COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2025/CLE/gen/00150

B E T W E E N

DION DAVIS

Claimant

AND

FTD XRAY LIMITED
(t/a FOURTH TERRACE DIAGNOSTIC CENTRE)

Defendant

Before:	Assistant Registrar Akeira Martin
Appearances:	Mrs. Romona Farquharson-Seymour appearing along with Mr. Samuel Taylor for the Claimant
	Mr. Kahlil Parker K.C. appearing along with Ms. Lesley Brown for the Defendant
Hearing Date:	20th November 2025

RULING

Introduction

[1] This is my written decision which sets out my reasons for acceding to the Defendant's application for an Order striking out the Claimant's claim against it on the basis that it was statute barred pursuant to section 9 (1) and (2) of the Limitation Act **(the "Act")**.

[2] While it is considered to be a harsh remedy to impose on a litigant there are some cases which clearly meet the criteria for striking out a claim, especially when balancing the parties respective rights.

[3] The determinative factor in the instant case was when the Claimant had actual knowledge of the alleged injuries caused by the Defendant.

[4] Throughout the course of the hearing, it became clear that the Defendant's limitation defence outweighed the Claimant's right to have his claim litigated any further as his claim was brought outside of the statutory limitation period and he did not satisfy the statutory provisions which would have extended his date of actual knowledge of the injury allegedly caused by the Defendant.

Brief Background Facts and Procedural History

[5] The Claimant's Claim Form and Statement of Claim both filed 3rd March 2025 **(the "Claim")** sought damages for breach of contract, special damages, general damages, any other Order the Court deemed fit and interest pursuant to the Civil Procedure (Award of Interest) Act and costs.

[6] The Claimant alleged that the Claim resulted from the Claimant's visit to the Defendant on or about the 11th May 2020 to examine his injured right hand by diagnostic imaging. The medical report from the imaging, dated 14th May 2020 **(the "Report")** indicated that there was no fracture or dislocation and no further action was taken by the Claimant's doctor based upon the Report.

[7] Several days after the Report was issued the Claimant's hand began to swell and his doctor sent him back to the Defendant. Upon the Claimant's return to the Defendant, further examination and testing was conducted which resulted in the Report being updated to include an addendum indicating that the Claimant had suffered injury and that soft tissue was noted and advised of a surgical orthopedic consult **(the "Updated Report")**.

[8] After the Claimant's doctor received the Updated Report, the Claimant's doctor examined his right hand but advised him that unfortunately too much time had passed to reset his finger and that he would have had a permanent deformity. The Claimant claimed that his right hand had become deformed, that he was permanently disabled and it was of no use to him.

[9] The Claimant claimed that the Defendant negligently failed to diagnose the said condition and breached its contractual duties to ensure accurate medical diagnosis and treatment.

[10] The Claim was served on the Defendant on 10th March 2025 as evidenced by its Acknowledgement of Service filed 25th March 2025.

[11] On 8th May 2025 the Claimant filed his Notice of Application and Affidavit seeking judgment in default of defence **(the "Default Judgment Application")**.

[12] On 9th May 2025 the Defendant filed its Defence having not been served with the Default Judgment Application.

[13] In response to the Default Judgment Application and further to its contention in its Defence that the Claim was statute barred, the Defendant filed both its Notice of Application and Affidavit of Rushea Stuart in support on 13th May 2025 seeking to strike out the Claim or alternatively to extend the time to serve its Defence to the 9th May 2025 **(the "Strike-out Application")**.

[14] The Claimant's Counsel, Mrs. Romona Farquharson-Seymour **("Mrs. Farquharson-Seymour")** sought to list the Default Judgment Application for hearing which was then assigned a hearing date of 11th September 2025 **(the "11th September Hearing")**.

[15] Ahead of the 11th September Hearing, Counsel for the Defendant, Mr. Kahlil Parker K.C. **("Mr. Parker K.C.")** served on the Court and the Claimant through his Counsel, the Second Affidavit of Rushea Stuart filed 8th September 2025 **(the "Defendant's Second Affidavit")** along with the Defendant's skeleton arguments also dated 8th September 2025 **(the "Defendant's Skeleton Arguments")**.

[16] Later that day on 8th September 2025, Mrs. Farquharson-Seymour wrote to the Court seeking an adjournment of the 11th September Hearing on the basis that her client was still waiting for a medical report addressing the Claimant's cognitive and communication abilities as a result of a stroke he suffered which she wished to exhibit to an Affidavit in order to rely on s. 9 (2) (b) of the Act.

[17] At the 11th September Hearing, the Claimant was granted an adjournment to allow the Claimant time to receive the aforesaid medical report and to prepare the affidavit in response to the Strike-Out Application. The Defendant was given an opportunity to respond thereto.

[18] The adjournment was granted and there was no order made for costs against the Claimant because of her adjournment request due to the late service of the Defendant's Second Affidavit and the Defendant's Skeleton Arguments on the Claimant.

The Strike-Out Application

[19] The Strike-Out Application was made pursuant to Rule 26.1 (2) (i) and (v) and Rules 26.3 (1) (b) and (c) of the Supreme Court Civil Procedure Rules, 2022 **(the "CPR")**.

[20] The grounds of the Application were that the Claimant's claim was statute barred pursuant to section 9 of the Act and that as pleaded it disclosed no reasonable cause of action against the Defendant and was frivolous, vexatious, scandalous and/or otherwise an abuse of the process of the Court.

[21] Alternatively, the Defendant's ground for extension was that when the Defence was filed and served on 9th May 2025 it was done prior to service and notice of the Claimant's application for leave to enter judgment in default of defence which was filed 8th May 2025. The Defendant added that it had both an absolute statutory defence and a good and arguable defence otherwise to the Claimant's claim.

The Defendant's Evidence and Submissions

[22] In support of its Application, the Defendant averred that the Claimant's claim, as pleaded, was that he was allegedly misdiagnosed by the Defendant which caused him to suffer alleged personal injuries as a result in 2020.

[23] The Defendant highlighted that at para. 15 of his Claim the Claimant pleaded that "as a result of the breach of contract the Claimant has suffered injuries and damages that were caused wholly or in part by the breach of contractual duties of the Defendant." But at para. 10 the Claimant asserted that after receiving an updated report from the Defendant dated the 20th May 2020, his doctor advised him "after her examination, that too much time had passed and the window to reset his finger(s) had passed. Hence, he would have had a permanent deformity."

[24] The Defendant then highlighted that the Claimant, who was born on the 2nd May 1975, asserted under his "Particulars of General Damage" at para 2 (i) that he "was Forty-Five (45) years old when he was misdiagnosed by the Respondent", averring that the Claimant had not pleaded that he was misdiagnosed by the Defendant and had suffered personal injuries as a result in 2020.

[25] The Defendant averred that based on those highlighted portions of the Claim the Claimant's action should be considered an action for damages for negligence or breach of duty, whether such duty existed by virtue of a contract or provision made by any written law or independently or any contract or such provision, where the damages claimed by the Claimant as a result thereof which was an action which should not have been brought after the expiration 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 pursuant to Section 9 (2) of the Act.

[26] In support of the alternative claim, the Defendant apologized for any delay in preparing and filing its Defence and maintained that it had both an absolute statutory defence as well as a good and arguable substantive defence to the Claim.

[27] By the Second Affidavit, the Defendant exhibited the email exchange between its Counsel and the Claimant's Counsel whereby the former had asked the latter to forego its Default Judgment Application and move to Case Management where any interlocutory application could be dealt with but the Claimant declined and insisted on having his Default Judgment Application heard.

[28] By the Defendant's written submissions, the Defendant contended that the Claimant's stale, statute barred, unreasonable, and oppressive purported claim should have been dismissed pursuant to Section 9 of the Act which provides,

> **"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) If the person injured dies before the expiry of the period prescribed by subsection (2), the period as regards the cause of action surviving for the benefit of the estate of the deceased shall be three years from — (a) the date of death; or (b) the date of the personal representative's knowledge, whichever is the later."**

[29] The Defendant's contention was predicated on the Claimant's pleaded claim that the Defendant's alleged breach of contract which included a claimed for alleged personal injuries, and his knowledge of the alleged consequences thereof, took place in May A.D. 2020 making it statute barred having been brought after the expiry of three years from when the cause of action accrued.

[30] The Defendant relied on **Riches v. Director of Public Prosecutions [1973] 2 All ER** where Lawton LJ stated with respect to a strike out application pursuant to Order 18 Rule 19 of the Rules of the Supreme Court, the precursor to the SCCPR 2022:

> **"The object of RSC Ord 18, r 19, is to ensure that defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested set of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute-barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defence. The delivery of the defence occupies time and wastes money; and even more useless and time-consuming from the point of view of the proper administration of justice is that there should then have to be a summons for directions, and an order for an issue to be tried, and for that issue to be tried before the inevitable result is attained. It seems to me that when that situation arises the comments of Lord Blackburn in Metropolitan Bank Ltd. v. Pooley are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The White Book, having called attention to that statement by Lord Blackburn, goes on to say that the object is 'to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation'. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackles will fall to the ground the moment the uncontested facts appear; and that is just this case."**

[31] The Defendant submitted that there was no exception or defence to the Defendant's plea of the Act and that it should not be harassed and put to any further expense by frivolous, vexatious, and hopeless litigation as the Claim was plainly statute barred.

The Claimant's Evidence and Submissions

[32] In opposition to the Strike-Out Application, the Claimant filed the Affidavit of Calvin Seymour **("Mr. Seymour")** on the 26th September 2025. Mr. Seymour, an employee in the firm of Messrs. R.A. Farquharson & Co., Attorneys for the Claimant, averred that he was duly instructed that the Claimant suffered a stroke on or about November, 2018 which affected his cognitive abilities, specifically his speech which resulted in the Claimant not being mentally aware of his injuries in order to instruct Counsel within the appropriate limitation period.

[33] Mr. Seymour continued that,

"3.....according to Mr. Davis' physician his injuries have and continue to affect his memory, cognitive and communication abilities. Hence, I verily believe time did not start running until Mr. Davis had actual knowledge of his injuries. Unfortunately, his knowledge and appreciation did not occur until after three (3) years of the incident. (Now produced and shown to me is a copy of the Claimant's medical report marked as "CS-1").

4. Further, we verily believe that the Claimant's condition, notwithstanding him experiencing intermittent, event today, is sufficient to successfully defend the Defendant's application.

5. Notably, when the Defendant's treated Mr. Davis they were or ought to have been aware of his mental state, especially as the same was explained to them. Hence, their advancing an application using the Claimant's mental health against his interest given that it is a party of his claim that he was taken advantage of by them due to his illness and consequential limitations, is vexatious and unjust.

6. Ultimately, Mr. Davis instructed Counsel when he was lucid and able to appreciate what had occurred to him, that knowledge came late as he is under a disability.

[34] The medical report referred to, was prepared as a letter from Dr. Dionne Dames-Allick **("Dr. Davis")**, an Internal Medicine Specialist at New Genesis Medical Centre **(the "Diagnosis Letter"**.

[35] By the Claimant's submissions dated 13th November 2025, the Claimant accepted that the time limit for commencing actions with respect to personal injuries was 3 years from the date on which the cause of action accrued or from the date of the Claimant's knowledge.

[36] The Claimant submitted in relation to the date of knowledge that in order for the date of knowledge to be established the Claimant must satisfy that the injury in question was significant, the injury was attributable in whole or in part to the act or omission of the Defendant, and the identity of the defendant must be known and relies on **section 10 of the Act** which states,

> **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 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."

[37] In furtherance of the submission the Claimant relied on the authority of **Candice Marshall v Rock of Ages Chapel and Crematorium et al SCCivApp No. 98 of 2021** where the Court of Appeal applied Catholic Care Diocese of Leeds) and Anor v Young (Kevin Raymond), [2007] 2 W.L.R. 1192 at para. 12 of its judgment:

> **"12. In Catholic Care (Diocese of Leeds) and Anor v Young (Kevin Raymond), [2007] 2W.L.R. 1192 the UK Court of Appeal took the view that whether a litigant could sensibly consider their injury to be significant enough to embark on litigation is an objective test. Here is what Dyson LJ said in para 21: "It is now clearly established that time starts to run against a claimant for the purposes of section 14(1) when he knows that the injury on which he founds his claim is capable of being attributed to the act or omission of the defendant he wishes to sue, irrespective of whether, at that point, he knows that the act or omission is actionable or tortious: see Dobbie v Medway Health Authority [1974] 1 WLR 1234."**

[38] The Claimant noted that s. 10 of the Act was similar to s. 14 of the United Kingdom's Limitation Act and contended that the purpose of s. 9 (2) (b) and s. 10 (1) (a) was to postpone time from running until the Claimant had knowledge of

the personal injury which their claim was based on akin to s. 11 (1) (b) and s. 14 (1) a) and relied on Dobbie v. Medway Health Authority [1974] 1 WLR 1234 where at pg. 1240 it was held,

"The effect of sections 11(4)(*b*) and 14(1)(*a*) is to postpone the running of time until the claimant has knowledge of the personal injury on which he seeks to found his claim. That is "the injury in question." The word "knowledge" should be given its natural meaning: see *Davis v. Ministry of Defence* (unreported), 26 July 1985; Court of Appeal (Civil Division) Transcript No. 413 of 1985. As Lord Donaldson of Lymington M.R. said in *Halford v. Brookes* [1991] 1 W.L.R. 428, 443:

"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.'"

This test is not in my judgment hard to apply. It involves ascertaining the personal injury on which the claim is founded and asking when the claimant knew of it. In the case of an insidious disease or a delayed result of a surgical mishap, this knowledge may come well after the suffering of the disease or the performance of the surgery. But more usually the claimant knows that he has suffered personal injury as soon or almost as soon as he does so.

Time does not begin to run against a claimant until he knows that the personal injury on which he founds his claim is significant within the definition in section 14(2). That gives rise to no issue in this appeal.

The effect of sections 11(4)(*b*) and 14(1)(*b*) is to postpone the running of time until the claimant has knowledge that the personal injury on which he founds his claim was wholly or partly attributable to the act or omission of the defendant on which his claim in negligence is founded. "Attributable to" was construed by May L.J. in the *Davis* case to mean "capable of being attributed to" and not "caused by," and I see no reason to question that conclusion. It cannot plausibly be suggested that the words "act or omission" import any requirement that such act or omission should be actionable or tortious, since that would stultify the closing words of section 14(1) and would moreover flout the recommendation on which the legislation was admittedly founded."

[39] **S. 11 (4) (b) of the UK Act** provides,

"Special time limit for actions in respect of personal injuries"

(1)This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a

contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
[(1A)This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997.]
(2)None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.
(3)An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.
(4)Except where subsection (5) below applies, the period applicable is three years from—
(a)the date on which the cause of action accrued; or
(b)the date of knowledge (if later) of the person injured."

[40] **S. 14 (1) (a) of the UK Act** provides,

"14Definition of date of knowledge for purposes of [sections 11 to 12].
(1)Subject to subsections (1A) and (1B) below, in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—
(a)that the injury in question was significant; and
(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; and
(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."

[41] The Claimant submitted that it was evident from the above stated provisions that they were similar to s. 9 2 (b) and s. 10 (1 (a) of the Bahamian Act.

[42] In reliance on the aforementioned provisions, the Claimant submitted that he was in a unique position as he suffered a stroke which impacted his cognitive and communication abilities which made him unable to ascertain and/or understand his injuries or that he was even injured and to verbalize his instructions to Counsel.

[43] As a result, the Claim was not statute barred as the time began to run in 2023, which was after the date of knowledge of his injuries that was caused by the negligence of the Defendant.

[44] The Claimant submitted that he satisfied s. 10 of the Act which stated that a claimant must be satisfied that the injury in question was significant, the injury was attributable in whole or in part by the negligence and/or omission of the defendant and that the defendant must be identified. He complained that the injury, which was attributable to the Defendant as identified, is significant as his hand is of no use to him and he is permanently disabled.

Legal Analysis

[45] The Strike-Out Application was made pursuant to Rule 26.1 (2) (i) and (v) and Rule 26.3 (1) (b) and (c) of the CPR.

[46] Rule 26.1 (2) (i) of the CPR provides the Court with the discretion to dismiss or give judgment on a claim after a decision on a preliminary issue which the Defendant did not ventilate as a part of its Strike-Out Application and therefore does not need to be considered.

[47] Rule 26.1 (2) (v) of the CPR is a catch all rule which provides the Court with the jurisdiction to take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation, or directing that such a hearing take place before a Court appointed neutral third party, with the aim of helping the parties settle the case.

[48] Rule 26.3 of the CPR provides the Court with the jurisdiction so strike out a statement of case, therefore for the purpose of the Strike-Out Application I do not need to lean on the discretion given by Rule 26.1 (2) (v) of the CPR.

[49] **Rule 26.3 (1) (b) and (c) of the CPR** states,

> **"26.3 Sanctions – striking out statement of case.**
> **(1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —**
>
> **(a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;**

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
(c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings"

[50] Rule 26.3 (1) (a) of the CPR is not applicable in the instant case as there cannot be said to be a failure to comply with a rule, practice direction, order or direction given by the Court.

[51] By reason of the Strike-Out Application being made pursuant to a limitation defence, reliance on 26.3 (1) (b) falls away as it is incorrect to argue that the Claim does not disclose any reasonable ground for bringing or defending a claim which translates to the old rule under Order 18 rule 19 (a) of the Rules of the Supreme Court, 1978 that a claim could be struck out if it did not disclose a reasonable cause of action.

[52] Therefore, my consideration is whether the Claim should be struck out if it is determined that it is frivolous, vexatious, scandalous or an abuse of the process of the Court likely to obstruct the just disposal of the proceedings. Under this limb, a Court can consider not only the pleadings but also extrinsic evidence, although the strike out application should not develop into a full blown trial.

[53] The Defendant's contention against the Claimant is that the Claim is frivolous, vexatious, scandalous and an abuse of the process of the Court because even though it is worded as a breach of contract, it is a claim for damages as a result of the Defendant's alleged negligence which required the Claimant to commence his action 3 years after the statutory period set out in the Limitation Act. The perceived act of professional negligence allegedly occurred in 2020 whereas the Claim was filed in 2025.

[54] The Claimant on the other hand contends that his Claim should not be struck out as he did not have actual knowledge of the injury to his hand until 2023 due to a stroke he suffered in 2018 which affected his cognitive abilities. The Claimant also contends that the English provisions of the Limitation Act mirrors those of the UK's Limitation Act.

[55] The comparison of s. 9 of the Act and its accompanying provisions to the UK provisions is not novel to this jurisdiction as they have already been examined by both Supreme Court and appellate Court judges alike. Additionally, the applicability of s. 9 of the Act to claims is also not novel to the jurisdiction.

[56] In fact, in the case of **Candice Marshall v. Rock of Ages Chapel and Crematorium et al SCCivApp & CAIS No. 98 of 2021**, which the Claimant relied on, the Court of Appeal dismissed an appeal of the decision of Charles J. (as she then was) at first instance who, after considering both the relevant Bahamian and English provisions of the Act, struck out the plaintiff's claim after finding that it was statute barred.

[57] The provisions were also considered by the Bahamian Court of Appeal in **Lucretia Rolle v The Airport Authority SCCivApp No. 119 of 2021.** In both cases, the Courts considered English authorities including **Catholic Care (Diocese of Leeds) and Anor v Young (Kevin Raymond) [2007] 2W.L.R. 1192** and what appears to be the locus classicus case from the House of Lords **Haward and others v Fawcetts and others [2006] UKHL 9.**

[58] From those authorities, the following was gleaned.

[59] Once the Defendant raises an intention to rely on the limitation defence and to apply to strike out a claim, the burden is placed on the plaintiff to file any evidence to show that there was some acknowledgement or concealed fraud or any matter which may show the court that the claim was not frivolous and vexatious or an abuse of court.

[60] In cases where the actual knowledge of an injury was concerned, prior to the limitation defence issue being raised by a defendant, if a plaintiff was aware that there was a possibility that the claim was being commenced after the expiration of the limitation period, it should be specifically pled in the statement of claim that there was a later date of knowledge which would allow a Court to consider limitation based on the plaintiff's pleaded case.

[61] Judicial officers must apply an objective test to determine whether a litigant could sensibly consider their injury to be significant. Therefore, when a litigant knows that the injury on which his claim is founded may be caused by the act or omission of the intended defendant he wishes to sue, regardless of whether, at that time, he knows that the act or omission is actionable or tortious, would be on a case by case basis.

[62] As it pertains to actual knowledge, the significance of the claimant'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 a claimant.

[63] During the hearing of the Strike-Out Application, Mrs. Farquharson-Seymour directed me to the cases she wished to rely on in support of her arguments on actual knowledge; those cases being **Candice Marshall v Rock of Ages Chapel and Crematorium et al SCCivApp & CAIS No. 98 of 2021** and **Dobbie v. Medway Health Authority [1974] 1 WLR 1234**. At that time, I read over the cases which is how I initially came to the conclusion that the Claim should be struck out.

[64] Her arguments, as I understood them to be, were that the Claimant could not have actual knowledge of the injury because he had suffered a stroke prior in 2018. However, I did not find merit in this argument because, as argued, the stroke was not caused by the Defendant, therefore actual knowledge was with respect to the hand injury.

[65] The Claim is pleaded as a breach of contract which would have provided the Claimant with six (6) years to commence a claim against the Defendant. Numerous observations are made however, with respect to the Claim as pleaded.

[66] At paras. 3 - 5 of his Claim he pled,

> **"3. On or about the 11th day of May, A.D. 2020 the Claimant's hand was injured.**
> **4. On the 14th day of May, A.D. 2020 the Claimant visited the Respondent's place of business and was examined.**
> **5. The medical report dated the 14th day of May, A.D. 2020 indicated that there was no fracture of dislocation inter alia."**

[67] At paras. 13 and 15 of his Claim he pled,

> **"13. The Respondent negligently failed to diagnose the said condition and breach their contractual duties to ensure accurate medical diagnosis and treatment.**
> **15. As a result of the breach of contract the Claimant has suffered injuries and damages that were caused wholly or in part by the breach of contractual duties of the Defendant and/or their agents/staff as they have breached their statutory duty and/or common law duties owed to the Claimant."**

[68] In his **"PARTICULARS OF BREACH OF CONTRACT"** the Claimant pled,

> **"1. The Claimant paid for medical services particularly diagnostic imaging and a proper medical report but the Respondent failed to conduct those services properly and/or at all.**

2. The Claimant, it servants and/or agents failed to exercise the proper care and skill required as a medical expert.
3. The Claimant failed to exercise proper care and skill in its initial examination of the Claimant and/or producing an accurate report.
4. The Claimant finger was swollen because of the Respondent's initial report which indicated that there were no fracture or dislocation inter alia.
5. The Respondent's breach prevented the Claimant from receiving proper medical care and has caused him to have a permanent disability in his right hand.
6. Failed to render an accurate diagnosis of the Claimant's condition.
7. Failed to initially treat the Claimant properly and/or at all.
8. Failed to conduct a proper examination of the Claimant in order to render a proper diagnosis that resulted in the Claimant not receiving medical care.
9. Ignored the Claimant's complaint.
10. Failed to observe and analyze the symptoms of the Claimant's condition.
11. Failed to treat the Claimant adequately or at all.
12. Failed to refer the Claimant to have any proper X-rays.
13. Failed to refer the Claimant to another medical doctor and/or medical institution, if the felt unable to perform the same.
14. Wrongly concluded initially that the Claimant did not have any fracture or dislocation."

[69] In his **"PARTICUALRS OF GENERAL DAMAGES"**, the Claimant pled,

"1. Pain Suffering and Loss of Amenities.....
2. .....
i. The Claimant was Forty-Five (45) years old when he was misdiagnosed by the Respondent....."

[70] **Section 5 of the Act** makes it clear that an action founded on simple contract must be brought before the expiration of six years. It states,

> **"5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say — (a) actions founded on simple contract (including quasi contract) or on tort"**

[71] Notwithstanding, the Claim pled as one for a breach of contract, there is no indication that there was an expressed or implied contract between the parties, no

express or implied terms of a contract and as a result could be no breach of an agreement or terms that did not exist at common law or statutorily.

[72] If I am wrong, and in fact there was some implied contract at common law or statutorily, the Claim sought damages for personal injuries allegedly caused by the Defendant which placed the claim squarely within the provisions of **section 9 of the Act**, and prohibited a claim for damages for negligence, nuisance or breach of duty, whether the duty existed by virtue of a contract or of provision made by any written law or independently of any contract or any such provision, after the expiration of 3 years.

[73] At the hearing of the Strike-Out Application the Claimant did not ventilate any arguments with respect to whether the Claim was in fact one for a breach of contract which falls under **Section 5 of the Act** but forcefully argued that time began running when he had actual knowledge of the Claim, in 2023.

[74] In support of his claim for actual knowledge the Claimant primarily relied on the Diagnosis Letter; understandably as in his Claim the only mention of the stroke was stated in one line under the heading **"PARTICULARS OF GENERAL DAMAGE"** and the subheading **"3. Home Care"** he states that,

> **"ii. Furthermore, the Claimant was unable to speak after suffering a stroke and his mother spoke to the doctor on his behalf when his hand began to swell."**

[75] Therefore, it was pleaded as if the Claimant had suffered a stroke after the alleged injury to his hand, as if this was also something attributable to the alleged breach of the Defendant for which it should pay.

[76] When one looks at the pleaded Claim however, the question that arises is whether the Claimant worded his claim as such because he genuinely thought there was a contract between the parties which was subsequently breached by the Defendant or whether the Claim was worded as such because he was aware of his statutory limitations; making the decision to include the sentence pertaining to the stroke, in the event a prudent attorney was able to differentiate between a claim for a simple contract or one for a breach of duties leading to personal injuries and raise the limitation defence.

[77] Without making a finding to the two questions posed, I am reminded that he who avers must prove and must do so in his pleadings. While a strike out application allows for the consideration of affidavit evidence, the authorities cited in the present circumstances also require that any intended reason for commencing a claim outside of a limitation period should be set out in its originating document for a judicial officer to be able to consider the limitation issue on the pleadings.

[78] In the instant case, the Claimant did not do so. Instead, he includes one sentence about his stroke under his particulars of injuries. Notwithstanding, I have taken into consideration, the findings of the Diagnosis Letter, despite my apprehension as the maker of the affidavit was not the maker of the Diagnosis Letter and is not a medical doctor but swore,

> **"3.....According to Mr. Davis' physician his injuries have and continue to affect his memory, cognitive and communication abilities. Hence, I verily believe time did not start running until Mr. Davis had actual knowledge of his injuries. Unfortunately, his knowledge and appreciation did not occur until after three (3) years of the incident.**
> **4.....Further, we verily believe that the Claimant's condition notwithstanding him experiencing intermittent, even today, is sufficient to successfully defend the Defendant's application."**

[79] Additionally, I note that Dr. Davis, of the New Genesis Medical Center, does not state how she became aware of the medical information from the Princess Margaret Hospital about the Claimant's condition.

[80] While I accept the findings of the Diagnosis Letter with great hesitation, there are two trains of thought that develop at this point.

[81] The first is that despite the memory impairment allegedly being into existence in 2020 when the alleged negligence by the Defendant occurred, there were legal options provided to individuals with memory impairment, such as the commencement of legal action by his next friend within the statutory period. This thinking is bolstered by the fact that in his Claim, the Claimant, in his one liner about his stroke, pled,

> **"ii. Furthermore, the Claimant was unable to speak after suffering a stroke and his mother spoke to the doctor on his behalf when his hand began to swell."**

[82] Consequently, the Claimant's mother as next friend would have had actual knowledge of the Claimant's hand injury when she spoke to the doctor on his behalf when his hand began to swell in 2020.

[83] Additionally, the Claimant's commencement of the Claim without a next friend, indicates that the memory loss he claims to have is intermittent. In that regard, I am led to follow the authorities with respect to actual knowledge of the Claimant.

[84] In considering the Claim itself, the Claimant knew that his hand was injured from the 11th May 2020. He claims that after the Report which stated that there was no fracture or dislocation, his hands began to swell which caused him to contact his doctor who advised him to return to the Defendant's establishment and request immediate medical attention.

[85] The Claimant also claims that upon his return and further examination an addendum was added to the Report indicating that the Claimant had suffered an injury. After receiving the Updated Report, the Defendant claims that his doctor examined him and advised him that too much time had passed and the window to reset his finger(s) had passed, leaving him with a permanent deformity.

[86] On the other hand, by the Diagnosis Letter, it was also stated that Mr. Davis had presented to the Princess Margaret Hospital on 13th May 2020 after receiving trauma to his hand.

[87] Based on the Claim itself, as pleaded, the Claimant had actual knowledge of what the injury was to his hand and the alleged misdiagnosis in May 2020. Accordingly, if the Claimant wished to attribute any negligence to the Defendant for failing to exercise proper care and skill when examining his hand, in order to prepare a proper report for the Claimant's doctor and provide a diagnosis, the time to do so was three years from the date he received the Updated Report.

[88] The Claimant knew that his hand was injured before attending the Defendant. Despite not being advised of the extent of his injuries during the first visit and in the Report, his Claim as pleaded, states that he knew that the window had passed to reset his finger and that soft tissue was noted, advising of the need to have surgical consult after receiving the Updated Report.

[89] While the Claim fails to state exactly when the Claimant knew of the permanent deformity to his hand, the settled definition of actual knowledge makes it unnecessary. Once the Claimant knew that the Defendant had erred in initially diagnosing him and that too much time had passed to reset his finger, actual knowledge of alleged wrongdoing existed and the time started running to commence a claim.

[90] In the circumstances, the Claim as pleaded, shows that both the Claimant and his mother had actual knowledge of the alleged misdiagnosis and subsequent issue of time passing to reset his finger on 20th May 2020 when he received the Updated Report. Accordingly, I find that his time to commence an action against the Defendant started at that time and that he had, at the latest, until 20th May 2023 to file his claim.

[91] I also wish to address the two Orders submitted by the Claimant as during the hearing, it was obvious that the Claimant was alluding to the fact that he was not being heard.

[92] The order from the September Hearing, prepared and submitted by the Claimant's attorney, highlighted that it was the Claimant's understanding that the adjournment was allowed to file any affidavit evidence in objection to the Strike-Out Application and not specifically medical evidence as Mrs. Farquharson-Seymour continuously alluded to during the hearing.

[93] Therefore, the refusal to adjourn to allow the Claimant to call the actual maker of the report, as set out in the order drafted by the Claimant after the hearing of the Strike-Out Application, was not a refusal of the Claimant being heard but was an attempt to balance the scales of justice between the parties. The Claimant had already been given the opportunity to file any evidence in objection to the Strike-Out Application.

[94] More importantly, on the face of the pleading itself I was satisfied as to when the Claimant had actual knowledge of the alleged negligence.

[95] Based on my consideration of the Strike-Out Application I did not find that it would be beneficial to either party to allow any additional adjournments which would further delay the action and prejudice both parties financially.

[96] For all of the reasons set out herein, I acceded to the Defendant's Strike-Out Application and struck out the Claimant's Standard Claim Form and Statement of Case both filed 3rd March 2025 as they were commenced outside of the 3 year limitation period and would be an abuse of the process of the Court to allow the Claimant to continue on with its frivolous, stale claim against the Defendant.

[97] The Defendant's application to extend the time to file its defence therefore falls away.

[98] Costs are awarded to the Defendant, which I have summarily assessed in the amount of $4,500.00. During the hearing, Mr. Parker K.C. sought and Mrs. Farquharson-Seymour agreed to costs for the adjournment in the amount of $3,500.00. I have added on an additional $1,000.00 to account for the time spent by Mr. Parker K.C. and his junior for the preparation of and r appearance at the hearing of the Strike-Out Application.

Dated this 7th day of January, 2026

Akeira D. Martin
Assistant Registrar