REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2019 - 00479

BETWEEN

SANDRA ANTHONY

Claimant

AND

THE NORTH WEST REGIONAL HEALTH AUTHORITY

Defendant

Before the Honourable Madam Justice Carol Gobin

Date of Delivery: September 30, 2021

Appearances:

Mr Russell Huggins instructed by Ms Priyanka Maharaj, Chersons Attorneys at Law for the Claimant

Ms Theresa Hadad Attorney at Law for the Defendant

Ruling on Limitation

1. This is a claim in medical negligence. It is founded on Ms Anthony's allegation that on 08/10/2014 and 09/10/2014, while she was being treated as a patient at the Port of Spain General Hospital she was wrongly, mistakenly, or inappropriately administered the drugs Levofloxacin and Ceftazidime and that as a result, she immediately suffered severe pain and injury. She claims further that she is suffering consequential long term debilitating effects of the drugs on her mobility, as well as pain in several parts of her body.

2. This action was filed on 05/02/2019, more than four years after the dates on which she was administered the drugs. The Claimant averred that it was only on 27/02/2019 when she received a copy of her medical file that she first acquired "conclusive knowledge of the accrual of her cause of action". The Defence at all times claimed that this claim was barred under the provisions of the Limitation of Certain Actions Act Ch. 7:09.

3. In the course of case management, I directed the trial of the limitation issue as a preliminary one. To resolve it, I had to hear the Claimant's evidence as to the date and the circumstances in which she alleged she first acquired knowledge of the cause of action.

Determination

4. I now indicate that having heard the Claimant's evidence and having considered the submissions, I find that this claim is indeed barred under the statute and it should be struck out.

The Statutory Provisions

5. The sections of the Act that fall to be considered are:

Section 5 2(b) which provides:

(2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of four years from—

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

(b) the date on which the person injured first acquired knowledge of the accrual of the cause of action.

And Section 7:

7. (1) In this Act, a person first acquired knowledge when he first became aware of any of the following facts:

(a) that the injury in question was significant;

(b) that 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;

(d) where 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 act or omission 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 person would reasonably have considered it sufficiently serious to justify his instituting

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 he might reasonably be expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of such medical or other expert advice as it is reasonable for him 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 he has taken all reasonable steps to obtain that advice and where appropriate to act on that advice.

6. It is accepted that S.7 (1) ss a,b, c, and d are to be read disjunctively. The Claimant at all times relied on S.5 2(b) and asserted in her pre-action protocol letter and pleadings that it was only when she obtained a certified copy of her patient file on 25/02/2015 she acquired "conclusive knowledge" of the accrual of her cause of action. Therefore, the filing of this claim on 05/02/2019 was within the limitation period, which would have expired on 25/02/2019.

7. On the other hand, the Defendant urged the application of S. 7(2) to the circumstances contained in the pleadings. The Defendant contended that when S. 5(2) and S. 7 were applied correctly on the facts pleaded in the amended statement of case, the Claimant would be deemed to have had knowledge of the accrual of her cause of action by 10/10/2014. The claim should have been filed within four years of that date. The question for me was therefore, from what date did time begin to run, and the answer required a close consideration of the Claimant's pleadings as well as her evidence.

Relevant Facts on Pleadings

8. The facts which I considered relevant on her pleaded case were:

1) On 2nd October 2014, the Claimant attended the St James District Health Facility with complaints of body pains and weakness. She was referred to the Port-of-Spain General Hospital and warded. (para 6(1) 6(2)).
2) While at the Port-of-Spain General Hospital, she complained of severe joint and muscle pains, body chills, aches and pains. She was told by Dr K Maharaj that she

was of the view that she had contracted the Chik V virus as her symptoms were the same. At the time, Chik V was prevalent in Trinidad. On 07th October 2014 she complained of joint pains, chest pains and dizziness six times.

3) On 08th October 2014 and on 09th October 2014, during the course her ongoing treatment by the medical team, she was intravenously administered Levofloxacin and Ceftazidime. At the time, she was unaware of what the drugs were, but she suffered an immediate adverse reaction.
4) On 08th October 2014 the Claimant began to experience constant and severe pain as though she was being bitten by millions of ants or pierced by needles all over her body. As a result of this, the Claimant was unable to sleep for two days and two nights. <u>This pain was in no way and/or form similar to those pains experienced by the Claimant upon her admission at the POSGH and those symptoms with the Chik V</u>. (emphasis added) (6X11)
5) As a result of that sensation of being bitten by millions of ants and pierced by millions of needles, the Claimant repeatedly requested information of the drug she was being administered. Having received no answer, she requested that the nurse remove the IV access from her hand, thus ending the administration of the drug or drugs. <u>The Claimant avers that soon thereafter, the pains similar to those of being bitten by ants, pierced by needles subsided and eventually disappeared while the Chik V joint pains remained.</u> (emphasis added) (6XV1)
6) The Claimant avers that only upon receipt of her file on 27/02/2015 she became aware that she was administered Levofloxacin for periods 8th – 10th October 2014.
7) The Claimant discharged herself from the hospital on 10/10/2014. She subsequently attended the Medical Outpatient Clinic ("MOPC") at the hospital on 02/01/2015, 06/02/2015 and 27/02/2015. On 06/02/2015, as a result of comments made by Dr Hosein, whom she saw for the first time, she took the file from Dr Hosein and began to peruse it (para 9(3)). She observed certain discrepancies. She noticed some documents/reports relating to a patient also named Sandra Anthony, who was aged 36 and on ward 53. The Claimant had been on ward 34. There were different file numbers. She immediately brought this discovery to Dr Hosein, who discussed them with Professor Seemungal, who was also attending to patients at the MOPC at the time. He looked at the file and instructed Dr Hosein to cross out some notes and to initial them. He removed four pages from the Claimant's file,

tore them and threw them in a waste paper basket. The Claimant retrieved them and ensured they were returned to someone there. (para 9. IV, V, VI)

8) On 20/02/2015, the Claimant met with Ms Nikisha Barrington of the quality control department of the hospital to discuss what had transpired on 06/02/2015. It was confirmed that the pages that had been torn, discarded and then retrieved by her were back on the file. Professor Seemungal was present for part of that meeting (para 10). The Claimant then requested a copy of her file. On 27/02/2015, the Claimant received the copy at the MOPC.

9) It was only after she received the file on 27/02/15 and was able to extensively review the same and obtain conclusive knowledge of the negligence effected by the Defendant.

9. In her pre-action protocol letter which was annexed to the statement of case, her attorneys specifically addressed the issue of the date of accrual of her cause of action. This is what was stated:

"Knowledge of the Negligence.

i) It was not until the 27th February 2015 and upon extensive review of the file by our client that the following was noted:

- That some of the blood test results on the file were that of the other Sandra Anthony or another patient as there were conflicting blood test results (particularly as it relates to the liver).

ii) That in corresponding the written notes with the medicine sheet and the test results it came to our client's attention that she was administered Levofloxacin and Ceftazidime only after being wrongly diagnosed with Hepatitis C;

iii) That some of her medical notes and the medical notes of Sandra Anthony who resided in Chaguanas were mixed up;

iv) That the parts deleted on the 6th February, 2015 related to a diagnosis of Hepatitis C ; and

v) That the pages which our client read on the 6th February 2015 and which revealed the address and age of the other Sandra Anthony as well as the diagnosis of Cirrhosis of the liver and Hepatitis B were missing from the copy of the file received by our client.

The letter continued:

At all times while under the care and control of the POSGH our client was treated for and noted as having a viral infection and possible Chik V. <u>During the period 4th October</u>

to 7th October 2014 she was treated with medication for suspected Chik V. On the 8th October 2014 however a blood test revealed that our client suffered from Hepatitis C and this was noted on our client's file. As a result of this, our client was administered extremely strong medication; Levofloxacin and Ceftazidime." (emphasis mine)

Knowledge of Injury

10. The observations that informed her conclusively of "the negligence of the Defendant" were particularised at para 13 of the amended statement of case. It detailed:

"On the 27th February, 2015 the Claimant noted the following:

i) That there was another patient by the name of Sandra Anthony at the POSGH during the period 3rd October, 2014 to 10th October 2014;

ii) That the Claimant's file number was recorded as No.A376896 while the file numbers P5829 or 15829 was that of another Sandra Anthony (all three versions appeared in the Claimant's file);

iii) That the Claimant was admitted to Ward 34 while the other Sandra Anthony, was on Ward 53 and that there was a 20 year age difference between the Claimant and the other Sandra Anthony;

iv) That some of the blood tests results on the file were that of the other Sandra Anthony or another patient as there were conflicting blood test results particularly as it relates to the liver function tests. In addition to the liver enzymes the white blood cells were higher than normal and the haemoglobin was lower than normal;

v) The blood test results for the period 3rd October, 4th October, 6th October to 9th October 2014 revealed abnormally high levels of liver enzymes in the patient while the blood test results of the Claimant dated the 2nd October 2014, 2nd January 2015 and 9th February, 2015 revealed a normal reading of the liver enzymes;

vi) The blood test results for the period 3rd October 2014, 4th October 2014, 7th October 2014 to 9th October 2014 referenced the information of the other Sandra Anthony and/or another patient at the POSGH;

vii) That in comparing the written notes with the medicine sheet and the test results it came to the Claimant's attention that she was administered Levofloxacin and Ceftazidime only after being wrongly diagnosed with Hepatitis C (Hepatitis B and Cirrhosis of the liver);

viii) That the pains similar to those of being bitten by millions of ants or pierced by millions of needles commenced at the same time as the administration of the Levofloxacin and/or Ceftazidime, that is on the 8th October, 2014;

ix) That the parts deleted on the 6th February, 2015 by the Second Defendant and signed by Dr A. Hosein related to a diagnosis of Hepatitis C;

x) That the pages which the Claimant read on the 6th February 2015 and which revealed the address and age of the other Sandra Anthony as well as the diagnosis of Cirrhosis of the liver and Hepatitis B were missing from the certified copy of the file received by the Claimant;

xi) That on the 6th February, 2015 it was noted that "*HCV and HBV screen has wrong ID No*." It was further noted that repeat tests for Hepatitis B and Hepatitis C were requested;

xii) That the results of blood tests done three (3) weeks prior to being admitted to the POSGH revealed a healthy liver. True copies of the Claimant's blood test results dated 15th September 2014 are hereto annexed and marked "G". The Claimant will rely on the said document at the trial of this action for its full true meaning and effect; and

xiii) That the results of blood tests done while the Claimant was a patient at the MOPC revealed that she had a healthy liver. A true copy of the blood test results dated the 9th February 2015 are hereto annexed and marked "H". The Claimant will rely on the said document at the trial of this action for its full true meaning and effect".

Relevance of these Facts to the Defendants' Submission

11. The Defendant submission, as I understand it was that the pleadings established that the Claimant was aware that she had suffered a severe injury as a result of the administering of drugs intravenously on 08/10/2014 and 09/10/2014. At all times, as the matters set out at para (7) above confirm, she recognised that the pain she was experiencing was not Chik V. She realised there was a connection between the unusual reaction of her body and the administering of whatever was in the intravenous line. As a result, she took control of the situation. She demanded the disconnection of the IV apparatus and found that immediately upon the cessation of that treatment, the pain subsided and eventually disappeared.

12. The Defendant further contended that since Ms Anthony was able to compare and clearly distinguish what she believed was Chik V pain which she had been suffering upon her hospital admission. The

severe, excruciating pain she suffered immediately upon being administered the drugs on 08/10/2014 and the immediate relief she got after the IV was removed, this was sufficient to bring her within the terms of S.7 (3) of the Act. All of this was sufficient to fix her with knowledge of her injury under the statute.

Issue of date of Knowledge of accrual of Cause of Action fixed for Trial

13. As I said before, I considered that the limitation issue could appropriately be heard as a preliminary issue, but to properly determine it, I needed to hear the Claimant's evidence on her claim that she acquired knowledge of the accrual of the cause of action on 27/02/2015. I gave directions and indicated that I would receive *viva voce* evidence on the issue. The Claimant gave evidence on 26/08/2021.

The Claimant's Evidence

14. Ms Anthony said that she was warded at the POSGH for the period 03/10/2014 to 10/10/2014. During that stay, she was not advised as to the nature of her ailment. She was administered drugs, but she did not know what they were. She told the attending nurse that she was in a lot of pain, but no one listened. She repeatedly asked to see Professor Seemungal, but he never came, so she eventually discharged herself on 10/10/2014. She had no idea up to that time what drugs had been administered.

15. She subsequently attended the Medical Outpatient Clinic on 06/02/2015 at the hospital. She saw Dr Hosein. As the latter took her history, she started asking, "I see you are an alcoholic?" which she denied. "No way", she said, "I would describe myself as a social drinker." The Doctor said, "that is what was written on the file." She then started reading the file herself. She began to see notes about Cirrhosis and Hepatitis. She continued perusing the file and saw notes relating to a person named Sandra Anthony, aged 36 years old, who was living in Chaguanas and who had been on ward 53. She said, "Oh my gosh … there are two of us."

16. Dr Hosein spoke with Professor Seemungal, who was himself seeing other patients at MOPC at that time. He came over, crossed out specific entries on the file, which he asked Dr Hosein to initial; he tore off four pages and threw them in the bin. That bothered her. She subsequently, on that date, went to the office of the Chief of Staff and spoke with the secretary. She asked for the torn pages to be retrieved, and they were.

17. On 20/02/2015, she was called to and attended a meeting with Ms Barrington of the quality control section of the POSGH. Professor Seemungal was in attendance. At the end of the meeting, Ms Barrington gave her a comment form and told her to write down everything that had happened. The Claimant filled out the form. She requested a copy of her file, but the copier was not working. She wanted to get those four pages, so she decided to go to another office to get a photocopy. If she got a copy of her file, she would see what had been written on them.

18. She received a copy of her file on 27/02/2015. She looked for the four torn pages, and they were not there. She was not aware of the names of the drugs, but she noticed when she had the ants biting and needle pricking pain, the pain which was not Chik V, it coincided with the days she had the drugs and presumed she was allergic to them. She would have to take notes for future reference because patients are usually asked about allergies when they go to a doctor. She was not paying attention to the names of the drugs as she was focused on locating the missing four pages. All that time, she was sure she had Chik V.

19. When Counsel for the Claimant, Mr Huggins, asked, "So it was at that time you first became aware of being administered those drugs?" the Claimant stated that she could see the names of the drugs but did not know what they were as she was not paying attention.

20. Then in answer to the final question (a leading one): "So it was at that time that you associated your biting ants syndrome, with the drugs?" The Claimant answered "on 27/02/2015 and subsequently …"

21. Ms Hadad, Counsel for the Defendant did not cross-examine the witness.

Assessment of Claimant's Evidence

22. The Claimant's evidence fell woefully short of what was pleaded at paras 12 and 13 of the amended statement of case. No evidence was led to establish how viewing her file on 27/02/2015 informed her "conclusively" of her cause of action. The Claimant was not referred to the particulars detailed in those critical paragraphs. No attempt was made to establish how her viewing of the file provided her with knowledge of those matters that had been pleaded and particularised. The absence of evidence to establish a nexus was by itself. This is not a case in which the Claimant pleaded that it was only with the help of expert advice, medical or otherwise, that she came by the knowledge of her cause of action. She claimed that it was upon perusing the file that she came by the knowledge of the matters set out at para 13.

23. The Claimant's evidence was inconsistent with the claim that the pleadings attempted to establish. She failed to prove how her viewing the file established any knowledge of the injury or a link between Levofloxacin or Ceftazidime and the symptoms the Claimant alleged she had experienced. The evidence established that far from perusing the record and acquiring knowledge of a cause of action, what Ms Anthony was doing when she got it ,was flipping through her file, looking for the four pages that had been torn out, dumped, retrieved, repaired and restored on 06/02/2015. She did say that in the course of flipping through, she noted that the record of the date of administering the drug coincided with the terrible and painful symptoms she suffered on 08/10/2014 and 09/10/2014. This did not assist; it only confirmed that as the Defendant was contending, she would have known that the injury she allegedly suffered, had dated back to 08/10/2014 and 09/10/2014.

24. Having failed to prove on the evidence that she acquired knowledge of the accrual of her cause of action on 27/02/2015, the postponement of the start of the running of time to four years from that date was no longer available to her.

25. I accept the Defendant submission that when S. 5(2) and S. 7(1) are applied, the Claimant would have been fixed with statutory notice of the accrual of her cause of action on 08/10/2014 and 09/10/2014 and at latest on 10/10/2014 when the pain disappeared. The injury she allegedly suffered on 08/10/2014 and 09/10/2014 into 10/10/2014 was significant. She began to suffer excruciating pain until the IV was removed; it first subsided, then it stopped. It was not comparable with the Chik V pain, but she was so aware of its impact on her body that she could differentiate between the pain caused by whatever drug in the IV and Chik V pain that she was at least able to tolerate. Though she claimed to have had no responses to her queries about the drugs, she did not wait for any; she caused the IV to be removed, and on the day that it happened, she left the hospital.

26. The Claimant's pleaded case was therefore sufficient to fix the Claimant with notice that her injury was significant. S. 7(2) (b) was therefore satisfied. On 08/10/2014 and 09/10/2014, the facts which supported her claim of the injury were observable or ascertainable. Her knowledge of them was the knowledge that was sufficient to cause the running of the four-year-time from the night of 09/10/2014 when she demanded the removal of the IV feed.

27. In the circumstances, the Court holds that the matter is statute-barred by the Limitation of Certain Actions Act Ch. 7:02.

28. The determination of this issue effectively puts an end to this claim and renders academic my ruling on the outstanding notice of application (filed on 16/11/2020) for permission to call expert evidence from experts Dr Jack Uetrecht and Dr Paul Adjei. I shall nevertheless indicate my ruling and with brief reasons for it. The application is refused with costs.

The Part 33 Application

29. The purpose of the evidence was indicated in the grounds of the application. In the case of Dr Uetrecht, it was to elicit evidence relating to the use, side effects and long term effects of the drugs Levofloxacin and Ceftazidime and whether the long term effects of Chik V and these drugs are similar. In the case of Dr Adjei, it was evidence relating to the course of treatment and the medical practice adopted by the Defendant and fundamentally whether, based on the various results and notes in the medical file, he would have come to the same conclusion and adopted the same treatment course as the Defendant. The reports were not available at the time of the filing of the application. They were eventually annexed to a supplemental affidavit of Counsel which was filed about four months thereafter. Having regard to the dates of the reports, and in the absence of disclosure, I can only surmise that instructions were being given while the application was pending and even as Counsel for the Defendant was pointing to the deficiencies in the case as pleaded.

30. Part 33.4 of the CPR limits the admissibility of expert evidence to that which is reasonably required to resolve the issues in the proceedings justly. This means resolving the issues in the case, which arise on the pleadings. The claimant failed to identify which if any issues would be resolved by the anticipated expert evidence or how it would assist the Court at all. The grounds of the Claimants' notice of application indicated the breadth of matters on which the experts' opinions had been sought. It was wide-ranging and lacking in the specificity that is required it the Court is to exercise its discretion.

31. The following excerpts from the grounds set out in the notice of application demonstrate the point:

> "3. In order to prove the Claimant's allegations, it is necessary to appoint medical professionals as expert witnesses to assist the honourable Court in dealing with the issues of Breach of Duty in the administration of treatment and causation as it relates to the current incapacities suffered by the Claimant.

6. It is in the interest of justice that an expert witness be appointed in order to ventilate the main issues in this matter as follows:
    a) Whether the Defendant breached their duty of care to the Claimant; and
    b) Whether this breach resulted in and/or caused the Claimant to suffer with issues of the tendons, muscles and soft tissue."

32. If the lack of specificity alone was not sufficient to cause me to reject the application (and I am of the view that it was), then that together with what was a clear invitation to the Court to embark on a roving mission to allow the case to be ventilated and to establish "whether the Defendant breached a duty of care to the Claimant", sealed it. This suggests that expert evidence was being sought essentially to establish and prove a case. This is not what is contemplated by Part 33.4. Further, our Court of Appeal has expressed its disapproval of this approach in **Bertlyn Barker** v **Eastern Regional Health Authority & Ors C.A.CIV.P.317/2016**. When the Claimant's pleading on the relevant particulars of negligence and causation is scrutinised, it is hard to avoid the conclusion that evidence is being sought belatedly to make a case on causation on very speculative grounds based on answers to questions which are irrelevant.

Pleaded Case on Causation

33. The Claimant's averments in the statement of case detailed a plethora of complaints about her general care and treatment at the POSGH from 03/10/2014 to 10/10/2014, on which date she discharged herself. But as I understand her case, what led to her injury and continuing suffering is the allegation that she was administered Levofloxacin and Ceftazidime (which is not in dispute) and that these drugs were wrongly administered to treat a bacterial infection when she believed she had a viral infection. Therefore assuming, for the purpose of this application, that a cause of action was made out in negligence, the issue of causation on which the admissibility of the expert opinion evidence is being sought had to be more closely considered in the context of the history of the case as pleaded.

34. In the original statement of case what the Claimant pleaded by way of causation was this nebulous statement:

> "Research reveals that the drug Levofloxacin is known to have side effects which created long-lasting, potentially permanent, ailments such as those complained about by the Claimant".

There was no reference to a personal medical assessment or diagnosis of her symptoms or to any specific identifiable or respected medical or scientific opinion for this claim of causation. A plea of causation based on "research" and with no identifiable source of authority does not approximate the level of cogency on the pleading that is required in a claim of medical negligence. This signalled that the Claimant's case on causation from the inception was not promising.

35. The weakness was compounded by the introduction in the amended statement of case of the medical report dated (11/05/2018) of a medical professional in Canada who said he could find no explanation for the Claimant's hip pain. There was no mention of Levofloxacin or Ceftazidime in the report. If that doctor had any history of her alleged adverse reaction to those drugs, he made no connection with it and her symptoms. Further, the late submission of a report of Dr Cynthia Low Chew Tung in the amended statement of case and the subsequent decision, which can be inferred from this application which does not include her, not to rely on her report only heightened the concerns about the bona fides , validity and sustainability of the claim on causation.

36. Five years to the day on which she allegedly came to know of her cause of action, the Claimant filed a reply. In response to the Defence (para 52) that Levofloxacin and Ceftazidime are regarded as broad-spectrum antibiotics which carry a low-level risk of harm or negative side effects and that such antibiotics are in common usage at hospitals including POSGH, the Claimant pleaded, again, with no reference to a source or identifiable medical or scientific authority:

> "Levofloxacin is a powerful antibiotic which was assigned a "Black Box" warning by the US Food & Drug Administration hereinafter referred to as ("the FDA") in 2008. A Black Box warning is the strictest warning put on the label of a drug when there is evidence of a serious hazard with the drug. The FDA, which is the leading drug regulatory organisation in the world, recommends Levofloxacin as a "*last resort*" drug for serious cases where no other antibiotic suffices. In addition, before administration, patients must be warned about the potential permanent side effects, which include injury to tendons, muscles, nerves, brain, eyes, liver, heart, kidneys and other organs. Levofloxacin has a strong affinity for cartilage and bone; this can affect tendons, muscles and joints. Previously healthy, vigorous individuals like the Claimant, suffer permanent functional compromise and disability. Intravenous administration has been shown

to produce more adverse effects than Levofloxacin given via other routes."

37. Ms Anthony did not disclose the source of this information, but the expert reports do not reflect the language or the tenor of the statement above. This caused concern as to whether the Claimant was framing a case on information provided by less than credible or authoritative sources, hoping that support would be found at some future date. Whatever the source of the above information, on this aspect as to it being a "last resort drug ", her experts contradict her claim. Dr Adjei has confirmed that he would have used Levofloxacin once it was within the guidelines recommended for treatment in Trinidad. The Defendant averred that it was. So that did not assist her case on the inappropriateness of the treatment. Dr Utrecht's answer to question (6) clearly recognised that some hospitals commonly use Levofloxacin.

38. The basic question asked of Dr Adjei as to "whether he would have treated the patient in the same way as did the Defendant" is irrelevant and takes the Claimant's case no further when the **Bolam** test is properly applied. Given his answer on local guidelines as well as his specific answer that he would have administered levofloxacin while her symptoms persisted, the opinion is unhelpful. The opinions recognise that administering Levofloxacin may accord with medical practice and opinion as it does in this country. I have also considered that many of the assumptions made, such as a diagnosis of Chik V (although Dr Adjei accepted he saw no test results) are erroneous.

39. I understood the Claimant's case to be that because records including blood reports and lab readings of another Sandra Anthony were placed on her file, she was wrongly diagnosed and/or treated for Hepatitis B and Hepatitis C and/or Cirrhosis of the liver with powerful antibiotics (Levofloxacin and Ceftazidime) that were not appropriate because she was suffering in fact from Chik V, a viral infection. Dr Adjei did speculate, however, that the test results of 07/10/2014 and 08/10/2014 (which the Claimant says were those of the other Sandra Anthony) may have indicated the Chiv V virus. This, too, could not help the Claimant's case, which was not that the other Sandra Anthony also had Chik V . The report mentions no indication of Hepatitis B, or Cirrhosis which the claimant claims she had and to which the results should have pointed. This was an actual issue in the case.

The failure to comply with the requirement to disclose the Claimant's instructions to the Claimant

40. The above reasons are sufficient to justify my refusal of the application, but there is one that I consider to be even more compelling. The failure to comply with the requirement for disclosure of

instructions, especially in the circumstances of this case, invited a sanction of refusal of the application and nothing less.

41. Part 33 opens with a stipulation that it is the duty of an expert witness to help the Court impartially on the matters relevant to his expertise. That duty to the Court overrides any obligations to the person from whom he has received instructions. The rule also provides (part 33.10):

"There must be also attached to an expert's report copies of—

(a) all written instructions given to the expert;

(b) any supplemental instructions given to the expert since the original instructions were given; and

(c) a note of any oral instructions given to the expert, and the expert must certify that no other instructions than those disclosed have been received by him from the party instructing him, his attorney-at-law or any other person acting on behalf of the party".

42. The disclosure of instructions provides a backdrop that is essential to the assessment by the Court primarily of admissibility of expert evidence and, ultimately, its reliability and impartiality. Compliance with the duty to disclose instructions is, in my view, mandatory. The Court can only properly consider whether an expert has discharged his/her responsibility if instructions are produced.

43. In this case, the expert reports fell short in this material aspect. No instructions were produced. The omission was brought to the attention of the Claimant's attorneys by Counsel for the Defendant. The refusal to amend the reports to comply with the rule even then, gave rise to questions about the independence of the experts and the reliability of the opinions expressed therein. The production of reports in question and answer form did not cure what I considered to be a serious deficiency .The submission that it is open to the Court to infer that the questions as formulated comprised the instructions is rejected.

44. On the face of it the rule is stringent. It extends to oral as well as supplemental instructions. The purpose is clear .To casually overlook any flouting of it would be counterproductive. It would allow parties to influence the opinions of experts for their benefit, with impunity with obvious negative consequences for the promotion of the overriding objective.

45. To return to the reports in question, a perusal of the reports would suggest that the experts were provided with copies of the Claimant's medical files, which, as I have noted, contained no record of any adverse reaction of the Claimant on 08/10/2014 and 09/10/2014. If opinions were proffered in the absence of such a record from reputable experts, further information must have been sought. I am therefore left to conclude that there must have been very much more by way of instructions. Dr Adjei's sets out the context at the beginning of his report. It is "from a review of the documents". I am not aware of what they were. His report included answers to questions about comparisons with reports of lab results of 12/09/2014, which form no part of the medical file, and as far as I am aware, no part of this case. His initial response was that he had not seen that report. By the time he produced his Part B answers, he had seen it. The reference in Dr Utrecht's report to the original questions and then "follow up" questions arising out of them, along with the continued non-compliance, confirmed similarly that there were supplemental, perhaps ongoing instructions. This has had the effect of undermining the value of the answers in the end.

46. **<u>Determination</u>**

I. The Notice of Application dated 16/11/2020 is refused with costs to be assessed by the Registrar in default of agreement.

II. I shall hear the parties on the costs of the action on 13th October, 2021 at 10:15am.

Carol Gobin

Judge