duty incurred in the course of performing its public functions (which would not attract the 6-month limitation period under the **PAPA**). To the contrary, the pleadings tend to show that the obligations upon which these proceedings have been initiated against the Hospital arise out of a relationship with the Claimants, which as stated by the Board in **Alves**, would be the same for any non-public person or body, and where there is no question of a public law challenge.

- [22] Considering the learning of Carrington JA [Ag.] in **Myrna Norde v Jacqueline Mannix**,¹⁰ as it relates to the issues of whether there is a clear limitation defence to the claim, the Hospital would have been required to show it had more than a real prospect of success on its defence of limitation, as a high threshold should be met to keep a claimant out of court on their claim. On the other hand, the Claimants only needed to show at this stage that they have a real prospect of countering a limitation defence and are not bound to overcome it. Applying the principles in **Alves** to the facts of this case, it is clear that the Claimants have satisfied this burden and their claim ought not to be struck out at this stage.
- [23] In light of the above, it would be wholly inappropriate for the Court to strike out the Claimants' claim based on Claimants' pleaded case and considering that the matter is at an early stage where the Hospital has not yet even filed a defence. The question as to whether the Hospital can enjoy the abbreviated 6-month limitation period provide by the **PAPA** would best be left for determination at the trial of the matter following the case management processes of disclosure and the filing of witness statements.
- [24] I am fortified in this view having considered the digest of decision of the Court of Appeal in **Jessy James Khouly et al v Mount St. John's Medical Centre Board**.¹¹ In that case, the named claimants were the Administrators of the Estate of the deceased and claimed against the defendant Board damages for medical negligence resulting from the death of the deceased, damages under the **Fatal Accidents Act**,¹² damages under **The Causes of Action (Survival) Act**¹³ and other relief. The claim was instituted almost a year after the death of the deceased. The defendant in that case, which is the Board of the Hospital in the present case, applied in the court below¹⁴ to strike out the Administrators' claim on the basis that

¹⁰ ANUHCv2015/0034 (delivered 16th February 2017, unreported) at para. 14.

¹¹ ANUHCvAP2022/0005 (delivered 8th March 2023, unreported).

¹² Cap. 166, Laws of Antigua and Barbuda.

¹³ Cap. 78, Laws of Antigua and Barbuda.

¹⁴ Claim No. ANUHCv2020/0031.

the claim was initiated after the 6-month limitation period under section 2 of the **PAPA**. The Court below found that the defendant was a public authority as contemplated by the **PAPA** and that the pleaded acts and neglects of the defendant in caring for the deceased fell within the ambit of the **PAPA**. The court below therefore found that the 6-month limitation period under **PAPA** applied to the claim and accordingly struck out the claim as an abuse of process.

- [25] On appeal, the Court of Appeal considered the Board's judgment in Alves and found that in light of the clear principles in Alves, the Court below erred in striking out the claim and that the appropriate course was to remit the issues posed in the defendant's application to strike out the claim form and statement of claim for consideration and determination during the trial of the matter in the Court below.
- [26] Although the facts of Khouly and the present case are different, the principles undergirding both cases are the same. In considering the applicability of the **PAPA** to the cases, the essential test lies in the difference between a public duty owed by the Hospital to the public generally and a private duty incurred in the course of acting under statutory enabling. Given that this remains a live issue on this claim, it is a matter best left for trial and not one for determination on a strike out application before a first case management conference has been held.¹⁵ In the circumstances, the Hospital's strike out application was refused.
- [27] The above findings were sufficient to dispose of the Hospital's application, however, there still remained the question of whether the Hospital is a public authority within the ambit of the **PAPA** considering section 3 of **The Mount St. John's Medical Centre Act, 2009** as amended by section 4 of **The Mount St. John's Medical Centre (Amendment) Act 2023**.¹⁶ However, in light of the above reasons, there was no need to further consider this point at this time. Similarly, the issue of the date from which the time under the **PAPA** started to run in this case no longer fell for consideration.

Costs

- [28] On the issue of costs consequent upon the Hospital's unsuccessful application, the Parties agreed to have discussions on the issue, failing which, the issue of costs would be ventilated at the next hearing of the matter.

¹⁵ See: *Hazeline Maynard et al v The Saint Christopher and Nevis Solid Waste Management Corporation et al* SKBHCVP2015/0006 (delivered 1st October 2015, unreported).

¹⁶ No. 10 of 2023.

Disposition

- [29] In light of the foregoing, I refused the Hospital's application to strike out the Claimants' claim as an abuse of process and ordered that the issue of costs conquest on the application be considered at the next hearing of this matter if not sooner agreed by the Parties. I also gave the Parties directions for the hearing of the Hospital's application for an extension of time to file its defence and set down the date for the hearing of that application.
- [30] I wish to thank learned Counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court



Registrar