COMMONWEALTH OF THE BAHAMAS **2014/CLE/gen/01698**

IN THE SUPREME COURT

Common Law and Equity Division

BETWEEN:

WAVNEY BRATHWAITE-BASTIAN

Plaintiff

V.

PHIL'S FOOD SERVICES LIMITED

Defendant

BEFORE: **Hon. Justice Keith H. Thompson**

DATE: March 10th, 2020

APPEARANCES: Rhionda Godet of Counsel for the Plaintiff

Cheryl Whymns of Counsel for the Defendant

Limitation period, claim statute barred as a preliminary point, jurisdiction, unconditional appearance.

[1] This action commenced by a generally indorsed Writ of Summons filed October 17th, 2014. The Statement of Claim was filed May 01st, 2019. The Defence was filed May 16th, 2019 and a Reply to Defence was filed July 22nd, 2019.

[2] The Summons for the hearing of the preliminary point was filed May 14th, 2019. That Summons which is the subject of the preliminary point is pursuant to Order 31 A (1), (2) of the Rules of the Supreme Court and/or the inherent jurisdiction of the Court to determine:-

> **"whether the Plaintiff's claim herein is statute barred pursuant to Section 9 of the Limitation Act 1996, the Writ having been filed more than three years after the date that the cause of action accrued."**

Order 31A, 1(d) provides:-

> "1. The Court shall deal with cases actively by managing cases, which may include:-
>
> (d) - deciding the order in which issues are to be resolved."

[3] Section 9 of the Limitation Act, ("The Act") provides:-

> **"ACTIONS FOR DAMAGES IN RESPECT OF PERSONAL INJURIES AND ACTIONS UNDER THE FATAL ACCIDENTS ACT."**
>
> **9. (1) Subject to subsection (6), this section shall apply 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 any written law 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) Subject to subsection 3, an action to which this section applies SHALL NOT BE BROUGHT after the EXPIRY OF THREE YEARS from:-

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

(b) the date (if later) of the Plaintiff's knowledge.

(3) ....

(4) ....

(5) ....

(6) This section shall not apply to an action to which section 12 applies or to an action under the Fatal Accident Act."

TIME LINE:

[4] The Statement of Claim discloses the following:

1. **"On Friday 16th, September 2011 the Plaintiff while shopping in the Defendant's Gladstone Road premises was struck down and injured when a movable trolley piled high with boxes of unevenly stacked bananas toppled on top of her, pushing her on to a display table with cantaloupes, thereby occasioning injury to the Plaintiff's head, back, neck, shoulder and right knee."**

[5] The Defendant claims that the generally indorsed Writ of Summons was filed approximately three (3) years and one (1) month after the accident in question. The Statement of Claim was only filed on May 01st, 2019, some five (5) years after the Writ.

[6] The Defence pleaded the limitation defence based on the date of the accident set out in the Statement of Claim. The Plaintiff claims that she only became aware of the true state of her condition subsequent to an MRI report dated December 29th, 2012, which is when she filed the Writ within the prescribed period.

[7] The Statement of Claim provides:-

"

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

SUPREME COURT
MAY 01 2019
Nassau, Bahamas

2014

CLE/gen/No.01698

BETWEEN

WAVNEY BRATHWAITE-BASTIAN

Plaintiff

AND

PHIL'S FOOD SERVICES LIMITED

Defendant

STATEMENT OF CLAIM

1. The Plaintiff is a citizen of The Commonwealth of The Bahamas.
2. At the time of the incident, the Defendant was a company duly incorporated under the Companies Act Chapter 308 of the Statute Laws of the Commonwealth of The Bahamas, and carrying on the business of grocers at Phil's Food Services, a retail and wholesale shopping mart, located on Gladstone Road.
3. The Plaintiff was at all material times and remains part owner of, and holds the position of Managing Director for Finance and Human Resources at M & W Construction and Heavy Equipment Rental Co. Ltd., a company carrying on the business of heavy equipment rental.
4. That the Defendant was at all material times, responsible to ensure that the premises in which it conducted its business were kept in a safe and secure manner during operating hours.
5. On Friday, 16th September A.D. 2011, the Plaintiff, while shopping in the Defendant's Gladstone Road premises, was struck down and injured when a moveable trolley piled high with boxes of unevenly stacked bananas toppled on top of her, pushing her on to

a display table with cantaloupes, thereby occasioning injury to the Plaintiff's head, back, neck, shoulder and right knee.

6. The injury sustained by the Plaintiff as mentioned in paragraph four (4) hereof was a direct result of the negligence, acts and or omissions on the part of the Defendant.

7. That, as a result of the negligence, acts and or omissions of the Defendant on its premises, coupled with the failure of the Defendant, its servants and or agents to exercise a reasonable duty of care, the Plaintiff has suffered personal injuries.

PARTICULARS OF NEGLIGENCE

AND BREACH OF DUTY OF CARE

(1) That the Defendant, its agents and or its servants failed to remove and or to properly stock the boxes of bananas that were stacked high and unbalanced on a moveable trolley on their premises during operating hours.

(2) That the Defendant failed to ensure that the premises were safe and secure during operating hours.

(3) That the Defendant failed to discharge a duty of care towards the Plaintiff.

(4) That the Defendant failed to ensure that the wheels of the moveable trolley were locked or were otherwise in a position to prevent its movement;

(5) That the Defendant failed to exercise proper care by stacking its banana boxes in a manner where the same were improperly balanced or otherwise insecurely positioned;

(6) That the Defendant failed to post warning signs advising its shoppers or licensees of the potential hazard that the boxes were likely to topple.

(7) That the Defendant failed to render proper supervision to monitor the trolley stacked high with boxes of bananas to ensure against it causing damage to its shoppers and or licensees.

(8) That the Defendant failed to consider adequately or at all whether the placement of the trolley stacked high with bananas would have presented a clear and present danger for nay one coming near it or in contact with it.

PARTICULARS OF PERSONAL INJURY

a. Cervical strain and sprain;

b. Cervical radiculopathy secondary to herniated disc C5-C6 with spinal canal stenosis to 10mm and narrowing of the left neuroforamina
c. Significant disc bulges at C4-C5 and C6-C7;
d. Left shoulder pain secondary to moderate subscapularis tendinosus without tears;
e. Mild subscapularis tendinosus and mild subscapularis tendinosus without tears;
f. Mild subacromial subdeltoid bursitis and mild synovitis of the bicereps and tendon sheaths;
g. Closed head injury;
h. Cerebral concussion
i. Cervicogenic headaches
j. Chronic Pain

PARTICULARS OF DAMAGES

Special Damages

The plaintiff claims the following special damages:

1) Out of pocket Miscellaneous/ Expenditure $89,926.45
2) Medical Expenses $15,890.82

General Damages

The Plaintiff claims the following general damages:

3) Pain & Suffering & $67,698.00
4) Loss of Amenities

Future Damages

5) Future medical expenses $300,953.68
6) Future Loss of Earnings $ 21,000.00

AND THE PLAINTIFF CLAIMS:

1. Damages for personal injuries and consequential losses;
2. Interest on the sum from the date of judgment;
3. Interest pursuant to the Civil Procedure (Award of Interest) Act, Ch. 80;
4. Costs;
5. Such further and other relief as the court seems fit.

ated this th day of April, A.D., 2019

Deleveaux Godet & Co.
No. 72 Nassau Street
P.O. Box SP-63971
Nassau, The Bahamas

....
Attorneys for the Plaintiff

[8] The Defence provides:-

COMMONWEALTH OF THE BAHAMAS 2014/CLE/gen/01698

IN THE SUPREME COURT

Common Law and Equity Division

SUPREME COURT
MAY 16 2019
Nassau, Bahamas

BETWEEN

WAVNEY BRATHWAITE-BASTIAN

Plaintiff

AND

PHIL'S FOOD SERVICES LIMITED

Defendant

DEFENCE

1. Paragraph 1 of the Statement of Claim is neither admitted nor denied as same is not within the knowledge of the Defendant.
2. Paragraph 2 of the Statement of Claim is admitted.
3. Paragraph 3 of the of the Statement of Claim is neither admitted nor denied as same is not within the knowledge of the Defendant.
4. Paragraph 4 of the Statement of Claim is admitted.
5. Paragraph 5 of the Statement of Claim is denied, and the Defendant puts the Plaintiff to strict proof of the allegations contained therein.
6. Paragraph 6 of the Statement of Claim is denied the Defendant puts the Plaintiff to strict proof of the allegations contained therein.

a) Paragraph 7 of the Statement of Claim and the particulars of negligence, breach of duty of care, personal injury, loss and damage alleged thereunder are each denied, and the Defendant puts the Plaintiff to strict proof of the allegations contained therein. Further or alternatively the Defendants will aver that the Plaintiff's claim is statute barred pursuant to Section 9 of the Limitation Act 1996, the Writ having been filed more than three years after the date that the cause of action accrued.

7. It is denied that the Plaintiff is entitled to damages, interest or any of the relief claimed in the prayer of the Statement of Claim and the Defendants put the Plaintiff to strict proof of the allegations contained therein.

8. Save as hereinbefore expressly admitted or otherwise pleaded to, each and every allegation contained in the Statement of Claim is denied as if the same where herein set forth and separately traversed seriatim.

DATED the 10th day of May, A.D., 2019

CHERYL T. WHYMS & CO.
Chambers
106 Church Street
Sandyport, Marina Village
New Providence, The Bahamas
Attorneys for the Defendant

[9] It would appear that the critical issue to be decided on this preliminary point is the date of knowledge or put another way, the date the cause of action accrued or the date (if later) of the Plaintiff's knowledge.

[10] Section 10 of the Act provides:

> **"10. (1) In section 9, references to a person's date of knowledge are references to the date on which that person 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 plaintiff would reasonably have considered it sufficiently serious to justify the institution of proceedings 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 such person might reasonably be expected to acquire –**
>
> **(a) from facts observable or ascertainably by such person; or**
>
> **(b) from facts ascertainable by such person with the help of such medical or other expert advice as it is reasonable, in the circumstances, to seek,**
>
> **but there shall not be attributed to a person by virtue of this subsection knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and where appropriate to act on) that advice."**

[11] It would appear from a reading of sections 9 and 10 that "KNOWLEDGE" plays a critical role in such matters. In this regard it brings into play the exercise of the discretion of the court in determining when this knowledge would have come to the Plaintiff. That discretion therefore can only be exercised based on certain information/evidence provided by the Plaintiff.

[12] The Plaintiff filed an affidavit on January 29th, 2020 which lays out in the Plaintiff's view the sequence of events inclusive of the time line which also includes visits to various medical practitioners and exhibits.

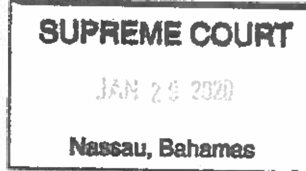
AFFIDAVIT OF WAVNEY BRATHWAITE-BASTIAN:

COMMONWEALTH OF THE BAHAMAS 2014/CLE/gen/01698

IN THE SUPREME COURT

Common Law and Equity Division

BETWEEN



WAVNEY BRATHWAITE-BASTIAN

Plaintiff

AND

PHIL'S FOOD SERVICES LIMITED

Defendant

AFFIDAVIT

I, **WAVNEY BRATHWAITE-BASTIAN** of #66 Country Club Road, Coral Harbour in the South Western District of the Island of New Providence, one of the Islands of the Commonwealth of the Bahamas, Office Manager, make oath and say as follows:-

1. On Friday afternoon, 16th September A.D. 2011, while shopping in the Defendant's Food Store located on Gladstone Road, I was standing chatting with a former colleague, Mr. Lorenzo Ferguson when I was struck down and injured by boxes of bananas which were unevenly stacked on a movable trolley. I was standing about 3 feet away from the trolley with my back to it. The bananas toppled on me hitting the back of my head, neck, lower back and right knee before pinning me on top of a table where cantaloupes were displayed for purchase.

2. My colleague and I were taken by Wilbert Dean an employee of Phil's Food Services Ltd. to the Human Resources Manager (at that time Ms. Kenris Longley) to lodge a complaint. She offered me pain killers and took a statement from me.

3. Later that evening I drove myself to Doctor's Hospital, where I complained of pain to my head, back, neck, shoulder and right knee. I was seen in the Emergency Room by Dr. Nigel Johnson, who ordered a Cat Scan and x-rays. The results of the Cat Scan and x-rays came up as 'normal'. A copy of the relevant documents to this end, all dated 16th September 2011, are hereto attached and marked respectively **WBB-1a, b, c and d**. As a result, Dr. Johnson prescribed pain killers and eight sessions of physiotherapy, for what he described '*as occiput tenderness, lower back tenderness and right knee tenderness*'.

4. In light of his recommendation for physical therapy, I asked Dr. Johnson to refer me to Dr. Michael Pyfrom, a Chiropractor whom I had known for several years and had attended occasionally as an avid jogger for adjustments but he refused saying that he didn't believe in Chiropractors.

5. The painkillers were really ineffective as they only masked the pain for the duration of time in which they were taken. Once they were gone the pain was there again so I, on my own volition, visited Dr. Michael Pyfrom. I now refer to the letter of Dr. Pyfrom dated September 19th 2011, marked **WBB-2**. In truth, I do not recall ever asking Dr. Pyfrom to provide this information to the Defendant or its attorney, especially since all the relevant fees for care under Dr. Pyfrom were borne in full by me. Having said this, I fully agree that the diagnosis and care stipulated in said letter is exactly what was communicated to me by Dr. Pyfrom.

6. As his report suggests, the CAT scan and x-rays done at Doctors hospital all came out 'negative', so I was treated with ten sessions of spinal manipulation (massages) ice therapy and soft tissue mobilization.

7. I did everything I was told to do and complied fully with the medical protocol provided and yet, still suffered extensive and excruciating pain, even in my chest.

8. The pain got so bad that I had to see a Cardiologist, Dr. Patrick Cargill, who after examination and an ECG and Stress Test considered the issue to be neurological and as a result, referred me to Consultant Neurologist, Dr. Clyde Munnings.

9. I saw Dr. Clyde Munnings on December 11th 2011, and outlined my history. He right away referred me to have an MRI undertaken. I have since learned that an MRI is a Magnetic Resonance Imaging which provides precise details of your body parts especially soft tissue with the help of magnetic fields and radio waves. This information cannot be seen with an X-ray or CT Scan.

10. I attended Physicians Imaging Center of Florida, Hollywood, Florida on December 29th 2011 for the MRI. By Report dated February 21st 2012, Dr. Clyde Munnings confirmed my suspicion that I had suffered extensively more than a mere sprain or strain as earlier diagnosed. I have attached and marked **WBB-3** the Report of Dr. Clyde Munnings in reference to the MRI results.

11. Of particular note, it was through the diagnosis of Dr. Munnings that the fact of neurological damage was confirmed and made clear. I had also suffered a closed head injury and cerebral concussion, along with protruding herniated and bulging discs at C4-5 and C6-7. As for my shoulder injury, I was advised that there is no surgery available to correct this; therefore I would have to suffer this shoulder injury for life, which I consider to be a disability. Based on the MRI's

findings, Dr. Munnings also opined that the problem in my neck may require neurosurgical intervention for complete resolution, supported by post-operative rehabilitation.

12. I did not know this from the earlier assessments or reports of Dr. Michael Pyfrom or Dr. Nigel Johnson, who only could have diagnosed my condition based on the limitations of a Cat Scan and x-ray. The MRI report, as explained by Dr. Clyde Munnings, clearly revealed to me that what I am dealing with is a far cry from mere sprain/strain or tenderness as previously diagnosed.

13. That I make this Affidavit in support of the fact that I was unaware of the true and full extent of my injury prior to December 2011. All I knew was that I suffered and still continue to suffer from chronic and excruciating pain – especially when the weather changes and when I try to sleep. My normal motor, sensory and autonomic functions have all been affected as a result of this injury. I can only sleep for 3 to 4 hours before being awakened with muscle spasms, shoulder pain and numb swollen fingers on both hands caused by damage to the nerves being pinched as well as some damage to the same nerves radiating from C5, C6 and C7 cervical vertebrae. To prevent further nerve damage from occurring, Dr. Munnings has prescribed Lyrica 75MG Capsules and B12 to aid in healing and strengthening of the nerves, Sirdalud 4MG Tablets to counter act the muscle spasms and Arcoxia 120MG as an anti-inflammatory. He has also prescribed Calcium Plus Vitamin D, Osteobiflex and other natural supplements to help heal the spine and brain, nerves and muscles and insists on the use of weights to strengthen the muscles and walking instead of jogging to prevent stress on the spine.

14. Ultimately, the injuries set out in my statement of Claim are borne from the knowledge provided from the MRI undertaken of December 11 2011 and the subsequent report of Dr. Clyde Munnings dated February 12th 2012, which he had earlier shared with me when he came in receipt of the MRI reports.

15. A copy of this communication was forwarded to the Defendant's Insurers, to which they refer in their letter dated November 11th 2014, which is hereto attached and marked **WBB-4**.

16. I note in particular the following statements thus:

> *"A CT scan of the brain and x-rays of the knee, cervical and lumbosacral spine, performed at the emergency room on the date of loss showed no abnormalities. Therefore, the Claimant was prescribed pain medication, referred to therapy and discharged.*
>
> *However, the claimant indicated that overtime she began to experience headaches, vertigo, dizziness, neck pain and stiffness, along with pain to the left shoulder, chest, breast, and scapula. Ms. Bastian was initially referred to a cardiologist due to the chest pains however it was determined that the chest pains were neurological.* ***Hence, the claimant was referred to a neurologist in December 2011 for further evaluation.*** *We have been advised that the Neurologist diagnosed Ms. Bastian with the following:*
>
> *Cervical Strain/sprain, cervical radiculopathy secondary ...* etc.

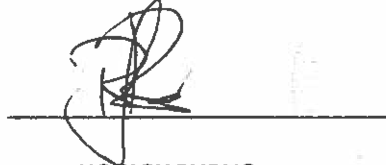
17. That I interpret this as the Defendant's own acknowledgement of when I would have been seized with the knowledge as pertains to my true condition.

5

18. That I make this affidavit in support of the fact that I was only seized with the true particulars of my condition in December 2011, and not in September 2011, as suggested by the Defendant. Yes. I knew I suffered pain which did not go away, but I believe the constant search for relief at my own personal expense demonstrates my desire to fully know and understand the true nature of my condition, which was not revealed until the MRI undertaken in December 2011.

Sworn to this 24th day)
of January A.D. 2020)
at Nassau, Bahamas)

Before me



NOTARY PUBLIC

Deleveaux Godet & Co.
#72 Nassau Street
P.O. Box SP-63971
Nassau, The Bahamas
Attorneys for the Plaintiff

6

WBB-2

[illegible]HIROPRACTIC CENTRE

Dwight [illegible] Marshall

[illegible]ember 19th, 2011

[illegible] [illegible]per
[illegible] Food Services
[illegible]stone Road
[illegible]sau, Bahamas

Re : Mrs. Wavney Brathwaite-Bastian

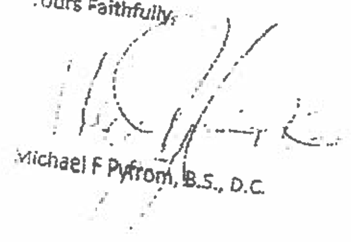
The above named presented for consultation and treatment after being involved in an accident while shopping at your food store. It was reported that a few cases of bananas fell on Mrs Brathwaite-Bastian Which caused pain in the lower neck , right hand numbness , lower back pain and right knee pain. All x-rays and Cat Scans done at Doctors Hospital on Friday September 16th, 2011 came out negative.

We are treating Mrs Brathwaite-Bastian for a sprain / strain injury of the lower neck and low back with spinal manipulation, ice therapy and soft tissue mobilization. At this time we feel it necessary to treat Mrs Brathwaite-Bastian for 10 sessions at a total cost of $ 50.00 per session with the initial visit of $ 75.00. Therefore the total cost would be $ 575.00.

If further information is needed please do not hesitate to call our office at the numbers below.

Please make check payable to Family Island Chiropractic Center.

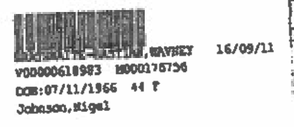
Yours Faithfully,



Michael F Pyfrom, B.S., D.C.

WB B1-d

REHABILITATION OUTPATIENT ... PHYSIOTHERAPY



Sports Therapy

Hand Therapy

Incontinence Treatment Program

Ergonomics

Splinting

Work Hardening/ Strengthening

Cognitive Assessment

Myofascial Release

Videofluoroscopy

Swallowing Treatment Program

Joint Replacement Rehabilitation

Musculoskeletal Therapy

PATIENT'S NAME: Wavney Brathwaite - Bastian

DATE OF BIRTH: 7/11/1966

DIAGNOSIS: STI neck/upper back / lower back

REFERRING PHYSICIAN: DR NIGEL JOHNSON

DATE: 10 / 9 / 2011

OF SESSIONS: (8) eight

- ☐ OCCUPATIONAL THERAPY ASSESSMENT AND TREATMENT
- ☒ PHYSIOTHERAPY ASSESSMENT AND TREATMENT
- ☐ SPEECH LANGUAGE PATHOLOGY ASSESSMENT AND TREATMENT
- ☐ ACTIVITIES OF DAILY LIVING
- ☐ ERGONOMIC WORKSITE ASSESSMENT
- ☐ FUNCTIONAL ABILITY EVALUATION
- ☐ HOME ASSESSMENT
- ☐ MOTOR SPEECH SKILLS ASSESSMENT
- ☐ NEUROMUSCULAR RE-EDUCATION
- ☐ PULMONARY FUNCTION TEST
- ☐ SPEECH AND COMMUNICATION TRAINING
- ☐ SPLINTING
- ☐ SWALLOWING RETRAINING
- ☐ WHEELCHAIR ASSESSMENT
- ☐ IONTOPHORESIS

COMMENTS: Please provide medical report.

PHYSICIAN SIGNATURE: [signature]

Rehabilitation OutPatient Services Department

#9 Collins Avenue,

P.O. Box N-3026 Nassau, Bahamas

www.doctorshosp.com

info@doctorshosp.com

PAGE 1

DATE: 16/09/11 @ 2217
USER: 2739

Doctors Hospital OE *LIVE*
PRELIMINARY NOTICE OF CHARGES

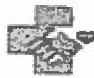
PATIENT NAME: BRATHWAITE-BASTIAN,WAVNEY
ACCOUNT NUMBER: V00000618983
DATE OF VISIT: 16/09/11

DATE	CATEGORY	PROCEDURE	BILLING #	QTY	AMOUNT
16/09/11	CAT SCAN	HEAD WO/ CONTRAST	721024066	1	550.00
16/09/11	PAYMENT	CASH COPAY/DEDUCTIBLE	PCASH		-200.00
16/09/11	PHARMACY Rx# 0193622	TIZANIDINE HCL 4 MG TAB	7120501883	15	22.00
16/09/11	PHARMACY Rx# 0193623	DICLOFENAC SOD 75 MG TABSR	7120502201	14	18.65
16/09/11	PHARMACY Rx# 0193624	BIOFREEZE 110 GM GEL	7120500272	1	18.20
16/09/11	PHARMACY Rx# 0193628	500 MG/30 MG ACETAMINOPHEN	7120506581	30	17.30
16/09/11	PHARMACY Rx# 832117	DICLOFENAC SOD 75 MG/3 ML	7120506262	1	12.00
16/09/11	Patient Care System	ER CHARGE FOR EDM/Resp	680090782	1	0.00
16/09/11	RADIOLOGY	KNEE, RIGHT 2V	728020700	1	90.00
16/09/11	RADIOLOGY	RADIOLOGIST ON CALL	728029032	1	100.00
16/09/11	RADIOLOGY	SPINE, CERVICAL AP/LAT	728021465	1	90.00
16/09/11	RADIOLOGY	SPINE, LUMBO-PELVIC 2V	728021480	1	90.00

TOTAL CHARGES	1008.15
TOTAL PAYMENTS	-200.00
OUTSTANDING BALANCE	808.15

THIS IS NOT A FINAL BILL

NAL BILL

 DOCTORS HOSPITAL

Health For Life

Doctors Hospital (Bahamas) Limited
DIAGNOSTIC IMAGING
P.O. Box N3018
Nassau, Bahamas
Phone: (242) 302-4662 Fax: (242) 356-3543

RADIOLOGY REPORT
Report Number: 0916-0086

==

Name: BRATHWAITE-BASTIAN,WAVNEY DOB: 11/07/1966 Age: 45 Sex: F

MR#: M000081225 Acct#: V00000618983 Ordering MD: Johnson, Nigel

Exam: 0916-0023 CT/HEAD WO/ CONTRAST

Date: 16/09/11
==

High-resolution axial images were obtained from the base of the skull to the vertex. The ventricular system and cortical sulci are normal for the age of the patient with no shift of the midline structures. Posterior fossa structures are normal including fourth ventricle and basal subarachnoid cisterns. Brain parenchyma is normal with no evidence of any sizable mass, bleeding or any focal abnormal attenuation. Bony skull vault is unremarkable.

IMPRESSION: Normal study. No sizable intracranial mass is seen

Dictated and Signed by: <Electronically signed by DINESH YADAV >

WBB-19

Dr. Nigel Johnson, Bsc., MBBS, DM(Emerg) (UWI)

CONSULTATION FORM

Date of Admission: 16/9/2011

Dear: Phil Food centre

Re: Wauney Brathwaite - Bastian

D.O.B.: 7/11/1966

16/09/11
DOB:07/11/1966 44 F
Johnson, Nigel

History: Patient visiting Phil establishment had a ~~basket~~ box of banana fell and hit her in the back of the head upper back lower back and (R) knee.

Exam: O/E SBP PR GCS 15
occiput tenderness c spine - no midline tenderness
lower back tenderness
(R) knee [illegible] tenderness

Investigations: Xray C spine / L spine (N) CT head (N)

Treatment/disposition: Analgesic
Patient needs Physical Therapy Treatment

Sincerely,

Dr. Nigel Johnson
Consultant Emergency Medicine
barmanjohnson@hotmail.com
Ph.: (242) 557-8044 / (242) 325-0227

COMMONWEALTH OF THE BAHAMAS | 2014

IN THE SUPREME COURT | CLE/gen/No.01698

Common Law & Equity Division

BETWEEN

WAVNEY BRATHWAITE-BASTIAN

Plaintiff

AND

PHIL'S FOOD SERVICES LIMITED

Defendant

CERTIFICATE

These are the exhibits marked **"WWB1 through WWB 4"** referred to in the Affidavit of **WAVNEY BRATHWAITE-BASTIAN**.

Dated this 24th day of January, A.D., 2020

NOTARY PUBLIC

DR. CLYDE A. MUNNINGS

CONSULTANT NEUROLOGIST

The Neurology Clinic, Doctors Hospital Health System

February 21st, 2012

TO WHOM IT MAY CONCERN

Dear Sir/Madam,

RE: WAVNEY BRAITHWAITE-BASTIAN

Ms. Wavney Braithwaite-Bastian presented to The Neurology Clinic at Doctors Hospital on December 21st, 2011. She reported on September 16th, 2011 while shopping at Phil's Food Store on Gladstone Road several boxes of bananas fell onto her head and back, hitting her in the back of the head, back of her neck, shoulders onto the right knee. She had immediate pain in all of those areas. She initially took two Tylenol and went to the Emergency Room where she was seen by Dr. Nigel Johnson. CT scan of the brain was done and was reported normal. X-ray of the right knee was normal. X-ray of the cervical spine was normal. X-ray of the lumbosacral spine was normal. She was treated with Sirdalud, Diclofenac and Biofreeze. She continued to have significant headaches, vertigo and dizziness, neck pains and stiffness, numbness and tingling of both upper extremities and fingers, left shoulder pain, left sided chest pain, left breast pain, left scapula pain. She reported decreased range of motion of the neck and both shoulders, left greater than the right. She was referred to physical therapy and underwent treatment for approximately two months. She continued to have left sided chest pain and was evaluated for Cardiology. Echocardiogram was normal and stress tests were negative.

Did this help?

She was diagnosed with:

- Closed head injury and cerebral concussion
- Post concussive syndrome
- Cervical headaches
- Cervical strain/sprain
- Cervical radiculopathy rule out herniated disc
- Left shoulder pain rule out rotator cuff tear

She was recommended for MRI scan of the cervical spine and left shoulder. She opted to continue with therapy and exercise and declined medications at the time. Initial blood pressure was 141/108, pulse 95, weight 145 lbs.

On December 29th, 2011 she underwent MRI scanning. The left shoulder showed moderate supraspinatus tendonosis and mild suprascapularis tendonosis without tear. There was mild subacromial subdeltoid bursitis, mild tenosynovitis of the biceps tendon sheath, small intramuscular ganglion in the proximal lateral aspect of the deltoid muscle, cartilage and labrium of the glenouboroid joint was maintained and the AC joint was intact.

P. O. BOX N-3030
SHIRLEY STREET & COLLINS AVENUE,
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TELEPHONE: (242) 302-4600 Ext. 5215

MRI of the cervical spine showed a C5-C6, 2 mm retrolisthesis with a 2 mm broad base protruded herniated disc an end plate osteophyte producing minimal narrowing of the left foramen. There was also loss of the normal lordodic curvature which was consistent with muscular spasm.

The patient was seen in follow up January 18th, 2012, blood pressure was 142/89, pulse 73, weight 146 lbs. She reported some slight improvements in her pain. It was noted additionally that her MRI showed bulging two discs at C4-C5 and C6-C7, 2 mm producing no significant stenosis and no significant nerve root displacement. Physical therapy was continued and she was started on Arcoxia 120 mg daily as an anti-inflammatory with Vitamin B12 to aid in healing of the pinched nerve. She was recommended for an additional twenty-four (24) sessions of physical therapy.

At follow February 2012 in The Neurology Clinic, blood pressure was 140/81, pulse 85, weight 146 lbs. She reported some increase in strength in the left upper extremity with therapy. There was still pain in the neck, right upper extremity and shoulder. She was taking more supplements in an attempt to ease the pain.

Examination continued to show spasms in the muscle of the neck with limited range of motion secondary to pain, decreased reflexes in the upper extremity and increased in the lower extremities and decreased power especially at the left arm.

Final diagnoses:

- Cervical strain/strain
- Cervical radiculopathy secondary to herniated disc at C5-C6, bulging disc at C4-C5, C6-C7
- Left shoulder pain secondary to tendonosis of the supraspinatus and subscapularis muscles, subacromial and subdeltoid bursitis and tenosynovitis of the biceps tendon sheath

She was to continue Arcoxia anti-inflammatory at 120 mg daily for two (2) weeks then reduce to 90 mg daily for a month, then 60 mg daily as long as she is having pain. She is to continue Vitamin B12, Calcium Plus Vitamin D, Osteobiflex and Glucosamine and other natural supplements to help healing of her spine as well as the healing of the brain, nerves and muscles that were damaged in the accident.

Additional diagnoses are:

- Closed head injury
- Cerebral concussion
- Post concussive syndrome with headaches, dizziness and vertigo

The mainstay of patient's therapy, in addition to natural vitamins, mineral and supplements will be physical therapy. She will require at least twenty-four (24) sessions on a yearly basis over the next two to four (2 – 4) years in order to continue to resolve these injuries.

It has to be noted that the problem in the neck may require neurosurgical intervention for complete resolution of symptoms. This could be at a cost of fifteen to twenty (15 – 20) thousand dollars inclusive of hospital stay and post operative rehabilitation.

Thanking you in advance. Should you have additional questions or concerns, please feel free to contact me at the numbers listed.

Dr. Clyde A. Munnings I
Consultant Neurologist

DR. CLYDE A. MUNNINGS - CONSULTANT NEUROLOGIST

W6B3

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November 11, 2014

"BY HAND"

Dr. Thomas Roush
Spine Surgery
3618 Lantana Road
Lake Worth Florida

Dear Dr. Roush

RE: Claimant : Wavney Braithwaite Bastian
Date Of Birth : October 19, 1961
Date Of Loss : September 16, 2011

Ms. Bastian reported that several boxes of bananas fell on her while at our insured's premise. The claimant advises that she subsequently sustained injuries to her head, back, neck, shoulders and right knee. A CT scan of the brain and x-rays of the knee, cervical and lumbosacral spine, performed at the emergency room on the date of loss showed no abnormalities. Therefore, the claimant was prescribed pain medication, referred to therapy and discharged.

However, the claimant indicated that over time she began to experience headaches, vertigo, dizziness, neck pain and stiffness, along with pain to the left shoulder, chest, breast, and scapula. Ms. Bastian was initially referred to a cardiologist due to the chest pains however it was determined that the chest pains were neurological. Hence, the claimant was referred a neurologist in December 2011 for further evaluation. We have been advised that the neurologist diagnosed Ms. Bastian with the following:

-Cervical Strain/sprain
-Cervical radiculopathy secondary to herniated disc C5-C6 with spinal canal stenosis to 10mm and narrowing of the left neuroforamina at that level.
-Significant disc bulges at C4-C5 and C6-C7.
-Left shoulder pain secondary to moderate supraspinatus tendinous
-Mild subscapularis tendinosus and mild subscapularis tendinosus without tears
-Mild subacrominal subdeltoid bursitis and mild synovitis of the biceps tendon sheaths
-Closed head injury and cerebral concussion
-Post concussive syndrome
-Cervical headaches
-Chronic pain

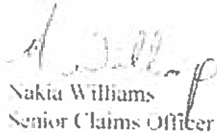
Nakia Williams
Wavney Bastian
November 11, 2014

We are investigating this loss, and would appreciate you providing us with a detailed medical report, which should include Ms. Bastian's diagnosis, prognosis and whether she had any pre-existing conditions or injuries that were exacerbated by the above captioned incident. Ms. Bastian has consented to the release of her medical information by endorsing this letter below.

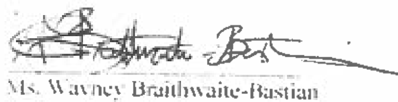
Kindly forward your bill to the undersigned, which will be paid upon receipt of the aforementioned.

Thank you for your assistance, and we look forward to hearing from you.

Regards,



Nakia Williams
Senior Claims Officer



Ms. Wavney Braithwaite-Bastian

[13] The affidavit sets out a time line, however, of special note is paragraph 8 where no date was given as to when the Plaintiff saw Dr. Cargill. It was at least at this point that the Plaintiff ought to have had the knowledge that her condition was very serious. The word "KNOWLEDGE" is defined in Black's Law Dictionary Eighth Edition as:-

> **"AN AWARENESS OR UNDERSTANDING OF A FACT OR CIRCUMSTANCE; A STATE OF MIND IN WHICH A PERSON HAS NO SUBSTANTIAL DOUBT ABOUT THE EXISTENCE OF A FACT."**

THE LAW:

[14] As set out at paragraph 10 above, the Act itself in 10 (3) defines what knowledge includes for the purposes of section 10. It speaks of what a person might REASONABLY BE EXPECTED TO ACQUIRE:-

10 (1) ....

(2) ....

(3) For the purposes of this section a person's knowledge includes knowledge which such person might reasonably be expected to acquire.

(a) from facts OBSERVABLE or ASCERTAINABLE by such person.

(b) from facts ascertainable by such person with the help of such medical or other expert advice as it is reasonable in the circumstances to speak.

But there shall not be attributed to a person by virtue of this sub-section knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (where appropriate to act on) that advice.

[15] The Plaintiff relies heavily on the case of **MINISTRY OF DEFENCE V. AB & Ors [2012]** UKSC 9 and cites a quote by **LORD WILSON** at paras 13 and 14 where he states:-

"A Claimant will not always have acquired knowledge by the date when he first consults an expert. Section 14 (3) recognizes that some facts may be ascertainable only with the help of experts, so the court will have regard to the confidence and the substance of a claimant's belief prior to consulting an expert and the effect on that belief of receipt of the expert's report. An expert may assist a claimant in acquiring knowledge of the facts required by Section 14 or he may provide evidence to help him substantiate the claim."

PARA: 13 & 14:

13. **"Soon after this publicity, a group of veterans, all of whom had served in the Pacific during the tests, formed the British Nuclear Test Veterans Association (BNTVA). Mr. McGinley was their Chairman, their objectives were to gather information about their exposure and its likely effects, to press for further research and to seek financial recompense for any harm suffered by veterans, either by claiming for war pensions or by making**

claims for damages. Several of the individual claimants with whom we are concerned in this appeal were active members of BNTVA.

14. **As a result of the publicity described above, in January 1983, questions were raised in Parliament about the possibility that the veterans had been injured by exposure to radiation. The MOD's attitude was that the men had not been exposed to excessive levels of ionizing radiation. That remains its stance. However, the Government commissioned a health survey of the men involved in the tests, to be conducted by the National Radiological Protection Board (NRPB)."**

[16] What the Plaintiff submits is that based on the dicta of Lord Wilson, true knowledge may only acquire upon further consultation. They go on to submit that a case can be made by the Plaintiff that prior to the MRI consultation on the 29th December, 2012 the Plaintiff treated the injury as an annoyance which simply required therapy, as indicated by her examining physician of first instance.

[17] The Plaintiff further relies on a quote from Lord Wilson wherein he said that:-

> **"Knowledge must demonstrate an awareness............... 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.**

He further stated that: ... this knowledge of attributability (as it is convenient to describe it) is predicated upon the assumption that the claimant has a valid cause of action and thus will be able to establish among other things even in the teeth of opposition from the defendant, not just attributability which means only that there is a real possibility that the act or omission caused the injury: SRARGO V NORTH ESSEX DISTRICT HEALTH AUTHORITY [1997] P.I. QR P 235 at P. 242, BROOKE LJ but, rather, that this act or omission actually caused the injury in the legally requisite sense."

[18] The Plaintiff submits that the substantive element of reasonable belief for the Plaintiff was the verification of a substantial injury diagnosed on 29th December, 2011, which vitiated the mistaken knowledge of the 16th September, 2011 and the Plaintiff says this is irrespective of the evidential basis for the belief that might have led to the commencement of such investigation.

[19] The Plaintiff again relies on a quote from Lord Wilson in the *Ministry of Defence* case (supra). However, counsel does not cite the entire paragraph. Quite often when parts are separated from the whole we miss the true meaning and/or interpretation of the intention and meaning of what is being conveyed in the whole. I will therefore set out the entirety of paragraphs 11 and 12.

"11. Lord Phillips is therefore correct to point out that when, in the present proceedings, it accepted that the belief had to be held with a degree of confidence but, as an aside, declined to accept that it had to be reasonable, the Court of Appeal was, apparently without so realizing, disagreeing with a statement of Lord Nicholls in the House of Lords as well as with that of Lord Donaldson. Had I been offering a view of the meaning of

knowledge in section 14(1) in circumstances in which I had been unassisted by authority, I think that I might have ventured the phrase "reasoned belief" rather than "reasonable belief". The word "reasoned" might even better have conveyed the need for the belief not only to be held with a degree of confidence (rather than to be little more than a suspicion) but also to carry a degree of substance (rather than to be the product of caprice). But the distinction between the phrases is a matter of little more than nuance. In the resolution of marginal issue, and even at the level of this court, there is a lot to be said for maintaining consistency in the law. So I consider that this court should reiterate endorsement for Lord Donaldson's proposition that a claimant is likely to have acquired knowledge of the facts specified in section 14 when he first came reasonably to believe them. I certainly accept that the basis of his belief plays a part in the inquiry; and so, to that limited extent, I respectfully agree with para 170 of Lady Hale's judgment. What I do not accept is that he lacks knowledge until he has the evidence with which to substantiate his belief in court. Indeed we should not forget that, if the action is to continue, the court will not be directly interested in evidence about mere attributability; it will require proof of actual causation in the legally requisite sense.

12. What then is the degree of confidence with which a belief should be held, and of the substance which it should carry, before it is to amount to knowledge for the purpose of the subsection? It was, again, Lord Donaldson in the *Halford* case, cited above, who, in the passage quoted by Lord Phillips in para 115 below, offered guidance in this respect which Lord Nicholls in the *Haward* case, cited above, was, at para 9, to describe as

valuable and upon which, at this level of generality, no judge has in my view yet managed to improve: it is that the belief must be held "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence". In *Broadley v Guy Clapham & Co.* [1994] 4 All ER 439 Hoffmann LJ, in the passage quoted by Lord Phillips at para 118 below, paraphrased Lord Donaldson's guidance in terms of a search for the moment at which the claimant knows enough to make it reasonable for him to begin to investigate whether he has a "case" against the defendant. I respectfully agree with the analysis by Lord Hoffmann LJ meant. The investigation upon which the claimant should reasonably embark is into whether in law he has a valid claim (in particular whether the act or omission of the defendant involves negligence or other breach of duty, being a matter of which the claimant is specifically not required to have had knowledge under section 14(1) and, if so, how that claim can be established in court. So it is an investigation likely to be conducted with the assistance of lawyers; but, in the light of their advice, it may well also embrace a search for evidence, including from experts. The focus is upon the moment when it is reasonable for the claimant to embark on such an investigation. It is possible that a claimant will take legal advice before his belief is held with sufficient confidence and carries sufficient substance to make it reasonable for him to do so. Thus, as Judge LJ pointed out in the *Sniezek* case, cited above, at p229 and p232, it does not automatically follow that, by the date when he first took legal advice, the claimant will have acquired the requisite knowledge; but such an inference may well be justified."

ARGUMENTS OF THE DEFENDANT:

[20] The Defendant in its skeleton arguments set out a time frame as to the filings of the pleadings.

(a) 17th October, 2014 - Generally endorsed Writ of Summons filed approximately 3 years and one month after the accident in question.

(b) 01st May, 2019 - Statement of Claim filed approximately 5 years later after the Defendant applied for and obtained a court order that unless the Plaintiff file and serve its Statement of Claim on or before 2nd May, 2019 the action stood dismissed.

(c) 16th May, 2019 - Defence filed denying liability and pleading the limitation defence based on the date of the accident as set out in the Statement of Claim.

(d) 22nd July, 2019 - Reply to Defence filed by Plaintiff which avers that the Plaintiff only became aware of the true state of her condition after having an MRI done and a report produced and dated 29th December, 2012. In this regard, the Plaintiff says that upon that knowledge she duly filed the Writ of Summons within the prescribed time.

[21] Of special note is that there is absolutely no reference of "DATE OF KNOWLEDGE" IN THE Statement of Claim. In fact there is no pleading which references any prejudice to the Plaintiff as it relates to the limitation defence.

[22] In reviewing the pleadings it becomes very clear that no consideration was given to the limitation defence prior to the filing of the Writ of Summons and Statement of Claim.

[23] The issue of prejudice would automatically invoke the court's inherent jurisdiction to consider exercising its discretion. The English Act (Section 33(3)) permits a court to extend the period within which claims for personal injuries or death can be brought.

[24] In the case of **DAVID WILLIAM CARR V PANEL PRODUCTS (KIMPTON) LIMITED [2018] EWCA Civ 190** Lord Justice McCombe stated at paragraphs 44-50:

> **"44. The court has to perform an overall assessment and, in my view, in considering the decision of a trial judge, this court must not assume that each and every factor mentioned by such a judge was treated by him or her, or should be treated by the court, as having had equal weight in the overall assessment. Allowances need to be made for judges who, having heard evidence, produce judgments on such issues, giving to the parties a clear explanation of why one has won and the other has lost, without running the danger of finding that the possible "shakiness" of one or other brick in the wall undermines the overall conclusion, unless, of course, it is a foundation stone that proves to be unsound.**
>
> **45. Mr. Hester attacks, first, what he says was the failure by the judge to consider prejudice to Mr. Carr, presumably owing to the passage of time in conduct of the proceedings and in the**

potential loss of his claim, although these features were not expressly identified in the grounds or in the skeleton argument. In oral submissions, Mr. Hester made clear that he relied on both aspects of prejudice to his client.

46. **The second element of potential prejudice (the potential loss of the claimant's claim) hardly needs mentioning in any case of this type. That is what limitation issues are about. In my judgment, the issue does not need to be expressly raised by a claimant in pleading or argument; it can be "taken as read". For the same reason, a judge does not have to mention that point expressly in a judgment on the point to avoid criticism of his evaluation later.**

47. **In his oral submissions, Mr. Turton argued that the prejudice to a claimant, for the purposes of section 33(1), relates to exclusively or at least mainly to the prejudice caused by loss of his or her claim and not to prejudice in the litigation more generally.**

48. **I do not think that that is correct. The wording of section 33(1) (a) is quite general with regard to prejudice to a claimant and is in precisely the same terms as section 33(1) (b) relating to prejudice to a defendant. As I have said already, potential prejudice to a claimant by the loss of his or her claim is the universal consequence of a claimant losing a limitation argument. Further, the Master of the Rolls said in paragraph 42(3) of his judgment in Carroll (supra) that the burden was on the claimant to show that his or her prejudice would outweigh that to the defendant. This must presume that factors of prejudice, beyond mere loss of the claim itself, can be advanced by a claimant in argument on the application of section33 in any**

given case in order to satisfy that burden. In the same paragraph of the judgment, the Master of the Rolls said;

> **"Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim."**

49. However, in my judgment, I do not consider that the judge can be faulted on this aspect of the case. This is simply because Mr. Carr did not raise, either in his pleadings or in his evidence, any specific issue of prejudice caused to him by the passage of time to meet the burden that was on him in this respect. Indeed, the witness statement said nothing at all as to why any discretion under the Act should be exercised in his favour. When in the course of argument, Mr. Hester was asked to direct us to areas in which specific points of prejudice had been advanced on Mr. Carr's behalf either in the documents or in argument, it seems to me that he could only direct us to other issues raised in his closing submissions at trial (e.g. paragraphs 65 and 67) attacking the elements of prejudice which had been specifically raised not on behalf of Mr. Carr but on behalf of Panel.

50. In the absence of identified elements of litigation prejudice having been raised on the part of a claimant, I do not consider that a judge can be faulted for simply addressing those points that had been advanced by the parties, as the judge seems to have done here."

[25] Further in the CARR case (supra) Lord Justice McCombe states, at paragraph 53:

"53. Mr. Hester accepted, of course, that, once the primary limitation period was passed, earlier delay can be relevant, as emerges most clearly from the speech of Lord Oliver in Donovan v. Gwentoys Ltd. (supra) which was cited by the learned District Judge at paragraph 27 of his judgment. The passage in Lord Oliver's judgment is as follows:

> **"The argument in favour of the proposition that dilatoriness on the part of the plaintiff in issuing his writ is irrelevant until the period of limitation has expired rests upon the proposition that, since a defendant has no legal ground for complaint if the plaintiff issues his writ one day before the expiry of the period, it follows that he suffers no prejudice if the writ is not issued until two days later, save to the extent that, if the section is disapplied, he is deprived of his vested right to defeat the plaintiff's claim on that ground alone. In my opinion, this is a false point. A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within the prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant. It is clear from the judge's judgment that, because sub-paragraphs (a) and (b) of section 33(3) of the Act of 1980 focus particular attention on the time elapsing after**

expiry of the limitation period, he felt constrained to regard the time which had to been allowed to pass prior to that date as something which had to be left wholly out of account. In my judgment, he was wrong to do so and that necessarily vitiated the exercise of his discretion."

[26] The Plaintiff says in her submissions at page 8 that:

"Accordingly, we respectfully submit, according to the facts viewed, that the Plaintiff came into reasonable knowledge of the true facts of her condition, on 29th December, 2012, through the evidence of an MRI test."

[27] The Defendant says at paragraph 4 of its submissions:

"Of note ....

Defendant. The Defendant submits that the Plaintiff possessed the requisite knowledge as early as 16th September, 2017, when she attended Doctor's Hospital or at the latest 19th September, 2011 when she attended the Family Chiropractic Centre and was at the time diagnosed as having suffered a sprain/strain injury of the lower neck and lower back and prescribed 10 sessions of physiotherapy."

[28] In paragraph 2 of the Plaintiff's affidavit filed January 29th, 2020, the Plaintiff states that Dr. Nigel Johnson described her injuries as "occiput tenderness, lower back tenderness and right knee tenderness" after having taken a CAT scan and X-ray.

[29] In paragraph 5 the Plaintiff says that the painkillers were ineffective and the pain kept coming back. As a result of that, she, on her own volition visited Dr. Michael Pyfrom who by way of "EX WBB2" treated the Plaintiff for sprain/strain injury of the lower neck and low back with spinal manipulation, ice therapy and soft tissue mobilization. There is no mention of any of the symptoms complained of existing prior to the incident. Thus there ought not to be any question as to attributability to the symptoms of the incident itself.

[30] The Plaintiff seems to take the position that she could not have the requisite knowledge unless and until she had received the results from the MRI test.

[31] The United Kingdom Supreme Court approved the decision of the Court Of Appeal in the MINISTRY OF DEFENCE case (supra). In the Court of Appeal LADY JUSTICE SMITH stated at paragraphs 83 – 89, and 92 – 93:-

> **"83. At paragraph 498, the judge cited from Spargo v North Essex District Health Authority – [1997] 8 Med LR 125 which he took as the leading exposition of the correct approach to knowledge of attributability. He cited the following well known propositions:**
>
> **"(1) The knowledge required to satisfy section 14(1), (b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;**
>
> **(2) "Attributable" in this context means "capable of being attributed to", in the sense of being a real possibility;**

(3) A plaintiff has the requisite knowledge when [he] knows enough to make it reasonable for [him] to begin to investigate whether or not [he] has a case against the defendant. Another way of putting this is to say that [he] will have such knowledge if [he] so firmly believes that [his] condition is capable of being attributed to an act or omission which [he] can identify (in broad terms) that [he] goes to a solicitor to seek advice about making a claim for compensation;

(4) On the other hand [he] will not have the requisite knowledge if [he] thinks [he] knows the acts or omissions [he] should investigate but in fact is barking up the wrong tree; or if [his] knowledge of what the defendant did or did not do is so vague or general that [he] cannot fairly be expected to know what [he] should investigate; or if [his] state of mind is such that [he] thinks [his] condition is capable of being attributed to the act or omission alleged to constitute negligence, but [he] is not sure about this, and would need to check with an expert before [he] could be properly said to know that it was."

84. The judge also considered a large number of other authorities but did not state what conclusions he drew from them until at paragraph 514, he began to express what he described as 'his preferred view' of the approach he should take to the issue of knowledge of attributability in these cases. He expressed the view that the claimant would need to appreciate the following:

"(i) That the injury of which he complains is capable of being caused by radiation and by more than just background radiation, the existence of which we must all be taken to appreciate.

(ii) That there is some credible evidence that he was exposed to ionising radiation in consequence of his time at the tests which was at a level above the ordinary background level."

We find the syntax of (i) above slightly confusing but think that what the judge meant was that the claimant must know that the injury of which he complains is capable of being caused by the higher level of radiation to which he thinks he has been exposed by the defendant as opposed to being capable of being caused merely by the background levels of radiation to which we are all exposed. The judge then expressed the view that, in the context of this case, that would mean that the claimant would need to appreciate that exposure to a level of ionising radiation above background level could be caused by inhalation or ingestion of radionuclides from fallout well after the detonation had taken place. He was of the view that a claimant's belief that he had been exposed to prompt radiation could have been a significant misconception and would not be sufficient to give knowledge of attributability. In short, the judge was saying that it would not be enough for the claimant to know that he had been exposed to radiation during his attendance at the tests and to know that such exposure was capable of causing his injury; he had to know that his exposure had been above background level and that it had occurred due to exposure to fallout. He said that, if he was right about that, none of the claimants would have had the necessary knowledge until they learned of the outcome of the Rowland study. Only then would they have known that there was credible scientific evidence

that they had been exposed to radiation above background levels. Before that there was, he said, only suspicion that they had suffered such exposure. However, having expressed this rather robust view, the judge indicated that they had to accept that, on the authorities, the threshold of appreciation of attributability was not quite as high as he had suggested. He did not then explain where he thought the threshold ought to be set.

85. In our view, he was plainly right to reject these propositions, albeit he did so with apparent reluctance. It is clear from the principles set out in Spargo that it is the knowledge of possibilities that matters; a claimant needs only enough knowledge for it to be reasonable to expect him to set about investigation. He can have knowledge even though there is no helpful evidence yet available to him. The claimants' contention that they did not have knowledge of possible attributability until they received the results of the Rowland study demonstrates a fundamental misunderstanding of the concept of knowledge for limitation purposes.

86. Further, we think that the judge was wrong to regard knowledge about prompt radiation as a significant misconception or an example of 'barking up the wrong tree' These claimants commenced their actions alleging both prompt radiation and exposure to fallout and we are unaware of the suggestion that any claimant's knowledge or belief about his exposure was ever limited to prompt

radiation. Their state of mind from an early stage appears to have been that they thought they had been exposed to both. Now, at a late stage, they have had to acknowledge that there was no prompt radiation and they have confined their claims accordingly. But it does not seem to us that, in these cases, the distinction between the two can be relevant to the limitation issues.

87. For those reasons, we think that the judge was wrong to be attracted to the claimants' propositions and right to abandon them. It will, however, be necessary to have careful regard to the judge's reasoning on the individual cases, given that he was attracted to these unsound propositions.

88. Let us take the kind of situation which arises in some of these cases. A claimant knows that he was present in the area of the nuclear tests and over the years he realizes that this means he may have been exposed to radiation whether by virtue of having watched a test or by exposure to fallout or both. For the purposes of section 14(1),(b), that will be enough knowledge of the acts or omissions of which complaint will be made. As Lord Hoffmann said in *Broadley v Guy Clapham & Co* [1994] 4 All ER 439 CA:

> **"... the court should look at the way the Plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based."**

Lord Hoffmann stressed that it was not necessary for the claimant to know that that the matters that he was complaining about amounted to negligence or breach of duty. On both these points, his remarks were expressly approved by the House of Lords in *Haward v Fawcetts* [2006] UKHL 9.

89. For the purposes of section 14(1),(b), the claimant also needs to know that there is a real possibility that the condition he is suffering from could have been caused by the factual matters he is complaining about. He does not need to know, from an expert, that his own condition has probably been so caused: *see Spargo and Nash v Eli Lilly & Co.* [1993] 1 WLR 782 at 797-8."

92. "So, in a case where the claimant's state of mind is more accurately described as one of belief rather than knowledge, it seems to us that what matters is whether his state of belief is such as to make it reasonable to expect him to begin to investigate further. In general that assessment will have to be made by reference to the things that he has said and done. For example, if he says that, at such and such time, he had a firm belief that his illness had been caused by radiation, it would obviously be reasonable to expect him to begin investigation. If he said that he had a firm belief that his illness could have been caused by radiation that would also, we think, be enough. In cases in which there is no such direct evidence, it would be relevant to consider how he acted. For example, if a claimant applied for a war pension

alleging that his condition had been caused by radiation at the tests, it seems to us that it would be difficult to avoid the conclusion that his belief in the casual connection was sufficient to make it reasonable that he should investigate the possibility that he had a viable common law claim. We note that the judge did not agree with that general proposition. We will return to that issue in the individual cases.

93. We note that, in Halford, Lord Donaldson MR suggested that a belief would have to be reasonable before it could amount to knowledge. With great respect, we do not think that the belief needs to be objectively reasonable. We think that what matters is the claimant's subjective state of mind. If a claimant comes to believe that there is a causal connection between his condition and the matters complained of, it will matter not from where he has derived that belief, even it were from an incompetent expert adviser or from a newspaper article which was not based on sound research. If the belief were of such strength that it was reasonable to expect him to start investigating his claim, it would amount to knowledge within section 14."

[32] At paragraphs 11 and 12 of the **MINISTRY OF DEFENCE** case (supra) UKSC, LORD WILSON stated:

"Lord Phillips is therefore correct to point out that when, in the present proceedings, it accepted that the belief had to be held with a degree

of confidence but, as an aside, declined to accept that it had to be reasonable, the Court of Appeal was, apparently without so realizing, disagreeing with a statement of Lord Nicholls in the House of Lords as well as with that of Lord Donaldson. Had I been offering a view of the meaning of knowledge in section 14(1) in circumstances in which I had been unassisted by authority, I think that I might have ventured the phrase "reasoned belief" rather than "reasonable belief". The word "reasoned" might even better have conveyed the need for the belief not only to be held with a degree of confidence (rather than to be little more than a suspicion) but also to carry a degree of substance (rather than to be the product of caprice). But the distinction between the phrases is a matter of little more than nuance. In the resolution of marginal issues, and even at the level of this court, there is a lot to be said for maintaining consistency in the law. So I consider that this court should reiterate endorsement for Lord Donaldson's proposition that a claimant is likely to have acquired knowledge of the facts specified in section 14 when he first came reasonably to believe them. I certainly accept that the basis of his belief plays a part in the inquiry; and so, to that limited extent, I respectfully agree with para 170 of Lady Hale's judgment. What I do not accept is that he lacks knowledge until he has the evidence with which to substantiate his belief in court, indeed we should not forget that, if the action is to continue, the court will not be directly interested in evidence about mere attributability; it will require proof of actual causation in the legally requisite sense.

12. What then is the degree of confidence with which a belief should be held, and of the substance which it should carry, before it is to amount to knowledge for the purpose of the subsection? It was, again Lord Donaldson in the *Halford* case, cited above, who, in the passage quoted by Lord Phillips in para 115 below, offered guidance in this

respect which Lord Nicholls in the *Howard* case, cited above, was, at para 9, to describe as valuable and upon which, at this level of generality, no judge has in my view yet managed to improve; it is that the belief must be held "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, <u>such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence".</u> In *Broadley v Guy Clapham & Co.* [1994] 4 All ER 439 Hoffmann LJ, in the passage quoted by Lord Phillips at para 118 below, paraphrased Lord Donaldson's guidance in terms of a search for the moment at which the claimant knows enough to make it reasonable for him to begin to investigate whether he has a "case" against the defendant. I respectfully agree with the analysis by Lord Philipps of what Hoffmann LJ meant. The investigation upon which the claimant should reasonably embark is into whether in law he has a valid claim (in particular whether the act or omission of the defendant involves negligence or other breach of duty, being a matter of which the claimant is specifically not required to have had knowledge under section 14(1) and, if so, how that claim can be established in court. So it is an investigation likely to be conducted with the assistance of lawyers; but, in the light of their advice, it may well also embrace a search for evidence, including from experts. The focus is upon the moment when it is reasonable for the claimant to embark on such an investigation. It is possible that a claimant will take legal advice before his belief is held with sufficient confidence and carries sufficient substance to make it reasonable for him to do so. Thus, as Judge LJ pointed out in the Sniezek case, cited above, at P229 and P232, it does not automatically follow that, by the date when he first took legal advice, the claimant will have acquired the requisite knowledge; but such an inference may well be justified."

[33] Of special note is the fact that the Plaintiff has exhibited to her affidavit filed January 29th, 2020 a letter dated September 19th, 2011. The letter is addressed to a Mr. Cooper of Phils Food Services, Gladstone Road, Nassau, Bahamas. The letter is from Michael F. Pyfrom, B.C., D.C. Mr. Pyfrom explains in the letter what the Plaintiff is being treated for and how many sessions will be needed. The last sentence reads:

> **"Please make check payable to Family Island Chiropractic Centre."**

[34] As Lord Wilson said at paragraph 12 set out above;

> **"What then is the degree of confidence with which a belief should be held and of the substance which it should carry, before it is to amount to knowledge for the purpose of the subsection? It was, again Lord Donaldson in the HALFORD case, cited above, who, in the passage quoted by Lord Phillips in paragraph 115 below, offered guidance in this respect which Lord Nicholls in the HAWARD case cited above was at paragraph 9, to describe as valuable and upon which, at this level of generating, no judge has in my view yet managed to improve: *it is that the belief must be held "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence.""***

[35] In the Defendant's submissions at (e) under the rubric "DATE OF KNOWLEDGE" the Defendant says;

e) **"The fact that she instructed the Centre to address its medical report dated 19th September, 2011 to the Defendant is a clear demonstration that legal proceedings were being contemplated and as such, she had reasonable belief that her injury was sufficiently serious to justify the institution of proceedings, against a defendant who did not dispute liability and was able to satisfy a judgment per section 10(2) of the Limitation Act."**

ALLEGED MISDIAGNOSIS:

[36] The Plaintiff's claim is that she was misdiagnosed by Dr. Nigel Johnson and as such whether the misdiagnosis constituted notice to the Plaintiff of her condition. The Plaintiff's contention is that it wasn't until she received the result of the MRI that she had knowledge of her true condition because she was misdiagnosed.

[37] In the case of **JOSE ANN SPARGO V NORTH ESSEX DISTRICT HEALTH AUTHORITY [1997] EWCA** Civ 1232 (13th March, 1997) LORD JUSTICE BROOKE who delivered the decision stated at pages 7 – 9;

> **"In order to see whether Section 14(1)(b) is satisfied in the present case, it is first necessary to identify the injury of which the plaintiff had actual knowledge for the purpose of Section 14(1)(a). This was not a case of traumatic injury or shock-induced psychiatric injury, such as would not give rise to any particular problems of identification. Any possible claim in trespass was statute-barred and as I have said the initial Statement of Claim simply made a cross-reference to the attached medical report. That medical report shows that the Plaintiff appeared to have been abusing laxatives, and**

possibly psychiatric medications, in the early 1970s which led to loss of weight and to an electrolyte disturbance which may have brought about temporary alternation of her mental state. It then refers to her prolonged period of hospitalization, and the clear inference is that this prolonged hospitalization is being causally connected with, or attributed to, the misdiagnosis which is pleaded in the Statement of Claim. The "injury" has now been more precisely pleaded in the proposed amendment of the Statement of Claim.

The judge was at a disadvantage in that he did not have this draft amendment before him, he used less precise terms. He said at one point that it was "quite plain that the Plaintiff did know that she was suffering from a condition whilst she was at the hospital." A little later he said that "she knew that she had been suffering whilst she was under detention, and there is no question as to that". There was no appeal against that finding.

In his admirable submissions to this court Mr. Maskrey has seized on passages here and there in the judgment to paint a picture that the Plaintiff was so confused in October 1986 that it was really not fair to attribute to her any knowledge that her suffering during her prolonged hospitalization (or any part of it) was capable of being attributed to the misdiagnosis. At one point he submitted that the omission that was causally relevant was the failure to treat her properly for her true condition, and that it was not necessary for him to assert that the omission constituted negligence. He resiled from that submission when the clear wording of Section 14(1)(b) was pointed out to him, and in my judgment from a perusal of the Particulars of Negligence in the Statement of Claim it is quite clear that it is the alleged negligence surrounding the diagnosis of organic brain syndrome which

constitutes the omission or omissions relied upon as being the cause of the injuries complained of. The failure to provide appropriate treatment was merely an inevitable consequence of the negligence alleged.

On passage on which Mr. Maskrey relied is to be found at an early stage of the judgment where the judge was referring to an attitude by the Plaintiff "which is coloured by her lack of insight into her condition when she was in the hospital. " Elsewhere, however, the judge found that "she was clear in her mind that the connection was there between the misdiagnosis and what she had suffered. Notwithstanding this later finding, Mr. Maskrey argued that, looking at the judgment as a whole, we should draw a conclusion from the judge's findings to the effect that his client was so confused when she first went to see Mr. Wicks that it would be wrong to hold that the clarity in her mind which the judge describes did not amount to the requisite knowledge for the combined purposes of Section 14(1)(a and (b).

Mr. Coghlan has, in my judgment, quite rightly riposted that in the absence of an appeal on this point we cannot go behind the express finding the judge made. Mr. Coghlan referred us to the finding of the psychologist in January 1986 that the Plaintiff was without any psychiatric impairment and otherwise fit to be gainfully employed, and said that if the correctness of the judge's finding on this point had been appealed, he would have wanted to bring before us all the contemporary hospital notes and a transcript of the Plaintiff's evidence at the hearing to demonstrate that the judge's finding that she was clear in her mind about the connection between the misdiagnosis and her suffering could not be successfully challenged.

On the face of it, therefore, the Plaintiff did know in October 1986 of her "injury" and of the causally relevant "omission" said to constitute negligence and of the possible connection between the two. Why, then, did the judge find that she did not have the requisite knowledge for the purposes of Section 14(1) (b)?

He appears to have been influenced in his approach by a single passage in the judgment of this court in *Nash v Eli Lilly & Co. [1993*] 1 WLR 982 at pp 795-6. In that passage Purchas LJ was endeavouring to explain the state of mind that must be attributed to a plaintiff before he can be fixed with knowledge for the purposes of Section 14)1). He contrasted the person who thinks that his condition is capable of being attributed to the act or omission alleged to constitute negligence, but realizes that this belief should be confirmed by an expert before it can be said that he knows that it is, with the person whose firm belief is of sufficient certainty to justify obtaining advice about making a claim for compensation: "then such belief is knowledge and the limitation period would begin to run". (See p 796G).

Mr. Coghlan submitted that the judge at first directed himself correctly when he said:

> **"The issue here is whether the Plaintiff did have knowledge that the injury was possibly attributable as opposed to a belief which can, if you like, be given the adjective 'firm belief' that it was indeed attributable."**

But he criticizes the judge when, after quoting the relevant passages in the judgment of Purchas LJ in *Nash* he went on to say:

> **"It does not seem to me that it is a fair or correct approach to say that because an individual, for reasons which may be good or may be bad, has a certainty in his own mind as to the connection, that in itself means that he has the requisite knowledge if, looked at objectively, it is perfectly plain that no layman would be able to know (as opposed to believe) that that connection existed without the assistance of some expert advice."**

A little earlier the judge had spoken of the solicitor's perception that he needed confirmation that there was the relevant causal connection, and a little later he added that the question will, in certain circumstances, be whether a particular injury was caused by an operation or was caused by something else. In my judgment, in all these passages the judge is substituting the much tougher test of proof of causation for the much less rigorous statutory test of attributability, in the sense that the identified injury was capable of being attributed to the identified omission. The test is a subjective one: what did the Plaintiff herself know? It is not an objective one: what would have been the reasonable layman's state of mind in the absence of expert confirmation? After all, the policy of Parliament, in these cases which would otherwise be statute-barred, is to give a plaintiff who has the requisite low level of knowledge three years in which to establish by inquiry whether the identified injury was indeed probably caused by the identified omission and whether the omission (identified initially in broad terms) amounted to actionable negligence. The judge's approach would be to stop the three years from even

starting to run until a much more advanced stage of the investigation had been completed.

In Nash the Court of Appeal was concerned with 18 Plaintiffs who claimed that there was a causal connection between their having taken Opren and their experiencing the unpleasant symptoms effects from which they suffered. The facts of the individual cases are much more fully described in the judgments of Hidden J and the Court of Appeal in the Medical Law Reports (see [1991] 1 Med LR 169: [1992] 3 Med LR 233 and [1992] 3 Med LR 353). It is not surprising that in proposing a test to enable the court to identify the relevant state of mind of Plaintiffs in a case like that – they knew the unpleasant symptoms they were suffering but were gradually picking up, from different sources, including television programmes, various pieces of information which helped to inform their minds about a possible connection between their sufferings and the drugs they had taken – this court was at pains to say that the person who thought that her condition was capable of being attributed to the drugs she had taken but realized that her belief should be confirmed by a doctor did not have the requisite knowledge. But that is a long way from the present case where the judge found that the Plaintiff was clear in her mind that the connection was there between the misdiagnosis and what she had suffered when she came to her solicitor for advice on whether and if so how she could claim compensation or what she had suffered. In such a case it is not necessary, nor required by the statute, for a court to embark on a further inquiry whether a rational lay person would have been willing to say that she knew that there was a possible casual connection between her suffering and the omission she had identified without first going to a doctor to seek confirmation.

Mr. Maskrey advanced to us a number of sophisticated submissions which tended to show that the pragmatic tests designed by this court in recent years to make it easier for lower courts to identify the relatively low level of knowledge required by the statute may not be appropriate in every possible case. However that may be, they are in my judgment both appropriate for use in this case and binding on this court and the judge was wrong to be lured into a more sophisticated inquiry which in the end postponed the date of knowledge for a further four and a half years. I would therefore allow this appeal."

[38] It would seem to me that in spite of what the Plaintiff says was a misdiagnosis, she would have had the requisite knowledge at least by 19th September, 2011 for two reasons. The first is that she would have sent a claim directly to the proposed defendant and secondly, the SPARGO decision makes it very clear where Lord Justice Brooke said;

"It does not seem to me that it is a fair or correct approach to say that because an individual for reasons which may be good or may be bad, has a certainty in his own mind as to the connection, that in itself means that he had the requisite knowledge if, looked at objectively, it is perfectly PLAIN THAT NO LAYMAN WOULD BE ABLE TO KNOW (as opposed to believe) that that connection existed without the assistance of some expert advice." In other words the requisite knowledge is not certainty but confident belief."

ARGUMENT IN REFERENCE TO THE UNCONDITIONAL APPEARANCE:

[39] The Plaintiff says that the filing of an unconditional appearance by the Defendant would have cured any procedural irregularity as it relates to the limitation defence. The Plaintiff further says that by filing the unconditional appearance, the Defendant has subjected itself to the jurisdiction of the court and cannot now challenge the court's jurisdiction. However, I respectfully disagree with counsel's contention, especially as counsel provided no authority to put such a position.

[40] In the case of PETER DAVID DUNN V THE PAROLE BOARD [2008] EWCA Civ 374 LORD JUSTICE THOMAS opined at paragraphs 9 – 21:

The procedural background:

9. Prior to the commencement of proceedings, the claimant's counsel and `solicitors had well in mind the provisions of s. 7(5) of the Human Rights Act 1998 which requires that proceedings by a person who claims that a public authority has acted in a way which is made unlawful under s. 6 of the Act must bring proceedings before:

"The end of –

a) the period of one year beginning with the date on which the act complained of took place; or

b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any ruling imposing a stricter time limit in relation to the proceedings in question."

10. Given the period of delay in bringing the claim under the HRA, the claimant in his particulars of claim sought an extension of time under s. 7(5)(b) of the HRA, on the basis that the claim was brought within one year of the decision of the House of Lords in West. The proceedings were issued without the grant of public funding; this was granted on 4 April 2006 and the proceedings served on 7 April 2006.

11. As one of the issues which arose on this appeal concerns the effect under CPR Part 11 of actions of the solicitor to the Prole Board after the service of the claim on 7 April 2004, it is necessary to set out briefly what happened:

 i) Service was acknowledged on behalf of the Parole Board on 25 April 2006; the box on the form which stated: "I intend to defend the claim" was ticked.

 ii) On 9 May 2006 the Solicitor to the Parole Board asked the claimant's solicitors for a stay until 9 August 2006 so it could investigate the claim; chasing letters were sent by the Parole Board's solicitor on 12 and 18 May 2006. On 18 May 2006 the Parole Board's solicitor spoke to the claimant's solicitors by telephone. They consented in principle to the Parole Board's stay pending formal instructions from the claimant.

 iii) On 2 June 2006 the Parole Board applied to the court for stay in order to investigate the claim. On 5 July 2006 District Judge Rutland ordered the Parole Board to serve its defence by 9 August.

 iv) On 8 August 2006 the Parole Board applied to strike out the claim on the basis that the claimant had disclosed no reasonable ground for bringing the claim and the alternative for summary judgment on the basis that he had no real prospect of success. The basis of the application was that proceedings had not been brought within one year and it would not be equitable to extend the period.

12. Prior to the hearing of the Parole Board's application, the claimant applied on 15 February 2007 to amend the claim to include a claim against the Parole Board for false imprisonment; this was pleaded on the basis that the claimant was falsely imprisoned as a result of delay by the Parole Board in holding a review.

13. On 26 March 2007 His Honour Judge Darroch granted the claimant permission to make the amendment at the hearing of all the applications, but in a judgment given on 29 March 2007 struck out the whole of the claim, including that made by amendment. The Judge gave permission to appeal; it was subsequently directed that the appeal be heard in this court.

The issues:

14. Three issues arose on this appeal:

    i) Whether the court should have determined under CPR Part 11 that the filing of the acknowledgement of service by the Parole Board precluded it from arguing the issue of limitation under s. 7(5) of the HRA.

    ii) Whether the claim for false imprisonment should be struck out.

    iii) Whether this was an appropriate case for the court to extend the period for bringing the claim under s. 7(5) of the HRA.

(1) CPR PART II: THE JURISDICTION OF THE COURT

15. The claimant contended that the judge should have decided that, because the Parole Board had not made an application under CPR Part 11 to strike out the claim within 14 days of filing of

acknowledgement of service, it had lost its right to rely on the limitation provisions in s. 7 of the HRA 1998. The application was not made within 14 days. This contention failed before the judge.

16. Part 11 provides:

"(1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction,

May apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have ...

(3) A defendant who files an acknowledgement of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must:

(a) be made within 14 days after filing the acknowledgement of service ...

(5) If the defendant –

(a) files an acknowledgement of service; and

(b) does not make such an application within the period specified in paragraph (4),

He is to be treated as having accepted that the court

has jurisdiction to try the claim."

17. It was submitted that the Parole Board's reliance upon the limitation defence in s. 7 of the HRA went to the jurisdiction of the court within the meaning of that term as used in CPR Part 11. Although it could not be argued that this was a case where the Parole Board could dispute the Court's jurisdiction to try the claim under CPR 11(1)(a), this was a case where the Parole Board was arguing the court should not exercise its jurisdiction within CPR 11(1)(b). As it was common ground that the Parole Board had not made an application within the period of 14 days, the Parole Board was to be treated as having accepted that the court had jurisdiction and therefore lost the right to rely on s. 7 of the HRA 1998.

18. This bold and novel argument was advanced in this court upon the basis of the decision of this court in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203. In that case, the claimants had issued a claim form but had not served it within the four month period provided for in CPR 7.5(2). Shortly before the expiry of the four month period, the claimant applied to the court to extend time for service of the claim form; the District Judge extended the time for service on the basis of the evidence put forward by the claimant. Prior to the service of the claim form, the defendant applied to set aside the order extending the time for service. Before that application was heard the claim form was served on the defendant whose solicitors acknowledged service, ticking the box "I intend to defend all of the claim" but not ticking the box "I intend to contest jurisdiction". It was contended by the claimant that in the circumstances CPR 11 was engaged and, as the conditions in CPR 11(5) were satisfied, the defendant was to be treated as having

accepted that the court should exercise its jurisdiction to try the claim, notwithstanding the late service of the claim form. The court held that this contention was correct:

> "22. In our judgment, CPR 11 is engaged in the present context. The definition of "jurisdiction" is not exhaustive. The word "jurisdiction" is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction; see CPR 6:20 et seq.
>
> 23. "But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(B)). Even if Mr. Exall is right in submitting that the court *has* jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court *should not exercise* its jurisdiction to do so in such circumstances. In our judgement, CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument

by the defendant that the court should not exercise its jurisdiction to try the claim."

24. "We would, therefore, hold that CPR 11 is engaged in the present context. This accords with what was said by Tugendhat J in *Mason v First Leisure Corporation Plc* [2003] EWHC 1814 (QB) para 11, HH Judge Havelock-Allan Q.C. in *The Burns-Anderson Independent Network Plc v Wheeler*, (Bristol District Registry Mercantile List, unreported 28 January 2005) para 45 and *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 1WLR 2070 para 34 (although in this last case, it was common ground that CPR 11 was engaged)."

19. I do not consider that the decision in *Hoddinott* as to the scope of CPR 11(5) applies to the present application *Hoddinott* was a case where the service of the claim form was necessary to give the court jurisdiction to try the case in the sense of having the authority and power to do it; the two first instance cases referred to at paragraph 24 of *Hoddinott* were similarly concerned with service as was the appeal in Uphill v BRB (Residuary) Ltd. The court in the present case had the power and authority to try the claim as the proceedings had been commenced and; the Parole Board were not seeking to contest that power nor to contend that the court should not exercise its jurisdiction.

20. What the Parole Board was seeking to do was to rely on s. 7(5) as providing a defence to the claim and to contend that the claimant had no reasonable grounds for bringing the claim and no real prospect of success. It is clear, in my view that limitation provisions provide a defence to the claim; they do

not go to jurisdiction. Such provisions have generally been treated under the law of England and Wales as procedural. There is no basis for categorizing the limitation provisions of the HRA in a different way; see also paragraph 112 of the opinion of Lord Roger of Earlsferry in *Somerville v Scottish Ministers [2007] UKHL 44.* Similarly the contention that there were no reasonable grounds for bringing the claim and that the claim had no real prospect of success did not go to the jurisdiction of the court; it went to an assessment of the claim that was before the court.

21. In my view therefore the argument put forward is misconceived; CPR 11 had no relevance to the Parole Board's application to strike out the claim. The judge was right in his conclusion and this ground of appeal fails."

[41] The DUNN case is clear and unambiguous on the point. Limitation provisions provide a defence to the claim; they DO NOT GO TO JURISDICTION.

[42] Having considered all of the evidence relative to knowledge inclusive of the time line and events which took place relative to knowledge, I find that the Plaintiff had the requisite knowledge at least by September, 19th 2011 and should have filed the Writ of Summons prior to October 17th, 2014.

[43] Therefore, in all the circumstances and after careful consideration I find that;

1. The Plaintiff's claim is statute barred and therefore dismissed.

2. Costs to the Defendant of and occasioned by this action to be taxed if not agreed.

I so order.

Dated this 30th day of October, A.D., 2020

Keith H. Thompson
Justice

2. Costs to the Defendant of and occasioned by this action to be taxed if not agreed.

I so order.

Dated this 30th day of October, A.D., 2020

Keith H. Thompson
Justice