

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE, SAN FERNANDO

Claim No.: CV2014 – 03834

BETWEEN

AYESHA ABRAHIM

Claimant

AND

TRINIDAD AND TOBAGO ELECTRICAL CONTRACTORS LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr. Imran S. Khan for the Claimant

Mr. Martin George instructed by Ms. Keisha Peters for the Defendant

DECISION ON A PRELIMINARY ISSUE OF LIMITATION

I. Introduction

[1] This decision is on the preliminary issue of whether this court should exercise its discretion under **section 9 of the Limitation of Certain Actions Act Chapter 7:09 (LCAA)**, so as to enable the claimant to proceed with her claim despite the fact that in accordance with **section 5 of the LCAA** it has become statute-barred.

[2] In the instant matter, the claimant filed her claim form and statement of case on 17 October 2014. By her claim she sought against the defendant-

- (i) Damages for personal injuries and consequential loss caused by the negligence and/or breach of statutory duty by the defendant, its servants and/or agents on 23 September 2010 at the Caroni Distillers Compound, Frederick Settlement, Caroni in the Island of Trinidad whilst the claimant was employed with the defendant;
- (ii) Interest;
- (iii) Costs; and
- (iv) Such further and/or other relief as the Court may deem fit.

[3] Further to filing her claim, on 21 October 2014 the claimant filed an application whereby she sought an order of this court to disapply the limitation period set out in **section 5 of the LCAA** for the filing of an action of the instant nature. The objective of her application was to have the limitation period extended from 23 September 2014 to 17 October 2014. Two affidavits were filed in support of the claimant's application, namely, the affidavit of the claimant and the affidavit of her attorney-at-law, Mr. Imran S. Khan.

[4] In response, the defendant filed an appearance to the claim on 31 December 2014 therein stating its intention to defend the claim. Accordingly, on 20 January 2015 the defendant filed its defence. By virtue of its defence, the defendant denied every allegation and implication of fact made in the statement of case, further stated that the statement of case disclosed no reasonable cause of action against the defendant and specifically pleaded that the claim was statute-barred on the basis that the limitation period had elapsed in accordance with **section 5(2)(a) of the LCAA**.

[5] The first case management conference was heard on 16 March 2015 and directions were given in respect of the filing and service of written submissions on the afore-stated preliminary issue. Consistent with the order of the court, on 13 April 2015, the claimant filed her written submissions and on 4 May 2015 the defendant filed its submissions in response. Thereafter, on 18 May 2015 the claimant filed its submissions in reply.

[6] I have had regard to all the circumstances of this matter, in particular, (i) to the length of and reasons for the claimant's delay in initiating the claim; (ii) the extent to which the evidence adduced or likely to be adduced by the claimant and defendant was or is likely to be less cogent than if the action had been brought within the limitation period; (iii) the conduct of the defendant after the cause of action arose; (iv) the duration of any disability of the claimant arising after the date of accrual of the cause of action; (v) the extent to which the claimant acted promptly and reasonably once she knew that the defendant's act or omission causing the injury would be capable of giving rise to an action for damages; and (vi) the steps taken by the claimant to obtain medical and legal advice subsequent to the accident.

[7] Having regard to the circumstances in which the instant claim was filed outside the limitation period, I am satisfied that it would be fair and just in all the circumstances of this case for the defendant to meet the instant claim on the merits notwithstanding the delay of the claimant in initiating the claim. I am of the view that upon balancing the prejudice against the defendant in having the claim brought out of time, against the prejudice to the claimant of having the claim barred, that the greater prejudice would accrue to the claimant if the claim is not allowed to proceed. Thus, I am of the view that this is an appropriate case in which it would be equitable for the court to exercise such discretion in extending the limitation period in favour of the claimant from 23 September 2014 to 17 October 2014.

[8] In light of the fact that the claimant has been at fault in not filing her claim within the limitation period thereby causing the defendant to respond to the instant application for extension of the limitation period, with regard to costs it is the order of this court that

consistent with **Part 66.6(2) of the Civil Proceedings Rules 1998, as amended (CPR)** the claimant shall pay to the defendant the defendant's costs of the instant application.

[9] I have hereinafter detailed the reasons for my decision.

II. Factual Background

[10] The facts that gave rise to this claim are fundamental to determining whether this court ought to exercise its discretion in extending the period for filing the claim. Though there is some disparity in the facts stated by the claimant and that proffered by the defendant, the relevant facts are simple and can be briefly summarised as hereinafter set out.

[11] According to the claimant, on 23 September 2010, she was employed with the defendant as an electrician and assigned to work as part of a crew at a job site at Caroni Distillers Compound, Frederick Settlement, Caroni (hereinafter simply referred to as "the job site").

[12] She stated that while at work she was instructed by her supervisor, Mr. Daniel John, to climb a ladder which was leaned against a wall in the machine shop area of the job site in order to reach onto a platform. The claimant maintained that she did not want to do it, but was instructed to do so, and so climbed the ladder.

[13] When she reached the top of the ladder and was about to step off on to the platform, the ladder slipped on the floor which was wet at the time, causing the claimant to fall and suffer injuries. The claimant stated that the ladder was not secure in any way.

[14] The claimant further stated that following the accident she was taken to and treated at the Eric Williams Medical Sciences Complex, Mount Hope (hereinafter "Mount Hope General Hospital") and a few days later on 28 September 2010 she also sought treatment from a private doctor, Dr. Rainer Rahman. At the time, she simultaneously continued to be seen at Mount Hope General Hospital. For the next few months after the accident she claimed that she continued to experience severe pain and

was not able to work. She also maintained that her condition was not improving and so she decided to seek further assistance from a private Orthopaedic Specialist, Dr. Ian Pierre, whom she saw on several occasions starting from 30 June 2011.

[15] The defendant admitted to the facts as alleged by the claimant, save and except the facts as hereafter follow. According to the defendant, at all material times, the claimant was a casual and temporary worker who functioned as an independently contracted electrical service provider. The defendant stated that the claimant was merely hired “off-and-on” when necessity required her services on job sites. To that end, the defendant maintained that there was no written contract of employment between the claimant and the defendant and the claimant had never been an employee of the defendant. Thus the defendant denied that the claimant was ever under any duty to adhere to the instructions from Mr. Daniel John as he was no supervisor of hers and therefore had no authority to give her instructions. The defendant annexed the **Occupational Safety and Health Authority (OSHA) Non-Critical Accident Report** in support of that fact.

[16] Further, the defendant insisted that it was a very conscientious, responsible and safety-conscious employer. Therefore, it took all reasonable steps prior to the incident to ensure that no employee or casual worker was allowed on the job site without protective equipment consistent with the defendant’s Personal Protective Equipment Policy stated at appendix A of its policy on **Occupational Safety, Health and Environmental Management System**. Additionally, the defendant emphasised that it also specifically provided the claimant with a back brace as she had continuously complained of back pains on a previous job site. The defendant noted that this was important particularly in light of some of the injuries for which the claimant sought relief, given that some of those injuries appeared to be from pre-existing back conditions which had nothing to do with the accident in question. Thus, the defendant alleged that the claimant was seeking fraudulently to have the defendant pay for even pre-existing injuries unrelated to her accident.

[17] Moreover, the defendant maintained that it provided the correct equipment in the form of an “A” frame ladder as certified by the OSHA Report. In light of that, the defendant stated that it is trite that one must first open up an “A” frame ladder before climbing so as to ensure its stability. The defendant was adamant that as an experienced electrician the claimant ought to have known how to use an “A” frame ladder and nowhere in her allegations did she suggest that she was ordered to climb the ladder without opening it up. In fact, the defendant averred that the claimant’s statement annexed to the OSHA Report indicated that the claimant was well aware of the risks involved in climbing the unopened “A” frame ladder at the material time as she stated in her statement that she had advised Mr. Daniel John that the floor was wet and the ladder was not supported.

[18] The defendant therefore concluded that the claimant acted recklessly and carelessly chose of her own accord and volition to use the “A” frame ladder as it was – unopened and leaned against the wall on the wet floor – instead of doing the simple act of opening it first so that it could be stabilised before use. The defendant noted that nowhere in her claim had the claimant tried to suggest that Mr. Daniel John prevented her from opening the “A” frame ladder for her use and, therefore, in all the circumstances, the accident and consequential alleged injury and loss endured by the claimant were wholly and solely one hundred percent the fault of the claimant.

[19] The defendant further mentioned that following the accident it acted responsibly by paying the claimant all monies due to her from 2 September 2010 to 3 October 2010 which was consistent with her submission of sick leave certificates. It also paid all the initial medical expenses of the claimant including the purchase of a “donut” cushion which was prescribed for the claimant by her private doctor to assist with care of her injury and which was delivered directly to her home and subsequently replaced by another.

[20] Both the claimant and the defendant admitted that subsequent to the claimant’s accident, *more than one year later*, a pre-action protocol letter dated 14 November 2011 was issued to the defendant by the claimant calling upon the defendant to admit liability

for the accident and to compensate the claimant for her injuries. The defendant thereafter responded to the pre-action letter, by a letter dated 8 December 2011 addressed to the claimant's attorney-at-law, whereby the defendant in essence denied liability for the claimant's accident and consequential injuries.

[21] *More than two years after the defendant's response to the claimant's pre-action letter*, the claimant's attorney-at-law again wrote the defendant by letter dated 11 March 2014 calling upon the defendant to make payments under the Workmen's Compensation Act in the sum of thirty-two thousand two hundred and fifty-six dollars (\$32,256.00). The defendant responded by letter dated 11 April 2014 in essence again denying any liability and stating inter alia that by subsequent correspondence the defendant would request that the claimant visit the defendant's office for an update on the present status of her overall health position with a view confirmed by a medical doctor and further development as the defendant felt necessary.

[22] No further correspondence transpired between the parties until *approximately four years and one month after the date of the claimant's accident* when the claimant filed the instant claim on 17 October 2014. The claim was filed twenty-four days after the limitation period had expired.

III. Grounds on which the claimant sought an order of this court to extend the limitation period in the instant action

[23] The grounds upon which the claimant based her application to extend the limitation period so as to enable her to proceed with the instant claim were in essence that-

- (i) The claimant was involved in an accident on 23 September 2010 while in the course of her employment with the defendant at Caroni Distillers Compound, Frederick Settlement, Caroni;
- (ii) As a result of the said accident the claimant suffered serious personal injuries, namely, a fractured coccyx and other related back injuries;

- (iii) Subsequent to the accident the claimant embarked on a long period of treatment for her injuries, firstly at the Mount Hope General Hospital and then privately through various private medical practitioners. This treatment continued from soon after the date of the accident continuously into the year 2014. The claimant would have had to ensure that her condition was assessed with some certainty and finality before finalising her case for filing;
- (iv) The claimant had a long and arduous journey in dealing with the effect of her injuries on her physical and mental state and this affected her general well being and frame of mind;
- (v) The claimant over the period of time, from the date of the accident, endeavoured as best as possible to recover any evidence concerning the circumstances of the accident. It was only sometime in or around the end of February 2014 that the claimant was able under cover of letter dated 18 February 2014 to obtain a copy of the investigation report into her accident conducted by the OSHA which inter alia placed blame for the accident on the defendant;
- (vi) The claimant's mental state deteriorated and worsened around that time thereby rendering her incapable of properly attending to her affairs. She entered into depression. This was exacerbated when her son was charged with murder after Carnival 2014 and this together with the combined effects of her injuries, her poor financial state and her inability to work, all contributed to her worsening mental state;
- (vii) As a result of the above the claimant did not contact or attend the office of her attorney-at-law in time to finalise the statement of case for filing herein before this matter went statute barred on 23 September 2014; and
- (viii) The claim form and statement of case were eventually filed on 17 October 2014.

IV. Issues before the Court for determination in the instant matter

[24] The sole preliminary issue for determination is whether this court should exercise its discretion under **section 9 of the LCAA**, so as to enable the claimant to proceed with

her action despite the fact that by virtue of section 5 of the LCAA her claim had become statute-barred.

V. The Law and its application to the issue

(i) Law

[25] At the root of the instant application are sections 5 and 9 of the LCAA. Section 5 of the LCAA, in so far as is material to this case, provides that-

“5. (1) Subject to subsection (6), this section applies to any action for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or any enactment or independently of any contract or any such enactment where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

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

(3) Where the person injured dies before the expiry of the period prescribed by subsection (2), the period with respect to the survival of the cause of action for the benefit of the estate of the deceased by virtue of section 28 of the Supreme Court of Judicature Act, shall be four years from—

(a) the date of death; or

(b) the date on which the personal representative first acquired knowledge of the accrual of the cause of action whichever is the later.” [Emphasis added]

[26] However, section 9 of the LCAA empowers the court to exercise its discretion in determining whether it would be just to extend the limitation period in certain cases. The relevant part of the section provides:

“9. (1) Where it appears to the Court that it would be inequitable to allow an action to proceed having regard to the degree to which—

- (a) *the provisions of section 5 or 6 prejudice the plaintiff or any person whom he represents; and*
- (b) *any decision of the Court under this subsection would prejudice the defendant or any person whom he represents,*

the Court may direct that those provisions shall not apply to the action or to any specified cause of action to which the action relates.

.....

(3) *In acting under this section the Court shall have regard to all the 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 by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 8 or, as the case may be, section 9;*
- (c) *the conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;*
- (d) *the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; or*
- (e) *the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the defendant's act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages;*
- (f) *the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."*

[27] The **LCAA** is similar to the **United Kingdom's Limitation Act 1980** (hereinafter called "the UK Limitation Act"). **Section 9 of the LCAA** is the equivalent to **section 33 of the UK Limitation Act**. Therefore, the English cases which interpret section 33 of the UK Limitation Act are of strong persuasive authority. In that regard, counsel for the claimant and defendant made reference to a number of cases in their submissions, such cases to which I shall refer.

[28] In **Lalchan Babwah v Steve Hagley and anor. Cv 2014-2485**, Rajkumar J disapplied the statutory limitation provision. In that case Rajkumar J weighed the equities in the case. *He balanced the prejudice against the defendant in having the claim brought out of time as against the prejudice to the claimant of having the claim barred on the basis that it was not brought in time.*

[29] In **Horton v Sadler and another (2007) 1 AC 307** a claimant brought a claim, but failed to meet certain statutory pre-conditions before bringing the claim. Thus, the claimant could not proceed with that initial claim. The claimant then satisfied the statutory requirements and filed another claim. However, the second claim was filed after the expiry of the statutory time limit imposed by **section 11 of the UK Limitation Act**. The Trial Judge opined that he would have allowed the Claimants to utilise section 33, but he could not do so because he was bound by the House of Lords decision in **Walkley v Precision Forgings Ltd [1979] 1 WLR 606**. **Walkley** set down a hard and fast rule that if the Claimant had brought an initial claim within the statutory time limit prescribed by **section 11**, he could not avail himself of the court's discretion to allow the claim under **section 33**. The Claimant appealed and the Court of Appeal dismissed his appeal. The Claimant further appealed to the House of Lords. The question for their lordships was whether **Walkley** should be followed and whether the claimant should be allowed to pursue the second claim. The House of Lords allowed the appeal, and reversed the decision in **Walkley**. Lord Bingham of Cornhill made the following observations at paragraph 35 of his judgment, in coming to his decision:

“In a straightforward case in which the appellant's delay was short and understandable and caused the effective defendant no forensic prejudice at all, the judge was in my opinion entitled to view a motor insurer (or in default, the MIB) as the primary source of compensation for the victim of a road traffic accident. I would give effect to his exercise of judgment.”

Lord Hoffmann observed at paragraph 44 of that judgment that-

*“The Court of Appeal held that the discretion was unfettered. Lord Denning MR said that it was a revolutionary step which "alters our whole approach to time bars". So it did. **Firman's case** was on*

this point approved by the House of Lords in Thompson v Brown [1981] 1 WLR 744 and since then the practice of the courts has been regularly to exercise the discretion in favour of the plaintiff in all cases in which the defendant cannot show that he has been prejudiced by the delay. No matter how negligent the claimant's solicitors may have been in the simple skills of keeping a diary, the plea of limitation which the statute confers upon the defendant is, in the absence of forensic prejudice, described as a windfall of which he can properly be deprived.” [Emphasis added]

[30] From the observations of Lord Hoffmann and Lord Bingham, it must be observed that the watermark for falling under section 33 does not appear to be high. The most important factors emphasised are whether the defendant suffers prejudice in presenting his defence, the length of the delay and the concern not to give the defendant a gratuitous windfall defence.

[31] Finally, in the case of **Cain v Francis (2009) 2 All ER 579** Smith LJ summarised some of the important considerations that the court ought to bear in mind when deciding whether to exercise its discretion. He explained at paragraph 73 of that judgment, that-

“73 It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones.” [Emphasis added]

(ii) Application of the law to the issue

[32] There is agreement by the parties that the instant claim which is founded primarily in tort had, by the time of filing of the claim form and statement of case, become statute-barred in accordance with **section 5(2) of the LCCA**. However, it is also agreed that consistent with **section 9(3) of the LCCA**, this court maintains the power to exercise its discretion to extend the limitation period in favour of the claimant so as to allow the claimant to proceed. In effect, such discretion remains unfettered but must be exercised in accordance with considerations set out in **section 9(3)**.

[33] Applying the principle in **Cain v Francis (supra)** in determining whether this court should exercise its discretion in favour of the claimant, the overriding consideration is whether it is fair and just in all the circumstances of this case to expect the defendant to meet the claim on the merits notwithstanding the delay of the claimant in initiating the instant claim. This court must in essence consider whether it would be equitable to allow the instant claim to proceed by balancing the prejudice against the defendant in having the claim brought out of time, against the prejudice to the claimant of having the claim barred on the basis that it was not brought in time: **Lalchan Babwah v Steve Hagley and anor (supra)**.

[34] To this end, taking into consideration the entirety of the circumstances, in particular, the factors provided at **section 9(3) of the LCAA** which assist the court in determining whether it would be equitable to allow a claim, I am satisfied that it would be equitable to allow the claimant to proceed with the instant claim as greater prejudice would accrue to her if she is prohibited from pursuing her claim when compared with any likely prejudice that would accrue to the defendant. The reasons for my decision can best be explained using the factors set out at **section 9(3) of the LCAA**.

[35] The first consideration for the court which is set out at **section 9(3)(a) of the LCAA** is the *length of and reasons for the delay* on the part of the claimant. In the instant matter, four years and twenty-four days had passed since the claimant's cause of action arose, but only twenty-four days had passed since the limitation period expired on

23 September 2014. Thus, this court bears in mind that a very short period has passed since the expiration of the limitation period and thus this factor is favourable to the claimant.

[36] Regarding the reasons offered by the claimant for the delay. The reasons proffered by the claimant were essentially because of:

- (i) her poor medical condition;
- (ii) the fact that she believed that in order to be compensated she would have to first obtain a proper assessment of her overall medical condition before anything could be done further;
- (iii) her difficulty in sourcing witnesses prior to finally securing a copy of the OSHA Report on 25 February 2014;
- (iv) the deterioration of her financial state as she was unable to get a job;
- (v) the charging of her son for murder after Carnival 2014 which, in the already stressful circumstances, lead to her suffering from the disability of moderate to severe depression; and
- (vi) management difficulties at the office of the claimant's attorney which were experienced around the time when the limitation period had expired and which caused the claimant's file to be temporarily lost in a pile of files.

[37] I shall look at each of these reasons in turn. In respect of her poor medical condition, it was not such that the claimant had been immobilized or restricted from giving instructions to her attorneys. In fact, the evidence before the court is that in the time following the accident, the claimant sought the advice of her attorney-at-law and instructed him to draft pre-action letters on her behalf. This is not a case whereby the claimant's medical condition incapacitated her to the extent that she could not pursue her claim. However, this court cannot overlook the fact that claimant's injuries were very serious and would have no doubt required much of her time and attention. Among the injuries claimed were:

- (i) A fractured coccyx;
- (ii) Severe sacral pains;

- (iii) Muscle injury lumbar spine;
- (iv) Lumbo-sacral strain;
- (v) Wedge compression fracture L2
- (vi) L2-L3 and L3-L4 foraminal and extraforaminal disc bulge resulting in left foraminal stenosis impinging the exiting left L3 and L4 nerve roots;
- (vii) L5-S1 left foraminal and extraforaminal disc bulge resulting in left foraminal stenosis abutting the exiting L5 nerve root;
- (viii) **Permanent partial disability 40%.**

[38] Indeed, it appears that the accident in question left the claimant in a serious state of injury, and even though she had not been fully immobilized or incapacitated, understandably her first and foremost concern would have been to seek her recovery, which in light of her injuries, would have consumed her time. The evidence is that she had cause to seek both private care as well as care at the general hospital. Certainly, she would have had a great deal on her hands following the incident.

[39] To add to this, I have also considered the defendant's submission that even if I am to consider that she suffered a disability in the form of depression or consider the duration of that disability following the accident (**section 9(3)(d) of LCAA**), this did not preclude the claimant from initiating the claim as it occurred in the last few months before the limitation period expired, by which time the claimant's attorney-at-law would have already had charge of her claim and therefore could forward it on her behalf once he received authority to do so. Such authority, it would appear, he would have readily gotten from the claimant. Although, I agree with counsel for the defendant, that the disability of the claimant in terms of the depression she suffered in the last few months, should not have by itself prohibited the claimant from filing the claim in the first three years before she suffered such depression, I have, however, considered that the problems faced by the claimant prior to limitation period expiring, should be looked at cumulatively.

[40] Not only had she allegedly accrued serious injuries which required much of her time and attention but following the charging of her son with murder (which would have, as his mother, taken a great deal of her time) she would then have been faced with the

additional burdens of depression, which, very likely and understandably, would have slowed her pace in dealing with her affairs, including this claim. Indeed, it is a situation which calls upon the leniency and mercy of this court.

[41] That notwithstanding, in respect of the claimant's excuse that she believed that in order to be compensated she would have to first obtain a proper assessment of her overall medical condition before anything could be done further, the defendant accurately pointed out that the medical reports submitted by the claimant were dated 1 February 2010, 26 August 2011, 11 October 2012 and 23 March 2014. Thus, each of the medical reports long predated the expiration of the limitation period and therefore contrary to the claimant's allegation, she had in truth, been able to properly assess her overall medical condition before the expiration of the limitation period. The same can be said in relation to the claimant's excuse that she had difficulty in sourcing witnesses prior to finally securing a copy of the OSHA Report on 25 February 2014. That report was also obtained by the claimant and passed to her attorney-at-law months before expiration of the limitation period. However, again the evidence has to be taken as a whole. The whole of the evidence would show that the claimant though suffering many setbacks as a result of her poor medical condition and her depressed state, would have still been making avid attempts to gather information and evidence required to secure her case. Certainly without that information she would not have been able to bring a properly supported case.

[42] Regarding the claimant's assertion that she also could not pursue the claim because of the deterioration of her financial state as a consequence of her being unable to get gainful employment since her injuries, certainly, the evidence is such that at the time of filing her claim, the claimant's employment status remained the same and thus it also likely follows that her financial state would not have improved much. Yet she was still able to initiate the claim twenty-four days outside of the limitation period. The claimant also appears to have been equipped with counsel for the majority of the years following the incident since the first pre-action letter was sent to the defendant. Therefore, I am hesitant to accept this as good reason for her delay in filing the claim. To this I feel compelled to add, that our legal system has developed to ensure access to justice even to those who are unable to afford private counsel through the provision of legal aid counsel.

Thus, it is becoming an excuse of the past that a litigant cannot access the courts due to impecuniosity and it appears that stronger evidence may be required to prove the inability or delay in accessing the courts on that basis.

[43] This court is also weary of accepting as good excuse the lack of diligence of counsel for the claimant in pursuing the claim. Indeed, unforeseen circumstances are inevitable for which counsel may not be totally at fault but the court discourages the use of such excuses as referred to in the Court of Appeal authority of **Deryck Mahabir v Courtney Philips CA No. 30 of 2002 per Kangaloo JA.**

[44] Altogether, having considered the first factor at **section 9(3)(a) of the LCAA**, I am of the opinion that the length of the delay in filing the claim subsequent to the limitation period was fairly short and there was merit in some of the reasons for delay that were proffered by the claimant. Additionally, it is clear from the pleadings that the injuries for which the claimant claims are of a serious nature and that in light of the short delay in filing the claim following the expiration of the limitation period as well as the merit in some of the claimant's reason, that she is likely to suffer great prejudice if her application for extension of the period is not allowed.

[45] Yet, I have also considered the likely prejudice that may accrue to the defendant. **Section 9(3)(b) of the LCAA** requires the court to consider the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or defendant is or is likely to be less cogent than if the action had been brought within the limitation period. To this end, I have considered the defendant's evidence that it had since closed its file in relation to the accident which occurred as it was thought unlikely in the circumstances that they would have to defend a claim and as such it may be difficult for the defendant to now procure witnesses. Indeed the defendant would have had every right to believe that the claimant had not intended to pursue the claim, given that the claimant had sent the defendant two pre-action letters, one in 2011 and the other in 2014, neither of which were followed by the initiation of a claim within the limitation period, despite the fact that the defendant had on both occasions responded to the claimant's pre-action letters denying liability for the claimant's accident and consequential injuries.

[46] Furthermore, given that more than four years have passed since the incident, if by some chance liability was proven against the defendant and the issue of quantum arose, it is very likely that the defendant would be prejudiced in that it would not be able to seek independent medical advice on the actual injuries suffered by the claimant consequent to the fall. Certainly, it is expected that the claimant would have recovered from some of the injuries or at least that some of the injuries would have improved. In the same breath, she may have also suffered other injuries from events subsequent to the accident such as the state of depression that she suffered when her son was charged for murder, which would cause difficulties in determining causation and the issue of damages.

[47] However, given that only twenty-four days had passed since the expiration of the limitation period, I hardly think that the defendant's situation now would have been very different had the claim been filed within the limitation period twenty-four days before. Regarding the closing of the defendant's file, it may be a simple matter of re-opening the file. Certainly, from a review of the defence filed by the defendant which was quite detailed, it appears to the court that the defendant is still in possession of information relevant to defend the instant claim. Further, in relation to any issue arising in terms of preparation of the defence, the court has taken into consideration that the defendant was notified from very early by the claimant's 2011 pre-action letter and then later on by the claimant's 2014 pre-action letter that there was some possibility of a claim for which the defendant should have ensured and taken time to obtain any information which it thought it may need in the event that the claimant did file a claim, as she has now done.

[48] Therefore, given the proximity between the expiration of the limitation period and the actual date of filing the claim, I am of the view that the defendant's evidence would not be any less cogent than had the claim been filed in time. Further, I am satisfied that the defendant would have been put on notice from very early that a claim may have been very likely and that the defendant had sufficient time to ensure the gathering of any information that would be useful to its defence.

[49] Of additional importance is the conduct of the defendant after the cause of action arose, including the extent to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claimant's cause of action against the defendant. Consistent with **section 9(3)(c) of the LCAA** this is factor which the court is required to take into account. Indeed, in light of the evidence, I must disagree with the submissions of counsel for the claimant that the defendant's conduct after the cause of action arose was less than ideal. I am of the view that the defendant can hardly be faulted in this regard. Nonetheless, the claimant gave two examples of what she considered to be 'poor conduct' on the part of the defendant. The first example referred to the fact that subsequent to the defendant's response to the first pre-action letter in 2011, the defendant had not done as it promised by its letter dated 8 December 2011 in requesting that the claimant visit its office for an update in the present status of her overall health nor had it contacted the claimant in respect of her NI 19 forms. The second example was in respect of the fact that following the defendant's response in April 2014 to further correspondence from the claimant, the defendant stated that it would forward a workman's compensation claim through their insurance brokers on behalf of the claimant. However, no communication was received from the defendant concerning payment of any such claim.

[50] Nonetheless, the evidence clearly shows that the defendant had indeed acted in good faith and very responsibly following the accident. The unchallenged evidence is that the defendant had responded to each of the claimant's letters in a timely fashion. Further, in relation to the last letter received from the claimant's attorney dated 11 March 2014 whereby Workmen's Compensation was claimed, the defendant in its response dated 11 April 2014 requested the provision of calculations used for the figure quoted as compensation, that is \$32,256.00, as it believed that some variance was required as the claimant was employed for less than a year. However, no response was forthcoming from the claimant.

[51] Additionally, the defendant paid to the claimant the total sums due from 27 September 2010 to 3 October 2010 which was in accordance with the submission of her

sick leave certificates. Moreover, all of the claimant's initial medical expenses were met by the defendant, which was inclusive of the purchase of a "donut" cushion that was prescribed by the claimant's private doctor at the material time. Notably, the defendant also mentioned, that on the issue of the claimant's NIS claims, the defendant indicated to the claimant that certain pre-signed NI 19 forms had been prepared for the claimant but the onus of submitting the forms was the claimant's. Thus, in these premises I have no doubt that the defendant conducted itself appropriately and in the circumstances reacted reasonably to the claimant's requests.

[52] In respect of the last two factors under **section 9 of the LCAA**, I agree with counsel for the claimant that the claimant ought to be credited for immediately taking steps to pursue medical treatment for her injuries and within relative time thereafter taking steps to obtain legal advice. This is a factor that the court may take into account under **section 9(3)(f) of the LCAA**. Furthermore, in relation to the question of whether the claimant acted promptly and reasonably once she knew whether or not the defendant's act or omission to which the injury was attributable, might be capable of giving rise to an action in damages (see **section 9(3)(e) of the LCAA**), I am of the view that although the claimant may have appeared to have dealt slowly with the claim, when all the factors are taken into consideration, as aforementioned, there was merit in some of the reasons which caused the claimant setbacks and prevented her from acting more promptly.

[53] Thus, in conclusion I am satisfied that it would be fair and just in all the circumstances of this case for the defendant to meet the instant claim on the merits notwithstanding the delay of the claimant in initiating the claim. I am of the view that upon balancing the prejudice against the defendant in having the claim brought out of time, against the prejudice to the claimant of having the claim barred on the basis that it was not brought in time, that the greater prejudice would accrue to the claimant if the claim is not allowed to proceed. Thus, I am of the view that the limitation period ought to be extended in favour of the claimant. This is an appropriate case in which it would be equitable for the court to exercise such discretion in extending the limitation period in favour of the claimant.

VI. Disposition

[54] In the premises, in accordance with **section 9 of the LCAA** this court hereby orders that the limitation period for filing of the claimant's instant claim be and is hereby extended from 23 September 2014 to 17 October 2014, so as to enable the claimant to proceed with her action.

[55] In light of the fact that the claimant has been at fault in not filing her claim within the limitation period thereby causing the defendant to respond to the instant application for extension of the limitation period, with regard to costs it is the order of this court that:

- (i) Consistent with **Part 66.6(2) of the CPR** the claimant shall pay to the defendant the defendant's cost of this application to be assessed in accordance with **Part 67.11 of the CPR** in default of agreement.
- (ii) In the event that there is no agreement, the defendant's shall file a Statement of Costs on or before 29 June 2015 and the claimant shall file objections (if any) on or before 20 July 2015.
- (iii) The case management conference is fixed for 10th July, 2015 at 10:45am via video link from SF 06 to POS 19.

Dated this 8th day of June, 2015

Robin N. Mohammed
Judge