[2015] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 105/2005

APPLICATION NO 182/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

BETWEEN	**KIMOLA MERRITT (Suing by her mother and next Friend Charm Jackson)**	
AND	**NOW CONTINUING AS 1ST PLAINTIFF UPON THE DEATH OF THE 1ST PLAINTIFF By order of the Court made on the 20th day of January 1997 THE SAID CHARM JACKSON**	**APPELLANT**
AND	**DR IAN RODRIQUEZ**	**1ST RESPONDENT**
AND	**THE ATTORNEY-GENERAL**	**2ND RESPONDENT**

Norman Hill QC and Raymond Samuels instructed by Samuels & Samuels for the appellant

Miss Lisa White instructed by the Director of State Proceedings for the respondents

29, 30 October, 1 November 2014 and 29 May 2015

PHILLIPS JA

[1] I have read in draft the very comprehensive reasons of my learned sister McDonald-Bishop JA (Ag) with regard to the application to amend the grounds of appeal to add an alternative ground of appeal regarding the true and proper interpretation of section 2(1)(a) of the Public Authorities Protection Act and also with respect to the substantive appeal. I am satisfied that she has set out in extensive detail the basis for our refusal of the application, it being entirely without merit. I am also in full agreement with her exhaustive reasons for concluding that the claim was statute-barred and that the issue of the claim being statute-barred was not caught by the doctrine of *res judicata* at the time of the trial.

[2] It has been a long and difficult battle in the courts for the appellant which must have been extremely distressing for her, but regrettably and unfortunately the required limitation period had passed before the claim was instituted and so this appeal must be dismissed.

BROOKS JA

[3] I too have read in draft the judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion for refusing the application to amend the grounds of appeal and that the appeal should be dismissed. There is nothing that I could usefully add.

MCDONALD-BISHOP JA (AG)

[4] This is an appeal from the judgment of Marva McIntosh J, delivered on 21 July 2005, in which she entered judgment with costs in favour of the respondents on a claim brought by the appellant for medical negligence. The learned trial judge found that the claim was statute-barred by virtue of the Public Authorities Protection Act as it stood in 1986 (which will, interchangeably, be referred to as "the Act") and that, in any event, the case presented by the appellant was deficient.

[5] The fundamental issue that is raised on this appeal concerns the applicability of the Act to the claim of medical negligence (alternatively, medical malpractice). In particular, the appeal focuses attention on whether the issue that the claim was statute-barred, as pleaded by the respondents in their defence, was *res judicata* by an *ex parte* order made by Master Hazel Harris (as she then was) on 14 January 1992, in which she stated, in essence, that the limitation period stipulated by the Act was suspended by reason of fraud (concealment of material information) on the part of the 1st respondent and/or servants or agents of the Crown.

The background facts

[6] The appellant brought proceedings in the Supreme Court against the respondents in two capacities. In or around 4 February 1991, she commenced proceedings against the 1st respondent as next friend for and on behalf of her

minor daughter, Kimola Merritt ("Kimola"), for damages for personal injuries allegedly suffered by Kimola as a result of the negligence (alternatively, medical malpractice) of the 1st respondent. She also brought a claim in her personal capacity for damages for consequential losses she suffered as a result of the injuries allegedly sustained by Kimola as a result of the 1st respondent's negligence.

[7] The 1st respondent had treated Kimola at the Savanna-la-Mar Hospital between September and October 1986 when she presented there with suspected meningitis. The appellant alleged that he had failed to properly treat Kimola and that this failure resulted in Kimola suffering severe brain damage and disability caused from the meningitis.

[8] The 1st respondent in his defence, apart from denying negligence (and malpractice), averred that he was at the time acting as a servant or agent of the Crown and was, as such, entitled to the protection of the Public Authorities Protection Act that rendered the claim statute-barred.

[9] Following the service of the defence, containing that pleading, on the appellant, she successfully sought and obtained, by way of an *ex parte* summons, an order from the learned master on 14 January 1992 to add the 2nd respondent as a defendant to the claim although the limitation period stipulated by the Act had already expired before the filing of the claim. The 2nd respondent was duly joined as a party to the proceedings in 1992 on the basis alleged by the

appellant that the limitation period was suspended due to fraud (concealment of information) on the part of the 1st respondent and other public officers employed to the Savanna-la-Mar Hospital.

[10] Kimola eventually died during the course of the proceedings in the court below and the appellant, by the order of the court made 20 January 1997, was permitted to continue the proceedings that were earlier brought by her on Kimola's behalf.

[11] The gist of each party's case presented at trial will now be outlined, starting with the case for the appellant.

The appellant's case

[12] The appellant's case was, essentially, as follows: on or about 4 September 1986, Kimola, then 11 months old, developed a persistently high fever, runny nose and swollen face. The appellant took her to the Savanna-la-Mar Health Clinic where she was given medication. Three days later, her fever continued and the appellant took her to a private medical practitioner who gave her medication and an instruction for her to return two days later. Two days later, upon Kimola's return to the private doctor, the fever had not abated. The doctor increased the dosage of medication and told her to return three days later.

[13] On Kimola's return to the private doctor, as instructed, the fever had still not improved and she was referred to the Savanna-la-Mar Hospital with a note

that a lumbar puncture should be done as meningitis was suspected. Upon the instruction of the private doctor, Kimola was taken to the Savanna-la-Mar Hospital and was admitted.

[14] The appellant contended that no lumbar puncture was performed on Kimola on the date of admission as the 1st respondent refused to perform the procedure. Up to three days later, the procedure still had not been done. She alleged that when the 1st respondent was asked about the reason for the procedure not having been done up to three days after admission, his response to her was that he would not be doing any lumbar puncture and he reprimanded her for taking the child from place to place before bringing her to the hospital.

[15] The appellant's contention was that for 14 days in the hospital, Kimola had obtained no treatment whatsoever. On 28 September 1986, the lumbar puncture was done, 14 days after Kimola's admission, and only after she had collapsed in the bed. Kimola was released from the hospital in October 1986 and she then had physical disabilities, in that, she was unable to walk, speak or sit up and was totally unresponsive. The appellant stated that despite all this, the 1st respondent told her that Kimola would have recovered and that she should be given banana and arrow root porridge which would aid in her recovery.

[16] Kimola sustained brain damage and was treated by a private voluntary organization at the Savanna-la-Mar Health Clinic after her discharge from the Savanna-la-Mar Hospital and was later referred to the Bustamante Children's

Hospital. A year after Kimola's discharge from the hospital, Kimola was examined by a medical practitioner who advised that Kimola would not recover. Kimola died roughly eight years later, on 6 July 1994.

[17] The appellant also contended that she never received a medical report from the 1st respondent or the Savanna-la-Mar Hospital despite repeated requests for one to be furnished to her.

[18] The appellant maintained that Kimola's condition was brought about by the lack of medical treatment by the 1st respondent or the poor medical treatment she received under his care for which the 2nd respondent is vicariously liable as his employer.

The 1st respondent's case

[19] The 1st respondent admitted that Kimola was taken to the Savanna-la-Mar Hospital where she was admitted and seen by him in his capacity as a part–time doctor employed to the Government of Jamaica at that time. She presented at the hospital after she had already been taken to the Savanna-la-Mar Health Clinic and a private doctor. She was referred to the hospital by the private doctor with recommendation for a lumbar puncture procedure to be done because of suspected meningitis.

[20] He denied the appellant's case that Kimola was not given any treatment by him until 14 or so days after her admission. He maintained that Kimola

received the appropriate treatment when she was given, among other things, a lumbar puncture and intravenous antibiotics on the day she was admitted. She also received a second lumbar puncture on 22 September 1986 when she had a seizure. The results of that test were received from a private laboratory in Savanna-la-Mar to which the specimen was taken by the appellant.

[21] According to the 1st respondent, Kimola's condition did not improve and during the first week in October 1986, she was discharged from the hospital with brain damage. He also averred that he was instrumental in getting her treated by a private voluntary organization at the clinic, as well as, at the Bustamante Children's Hospital following her discharge from the Savanna-la-Mar Hospital. At the time when all the records were intact, no one had requested a medical report from him.

[22] He denied negligence or malpractice as alleged against him and that, in any event, the claim was statute-barred, it having been brought outside the one year limitation period stipulated by the Public Authorities Protection Act.

The 2nd respondent's case

[23] The 2nd respondent's case was based on two limbs. The first was that the case was statute-barred under the Act. Secondly, that the 1st respondent is not liable for any negligent act alleged against him because Kimola's condition resulted from the appellant's delay in securing proper diagnosis and treatment of

her illness and the failure of the private doctor to diagnose the type of illness from which she was suffering.

The appellant's reply

[24] The appellant in her reply to the limitation defence raised by the respondents averred for the first time in her pleadings the same facts that she had set out in the *ex parte* summons that went before the learned master in 1992 and which formed the basis on which the order joining the 2nd respondent as a defendant to the claim was made. Essentially, in this regard, she pleaded, among other things, that there was fraud on the part of 1st respondent and/or servants or agents of the Crown that operated to suspend the limitation period under the Act. The fraud was alleged to have been on the basis that the 1st respondent and/or servants or agents of the Crown withheld "every possible information" (including a medical report) from her that would have enabled the action to be filed and that the 1st respondent had given an assurance that Kimola would recover. Also, she averred that she was not aware that the 1st respondent had acted as a servant or agent of the Crown until he had filed his second defence averring the capacity in which he was acting when he treated Kimola.

The respondents' preliminary point of objection at trial

[25] The respondents filed a preliminary point of objection at trial objecting to the trial of the claim on the basis that that it was statute-barred by virtue of the Public Authorities Protection Act and that the court had no authority to extend

time. The appellant, however, raised the point that the limitation period was already suspended by the order of the learned master. She argued that that order had given rise to issue estoppel in relation to the respondents' assertion that the claim was statute-barred. Accordingly, that issue was *res judicata*, having already been decided by the learned master.

[26] After hearing the submissions of the parties, the learned trial judge reserved her ruling on the preliminary point until after the taking of the evidence. She did so on the basis that the issues raised on the preliminary objection would best be resolved following the trial of the claim.

The impugned decision of the learned trial judge

[27] After a consideration of the evidence adduced by the parties and the competing contentions of the parties in the submissions made on their behalf, McIntosh J concluded:

> "This action commenced outside the limitation period provided by the Public Authorities Protection Act and the Court finds no evidence of any fraud which would have prevented the time from running. The suit was therefore statute barred. Even if this insurmountable obstacle did not exist the case as presented is deficient.
>
> The circumstances were unfortunate and the Court is not unmindful of the distress which the plaintiff must have suffered but on the totality of the evidence the plaintiff has not proved on a balance of probabilities that the 1st defendant was negligent and that such negligence resulted in Kimola suffering severe brain damage.

> In the circumstances Judgment for the 1st and 2nd (added) defendants with costs to be agreed or taxed."

The appeal

[28] The appellant, being aggrieved by that decision, filed a notice of appeal that embodied 11 grounds of appeal that are extensively set out in the record of appeal but which, for the sake of economy, will not be detailed at this juncture. Suffice it to say that on the basis of those grounds, she seeks orders from this court as follows:

> "(i) That the said Judgment be set aside and Judgment instead entered for the 1st and 2nd Claimants.
>
> (ii) That the Order for costs be set aside and costs awarded instead to the 1st and 2nd Claimants.
>
> (iii) The specific power which the Court is asked to exercise is that the said Judgment be set aside."

[29] Given the grounds filed, it is recognised that the pivotal feature of the appellant's complaint is with respect to the finding that the action was statute-barred. If the learned trial judge was correct in that finding, then, that would be sufficient to dispose of the appeal. It is for that reason that it is considered appropriate at this time (and in light of the various and comprehensive grounds of appeal that have been filed) to focus attention, firstly, on those grounds that touch and concern the findings relating to whether the claim was statute-barred by virtue of Act. These are grounds one, two and three.

The immediately relevant grounds of appeal

[30] Grounds one, two and three read as follows:

> "(1) The Learned Trial Judge misdirected herself on the issue of the action being Statute-barred. That issue was already decided and an Order granted in the Supreme Court on the 13th day of January, 1992 that the Statute of Limitations was suspended by virtue of the concealed fraud of the Defendants. The Defendants applied by Summons to set aside the said Order made on the 13th day of January 1992 and by Order dated the 24th day of March 1994 a Summons to set aside the said Order was dismissed. The 2nd defendant obtained Leave to Appeal and appealed to the Court of Appeal but on the 6th day of November 1995 the said Appeal was dismissed for Want of Prosecution. The issue before the Learned Trial Judge and to which the Claimant's submissions were directed was rather; was the issue of the action being Statute barred now caught by the doctrine of Res Judicata?
>
> (2) That the Learned Trial Judge having arrived at the decision that the action was Statute-barred that decision would have prejudiced her mind and made her incapable of assessing all other aspects of the evidence in the Claimants' case.
>
> (3) The Learned Trial Judge erred in confusing the real basis of the Claimants' Claim which is founded in Negligence with that of fraud. The Claimants at no time whether on the Pleadings or in viva voce evidence before the Court took upon themselves the burden of proving fraud."

Refusal of the application to amend ground one

[31] Upon the commencement of the hearing before this court, the appellant by a notice of application for court orders, filed on 24 October 2014, sought the

court's permission to amend the grounds of appeal to add an alternative ground to ground one. The proposed ground reads:

> "Alternatively that by virtue of Section 2(1)(a) of the Public Authorities Protection Act [14th May 1942] (Cap 316 Act 6 of 1967) the said action was not statute barred by reason that the alleged negligence caused and/or contributed to the death on the 6th day of July 1994 of the 1st Appellant the said injury or damage having continued throughout her life and time when it ceased on the date of her death being the 6th day of July 1994 and as such time would continue to run for a further year after the injury or damage."

[32] The appellant set out several grounds on which the application to amend the ground of appeal was based. The core ground was that the learned trial judge erred in deciding the preliminary point taken by the respondents that the appellant's case was statute-barred under the Public Authorities Protection Act, as the action commenced outside the limitation period. This application was strenuously opposed by the respondents.

[33] At the end of hearing submissions from both sides, we refused the application and promised then to provide our reasons for so doing in writing as part of our judgment to be delivered upon completion of the hearing of the substantive appeal. In fulfillment of that promise, I now set out my reasons for agreeing with my learned colleagues that the application should be refused.

Reasoning

[34] Section 2(1)(a) of the Public Authorities Protection Act (as it was then) stated:

> "2–(1) Where after the commencement of this Law any action, prosecution, or other proceeding, is commenced against any person for any act done in pursuance, or execution, or intended execution, of any Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Law, duty, or authority, the following provisions shall have effect-
>
> (a) the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within one year next after the ceasing thereof..."

[35] The claim against the 1st respondent was not brought until February 1991, which would have been over four years or so after he had treated Kimola. Notwithstanding this fact, the appellant argued, through her counsel, Mr Hill QC, that the "act, neglect or default" complained of in her statement of case had led to Kimola suffering injury and damage and that the said injury and damage suffered by Kimola continued throughout her life and ceased when she died on 6 July 1994. Therefore, according to learned Queen's Counsel, the alleged negligence caused and contributed to the death of Kimola on 6 July 1994 and so the appellant would have had until 5 July 1995 to bring her claim. As such, the learned trial judge did not properly address section 2(1)(a) the Act as the "injury or damage" referred to in the section would have continued and only ceased in

July 1994 when Kimola died. On that basis, he contended, the action would not have been statute-barred when the writ was filed on 4 February 1991.

[36] According to learned Queen's Counsel, the Act should be read in its natural and ordinary meaning as the words used in the relevant provision are precise and unambiguous. He maintained that when the words of the statute are read in their ordinary and literal meaning, they do reflect the interpretation advanced on behalf of the appellant that at the time the writ was filed there was a continuance of the injury or damage complained of and so the limitation period for bringing the claim had not yet expired when the claim was filed.

[37] Mr Hill strongly urged the court to move away from the restrictive interpretation of the section that has been enunciated in several English authorities, starting with **Carey v Metropolitan Borough of Bermondsey** (1903) 67 JP 447. In **Carey**, the plaintiff was injured due to the negligence of a local authority in repairing a road when he fell over a projection left by the authority's servants. The fall and injury occurred more than six months before the action was brought. At the time the action was brought the plaintiff was still suffering from the injury. The defendants pleaded the statute. The plaintiff's contention was that the injury or damage to her had not ceased when the action was brought and that the words of the section must be given their ordinary meaning. The learned trial judge, Chanell J, decided in favour of the defendants holding that the only case in which the time limit did not apply after the

expiration of six months from the date of the neglect or default was where there was a continuing cause of action.

[38] The learned trial judge's decision was upheld by the Court of Appeal where Lord Halsbury, in affirming the decision, said:

> "In my opinion the judgment of Channell J. in this case was right. The language of s.1 of the Public Authorities Protection Act, 1893, is reasonably plain, and it is manifest that 'continuance of the injury or damage' means the continuance of the act which caused the damage. It was not unreasonable to provide that, if there was a continuation of an act causing damage, the injured person should have a right to bring an action at any time within six months of the ceasing of the act complained of. But that is wholly inapplicable to such cases as the one before us, where there was no continuance of the act complained of, and where the only suggestion is that, in consequence of the negligent act, the plaintiff is not in such a good physical condition as she was before the accident."

[39] In a later case, **Freeborn v Leeming** [1926] 1 KB 160, the question arose as to the meaning of the same statutory provision. In that case, the plaintiff was injured in an accident and on 6 September 1923 was placed under the care of the defendant who was the medical officer at a workhouse infirmary to which he was taken. The defendant negligently failed to diagnose the nature of the plaintiff's injury and made no attempt to give him treatment, which, if given at the time, would have effectively cured him. The plaintiff left the infirmary on 15 October 1923 and ceased to be under the care of the defendant. The plaintiff consulted another doctor who discovered that his hip was dislocated,

but as it was then too late to apply the necessary remedy, the plaintiff's injury was permanent. On 25 April 1924, more than six months after he had ceased to be under the defendant's care, the plaintiff brought his action claiming damages.

[40] It was held on the authority of **Carey**, by which the court held itself bound, that the action was statute-barred by virtue of section 1 of the 1893 Act, it not having commenced "within six months next after the act, neglect, or default complained of". Salter J said at page 164:

> "The words of the Act seem to me to be very plain. It is very easy to imagine cases of hardship and it may well be that by the time a cause of action has accrued, the happening of the damage as a result of the act, it may be too late to sue. But it must be remembered that this Act is obviously intended for the protection of public officers who are defendants. It assumes misconduct, and it is designed to protect public officers even where they have been guilty of misconduct. No doubt it contemplates an "act, neglect, or default" complained of in an action. It seems quite clear that the date from which the period is to run is not the date of the accrual of the cause of action, but the date of the act, neglect or default complained of."

[41] His fellow judges, Bankes and Scrutton LLJ, also shared the same view that 'continuance of the injury or damage' means the continuance of the act which caused the damage as expounded in **Carey.**

[42] Mr Hill, in appreciable detail, pointed out that the restrictive interpretation in **Carey** has been the subject of criticism by judges in subsequent cases as it had started the problem with the interpretation of the section. In asking this court not to apply the restrictive interpretation, he cited for instance, **Huyton**

and Roby Gas Co v Liverpool Corporation [1926] 1 KB 146 at 156; **Julia T Carroll v The County Council of the County of Kildare** [1950] IR 258; **Markey and Another v Tolworth Joint Isolation Hospital District Board** [1900] 2 QB 454; and a case from this court, **Millen v University Hospital of the West Indies Board of Management** (1986) 44 WIR 274. Mr Hill noted that given the clear and unambiguous meaning of the words of the statute, it was not the intent of Parliament for such a restrictive meaning to be adopted.

[43] Miss White, in opposing the application on behalf of the respondents, maintained that the interpretation of the statutory provision advanced by the appellant is unsustainable in the light of the relevant authorities. She noted, in particular, that this court in **Millen** had not departed from the **Carey** interpretation, despite the criticisms of the decision.

[44] She pointed out too that there was no evidence led at trial that could support the assertion being made by the appellant to ground the amendment that there was continuing damage as contemplated by the Act. This is so, she submitted, because the 1st respondent had ceased treating Kimola when she was discharged from the hospital in October 1986 and there is no medical evidence to support any allegation of continuing or further injury to Kimola as a result of the act, neglect or default of the 1st respondent. She maintained that the cause of action based on the appellant's averments would have accrued at the time

Kimola had suffered brain damage which was manifested before her discharge from the hospital.

[45] She relied extensively on dicta from **Anna Hegarty v Francis O'Loughran and Gerald Edwards** [1990] 1 IR 148 to support the point that the cause of action would have started to run when the damage or injury occurred, which would have been 1986, and so the claim in negligence would have been statute-barred.

[46] The arguments advanced by Miss White for refusal of the application on the basis of the interpretation of the statute were not without merit. It is noted that section 2(1)(a) of the Act, except for providing that the limitation period was for one year, had reproduced *verbatim* section 1 of the English Public Authorities Protection Act 1893 in all other respects. Under that latter statute, the limitation period was six months. This was the section under consideration in **Carey** and **Freeborn.**

[47] In **Millen**, Carberry JA, in his customary style, provided an in-depth analysis of the application of the section, its interpretation and its purpose, by reference to the relevant English authorities, including **Carey** and **Freeborn**. That analysis, has, indeed, rendered our task much easier. The facts of **Millen** were, basically, that the plaintiff received both ante-natal and post–natal care at the University Hospital of the West Indies (UHWI) between September 1973 and October 1975. She visited a private doctor in November 1976, who opined that

her treatment at the UHWI was the cause of problems she encountered during delivery and following her discharge from the UHWI. 0n 14 April 1980, the plaintiff issued a writ suing the UHWI for negligence in the treatment of her. The UHWI relied on section 2(1)(a) of the Public Authorities Protection Act in its defence to assert that the claim was statute-barred.

[48] The trial judge had found that the hospital was negligent but that the action was statute-barred by virtue of the Act. The plaintiff appealed against the decision that the Act applied and the UHWI also cross-appealed the findings of negligence. The primary questions for the court, which are relevant for present purposes, were whether the Act applied to the UHWI and, if so, whether UHWI was entitled to the protection of the Act. The court found, *inter alia*, that the hospital could claim protection under the Act and that the action was statute-barred by virtue of section 2(1)(a) of the Act.

[49] Carberry JA, in dealing with the question as to when time would have started to run in that case, recognised the hardship that the restricted interpretation could potentially cause. He opined at page 292:

> "…The section as worded is capable of causing great hardship in cases in which the occurrence of damage is necessary to complete the cause of action, eg negligence. In cases where the act is followed by damage which occurs more than one year after the act or default in question, a plaintiff may well lose his remedy before his cause of action accrues; see Atkin LJ in *Huyton & Roby Gas* Co *v Liverpool Corporation* [1926] 1 KB 146. Further, the words 'continuance of injury or damage' have received a restricted

> interpretation. It is not open for the plaintiff to say: 'I am still feeling the effects of the injury you inflicted on me' (**Carey v Bermondsey Metropolitan Borough** (1903) 20 TLR 2)…"

The learned judge later stated that "'[c]ontinuing injury or damage' has been limited to cases where there is a continuance of the original act, eg in cases of subsistence as and when it occurs".

[50] Carberry JA, with the concurrence of the other members of the court (Carey and Ross JJA), found that the most favourable relevant time that could have been chosen for the plaintiff, as the date when the cause of action accrued, was the date on which she had ceased to be a patient of the hospital. They concluded that the writ filed on 14 April 1980 was caught by the Act and by the ordinary limitation period of six years and so the action was statute-barred.

[51] This court, therefore, as far back as 1986, being roughly 30 years ago, had recognised the restrictive interpretation established by **Carey** and the problems that such interpretation may cause but there was no departure from it on those facts. The court made it clear then, on the authority of **Carey**, that it was not open to the plaintiff to say, 'I am still feeling the effects of the injury you inflicted on me". That is exactly what the appellant has been saying in the instant case that Kimola, up to the time of her death, was still feeling the effects of the injury allegedly caused by the 1st respondent and so time would have

continued to run for one year after her death for the action to be brought. This contention is not accepted.

[52] I accept on the authority of **Anna Hegarty v Francis O'Loughran**, as pointed out by Miss White, that the period of limitation does not begin to run unless and until a complete and available cause of action first comes into existence and that is when a "provable personal injury, capable of attracting compensation, occurred to the plaintiff". In this case, the cause of action in negligence would have accrued, at latest, from the date Kimola was discharged from the care of the 1st respondent and the Savanna-la-Mar Hospital in October 1986. After that, the 1st respondent's treatment of her (and so any act, default, or neglect on his part) would have already occurred and definitively ceased by that date and the resulting damage to her would have been known. There would have been by then a provable personal injury capable of attracting compensation based on the appellant's assertion as to what she knew happened in the hospital from the time Kimola was admitted up until her discharge from the 1st respondent's care.

[53] In the light of the authorities and given the facts of this case, there would have been absolutely no need or proper basis for this court to depart from the established principle that has stood the test of time that "continuing injury or damage" has been limited to cases where there is a continuance of the original act, neglect or default complained of. The interpretation advanced by Mr Hill for

application to the facts of this case would have had the effect of nullifying the intended purpose of the limitation period prescribed by the Act.

[54] In **Julia T Carroll v The County Council of the County of Kildare**, Maguire CJ, in examining the application of the restrictive interpretation, made a useful observation, when he stated:

> "It is true, as Atkin L.J. said, that to insist on action being brought within six months of the act, looked at in one way, is unfair. But in any action for damages for personal injuries it is accepted that a plaintiff can only recover once and for all and the possible hardship on a plaintiff of being compelled prematurely to pre-estimate the damage is very often present. If, however, a plaintiff in an action for personal injuries were entitled to wait till the final physical results of his injuries were discoverable the obvious value of prescribing time limits within which defendants must be sued would be lost. It must be remembered that the intention of the Legislature in enacting s. 1 of the Public Authorities Protection Act, 1893, was to secure that actions against persons for acts, neglects, or defaults in the performance of a public duty should be promptly brought."

[55] The proposed alternative ground of appeal that the appellant wished to advanced was without any realistic prospect of success and, therefore, was bound to fail. There was thus no useful purpose that could have been served in permitting that amendment. On that basis alone, the application was untenable.

[56] The application was, in any event, objectionable, on another basis contended by Miss White, and that is, that the appellant was raising the point for the first time on appeal, without any evidential basis to support it. Learned

counsel argued that there would have been considerable prejudice to the respondents if the appellant was allowed at this late stage to introduce a new point of law without any evidential basis for it.

[57] In **Wilson and Another v Liverpool City Council** [1971] 1 All ER 628 (cited by Miss White), the 'well-known rule of practice' was reiterated that if a point was not taken in the court of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter finally without injustice to the other party and without recourse to a further hearing in the court below.

[58] The rule, of course, has an element of discretion that would allow for deviation from it in appropriate circumstances, as their Lordships, themselves, pointed out. The instant case, however, is not an appropriate case in which any exception to the rule could have been made. It would have been unfair to the respondents to permit such a ground to be argued without any evidential base to support it and at this late stage in the proceedings.

[59] For the foregoing reasons, therefore, I concluded that the application to amend ground one of the appeal should be refused. I will now proceed to treat with the relevant grounds of appeal, as filed.

Ground one

Whether the learned trial judge misdirected herself on the issue of the action being statute-barred

[60] The appellant, through Mr Hill, contended that the action was not statute-barred as found by the learned trial judge because that issue was decided by the order of the learned master that was made on 14 January 1992 and was thus *res judicata* by the time of the trial. In arriving at a determination of this question, it is necessary to use, as a starting point, the proceedings that were before the learned master that led to the order being made and on which the appellant sought to rely in grounding the claim of *res judicata*. A detailed examination of those proceedings is warranted.

Earlier proceedings before the master

[61] On 3 December 1991, the appellant, by way of an *ex parte* summons, sought an order that the 2nd respondent be joined as 2nd defendant to the claim notwithstanding the fact that the limitation period under the Public Authorities Protection Act would have expired. At the time of the application, the 1st respondent was the only defendant to the claim. In the statement of claim filed by the appellant and served on him, there was no averment relating to the Act, albeit that more than one year would have elapsed since Kimola was treated by the 1st respondent and discharged from the Savanna-la-Mar Hospital. The 1st respondent, in his defence to the statement of claim served on him raised the limitation defence in reliance on the Act that the claim was statute-barred.

[62] It was in response to that defence of the 1st respondent that the appellant by *ex parte* summons sought to add the 2nd respondent as a party to the proceedings. The grounds for bringing that application were that:

> "(a) The Limitation period was suspended by reason of the fact that the Plaintiff did not know and could not with reasonable diligence have known that the act giving rise to the action herein was capable of doing so until expert medical opinion was obtained and this was not obtained until Medical Report dated 3rd December, 1990 was received.
>
> (b) That up to the time when action was filed herein by reason of the combined fraud of the servants or agents of the Crown in withholding every possible information from the Plaintiffs that could have enabled the action to be filed the capacity in which the Defendant dealt with the first Plaintiff was not known and could not with reasonable diligence have been known and it was not until the Defendant filed a second Defence herein dated the 11th day of November, 1991 that the Defendant disclosed that he acted at the material time as a servant or agent of the Crown."

[63] The learned master granted the order sought in the *ex parte* summons to add the 2nd respondent for the same reasons set out by the appellant in the summons. In fact, she expressly recited paragraphs (a) and (b) above in the exact terms of the summons. She also stated that she granted the order "upon hearing Mr. Norman O. Samuels, Attorney-at-law on behalf of the Plaintiffs and upon referring to the Affidavits of the 2nd Plaintiff and that of the said Norman O.

Samuels sworn to on the 2nd day of December, 1991 and the 3rd day of December, 1991, respectively and the several exhibits attached to each."

[64] It is, therefore, clear on the face of the order that the learned master did not hear from the respondents or anyone acting on their behalf, as the proceedings were *ex parte*. There were also no notes of the proceedings and no reason was given for the decision to grant the order in terms of the summons.

[65] The 2nd respondent made an application to set aside that *ex parte* order, which was heard on 24 March 1994. The learned master, after hearing submissions of the attorneys-at-law on behalf of the parties, and after considering the affidavit of the 2nd respondent's attorney-at-law and the affidavits relied on by the appellant in support of the earlier *ex parte* application, ordered as follows:

> "(a) Summons to Set Aside Exparte Order dated the 1st day of July, 1992 be and is hereby dismissed.
>
> (b) Leave to Appeal granted."

[66] The 2nd respondent, although having filed the appeal, failed to pursue it resulting in it being struck out for want of prosecution. The position is, therefore, that the order on the *ex parte* summons remained for all intents and purposes, that is to say that the 2nd respondent remained a party to the proceedings on the grounds that the limitation period was suspended by reason of fraud (concealment of material facts).

The submissions

[67] Mr Hill contended that at the hearing of the application to set aside the *ex parte* summons that was brought by the 2nd respondent, which was heard *inter partes*, the issue would have been determined then and so the failure of the respondents to pursue the appeal means that the order of the learned master had finally determined the issue. Accordingly, *res judicata* would have applied in relation to that issue at the trial of the claim before McIntosh J. As such, he argued, McIntosh J erred in law when she found that the action was statute-barred as that issue was, "already decided between the parties, who were thereby bound by the previous decision of the Court".

[68] Learned Queen's Counsel cited in support of his arguments on this point, the well-known authorities of **Henderson v Henderson** [1843-1860] All ER Rep 378; **Yat Tung Investment Co Ltd V Dao Heng Bank Ltd and Another** [1975] AC 581 and **Fidelelitas Shipping Co Ltd v V/O Exportchleb** [1966] 1 QB 630. He also relied on **Gloria Edwards v George Arscott and Another** (1991) 28 JLR 451 and **Badar Bee v Habib Merican Noordin and Others** [1909] AC 615, at 622 & 623.

[69] Miss White did not agree that *res judicata* applied for several reasons, noted by her, primarily of which was the fact that the order was made at an *ex parte* hearing. The hearing was convened for the sole purpose of adding the 2nd respondent as a party to the substantive claim and which did not involve the 2nd

respondent. She maintained further that the learned master at that hearing did not have the benefit of full pleadings in the case as would have been before the learned trial judge because up to then, the amended defence of the respondents and the reply of the appellant, in which the issue of suspension of the Act for the reason of fraud was raised as an issue between the parties, had not yet been filed.

[70] She submitted that in such circumstances, McIntosh J was not precluded by the previous order of the learned master to adjudicate upon and to determine the issue. The learned trial judge, she said, was correct to find that the claim was statute-barred.

***Res judicata* : the law**

[71] In considering the contention of the appellant on appeal, it is recognised that two separate but inter-related issues, necessarily, have arisen for consideration and those are: issue estoppel (which was raised and argued by counsel for the appellant below) and the doctrine of *res judicata*. A brief insight into the law applicable to the operation of these two concepts is warranted.

[72] The learned writers of Halsbury's Laws of England, 4th edition, Volume 16, paragraph 1527, in speaking of *res judicata*, noted that the doctrine is not a technical one applicable only to records but is a fundamental doctrine of all courts that there must be an end to litigation. They also noted that usually *res judicata* is pleaded by way of estoppel and so ordinarily, it is conveniently treated

as a branch of the law of estoppel. The trend, it is said, has been to treat *res judicata* as arising on the plea of three forms of estoppel: the two traditional ones being "cause of action estoppel" and "issue estoppel" and the third being an extension of the doctrine of estoppel enunciated in **Henderson v Henderson**, by Vice-Chancellor Sir James Wigram. This third type is, conveniently, called "**Henderson v Henderson** estoppel".

[73] It is said by some legal practitioners, however, that *res judicata* is different from estoppel in the sense that *res judicata* is a matter of procedure while estoppel is a matter of evidence. Despite the different classifications, however, one thing that is clear is that the estoppels and the doctrine of *res judicata* do operate towards the attainment of the same result, which is, to put an end to litigation in the interests of justice. The fundamental similarity among them, therefore, lies in the fact that they operate to avoid re-litigation of a matter or an issue that would amount to an abuse of process with the underlying public interest being that there must be an end to litigation.

[74] Given the arguments raised on behalf of the appellant, both here and in the court below, it is obvious that no question as to cause of action estoppel arises. The issue to be resolved relates, primarily, to the question of whether issue estoppel or **Henderson v Henderson** estoppel would apply to bar the respondents from relying on the limitation defence.

Issue estoppel

[75] Issue estoppel, as formulated in Halsbury's Laws of England, 4th edition, Volume 16, paragraph 1530 (based on the authorities cited therein) is this: "[a] party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him". Even if the objects of the first and second actions are different, the findings on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision, that is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law.

[76] Some authorities have explained it as a form of estoppel that arises where a particular issue, forming a necessary ingredient in a cause of action, has been litigated and decided and one of the parties seeks to re-open it in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant. See, for instance, **Arnold v National Westminster Bank Plc (No 1)** [1991] 2 AC 93, 105 and **Thoday v Thoday** [1964] P 181, 198.

Henderson v Henderson estoppel

[77] The principle giving rise to **Henderson v Henderson** estoppel, was that expressed by Wigram V-C (in that case at pages 381 and 382) thus:

> "…In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that ligation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time..."

[78] Succinctly stated, the principle is that a party cannot in subsequent proceedings raise a ground, claim or defence which, upon the pleadings or the form of the issue, was open to him in the former one: Halsbury's Laws of England 4th edition, Volume 16 at paragraph 1533.

[79] In **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another** their Lordships, in dealing with the application of the doctrine, noted in embracing the **Henderson v Henderson** principle at page 590:

> "…[T]here is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."

[80] In **Fideletas Shipping Co. Ltd v V/O Exportchleb** at page 640, Lord Denning MR stated the kernel of the principle this way:

> "…The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour) he may find himself shut out from raising that point again, at any rate where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances…"

Analysis and findings

[81] The question that now arises for consideration is whether the issue raised by the appellant on the *ex parte* proceedings between 13 and 14 January 1992 before the learned master that fraud had operated to suspend the limitation period under the Public Authorities Protection Act was litigated in those proceedings so that the respondents would have been estopped from raising the statute of limitations as a defence at trial of the claim before McIntosh J.

[82] The authorities have established that for issue estoppel to apply there are certain conditions that must exist. They are as follows: (i) the issue in question must have been decided between the same parties (or their privies) in a court of competent jurisdiction; (ii) the issue must have been once "distinctly put in issue"; (iii) the issue must have been "solemnly and with certainty determined" against the party in relation to whom the estoppel is being invoked; and (iv) the issue must be embodied in a judicial decision that is final.

Whether issue of fraud decided between the same parties

[83] In considering whether issue estoppel arises, the critical point noted is that the proceeding was *ex parte,* that is to say for emphasis, not only done in the absence of the respondents but without notice to them. Even more significantly, the 2nd respondent, who would have been affected in its statutory defence by such an allegation was not a party to the claim at the time when the issue was raised by the appellant on the *ex parte* summons and the order made by the learned master. In fact, it was as a consequence of that *ex parte* order, that the 2nd respondent was made a party to the claim.

[84] I do have a difficulty accepting the contention of Mr Hill that the learned master, having dealt with the subsequent application brought by the 2nd respondent to set aside the order made on the *ex parte* summons, would have determined the issue of concealed fraud between the parties at that *inter partes* hearing. Firstly, the application to set aside the order adding the 2nd respondent was the subject of an application brought by the 2nd respondent only. The 1st respondent was not a party to that application. That application was, therefore, formally between the 2nd respondent and the appellant. The 1st respondent who would have been the party against whom the fraud was alleged, and from whom evidence would have had to come to admit or rebut the assertions of the appellant, gave no evidence in those proceedings as is seen from the order of the learned master made on that application. Furthermore, he was not given any opportunity to cross-examine the appellant on her factual assertions.

[85] In addition, there is nothing before this court to show that the learned master had revisited the issue of fraud and made a determination on that question at the *inter partes* hearing based on the terms of the order she made on the application that was before her. She simply refused to set aside the order made on the *ex parte* summons as her order shows. There is no recorded finding in relation to the issue of concealed fraud resulting from that new hearing. Also, we have not been provided with any records of the basis on which she had refused to set aside the *ex parte* order. One thing is clear from the record is that whatever her reasons for doing so might have been, it was not based on any evidence elicited by or from the 1st respondent (who was the critical defendant in response to this allegation of fraud).

[86] I am guided by the principle stated in Halsbury's Laws of England, 4th edition, Volume 16 at paragraph 1527 that to decide what questions of law and fact were determined in the earlier judgment, the court is entitled to look at the judge's reasons for his decision and his notes of evidence and is not restricted to the records. The learned writers went on further to state that the parties are estopped by the findings of fact involved in the judgment and the facts must appear from the judgment as delivered to be the ground on which it was based (see paragraph 1527 and footnote 7).

[87] In this case, there are no such findings of facts arising from any *inter partes* hearing upon which this court could hold that the respondents are bound

by the learned master's orders so that they cannot rely on the Act for protection. The learned master had refused to set aside the *ex parte order* which means that the *status quo* would have remained the same with all its implications. More specifically, the order that was allowed to stand would still have been made in the absence of the respondents, and so without their knowledge and input. The nature and effect of that order would have remained unchanged even after the end of what Mr Hill had described as an *inter partes* hearing.

[88] In effect, the only party to the proceedings in which the decision was made to add the 2nd respondent for reason of fraud, was the appellant and that was the decision that the learned master refused to set aside. It, therefore, means that the issue that would go to the very heart of the respondents' statutory defence was not an issue raised in the *ex parte* proceedings between the same parties and it was not investigated and determined in any *inter partes* proceedings to which they were all parties. It cannot be said then that the issue of fraud had been determined between the same parties to the proceedings. On this analysis, the first requirement for invocation of issue estoppel or the doctrine of *res judicata* based on issue estoppel would not have been satisfied.

[89] This, by itself, would have been fatal to the appellant's reliance on *res judicata* based on the *ex parte* order, because a fundamental pre-requisite for the operation of the doctrine would have been absent. I have gone further, however, in my analysis and found that all the other conditions necessary to

ground issue estoppel would also not have been present in the circumstances of this case.

Whether issue of fraud "distinctly put in issue" and "solemnly and with certainty" decided against the respondents

[90] The second principle for a successful invocation of issue estoppel or *res judicata* based on it is that it must be shown that the party to be estopped is seeking to re-litigate a precise point which had once been distinctly put in issue in an earlier proceeding and which has been solemnly and with certainty determined against him. It must be shown that the matter on which the decision was alleged to have been made in the earlier action was one that had come directly (not collaterally or incidentally) in issue in the first action being relied on (see Halsbury's Laws of England, 4th edition, Volume 16, paragraph 1530).

[91] Again, since the first proceedings before the learned master on which the order was made were *ex parte*, the respondents had not directly and distinctly joined any issue with the appellant in those proceedings. In fact, a chronology of the pleadings of the parties shows that it was not until after the *ex parte* summons was filed and the order granted by the learned master that the appellant, in reply to the defence of the respondents, had stated that fraud had suspended the Act. So at the time the learned master granted the order, no pleading alleging fraud and the suspension of the Act was included in the appellant's statement of case that was served on either of the respondents. The fact that she refused an application to set aside this order means that the *inter*

partes hearing of the application to set aside had not changed the initial order that was made and its ramifications.

[92] The respondents were, therefore, unaware of the issue of fraud raised by the appellant and so were not given an opportunity to join issue with the appellant and to be heard. It cannot be said then, given the nature of the proceedings at which the decision was taken, that the issue of fraud and suspension of the limitation period under the Act was "distinctly put in issue" between the appellant and any of the respondents in the earlier proceedings.

[93] For the same reasons, it cannot be said too that the issue as raised in that context and in that forum was "solemnly and with certainty determined" against the respondents. It is clear from the nature of the proceedings and the terms of order that the learned master, in the face of the involuntary absence of the respondents, acted purely on the un-served summons and untested affidavit evidence of the appellant and her attorney-at-law in making her order that the 2nd respondent was to be added as a defendant on the ground that fraud had suspended the operation of the Act.

[94] This conclusion as to the existence of fraud, which is a serious factual and legal contention, was arrived at without the respondents having been given notice of the proceedings and an opportunity to be heard. All that the learned master would have had before her at the time she made the order was the case advanced on paper by the appellant which the respondents were not given an

opportunity to challenge. So, the mere fact that they were not parties to the proceedings at which the order was made, which was not by their own act or default, means that the issue could not have been "solemnly and with certainty" decided against them so as to estop them from raising in subsequent proceedings, in which the appellant is a party, the defence that is available to them in law.

[95] So, in effect, the allegation of fraud and the respondents' right to rely on the Public Authorities Protection Act is not shown to have been litigated and solemnly determined definitively and with certainty by the learned master on the *ex parte* summons or at the subsequent hearing held to deal with the application brought by the 2nd respondent to set aside the order made on the *ex parte* summons. So, another requirement necessary for issue estoppel to arise would, therefore, not have been satisfied.

Whether issue decided and embodied in a judicial decision that was final

[96] It follows from the foregoing analysis that there was no fulfillment of the final requirement for issue estoppel to arise and that is that the issue being relied on must have been definitely decided between the parties and embodied in a judicial decision that was final. There were no proceedings before the learned master involving all the parties to the claim in which the issue of fraud that was raised by the appellant was pleaded (as required), investigated and determined on the merits. There is no way that her *ex parte* order that she refused to set

aside could have been taken as embodying a final decision on the matter so as to bind the respondents. Issue estoppel, in its classic form, cannot avail the appellant to ground *res judicata*.

Henderson v Henderson estoppel

[97] In terms of the appellant's reliance on **Henderson v Henderson** estoppel, it can easily be stated that such reliance is, also, misplaced. That principle requires the parties to the litigation to bring forward their whole case in one proceeding and to put forward every point, which properly belongs to the subject of the litigation between them and which they, exercising reasonable diligence, might have brought forward at the time. It is obvious that this estoppel is predicated on the first requirement that was discussed above that the prior proceedings would have had to involve the same parties who are in the subsequent proceedings.

[98] In this case, none of the respondents was a party to the *ex parte* proceedings before the learned master and so none of them was in a position to put forward their case in relation to the limitation defence and, more particularly, on the issue whether fraud had suspended the operation of the Act. In other words, it was not open to either of the respondents in the proceedings before the learned master to raise their defence and to seek to respond to the charge that fraud had suspended the operation of the Act.

[99] **Henderson v Henderson** estoppel would not apply to *ex parte* proceedings for obvious reasons. This is, simply, because a party who has not been served notice of proceedings and who has not been given the right to be heard could not admit any fact asserted so as to be bound by that admission or to put forward his own case in rebuttal, as he was not given an opportunity to do so. It means that in the instant case, the respondents could not have put forward their defence to the claim and defend their right to the protection afforded them by the Act.

[100] I cannot envisage how the court, in the interests of justice, could hold a person perpetually bound by an adverse finding of unlawful conduct made in his absence when he had no knowledge that such accusation was leveled at him and he was not given an opportunity to be heard, which would include the right to cross-examine his accuser. Any such course adopted by the court would go against the fundamental rules of natural justice.

[101] In **Bastion Holdings Limited and Another v Jorril Financial Inc** [2007] UKPC 60, their Lordships noted at para. [39]:

> "[39] The essential requirement in litigation if adverse findings are to be sought against a party, and particularly if the proposed findings are to be based on allegations of fraud, deception or dishonesty, is that the party should be given prior notice of the allegations and a sufficient opportunity to challenge them and submit evidence, if so advised, in answer to them. Rules of court prescribe how this is to be done where the allegations are part of a

> Plaintiff's case against the Defendant, or, for that matter, a counter-claiming Defendant's case against the Plaintiff…"

There would have been breach of that fundamental procedural requirement to the detriment of the respondents as they would not have been placed in a position to put forward their case in response to such serious allegations.

[102] This leads me to conclude that **Henderson v Henderson** estoppel does not arise in the circumstances of this case to assist the appellant to bar the respondents from relying on the limitation defence afforded them by the Act.

The effect of the failure of the appellant to plead concealed fraud in the statement of case

[103] Apart from the proceedings before the learned master, in which the order was made, having been conducted in the absence of the respondents and without their knowledge, the assertions made in the summons that resulted in the granting of the learned master's order were not, at the time, pleaded in the appellant's statement of claim that was served on the respondents. As already indicated, it was after the order was made that the appellant had raised it in her reply. So, when she presented her case to the learned master on the *ex parte* summons, there was nothing in the statement of case that had raised concealed fraud or any issue as to the suspension of the limitation period. The order would simply have been made on the *ex parte* application to join the 2nd respondent and the affidavits filed in support of that application and not on any pleadings in the substantive claim.

[104] In **Dow Hager Lawrance v Lord Norreys and Others** (1890) 15 App Cas 210 (a case considered by the learned trial judge), the English court in treating with the issue of concealed fraud, which was raised in that case in the context of the Statute of Limitations (3 & 4 Will 4, c 27), established that concealed fraud must not only be proved by the claimant but must be specifically pleaded in the statement of claim. The headnote reads, in so far as is relevant:

> "In a case of concealed fraud within sect. 26 of the Statute of Limitations…, it is not enough to prove a concealed fraud; the plaintiff must shew that he or some person through whom he claims has been by such fraud deprived of the land sought to be recovered, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought."

It, then, goes on to state:

> "…[G]eneral averments of fraud are not sufficient: the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the deprivation, and excluding other possible causes."

[105] These principles were borne in mind by the learned trial judge, albeit that the Public Authorities Protection Act is not in the same terms as the Statute of Limitations that was under consideration in that case. She, however, found it useful, apparently, because of the issue of concealed fraud that was being relied on by the appellant to oust the respondents' defence. It is important to note, however, that in the absence of such pleadings in the appellant's statement of

case at the time she applied to the learned master to add the 2nd respondent as a defendant, there would have been no triable issue on the writ at that time concerning the allegation of fraud and its effect on the limitation period.

Issue of concealed fraud emerged as a triable issue on the pleadings

[106] It was after the allegation of concealed fraud was pleaded in the appellant's reply to the limitation defence of the respondents that the issue would have arisen between the parties. Having asserted such a fact, it would have also been incumbent on the appellant to strictly prove it. This could only have been properly done within the context of a trial involving the parties and not in the *ex parte* proceedings.

[107] The trial of that issue would have been necessary because the limitation defence provided by the Public Authorities Protection Act is an absolute defence. The respondents would have had what the authorities describe as an 'accrued right' to plead the time bar established by the Act after the lapse of the statutory period. That right could not be taken away from them by a decision made in their absence when they were not given an opportunity to be heard and especially when the 2nd respondent was not yet a party to the proceedings in which the decision was made. So whether there was conduct on the part of the 1st respondent that could have deprived him of the protection of the Act was a triable issue.

[108] It should be noted, too, within this context that the Act has made no allowance by its express terms for the limitation period prescribed by it to be suspended on account of fraud or for any other reason. Given the absence of express provisions in the Act concerning the effect of concealed fraud on its operation, it was, thus, a novel issue raised by the appellant that would have warranted, in the interests of justice, some input from the respondents who would have been the ones to be adversely affected by the ruling of the learned master. The issue raised was plainly triable and the respondents were entitled to be heard on it as a matter of fairness.

[109] In **Lemuel Gordon v The Attorney General** (1997) 51 WIR 280, the Privy Council considered the meaning of the words "act done in pursuance, or execution or intended execution…of any public duty" as used in the Act. Their Lordships endorsed the dictum of Lord Finlay in **Newell v Starkie** (1919) 83 JP 113 at page 117 that the Act will not necessarily apply if it is established that the defendant public servant had acted, inter alia, unlawfully or in abuse of his statutory and legal authority. It was made clear by their Lordships that section 2(1) of the Act did not accord protection to police officers (like other persons in the public service) when they were not acting bona fide in the execution of their duty. They, however, opined that the issue as to whether the police officers in that case were not acting bona fide in the execution of their duties could not have been resolved without a trial.

[110] So, by parity of reasoning, it may be said that where an allegation of fraud is raised as a ground to deprive a public officer of the protection of the Act, as in this case, it is a serious allegation that goes to the right of the public officer to raise the statute as an absolute defence. It means that such a serious allegation would, necessarily, warrant investigation and definitive determination by a court of competent jurisdiction. It must be viewed as a triable issue.

[111] It follows, then, that the issue as to whether the claim was statute-barred was a triable issue that properly fell for the determination of the learned trial judge before whom the issue was distinctly and directly raised on the pleadings put forward in the action to which the respondents and the appellant were parties. The Privy Council had made it clear in **Honiball & Brown v Alele** (1993) 30 JLR 373 (notably within the context of contested proceedings) that a "motion supported by affidavit evidence is not an ideal way of defining or trying issues of fraud and misrepresentation". See also similar views expressed by this court in **Beverley Harvey and Another v Gloria Smith and Another** [2012] JMCA Civ 29 at paragraphs [39] and [43] in relation to the use of fixed date claim form (within the new procedural code) in cases alleging fraud. As my learned brother, Brooks JA, opined in that case, the more appropriate forum for the trial of substantive claims involving allegations of fraud is by way of cross-examination in open court.

[112] It may be said, with even greater force, that an *ex parte* summons bearing such allegation of fraud, backed by un-served and, therefore, unchallenged affidavit evidence that was considered in chambers, would have been a wholly improper and unacceptable way of defining, trying and determining the allegation of fraud raised by the appellant in this case. This was, indeed, a matter for trial on the writ and pleadings in open court as no exceptional circumstances, prima facie, would have existed to justify a departure from that established procedure.

[113] It seems safe to conclude that in the circumstances of this case, the issue of fraud, which was raised on an *ex parte* summons (and not on the writ and accompanying pleadings of the parties), could not have been properly and competently tried in chambers by the learned master on the untested affidavit evidence of the appellant. Indeed, it would be unfair (including being unfair to the learned master) for this court to hold that the learned master had conducted a trial of fraud in the interlocutory proceedings and had finally and conclusively determined the issue. Accordingly, the learned master's *ex parte* order cannot be taken as being determinative of the issue that the claim was not statute-barred as a result of concealed fraud.

The effect of the 2nd respondent's failure to pursue the appeal of the learned master's order

[114] Mr Hill had argued too that the dismissal of the 2nd respondent's appeal for want of prosecution means that the issue was caught by the doctrine of *res*

judicata. He maintained that the ruling of the learned master not having been appealed against in due time, the respondents could not challenge the ruling in the substantive matter and cannot now challenge the order before this court. He prayed, in support of this argument, the Canadian case, **David Diamond v the Western Realty Company and Others** [1924] SCR 308. In that case it was stated, among other things, that an interlocutory judgment, which definitely decides a question of law and from which no appeal is taken, may be *res judicata* when the question is raised between the same parties even in the same action.

[115] Learned Queen's Counsel also cited **Badar Bee v Habib Merican Noordin and Others** in which Lord Macnaghten opined at page 623:

> "It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time."

[116] Regrettably, those cases cited by learned Queen's Counsel are of no assistance to the appellant. This is so because in the instant case, even though the order was made on an interlocutory application, none of the conditions necessary to invoke an estoppel or *res judicata* existed as already found because the proceedings were *ex parte* and so there was no question that could have arisen between the parties in relation to concealed fraud that could have formed the subject matter of an appeal. As such neither issue estoppel nor *res judicata*

would arise to avail the appellant on the basis that there was no appeal arising from the *ex parte* order.

[117] This conclusion finds sturdy anchor in the reasoning and opinion of the Privy Council in **Administrator General for Jamaica v Rudyard Stephens and Others** (1992) 41 WIR, 238. A brief insight into the facts of the case, relevant to this particular issue, should prove helpful. The facts, as outlined, were as follows: The appellant was the administrator of the estate of a deceased who had entered into a contract for sale of a parcel of land in 1978. The appellant was sued in an action brought in 1984 in respect of specific performance of that agreement. Leave to enter judgment in default was granted to the plaintiff in the action but no judgment was entered. In 1988, the appellant, after various other applications in the matter, sought leave to file his defence out of time which was dismissed. The appellant appealed that decision but later discontinued the appeal and sought directions as to the specific performance of the agreement.

In a second action relating to the same land, the appellant was joined as a defendant. In his defence in the second action, he sought to raise a point not raised in his defence to the earlier action. That second defence was struck out. He appealed that order and then withdrew the appeal.

Following that, specific performance of the agreement, among other things, was ordered by the court. The appellant appealed against that order, raising a point

not raised on his earlier defences that had been struck out and not pursued on his earlier appeals of those orders. The point he sought to raise was that the 1978 agreement, in respect of which specific performance was granted, was void.

[118] His appeal was dismissed by this court on the basis that this issue was determined against him upon the application of the doctrine of *res judicata*. On appeal to the Privy Council, their Lordships accepted the argument that *res judicata* based on cause of action estoppel and issue estoppel did not arise. Their Lordships said (in so far as is relevant for immediate purposes):

> "In a most able argument counsel on behalf of the appellant has criticised the reasoning of the Court of Appeal submitting they have confused res judicata based upon cause of action estoppel with res judicata based on issue estoppel. **Counsel rightly points out that no question of issue estoppel can arise in this case because the question whether the 1978 agreement was void is an issue that has never been investigated or determined by the court…"**(Emphasis mine)

Their Lordships, then, stated further:

> "The ground upon which their Lordships uphold the decision of the Court of Appeal is neither that which is technically known as cause of action estoppel nor issue estoppel but it is founded upon the same principle, namely that there must be an end to litigation."

[119] I have raised all this to say that the *ex parte* order of the learned master cannot give rise to any estoppel and/or *res judicata* in the circumstances even though the 2nd respondent had not pursued the appeal. This is so because the issue of the suspension of the limitation period by reason of fraud had not been

investigated and determined by the learned master on the merits of the *ex parte* summons or subsequently in the hearing of the application to set it aside.

[120] The only other recourse that the appellant would have had to take in order to bar the respondents from relying on the Act would have been to successfully raise abuse of process on the broad basis that there should be an end to litigation. However, even with that, she would have encountered insurmountable difficulties because of the nature and effect of the earlier proceedings on which she is relying to ground *res judicata*.

[121] In **Administrator General v Rudyard Stephens,** their Lordships held that there was abuse of process although there was no hearing on the merits and albeit that *res judicata* did not apply. They based their decision on the broader principle that there should be an end to litigation. They made some salient points in concluding that there was an abuse of process in that case that managed to prove quite instructive in the consideration of the instant case. Their Lordships noted: (1) the appellant in that case had ample opportunity to raise his defence and to challenge the decisions at first instance, which had gone against him and had chosen not to take advantage of those opportunities;(2) it was far too late to raise the defence yet again; (3) in the absence of radically altered circumstances since the decisions on interlocutory proceedings, it would have been most oppressive to the other parties to the litigation to allow the appellant to revive the defence; (4) there comes a time when it is oppressive to allow a

party to litigation to re-open a matter that had been judicially determined against him in interlocutory proceedings; (5) there must be an end to litigation; and (6) the case having been in the courts for a decade or so, it was time for it to be brought to an end.

[122] In considering the circumstances of this case within the context of those observations made by their Lordships, it cannot be said that the respondents had been given any opportunity, outside of the trial before McIntosh J, to put forward their defence and to answer to the appellant's allegation of fraud. Also, there was no judicial decision made against them in any proceedings to which either of them was a party. Even more importantly, the proceedings had not reached a point where it could be said, with all honesty and fairness, that the conduct of the respondents' case was oppressive to the appellant. In the end, the case had not reached any stage where it could fairly be said that there should have been an end to litigation of the issue with the learned master's orders.

[123] The failure of the 2nd respondent to pursue the appeal in all the circumstances of the case cannot be sufficient to ground *res judicata* on any estoppel (as the issue was never investigated and determined prior to the trial) and neither can it be said that there was an abuse of process on the basis of the underlying public interest that there should be an end to litigation. The learned trial judge was correct, in all the circumstances, to treat with the issue of

whether the Act was suspended on account of fraud in her determination of the defence that the claim was statute-barred.

[124] The learned trial judge, after a trial of the case, having taken into account all the evidence presented by both sides and the contention of the appellant that fraud had suspended the operation of the Act, concluded that fraud was not made out on what was presented before her. She made the following findings:

> "The plaintiff would have had knowledge within a year of the alleged negligence or access to sufficient information to enable her to file a suit. Her evidence is that she was at the hospital daily with Kimola and knew that no treatment had been given to the child.
>
> The absence of a Medical Report preventing the filing of suit is without merit. Kimola was obviously ill, she was deprived of proper treatment at the hospital and the fact that the plaintiff did not know the name of the specific illness which had incapacitated the child so badly is not a basis for failing to file an action.
>
> There is no evidence whatsoever to indicate that the Medical Report from the Savanna-la-mar Hospital was concealed or deliberately kept away or destroyed. The evidence is that the plaintiff was directed to the Medical Records Office where records could not be located and it is noteworthy that the plaintiff's Attorney at law requested the reports, provided incorrect information to the hospital for the purpose of locating the records which fact merely added to the problems being experienced in locating the records."

She then concluded:

> "The plaintiff alleges fraud on the basis of false assurances given by the 1st Defendant (that Kimola would recover) and the absence of a Medical Report. The Court finds that there were not [sic] fraudulent acts and the plaintiff had ample opportunity and

> information between October 1 - 8 and October 1987 to get a confirmed medical analysis of her child's specific illness."

[125] The learned trial judge had made her findings of fact based on the evidence that was led before her. There is no basis in law for this court to hold that she was plainly wrong in coming to that finding that there was no fraudulent act or concealment of material information on the part of the 1st respondent and/ or any other public servant attached to the Savanna-la-Mar Hospital. Accordingly, her decision on that issue cannot be disturbed.

[126] It is an uncontroverted fact that the claim was brought outside the limitation period. It follows, logically, then, upon the finding of the learned trial judge that there was no fraudulent conduct on the part of the respondents, that the respondents were entitled to the protection of the Act. The claim was clearly statute-barred and so the learned trial judge was correct in so finding as a matter of fact and law. There is no basis on which this court could properly interfere with such a finding. Ground one of the appeal is, therefore, unmeritorious and, accordingly, fails.

Ground two

Whether the learned trial judge was prejudiced in assessing the appellant's case by virtue of her finding that the claim was statute-barred

[127] There is no basis to accept the appellant's complaint on ground two that the learned trial judge, having found that the claim was statute-barred, would

have been prejudiced in assessing the appellant's case. The learned trial judge expressly recognised that the burden of proof of negligence was on the appellant to prove that (i) the 1st respondent was negligent in the light of the standard laid down in **Bolam v Friern Hospital Management Committee** [1957] 2 All ER 118 and (ii) that the damage would not have occurred but for the negligence of the 1st respondent.

[128] The learned judge, having recognised the two broad issues to be resolved, clearly embarked on an assessment of the evidence that was before her from both sides and concluded that the evidence did not establish, on a balance of probabilities, that the 1st respondent was negligent and that such negligence resulted in Kimola suffering severe brain damage. She found:

> "[T]he allegations of negligence are based solely on the recollection of the plaintiff and her evidence conflicts in several material areas [sic] is inconsistent on important issues and contradicts the pleadings."

[129] She, ultimately, arrived at a conclusion that the evidence presented by the appellant was deficient to support the claim of negligence. There is nothing to suggest, even remotely, that the learned trial judge's conclusion was influenced and/or informed by her finding that the claim was statute-barred. There is no evidence of any prejudice or likely prejudice on the part of the learned trial judge in arriving at her ultimate finding in respect of the claim. Ground two, inevitably, fails.

Ground three

Whether the learned trial judge confused the basis of the claim and so erred in finding that the appellant had failed to prove fraud

[130] The appellant had contended on ground three that the learned trial judge had confused the real basis of the claim, which was founded in negligence with that of fraud. According to learned Queen's Counsel on her behalf, the appellant at no time before the court took upon herself the burden of proving fraud and that she was not relying on fraud to prove the case but negligence. It is evident from the learned trial judge's reason for judgment, however, that she had not lost sight of the fact that the claim sounded in negligence. She stated:

> "The plaintiff's cause of action is grounded in negligence not fraud and allegations of fraud were not raised until the plaintiff filed her Reply to the Defence."

[131] As already indicated, the issue of fraud having been raised by the appellant in reply to the respondents' defence, the learned trial judge had to resolve that as a live issue before determining whether the Act applied. The effect of the alleged fraud on the respondent's defence had to be investigated and determined. Her finding that there was no fraudulent acts that had suspended the operation of the Act, cannot be faulted, in the light of the case that was before her for consideration. She, therefore, made no error in finding on that issue that the appellant had failed to prove fraud as alleged. Ground three of the appeal cannot succeed.

Disposal of the appeal

[132] Given the finding that the claim was statute-barred and that the learned trial judge was correct in so finding, there is no necessity to consider the remaining grounds of appeal concerning the learned trial judge's treatment of the evidence. It was, indeed, a sad end to a young life but the reality is that even if the respondents were proved to have been negligent, the claim would still fail because it would have been statute-barred. The appellant had, simply, taken too long to pursue the claim. Mr Hill, himself, had intimated as much during the course of his oral arguments that a finding that *res judicata* did not apply would, effectively, determine the appeal.

[133] The findings on grounds of appeal one, two and three are, therefore, sufficient to dispose of the appeal in favour of the respondents. Accordingly, I would dismiss the appeal with costs to the respondents to be taxed, if not agreed.

PHILLIPS JA

ORDER

1. The appeal against the judgment of Marva McIntosh J dated 21 July 2005 is dismissed.
2. Costs to the respondents to be agreed or taxed.