AS TO THE ADMISSIBILITY OF

Application No. 28477/95
by Margaret DOBBIE
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 28 April 1995 by Margaret DOBBIE against the United Kingdom and registered on 8 September 1995 under file No. 28477/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a United Kingdom national born in 1926 and residing in Sittingbourne, Kent. Before the Commission she is represented by Ms. Nuala Mole, a lawyer practising in London.

The facts of the case as submitted by the applicant may be summarised as follows.

Particular circumstances of the case

In the summer of 1972 the applicant discovered a lump in her left breast. She consulted her general practitioner who told her it was only mastitis. She returned to him on several occasions because the lump seemed to be increasing in size and was painful. She was referred to a consultant.

On 19 March 1973 she was seen by a medical consultant who found a "mobile lump" in her left breast and recommended that it be excised. On 26 April 1973 the applicant was admitted to hospital for a biopsy. During the course of the operation the surgeon excised the lump and after examining it visually and by probing it found that it looked

"pre-cancerous". On the basis of this observation the surgeon proceeded to perform a mastectomy, thus removing the applicant's left breast. The question whether the applicant had given her prior consent to the possibility of a mastectomy being performed is disputed.

When the applicant recovered from the anaesthetic she discovered that the whole of her left breast had been removed. She was told by the doctors that since the lump had looked suspicious it had been safer to remove the breast in case the lump had been cancerous.

On 14 May 1973 the pathologist's report of the examination of the lump revealed that it had been benign. Several weeks later, when she visited the clinic, the applicant was informed of this finding. She was also told that the hospital did not have facilities for testing lumps for malignancy while the patient was still under the anaesthetic and that therefore her breast had been removed to be safe and to avoid the risk in case the lump would have been cancerous.

The applicant suffered considerably as a result of the loss of her breast. During the following years she had deep depression and was admitted on several occasions to a psychiatric hospital.

In 1988, fifteen years later, the applicant learnt of another woman in a similar position who had successfully sued her surgeon. The applicant then thought that in her case too the mastectomy should not have been performed before the results of the microscopic examination were known. In May 1989 the applicant's solicitors brought an action for damages and personal injury against the responsible health authority.

On 14 February 1992 Mr. Justice Otton at the High Court rejected the applicant's claim as it was brought after the expiry of the three-year time limit under the Limitation Act 1980 (see below Relevant domestic law). In his judgment Mr. Justice Otton, when applying the legal criteria for determining the initial date from which this time limit was running for the applicant, turned to the issue of the date she first had knowledge of the facts that the injury was attributable, in whole or in part, to the act or omission alleged to constitute negligence. In this respect the judge emphasised that the relevant moment was when the applicant had knowledge "of the facts" showing that the injury was attributable to the act of the defendant. He stated further:

"If the [law] had provided that the critical date was when the [applicant] learnt that she had a good cause of action in law, it would mean that the time limit in many personal injury actions would only begin to run from the date of the receipt of the expert's opinion that the injury was due (as a matter of law) to the defendant's negligence or breach of duty. This is clearly not the law ...

...

I therefore have to scrutinize the facts that were known to the plaintiff within the limitation period. On her evidence she knew that:

1. She had been admitted for a biopsy only.
2. Her left breast had been removed.
3. The lump when examined had not been malignant but benign.
4. That the decision to remove had been taken before the histological test had been carried out and the result known.
5. There were no facilities for histological examination at [the] hospital.
6. She had not given her consent to the removal of her breast.
7. Her knowledge of the foregoing had caused her acute and prolonged anger, distress and psychological damage as well

as physical damage.

In my judgment, she had broad knowledge of sufficient facts to describe compendiously that her breast had been unnecessarily removed, that something had gone wrong and that this was due to the defendants' negligence and further (or in the alternative) that it had been removed without her consent. Even though she might not have had the knowledge to enable her counsel to draft a fully and comprehensively particularised statement of claim, in my view she had knowledge of the nature referred to in Section 14(1)(b) sufficient to set time running against her both in negligence and trespass.

Thus, without reference to Section 14(3), on which I consider the Defendants do not need to rely, the Plaintiff, after her visit to the surgeon's clinic in June 1973, well knew that her injuries were capable of being attributable to what could compendiously be called the Defendants' fault. This knowledge was enough to set the time running against the Plaintiff under the combined effects of Sections 11(1), (3) and (4) and Section 14(1) of the Act. It follows that the relevant period expired in April 1976 for any cause of action based on lack of consent and in June 1976 for any cause of action in negligence."

The judge further found that despite her depression the applicant's condition had never been such that she had been under a disability to act. There were substantial periods when the applicant could have obtained expert advice if she had taken reasonable steps to do so. The judge also found that it would have been reasonable for her to seek such advice within three years of knowing the result of the biopsy or, in any event, earlier than fifteen years following the events complained of.

The judge also declined to exercise his discretionary power under Section 33 of the Limitation Act 1980 (see below Relevant domestic law) to disapply the time limit and to allow the action to proceed on the basis of considerations of equity. He observed inter alia that he was dealing with the case almost nineteen years following the events and that the defendants would be prejudiced on certain issues of evidence, such as the vital question whether the applicant consented to the possibility of a mastectomy being performed. The evidence in this regard consisted of the recollections of the applicant and of two doctors, one of whom could not be found. Despite the fact that other important evidence was contained in hospital documents which were available, the balance of prejudice was in favour of the defendants.

On 11 May 1994 the applicant's ensuing appeal was dismissed by the Court of Appeal. The judgment confirmed in principle the conclusions of Mr. Justice Otton. It also stated inter alia that knowledge that the facts complained of were "negligent" as a matter of law, was irrelevant to the running of the time-limit under the Limitation Act 1980. Moreover, the applicant's argument that in 1973 she had lacked the knowledge that the mastectomy had been "unnecessary", was "simply an attempt to argue that the injured party must know that [she] has a possible cause of action". However, this was not the law. Some legal reform proposals for the introduction of requirements such as knowledge "that the defendant was at fault" had been rejected by the Parliament in 1975 and 1980 as the concept of "fault" would have been imprecise and impossible to define.

On 31 October 1994 the applicant's request for leave to appeal from the House of Lords was refused.

Relevant domestic law

Section 11 of the Limitation Act 1980, which provides for a special time limit for actions in respect of personal injuries, insofar

as relevant reads as follows:

> "(4) ... the period applicable is 3 years from:
>
> (a) The date on which the cause of action accrued;
> or
> (b) The date of knowledge (if later) of the person injured".

Section 14 contains a definition of date of knowledge for the purpose of Section 11:

> "(1) In Section 11 ... references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts:
>
> (a) That the injury in question was significant;
>
> (b) That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence;
>
> ...
>
> and knowledge that any acts or omissions did or did not as a matter of law involve negligence ... is irrelevant.
>
> (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages 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 have been expected to acquire:
>
> (a) from facts observable or ascertainable by him or
>
> (b) from facts obtainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek
>
> but a person shall not be fixed under this sub-section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (where appropriate to act on) that advice".

Section 33, insofar as relevant, provides as follows:

> "If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which:
>
> (a) the provisions of Section 11 ... prejudice the plaintiff;
>
> (b) any decision of the court would prejudice the defendant ...
>
> the court may direct that those provisions shall not apply to the action ...
>
> (3) In acting under this Section the court shall have regard to all circumstances of the case and in particular to:
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced ... is or is likely to be less cogent ...

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice ..."

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention that she was denied access to court for the determination of her civil right to compensation. She alleges that the date of knowledge test as set out in the Limitation Act 1980 and as applied by the courts in her case operated so as to extinguish her right to bring an action before she was aware of any facts that would have reasonably prompted her to seek legal advice with a view to do so.

Thus, what was "wrong" in her case was not that her breast had been removed, removal of healthy tissue being often an inevitable part of certain medical processes, but that this removal, in the particular circumstances, was not a normal medical practice. Therefore, in 1973 the applicant knew that she suffered a "loss" (damnum), but she did not know that this loss constituted an "injury" (injuria). This she learned only later, when she became aware of the normal medical practice which should have been followed in her case.

The applicant further contends that, although it is generally appropriate to impose time-limits on the bringing of civil actions, there are special problems in cases of lay persons who are victims of medical negligence. Thus, the applicant believed the assurances given to her that the mastectomy had been in her interest and, naturally, could not be reasonably expected to seek legal advice to bring an action. In this situation the date of knowledge definition, as applied by the courts, is a restriction without a legitimate aim, as it could not possibly operate to encourage sorting out of all claims without delay. It simply had the effect of excluding any reasonable possibility to bring an action.

The applicant also invokes the principle of "equality of arms" and states that she, as a lay person, was seriously disadvantaged compared to the medical profession as she did not have specialist knowledge.

The applicant further asserts that even assuming that the limitation on access to court resulting from the date of knowledge definition had a legitimate aim, it was not applied in a manner proportional to this aim.

2. The applicant complains also under Article 6 para. 1 taken in conjunction with Article 14 of the Convention that victims of medical negligence cannot enjoy the same access to court as other victims of negligence unless they are in possession of the specialist medical knowledge to enable them to know that the treatment they had received may have been inappropriate. On the other hand the lack of specialist knowledge would not have the effect to preclude a civil claim, for example, for a person who is injured on the road or in the workplace, or even in cases which in principle require specialist knowledge, but not of medical character.

3. The applicant also complains under Article 13 in conjunction with Article 8 of the Convention that the procedural bar to litigation in her case deprived her of an effective remedy in domestic law for the interference with her right to respect for her physical integrity and, hence, for her private life.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the date of knowledge test, which concerned the initial moment of the running of the time-limit for bringing an action for

damages, as applied by the courts in her case, operated so as to amount to a denial of access to a court. Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, provides as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by a ... tribunal..." The Commission recalls the Court's case-law according to which the right to access to a court is not absolute but may be subject to limitations, since by its very nature this right calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Convention organs. They must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. A limitation will not be compatible with Article 6 para. 1 (Art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, as a recent authority, Eur. Court HR, Bellet v. France judgment of 4 December 1995, Series A, No. 333-B, para. 31).

Also, it must generally be accepted in the interests of good administration of justice that there are time-limits within which prospective proceedings must be introduced. Time-limits imposed on the introduction of claims pursue the legitimate aim of preventing stale claims and the possible injustice to defendants faced with evidential difficulties in contesting allegations relating to distant events and of promoting legal certainty (No. 9707/82, Dec. 6.10.82, D.R. 33 p. 223; Leslie Stubbings, J.L. and J.P. v. the United Kingdom, Comm. Report 22.2.95, unpublished). Furthermore, the Commission's case-law has established that the need for legal certainty may justify the imposition of time-limits which cannot be waived even when new facts arise after the expiry of the relevant time-limit (No. 9707/82, Dec. 6.10.82, D.R. 31 p. 223). The Commission also refers to the six-month time-limit set down by Article 26 (Art. 26) of the Convention and to its own strict approach in this respect (see, for example, No. 10416/83, K v. Ireland, Dec. 17.5.84, D.R. 38 p. 158).

The Commission further recalls that it is not a court of appeal from the national courts. Under Article 19 (Art. 19) of the Convention its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. It cannot examine complaints about errors of fact or law allegedly committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (No. 7987/77, Dec. 13.12.79, D.R. 18, p. 31)

The Commission notes in the present case that Section 11 of the Limitation Act 1980 allowed for an extension of the relevant limitation period in cases where a plaintiff did not at the pertinent time have knowledge that the injury was significant or that it was attributable in whole or in part to the act or omission alleged to constitute negligence. The Commission further notes that Section 33 of the Act provided that the courts can disapply the provisions of Section 11 if having regard to all the circumstances of the case it would be equitable to allow the action to proceed. It does not appear, therefore, that the relevant law as such restricted or reduced the access to court left to a plaintiff in a way which would affect the very essence of the right to a court as enshrined in Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant complains, however, of the application by the courts in her case of these provisions in circumstances where she knew

that she had suffered a loss but did not know at the time that the act which resulted in this loss was not in conformity with the normal medical practice. Her complaint concerns the determination by the courts of the initial moment from which the time-limit for bringing her action was to be counted.

The Commission notes in this respect that when determining this moment the courts applied the established legal criteria in examining the relevant facts and, in particular, the applicant's own recollection of the events of 1973. The courts noted that the applicant was aware, in 1973, that her breast had been removed without prior analysis of the suspicious lump and that the lump had proven benign. The courts also took into account the situation of the applicant in general. On the basis of all these considerations the courts concluded that it would have been reasonable for the applicant to seek specialist advice, with a view to ascertaining whether there had been negligence in her case, within three years of knowing the result of the biopsy or, in any event, earlier than fifteen years following the events complained of.

In these circumstances the Commission considers that it is not called upon to undertake its own examination of the evidence in the applicant's case and to replace the courts' assessment of the facts by its own. The Commission cannot, as urged by the applicant, embark on a review whether the courts were correct in their conclusion that she could be reasonably expected to act earlier. Whether knowledge of certain medical practice was necessary for her to be reasonably expected to inquire about a possible cause of action for medical negligence was a matter of assessment of the particular situation, and this was done by the domestic courts.

Furthermore, the approach adopted by the domestic courts in exercising their discretion under Section 33 of the Limitation Act 1980 was neither arbitrary, nor unreasonable. The courts balanced the opposing interests of the applicant and of the defendant and took into consideration all surrounding circumstances.

The Commission finds, therefore, that the procedural time-limit for bringing of the applicant's claim for damages did not operate in a way so as to restrict or reduce her access to a court in a manner incompatible with Article 6 para. 1 (Art. 6-1) of the Convention.

Finally, insofar as the applicant invokes the principle of "equality of arms", the Commission notes that this applies to proceedings actually undertaken.

It follows that this part of the application is manifestly ill-founded and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains, invoking Article 6 para. 1 in conjunction with Article 14 (Art. 6-1+14) of the Convention, that victims of medical negligence cannot enjoy the same access to court as other victims of negligence unless they are in possession of the specialist medical knowledge to enable them to know that the treatment they had received may have been inappropriate.

However, the Commission has just found that the determination of the initial date of running of the time limit in the applicant's case was based on an analysis of the complex of particular facts surrounding the events of 1973 and on an assessment whether she had been aware of the facts which would reasonably induce her to seek expert advice. It does not appear, therefore, that the domestic courts treated the applicant differently based on her lack of specialist knowledge or, indeed, on any other basis.

It follows that this part of the application is also manifestly ill-founded and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains under Article 13 in conjunction with Article 8 (Art. 13+8) of the Convention that the procedural bar to litigation in her case deprived her of an effective remedy in domestic law for the interference with her right to respect for her physical integrity and for her private life.

Insofar as the applicant may be understood as claiming that the acts of the medical doctors in 1973 constituted an interference by a public authority with her right to respect for her private life, so that Article 13 (Art. 13) would require the existence of an effective remedy in respect of such interference, the Commission need not decide whether the applicant could have had an arguable claim under Article 8 of the Convention, as the complaint under Article 13 (Art. 13) is in any event manifestly ill-founded. The Commission recalls the established case-law according to which where the right claimed is of a civil character, the guarantees of Article 13 (Art. 13) are superseded by the more stringent requirements of Article 6 (Art. 6) of the Convention (No. 13021/87, Dec. 8.9.88, D.R. 57, pp. 268, 277). However, the Commission has already found that the procedural bar to the applicant's claim for damages did not amount to a breach of her right to access to a court under Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that the remainder of the application is also manifestly ill-founded and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber