

**EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO.: SVGHCV2020/0096

BETWEEN

DENZIL BACCHUS

Claimant

and

TELBERT SAMUEL

Defendant

Appearances:

Mrs. Kay Bacchus-Baptiste for the Claimant
Mr. Jomo Thomas for the Defendant

2021: March 1, 30

JUDGMENT

- [1] **GILL, M.:** By a notice of application filed on 28th August 2020, the intended claimant, Mr. Denzil Bacchus ("the claimant") seeks an order under section 33 of the Limitation Act¹ that the provisions of section 13 of the said Act shall not apply to his cause of action against the intended defendant, Mr. Telbert Samuel ("the defendant"). The application is supported by the claimant's affidavit. The claimant alleges that on 8th August 2017, he was injured when he was struck by a vehicle driven by the defendant. This application is brought after the expiration of the 3-year limitation period stipulated under section 13 for bringing an action for personal injuries. The defence opposes the application and asks the court not to exercise its discretion in favour of the claimant on the basis that he has failed to satisfy the factors set out in the legislation.

¹ Cap. 129 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009

- [2] The claimant's explanation for not filing a claim within the limitation period revolves around discussions/telephone conversations between counsel for the parties. Learned counsel for the claimant, Mrs. Bacchus-Baptiste, is adamant that discussions she held with learned counsel for the defendant, Mr. Thomas, were with a view to settlement on the issue of quantum, not liability. Mr. Thomas counters that there has been no admission of liability on the part of the defendant. It should be noted that the defendant is not in St. Vincent and the Grenadines and has been living abroad for over a year. Counsel has been unable to reach him by telephone, but counsel appears in the matter also in the interests of St. Vincent Insurances Limited (VINSURE), the insurer of the defendant.

Issue

- [3] The court must determine whether to disapply section 13 of the Limitation Act and allow the claimant to file a claim outside of the limitation period.

The Law

- [4] By virtue of section 13 of the Limitation Act, an action for damages for negligence in respect of personal injuries shall not be brought after the expiration of 3 years from the date on which the cause of action accrued. However, section 33 gives the court a discretion to direct that the limitation provision shall not apply in a case where it is equitable to do so. Section 33 reads:

“(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree which –

- (a) the provisions of section 13 or 14 prejudice 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 these provisions do not apply to the action, or shall not apply to any specified cause of action to which the action relates.

- [5] The section further sets out the factors to be taken into consideration in the exercise of this discretion. Subsection (3) reads:

“(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –

- (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 or likely to be 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 action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purposes 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 damage;*
- (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."*

[6] As pointed out by Moise M., as he then was, in **Dianne Browne v Jacintha Adams and Aaron**,² these factors are not exclusive, neither are they conjunctive. The application of the provisions in the UK Limitation Act 1980, which contains the same sections, was put in perspective by Sir Terence Etherton MR in **The Chief Constable of Greater Manchester Police v Robert Carroll**³ when he stated:

"The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into consideration by the judge.

The essence of the proper exercise of judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant."

² SVGHCV2018/0109 at paragraph 5

³ [2017] EWCA Civ 1992 at paragraphs 42(2) and (3), citing *Donovan v Gwentys Ltd* [1990] 1 WLR 472

- [7] In determining whether it is equitable to disapply section 13 of the Limitation Act and allow the claimant to proceed to file a claim outside of the limitation period, I will have regard to the factors set out in section 33(3).⁴

The length of, and reasons for, the delay on the part of the claimant

- [8] The delay is not lengthy. The alleged incident occurred on 8th August 2017. This application was filed on 28th August 2020, about 20 days after the expiration of the 3-year time limit under section 13 of the Act.
- [9] The main thrust of the claimant's submissions is that counsel for the parties were engaged in discussions on settlement of this matter and the claimant was awaiting an updated medical report to inform the quantum of compensation to be paid to him. In his affidavit in support of the application, the claimant swore that the defendant's lawyer requested cases and an updated medical report. He stated that he tried to get an updated medical report and the cost for surgery but COVID-19 restrictions made it difficult. He did not explain how. He averred that he finally got the updated report on 26th August 2020, just after the limitation period had expired.
- [10] Learned counsel for the claimant, Mrs. Bacchus-Baptiste was beside herself in insisting that discussions between herself and learned counsel for the defendant, Mr. Thomas, were always on quantum. Counsel posited that no question was raised on liability, and even if counsel never used the words "we accept liability", Mrs. Bacchus-Baptiste stated that she was led to believe so, and this was not an unreasonable belief.
- [11] In a supplemental affidavit filed by the claimant on 29th September 2020, he deponed that Mr. Thomas requested a copy of the CD of his X-ray, and he intimated that there would be a settlement but the issue was quantum. The claimant stated that the cases Mr. Thomas requested were sent to him and Mr. Thomas sent the following WhatsApp message to Mrs. Bacchus-Baptiste.

"Good morning Kay

You told me you were going to send CD. Anyways I will send for it today.

Mr. Goodluck is keen on settling as well. He just wants to be sure that he is making a fair settlement."

(The correspondence exhibited reveals that Mr. Goodluck is the manager of VINSURE.)

⁴ See *Burton Williams v Elvineal Richards et al*, Claim No. 113 of 2008 (Saint Vincent and the Grenadines)

- [12] Mrs. Bacchus-Baptiste submitted that being mindful of the limitation period, on 11th May 2020, she wrote to Mr. Thomas sending the cases as requested by him towards settlement and reminded him, "Time is definitely of the essence." Mrs. Bacchus-Baptiste stated that on 20th May 2020, Mr. Thomas responded that he never got the cases. She said she sent them again on 3rd June 2020 and reminded counsel to respond. As part of a WhatsApp exchange on 30th June 2020, Mrs. Bacchus-Baptiste wrote to Mr. Thomas, "Time is short."
- [13] The claimant maintained that the only reason for the delay was the obtaining of the final medical report requested by counsel for the defendant and his reassurances of keenness of the insurance company to settle this matter. Mrs. Bacchus-Baptiste submitted that the clear and unambiguous words of Mr. Thomas led the claimant to expect nothing less than a "fair settlement". In the words of the claimant, "I trusted and relied on the word of Counsel for the Respondent."
- [14] The evidence of the defence, in an affidavit in opposition to the application sworn by an executive assistant of VINSURE, is that at no time did for the defendant or the insurance company accept liability or inform the claimant that they were willing to compensate him. The affiant exhibited a letter dated 23rd April 2020 from Mrs. Bacchus-Baptiste to the manager of VINSURE in which counsel requested a response to her previous letter claiming damages for her client. Counsel wrote, "Please respond by 30th April 2020 failing which we shall file a Claim Form." The affiant further stated that she was informed by counsel Jomo Thomas and verily believed that in or around the month of June 2020, in a telephone conversation, counsel Bacchus-Baptiste told him that she would file the claim on behalf of the claimant because the insurer was not yielding to her demand letter and that he told her to go ahead and file their claim. The claimant retorted that this statement is "absolutely untrue".

The impact of the delay on the cogency of the evidence

- [15] The alleged incident occurred over three and a half years ago. There is nothing before the court to suggest that any evidence by the claimant is likely to be less cogent than if an action had been brought within the limitation period. However, learned counsel for the defendant raised the issue that the defendant is now living abroad and up to the date of the hearing, counsel was unable to

contact him. Drawing from several authorities, in **The Chief Constable of Greater Manchester Police v Robert Carroll**,⁵ Sir Terence continued his distillation of section 33(3) as follows:

“The prospects of a fair trial are important. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why. It is, therefore, particularly relevant whether, and to what extent, the defendant’s ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents.”

Counsel submitted that any obligation to pay would be on the insurer and in the circumstances, the insurer’s right to a fair opportunity to defend itself is compromised. The evidence of the defence is that the claimant only alerted the defendant’s insurer 2 years and 4 months after the incident, at which time the defendant had already left the jurisdiction.

- [16] Mrs. Bacchus-Baptiste is of the view that the defence is fully aware of the facts and reports in this matter and cannot be prejudiced by the intended claim. Counsel submitted that to say the insured is out of state is ridiculous and that counsel for the defendant and the insurers ought to be able to contact the defendant.

The conduct of the defendant after the cause of action arose

- [17] The claimant wrote to the defendant’s insurer seeking compensation for injuries he claimed he sustained in the alleged incident. There is no evidence of any request for information or inspection made by the claimant for the purposes of ascertaining facts relevant to his cause of action. Any relevant conduct of the defence is tied in with the issue of the reasons for the delay.

The duration of any disability of the claimant

- [18] Whereas the claimant deponed that his injuries are severe and he is now partially disabled, there is nothing in the evidence to show that any disability prevented him from bringing his cause of action within the limitation period.

The extent to which the claimant acted promptly and reasonably once he knew the defendant’s act might be actionable

⁵ [2017] EWCA Civ 1992 at paragraph 42(6)

[19] The matter concerns a pedestrian, the claimant, being struck by a motor vehicle driven by the defendant. From the outset, the claimant must have considered that the defendant may be liable in a claim in negligence in respect of his driving. 21st August 2017 is the first recorded date of the claimant's visit to a doctor. The doctor's report dated 21st May 2019 shows the nature his injuries. The record shows another doctor's visit on 30th November 2017. This is indicated in a medical report dated 31st July 2019. In July 2018, the claimant travelled to the US and obtained a medical opinion of his injuries.

[20] It is evident that from early on, the claimant was in possession of sufficient information to institute a claim against the defendant. Clearly, the defendant did not act promptly in this regard. The claimant could have duly filed his claim without an updated medical report, which, if obtained subsequently, could be properly introduced in evidence with the necessary application.

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

[21] As just mentioned, the claimant sought and received medical advice. He obtained the latest medical report on 26th August 2020.

[22] The earliest evidence exhibited by the claimant of the involvement of counsel is a letter dated 17th December 2019 to VINSURE claiming compensation for his injuries. There was no proof of delivery or receipt of this letter so a second letter dated 10th January 2020 was sent. The defence contends that the 10th January 2020 letter is the first on record from counsel for the claimant.

[23] Given that the claimant's stated reason for the delay in filing a claim is as a result of counsel for the parties negotiating on quantum, and not liability, it is safe to draw the inference that learned counsel for the claimant advised him accordingly.

Discussion and conclusion

[24] The dominant factor weighing heavily in this matter is the claimant's reason for the delay. Again, I am guided by Sir Terence when he explained:

"The reason for the delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction. I consider that the latter may be better

expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.

Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context."⁶

- [25] There is much contention between counsel for the parties as to the content and purpose of their discussions on this matter. Mrs. Bacchus-Baptiste is firm in her assertion that discussions held with Mr. Thomas were with a view to determining the quantum of compensation to be paid to the claimant, and that liability was not an issue. Mr. Thomas, on the other hand, is equally unyielding that there was never any admission of liability on the part of the defence, and that before the expiration of the limitation period, in a telephone conversation, he told her to go ahead and file the claim.
- [26] The tone and content of Mr. Thomas' WhatsApp message contained in the supplemental affidavit of the claimant convey a certain stance. It is evident that Mr. Thomas was awaiting the CD of the X-ray showing the claimant's injuries, and indicating that the manager of the insurance company was "keen on settling as well". This appears to me to be a situation in which Mr. Thomas was trying to determine the extent of the claimant's injuries, and not what caused them. Mr. Thomas regrets that he could not produce to the court any record of his telephone conversation with Mrs. Bacchus-Baptiste.
- [27] The balance was tipped in favour of the claimant when the court, in attempting to resolve the issue, asked Mr. Thomas to clarify his position. Learned counsel told the court that the insurance company would be prepared to settle if Mr. Bacchus suffered verifiable injuries; if the injuries are bona fide and verifiable, the defence would like to settle. Nevertheless, Mr. Thomas insisted that it was never settled that quantum was the singular issue. Again, a determination as to whether the claimant's injuries were "bona fide and verifiable" appears to me to be a question of quantum, not causation. It was whether injuries as stated by the claimant were real or genuine and demonstrated to be true and accurate. Therefore, I accept the submission of Mrs. Bacchus-Baptiste that she reasonably believed that the discussions between counsel were with a view to determining quantum, and not liability.

⁶ [2017] EWCA Civ 1992 at paragraphs 42(9) and (10)

- [28] From the WhatsApp conversations between counsel, it is clear that Mrs. Bacchus-Baptiste was alive to the fact that the expiration of the limitation period was fast approaching, but relied on the impression given to her that the amount of compensation payable to the claimant was what was being worked out, based on the information the claimant was supplying to counsel for the defendant.
- [29] The letter from learned counsel for the claimant to the insurance company, whether of December 2019 or January 2020, is the only evidence of the claimant seeking legal advice, that is, well over 2 years since the accrual of the cause of action. This speaks to some lethargy and lackadaisical treatment of the matter on the part of the claimant. Even so, at this late stage in the life of the limitation period, counsel engaged in pre-action discussions.
- [30] The issue of the defendant having moved out of the jurisdiction is of some moment. Learned defence counsel has been unsuccessful in contacting the defendant himself, and counsel is concerned about the implications for the insurance company. Whereas it is the policy of insurance companies in this region to provide legal representation for their insured, and to honour orders of the court to pay damages awarded against the insured, the court must focus on the fact that the defendant in this matter is Mr. Telbert Samuel, not VINSURE. The claimant's cause of action is against Mr. Samuel. Mr. Samuel is not a witness for the insurance company, which is not a party to these proceedings. On that basis, I do not give favourable consideration to the argument that given the unavailability of the defendant, the insurance company's right to defend itself is compromised. In the event the claimant is allowed to proceed with his claim against Mr. Samuel, the responsibility will be on the claimant to make the necessary application to serve the defendant out of the jurisdiction.
- [31] The claimant did not provide details but he averred that COVID-19 restrictions made it difficult for him to get an updated medical report and the cost of surgery, and that counsel for the defendant requested an updated report as late as 15th June 2020. The claimant finally received the report on 26th August 2020. As stated earlier, it was not necessary for the claimant to obtain the latest medical report to file his claim. He had abundant information to institute proceedings. Still, in light of the discussions being held between counsel for the parties, and with Mrs. Bacchus-Batiste's reasonable belief that quantum was the issue to be determined, I find this an excusable reason for the delay in filing the claim.

[32] The claimant asserts that he has a considerable claim against the defendant as he has suffered severe injuries and he is now partially disabled. He says he has lost movement in his shoulder, he is now incapable of working and he needs further medical attention. He urges on the court that he will be greatly prejudiced if his claim is not allowed to proceed.

[33] Having regard to all the circumstances of this case, I will exercise my discretion to disapply section 13 of the Limitation Act. I am of the view that the claimant has shown that it is equitable to allow his action to proceed. To my mind, any prejudice to the defendant concerning his capacity to defend the claim is far outweighed by the prejudice to the claimant if he is barred from pursuing damages for the serious injuries he allegedly suffered as a result of the actions of the defendant.

Order

[34] Based on the foregoing, it is ordered as follows:

1. The limitation period of 3 years stipulated in section 13 of the Limitation Act shall not apply to the cause of action of the claimant against the defendant in these proceedings.
2. The claimant is granted leave to file a personal injuries claim against the defendant within 14 days of today's date.
3. There is no order as to costs.

[35] The parties are encouraged to settle this matter.

Tamara Gill
Master

By the Court

Registrar