COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2015/CLE/gen/00930

BETWEEN:

CANDICE MARSHALL

Plaintiff

AND

ROCK OF AGES FUNERAL CHAPEL & CREMATORIUM

1st Defendant

AND

KELSON COX

2nd Defendant

AND

DORCAS COX

3rd Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Travette Pyfrom for the Plaintiff
Mr. Norwood Rolle for the Defendants

Hearing Dates: 11 May, 13 May 2020 (Heard by way of written submissions)

Limitation of action – Personal injuries - Plaintiff's knowledge – Date of plaintiff's knowledge that injury was significant – Whether the failure of doctors to advise what the condition was reset time running – Limitation Act 1995 ss. 10(1), 10(2), 10(3)

By Writ of Summons filed on 26 June 2015 and a Statement of Claim filed on 5 February 2016, the Plaintiff brought an action against the Defendants for damages for negligence and breach of statutory duty which resulted in personal injuries from an incident which occurred on 9 April 2009. The Defendants denied liability and raised a preliminary issue that the Plaintiff's cause of action is, in any event, statute-barred.

The Defendants argued that the limitation period of 3 years for personal injury claims had already lapsed at the date that the Writ of Summons was filed. They say that time began to run against the Plaintiff on 9 April 2009, when the incident occurred, or alternatively, the next day on 10 April 2010, when she could not move or, at the latest in 2010, when she became aware that she was suffering from a chronic back injury. The Plaintiff opposed the preliminary issue alleging that time did not begin to run against her until January of 2014, when she was advised that her condition would lead to multiple sclerosis.

The Plaintiff also raised a jurisdictional issue under Order 12 and submitted that the Defendants ought to have entered a conditional appearance and, within 14 days of entering the appearance, ought to have applied to have the writ set aside. The Plaintiff alleged that, as a result of that failure, the Defendants have waived their rights to argue limitation.

HELD: Striking out the Plaintiff's Writ of Summons and Statement of Claim for being time-barred with costs to the Defendants to be taxed if not agreed.

1. The Plaintiff's argument with respect to the Defendants having waived their rights to argue limitation is wholly misconceived and must fail. Firstly, the Defendants are not alleging nor have they ever alleged that "the writ or service of the writ, or notice of the writ, on [them] or declaring that the writ or notice has not been duly served on [them] to which RSC Ord, 12 r. 7 applies. Secondly, a party must in any pleading subsequent to a statement of claim plead specifically the relevant period of limitation. In other words, it is for the defendant to plead the defence of limitation as the courts will not take the point against the plaintiff. Once the defendant has raised the defence of limitation, the burden shifts to the plaintiff to prove that time to bring the claim has not expired.

2. The word "knowledge" is an ordinary English word. It means "know 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". It does not mean "know for certain and beyond possibility of contradiction". Vague and unsupported suspicion will not suffice but reasonable belief will normally suffice: **Halford v Brookes** [191] 1 WLR 428 at page 443 applied.

3. The Plaintiff's Witness Statement was key evidence in determining her "knowledge". Her belief based on all the facts and her conduct determined when she had knowledge - **Ministry of Defence v AB and Others** [2012] UKSC 9 and **Haward and others v Fawcetts (a firm)** [2006] 1WLR 682 relied upon.

4. The significance of the Plaintiff's injury for the purpose of setting time running did not need to be determined by a medical professional. It is not a medical question

of fact but a question of fact based on the facts observable and ascertainable by the Plaintiff herself.

5. The failure of the doctors to give a conclusive prognosis of the Plaintiff's medical condition did not affect her ability to determine that her injury was significant and it did not create doubt as to the attributability of the injury to the Defendants' failure to provide adequate and fully functional equipment for transporting corpses. The link necessary to establish knowledge in terms of attributability was clear in 2010 when the Plaintiff became aware that she was suffering from a chronic back injury.

RULING

CHARLES J:

Introduction

[1] By Writ of Summons filed on 26 June 2015 and a Statement of Claim filed on 5 February 2016, the Plaintiff ("Ms. Marshall") claims against the Defendants damages for negligence and breach of statutory duty which resulted in personal injuries from an incident which occurred on 9 April 2009. Ms. Marshall alleged that her injuries were caused by the Defendants' failure to provide adequate and fully functional equipment for transporting corpses.

[2] In their Defence filed on 6 April 2016, the Defendants denied liability. They alleged that Ms. Marshall was not authorized, but was instead on a frolic of her own, when she carried out the acts that caused her injury. More importantly, the Defendants pleaded that the cause of action accrued more than three years before the commencement of the action: see Amended Defence filed on 14 July 2017. Accordingly, the Defendants argued that the action brought by Ms. Marshall is statute-barred because time begun to run against her on 9 April 2009, the date of the incident, or alternatively, the next day on 10 April 2010, when she could not move, or at the latest, in 2010 when she became aware that she was suffering from a chronic back injury.

[3] Ms. Marshall opposed the preliminary issue and argued that time did not begin to run against her until January of 2014, when she was advised by her doctors that her condition might/would lead to the development of multiple sclerosis. According

to Ms. Marshall, she was “fixed” with knowledge when she was informed of the development of a significant injury.

[4] For reasons which are expressed below, I find that Ms. Marshall’s claim against the Defendants is statute-barred and as such, the Writ of Summons and Statement of Claim are struck out with costs to the Defendants to be taxed if not agreed.

Background Facts

[5] Ms. Marshall was at all material times an employee of Rock of Ages Funeral Chapel & Crematorium (“the First Defendant”). The Second and Third Defendants are the proprietors of the First Defendant.

[6] On Friday, 9 April 2009, Ms. Marshall was unloading two dead bodies (corpses) from the First Defendant’s van into its funeral home. The first corpse was unloaded without incident. In attempting to move the second corpse which was about 300 pounds, the cart provided by the First Defendant for transporting corpses malfunctioned. The wheels failed to lock into place. The result was that the elevated cart carrying the corpse dropped and Ms. Marshall, who had lifted it grabbed it, before the cart dropped. The reflex resulted in Ms. Marshall grabbing the cart to avoid dropping but, at the same time, bearing the entire weight of the corpse.

[7] At the time when Ms. Marshall lifted the corpse, she was in a bent over position. Once she stood up, she heard a “pop” sound in her back and, in quick succession, she experienced hot and cold symptoms. She did not think anything of it.

[8] The following morning, Saturday, 10 April 2009, when she woke up, she realized that she could not move any part of her body. She could not turn her head or move her left arm. The left side of her body was completely unresponsive. She then called in sick ahead of the following Monday to advise the Third Defendant that she needed to seek medical attention because she had hurt her back.

[9] She visited the clinic and the diagnosis provided was a “sprain”. She was given medication consistent with the diagnosis.

[10] Dissatisfied with this diagnosis, Ms. Marshall visited the Accident and Emergency Department (“A&E”) at the Princess Margaret Hospital (“PMH”). There, she was advised that she had pulled and damaged a nerve in her neck. She was given medication consistent with the diagnosis.

[11] In 2010, due to the increase and consistency of the pain, she again visited PMH. She was informed that she was suffering from a chronic back injury and she might have to go on disability. Ms. Marshall filed for Disablement Benefit at the National Insurance Board (“NIB”).

[12] In January 2014, NIB referred Ms. Marshall to a specialist. She averred that the specialist determined that the injury she sustained was going to lead to multiple sclerosis. As a result, she said that she was placed on disability.

[13] Ms. Marshall stated that, since 2014, she has seen and been assessed by numerous physicians. She has been placed on numerous medications to treat something that the doctors have yet to make a final conclusion about. Due to the quantity of medication that she had been using, she has developed new symptoms which her doctors are still assessing to determine their cause.

[14] A medical report dated 15 February 2015 from PMH attributes the multiple sclerosis to the incident in question.

[15] In 2016, Ms. Marshall was referred to Dr. Charles Rahming for therapy sessions. She attended the sessions. While at the sessions the pain decreased but the aftermath was tremendously painful. The therapy made the pain worse. She reported that to Dr. Rahming who examined her and asked her to discontinue the therapeutic treatment as it was making matters worse.

[16] Ms. Marshall has not worked since the date of the incident, i.e. from 9 April 2009.

[17] Ms. Marshall blames the Defendants for the incident. According to her, if they had provided 2 carts as are required, or provided a functional cart, the cart would not have malfunctioned due to overuse.

Law on limitation period

[18] The Limitation Act, 1995 ("the Act") lays down the time frame within which actions must be brought.

[19] Section 9 of the Act deals with the time limit for personal injuries. Section 9(1) states:

> **"…[T]his section shall apply to any action for damages for negligence, nuisance or breach of duty …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."** [Emphasis added]

[20] Subsection 9(2) provides that 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.**

[21] Section 10 of the Act deals with date of knowledge and what constitutes "knowledge" for the purposes of section 9. It provides:

> **"In section 9, references to a person's date of knowledge are references to the date on which that person 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".

[22] Subsection (2) explains what amounts to a "significant injury" to fixate a plaintiff with the knowledge for time to begin to run against a defendant. It provides:

> **"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 the liability and was able to satisfy a judgment."**

[23] Subsection (3) is important. It explains what constitutes knowledge for the purposes of time beginning to run and clarifies that knowledge is not attributed to a plaintiff only with the help of medical or other expert advice so long as a plaintiff takes reasonable steps to obtain such advice. It expressly states:

> **"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; 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."**

Law on burden of proof regarding limitation period

[24] Notwithstanding that the Defendants have raised the preliminary point that this action is statute-barred, the burden of proving that the cause of action has been brought within the requisite time frame is upon Ms. Marshall. This was affirmed by the House of Lords in **Cartledge and others v Jopling & Sons Ltd.** [1963] AC 758 which affirmed the Court of Appeal's position that the plaintiff bears the burden of proving that his cause of action accrued within the relevant period for the Statute of Limitation. At page 784, Lord Pearce had this to say:

> **"I agree with the judgments of the Court of Appeal and I share their regret. I would only wish to add a gloss to what was said on the onus of proof in the case of the plaintiff South. I agree that when a defendant raises the Statute of Limitations the initial onus is on the plaintiff to prove that his cause of action accrued within the statutory period. When, however, a plaintiff has proved an accrual of damage within the six years (for instance, the diagnosis by X-ray in 1953 of hitherto unsuspected pneumoconiosis), the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date…."** [Emphasis added]

[25] This position was confirmed by Mance J in **Croker v British Coal Corporation** (1995) BMLR 159. At page 160, the Court held that:

> **"It was not for the defendants to prove that the plaintiff had the required knowledge more than three years before the commencement of the action. The onus of proof on limitation did not vary according to whether the issue of limitation turned on when the cause of action accrued, or on when the plaintiff first knew of the facts specified in s 14 (1) of the Limitation Act 1980. The onus was on the plaintiff in both cases."**

Determining "knowledge"

[26] The House of Lords in **Haward and others v Fawcetts (a firm)** [2006] 1 WLR 682 directly dealt with what amounted to "knowledge" under sections 14A and 14B, the UK statutory equivalents to sections 9 and 10 of the Bahamas Limitation Act, 1995. In interpreting the statutory provisions, Lord Nicholls, at page 685, had this to say on the question of knowledge:

> **"By these provisions Parliament sought to identify the knowledge a claimant needs to possess before it is fair and reasonable that time should run against him. That is their purpose. This is made explicit in section 14A by its introductory description of the requisite knowledge as "the knowledge required for bringing an action [etc]". The claimant is to have a reasonable period, set by Parliament at three years, in which to start proceedings after he has the knowledge he reasonably needs for that purpose".** [Emphasis added]

[27] In **Ministry of Defence v AB and Others** [2012] UKSC 9, the UK Supreme Court set out the factors that the Court ought to consider when deciding whether a cause of action was statute-barred by the limitation period. Lord Wilson explained what

constitutes “knowledge”. His view was that the following formulations of Lady Hale, Lord Phillips and Lord Kerr are all “requirements that the claimant must, actually or constructively, have evidence before he is fixed with the knowledge which will set time running.” He stated at para 7 that:

> **“For her part, Lady Hale suggests, at paras 168 and 170, that the belief should have a reasonable basis either in evidence or, alternatively, in “objective fact”. And, for his part, Lord Kerr, who adheres strictly to the word “knowledge” concludes at para 209 that it exists only when founded on objectively verifiable facts.”**

[28] He went on to explain that a plaintiff’s belief is an important factor in ascertaining the time at which he has knowledge which need not, as Lady Hale said, be substantiated by evidence. At para 11, he continued:

> **“…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.”**

[29] Relevant considerations to determining when a plaintiff is said to be fixed with knowledge of the significance of the injury to set time running include the gravity of the experience as well as the abnormal or accidental nature of what occurred in the context in which it occurred: see **Crocker v British Coal Corporation** (supra) at page 160.

[30] When determining the time at which a plaintiff had sufficient knowledge for time to begin to run against him, there are two aspects of “knowledge” to be considered namely: (i) the degree of certainty required before knowledge can be said to exist and (ii) the degree of detail required before a person can be said to have knowledge of the matter. Lord Nicholls in **Haward** at page 685 said:

> **“Two aspects of these “knowledge” provisions are comparatively straightforward. They concern the degree of certainty required before knowledge can be said to exist, and the degree of detail required**

before a person can be said to have knowledge of a particular matter. On both these questions courts have had no difficulty in adopting interpretations which give effect to the underlying statutory purpose."

[31] In **Halford v Brookes** [1991] 1 WLR 428 at page 443, Lord Donaldson stated:

> **"It was in this context that May L.J., with the agreement of Sir Edward Eveleigh, expressed his view as to the meaning of the word "knowledge," the full quotation being:**
>
> > **"'Knowledge' is an ordinary English word with a clear meaning to which one must give full effect: 'reasonable belief' or 'suspicion' is not enough. The relevant question merits repetition — 'When did the appellant first know that his dermatitis was capable of being attributed to his conditions at work?'"**
> >
> > **To "attribute" means "to reckon as a consequence of." Mr. Davis did not know that he could reckon his dermatitis as a consequence of the conditions of his employment until the expert's advice to the contrary was withdrawn, although all along he reasonably believed or suspected that it could.**
> >
> > **This leaves entirely open what is meant by having "knowledge" in the context of other paragraphs such as paragraph (*c*) which refers to the identity of the defendant. The word has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context "knowledge" clearly does not mean "know for certain and beyond possibility of contradiction." It does, however, mean "know 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." Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice…."** [Emphasis added]

[32] Lord Donaldson's interpretation of the degree of certainty was that the threshold of certainty required is below complete certainty but above vague and unsupported suspicion.

[33] In addition, in **Haward**, Lord Nicholls, at page 685, said that the test for the degree of certainty can therefore be stated simply: **"In other words, the claimant must know enough for it to be reasonable to begin to investigate further."**

[34] In **Ministry of Defence v AB** (supra), Lord Wilson opined that the interpretation of Lord Donaldson of the degree of certainty was one that **"no judge has in my view yet managed to improve**". He continued at para 13:

> **"[13] I hasten however to attach an obvious rider. From the fact that a Claimant may well need to consult experts *after* he has acquired the requisite knowledge, it in no way follows that he will have acquired such knowledge by the date when he first consults an expert. Section 14(3) expressly recognises that the facts which he is required to know may be ascertainable by the Claimant only with the help of experts and deems him to have acquired such knowledge at the point at which he might, with their help, reasonably have been expected to acquire it. In my view the date upon which the Claimant first consulted an expert is not, on its own, likely to assist the court in determining whether by then he had the requisite knowledge. Instead the court will have regard – broadly – to the confidence with which the Claimant held the belief, and to the substance which it carried, prior to his consulting the expert (and in particular, no doubt, the reasons which induced the Claimant to consult him) and also, if the conclusion is that at that prior stage the Claimant lacked belief of the requisite character, the effect upon the Claimant's belief of his receipt of the expert's report".** [Emphasis added]

[35] The question for the court in **Wilkinson v Ancliff (BLT) Ltd.** [1986] 3 All ER 427 was the time at which the plaintiff had knowledge that his injuries were capable of being attributed to the Defendants' failures to provide him with safe working conditions as his employers. As to the degree of detail required before a person can be said to have knowledge of the matter, Slade LJ opined, at page 438:

> **"In a case such as the present, where the acts and omissions on the part of the defendants which are complained of are, in broad terms, the exposure of their employee to dangerous working conditions and their failure to take reasonable and proper steps to protect him from such conditions, I think that the employee who has this broad knowledge may well have knowledge of the nature referred to in s 14(1)*(b)* sufficient to set time running against him, even though he may not yet have the knowledge sufficient to enable him or his legal**

advisers to draft a fully and comprehensively particularised statement of claim". [Emphasis added]

[36] In other words, a plaintiff does not have to have all the necessary particulars for the statement of claim.

[37] Over the years, the Courts have articulated, in different ways, that time begins to run when a plaintiff has knowledge of the essence of his claim/complaint. Section 14(1)(b) requires that one 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": **Broadley v Guy Clapham & Co.** [1994] 4 All ER 439 at page 447.

[38] At the end of the day, the court is concerned with the identification of the facts which are the "essence" or "essential thrust of the claim" or which "distil what [the claimant] is complaining about." Lord Nicholls in **Haward** at page 702**.**

[39] To summarize, the principles that can be distilled from the above cases are:

a. A plaintiff bears the burden of establishing that his cause of action has been brought within the requisite time frame;

b. Time starts running against a plaintiff when he becomes knowledgeable of all of the facts set out in the legislation;

c. The time of a plaintiff's knowledge is dependent on his belief – A plaintiff has "knowledge" of all of the required facts when he first comes to reasonably believe them;

d. Such a belief need not be based on objective evidence, but should be held reasonably;

e. A plaintiff's belief need not reach the level of absolute certainty, but must be held with sufficient confidence to justify instituting proceedings.

Discussion and analysis

[40] The critical issue in this action is when did Ms. Marshall know enough to set time running against her.

[41] Learned Counsel for the Defendants, Mr. Rolle submitted that Ms. Marshall became fixed with the requisite knowledge to set time running immediately after the incident on 9 April 2009, or alternatively, the morning following the incident, or at the very least in 2010, when she was advised that she was suffering from a chronic back injury and might have to be put on disability.

[42] Learned Counsel Ms. Pyfrom, who appeared for Ms. Marshall, submitted that time did not begin to run until January 2014 when Ms. Marshall was advised that her injury would lead to the development of multiple sclerosis. Counsel argued that Ms. Marshall was 'fixed' with knowledge when she was informed of the development of a significant injury, that is, multiple sclerosis.

[43] Ms. Pyfrom next argued that Ms. Marshall could not, without evidence, argue that she had knowledge by reference only to her witness statement, that as this is a personal injury matter, the significance of the injury could only be determined by a medical report. She relied heavily on **Ministry of Defence v AB** and particularly paras 7 to 12 [supra]. In my judgment, this case is not supportive of Ms. Pyfrom's argument.

[44] As to her assertion that the significance of Ms. Marshall's injury could only be determined by medical professionals, Lord Wilson, in **Ministry of Defence v AB**, does accept that medical evidence is a constituent part of knowledge but he explicitly rejects the contention that a plaintiff lacks knowledge until he has evidence (in this case medical evidence) to substantiate his belief (although Ms. Marshall had, in any event, received medical evidence that she suffered from a chronic back injury as early as 2010). The Act expressly states that "knowledge" includes knowledge of the facts observable or ascertainable by the plaintiff and facts ascertainable by the plaintiff **with the help of medical advice**.

[45] The underpinning of the authorities is the Plaintiff's personal belief. The cases lay down that what is relevant is the plaintiff's belief based on the facts observable and ascertainable, all of which are expected to be (and are) borne out in Ms. Marshall's witness statement. What is important is how much Ms. Marshall knew – "the plaintiff must know enough to investigate further." The only way to ascertain what Ms. Marshall knew is to read her witness statement. The significance of the injury for the purpose of time running is not a medical question of fact but rather a question of fact based on the facts observable and ascertainable by Ms. Marshall, herself. Therefore, the question of the significance of Ms. Marshall's injury was to be determined by her and any other reasonable person. The medical evidence supplements her injuries particularly for purposes of assessing the quantum of damages.

[46] Relevant considerations to determining when Ms. Marshall was fixed with knowledge such as the gravity of the experience and the abnormal or accidental nature of the incident were articulated in Ms. Marshall's witness statement. Therefore, Ms. Pyfrom's attempt to diminish the value of her witness statement and her contention that the significance of the injuries could only be determined by a medical professional, are untenable.

[47] In addition to the date on which a plaintiff first consults a medical expert, the court have regard to the confidence with which a plaintiff held the belief and to the substance that it carried prior to the consultation with the doctor as well as the reasons which induce him/her to consult the expert. In the instant case, even though Ms. Pyfrom fought hard to modulate Ms. Marshall's witness statement, it was material in determining the point of knowledge as her belief based on all of the facts and her conduct determined when she had knowledge. Accordingly, it was open to the Defendants to assert a time at which Ms. Marshall became knowledgeable about the significance of her injury. Her witness statement, inclusive of her experience of pain and how she interpreted the medical report along with the facts, was the primary piece of evidence alongside the medical reports. The assertions of the Defendants were not, as Ms. Pyfrom suggested,

without evidence. They are based on all of Ms. Marshall's observable and ascertainable facts as set out in her Witness Statement namely (i) she had seen doctors before the specialist in 2014; (ii) she experienced some minor pain immediately after the incident; (iii) on the day immediately after the incident, the left side of her body was unresponsive and she could not move; (iv) she was induced to see a doctor one year after the incident due to increasing pain; (v) one year after the incident she was told that she was suffering from "chronic back injury" and (vi) she had not worked since the incident and she applied for disablement benefit as early as 2009.

[48] Counsel for the Defendants referred to the case of **Jan Collins v Tesco Stores** [2003] EWCA Civ 1308 which is interesting in the light of the present case. The brief facts are that the Claimant was employed by the Defendant as a petrol kiosk attendant. Part of her duties involved re-stocking goods. She had to collect them in a metal cage from a nearby store. She claimed that she had injured her right shoulder and that the Defendant was to blame. Her evidence was that she had first had pain in her shoulder in late 1996 but she was not absent from work until 26 June 1998. She remained off work until 13 November 1999 but thereafter, she returned to work for short periods of time. On 14 January 1998, she went to a Consultant Rheumatologist. On 26 June 1998, she went to a Physiotherapist who told her that the strain in her shoulder had been caused by heavy lifting. She issued a Claim Form on 26 January 2001. The Defendant pleaded limitation. The Judge found for the Claimant on the issue on the basis that she had become aware of the significance of the injury when she went to see the Physiotherapist and the fact that she knew moving the metal cages caused pain did not mean that she knew her injury was attributable to her work. On appeal, it was held that the Claimant's symptoms, treatment and absence from work meant that by January 1998, she had knowledge of a significant injury. The link necessary to establish knowledge in terms of attributability was clear by the same date.

[49] Ms. Pyfrom insinuated that before January 2014, Ms. Marshall's ability to determine that her injury was significant was affected by the doctors' failures, until

that time, to determine exactly her medical prognosis and that the Plaintiff's medical records were a bundle of confusion, thereby muddling her ability to have determined that her injury was significant.

[50] This argument is unsustainable. Firstly, the contents of Ms. Marshall's medical record are not conflicting. Ms. Marshall merely had not been advised of exactly what she suffered from. The failure of the doctors to advise her of exactly what she suffered from did not make her medical record conflicting. Notwithstanding, her experiences were sufficiently significant to have established knowledge in spite of the doctors' failure. Certainly, by the 2010 visit to PMH, she ought to have been certain that the injury was significant – the increasing pain coupled with the diagnosis that she was suffering from a "chronic back injury" and she might have to go on disability.

[51] In any event, the effect of not having a conclusion on her medical condition would have had a very limited effect, if any on her knowledge of the significance of the injury. As reiterated, what is relevant are the facts reasonably observable and ascertainable by Ms. Marshall and her belief based on those existing circumstances. Notwithstanding that Ms. Marshall did not know what her prognosis was, she knew all the other facts.

[52] Ms. Marshall's belief between the incident and her 2010 PMH visit must have been that the injury was significant, as she was induced to visit PMH again by increased pain. Ms. Marshall's conduct was consistent with the belief that her injury was significant, not having worked since the incident. Further, the loss of the many amenities she suffered, must have triggered some belief that her injury was significant. So also is the fact that she applied for Disablement Benefit as early as 2009 (the same year as the incident). These circumstances, coupled with the fact that she attributed her injury to the Defendants' failure, mean that she was fixed with the knowledge before 2014; to wit, by 2010, at the latest.

[53] In my judgment, Ms. Marshall knew enough, at the latest, in 2010 when she visited PMH again, to make it reasonable for her to begin to investigate whether or not she had a case against the Defendants. She then had three years in which to conduct her inquiries and, if advised that she has a cause of action, prepare and issue her writ. She knew that the injury was caused by an act or omission of the Defendants.

Submission to jurisdiction

[54] Additionally, says Ms. Pyfrom, the Defendants have waived their rights to argue limitation and have submitted to the jurisdiction of the Court. She stated that, pursuant to Order 12, the Defendants ought to have entered a conditional appearance and, within 14 days of entering an appearance, applied to have the writ set aside. She submitted that the failure to apply to set aside the writ is a presumption of waiver of the objection to the proceedings.

[55] Learned Counsel argued that there is no application before the Court which seeks to challenge the jurisdiction of the Court. The Defence to the action was filed 9 months after the appearance. Therefore, the presumption of waiver applies.

[56] This argument is wholly misconceived. As Mr. Rolle correctly argued, firstly, the Defendants are not alleging nor have they ever alleged that "the writ or service of the writ, or notice of the writ, on [them] or declaring that the writ or notice has not been duly served on [them] to which RSC Order 12 rule 7 applies.

[57] Secondly, the Supreme Court Practice (1993 ed.), Vol. 1, RSC Order 18 rule 8 states that, inter alia, **a party must in any pleading subsequent to a statement of clam plead specifically the relevant period of limitation** and RSC Order 18 rule 8 (5) reads as follows:

> **"Statute of limitation: <u>This point of law must always be raised by an express plea</u>, even in actions for possession of land."** [Emphasis added]

[58] Therefore, it is for the defendant to plead the defence of limitation as the courts will not take the point against the plaintiff. Once the defendant has raised the defence of limitation, the burden shifts to the plaintiff to prove that time to bring the claim has not expired.

Conclusion

[59] In the present case, Ms. Marshall did not discharge the burden of proving that time did not begin to run until January 2014. All of the observable and ascertainable facts (which were provided in her witness statement) which existed between 2009 and 2010 constituted reasonable basis on which her belief that the injury was significant was held. Her actions during this time were consistent with such a belief.

[60] In my judgment, Ms. Marshall knew that her injury was significant in 2010, when she was induced by increasing pain to visit PMH. Consequently, the limitation period lapsed in or about 2013. The writ having been filed in 2015 makes the present action statute-barred.

[61] I shall strike out Ms. Marshall's Writ of Summons and Statement of Claim for being time-barred. Ms. Marshall shall pay the Defendants' costs to be taxed if not agreed.

Dated this 8th day of March, A.D., 2021

Indra H. Charles
Justice