

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
(SUB REGISTRY SAN FERNANDO)**

Claim No. CV 2012-00309

BETWEEN

Mala Chamroo
(Legal Personal Representative of the Estate of Anil Alvin Mahabir) Claimant

And

Richard David Rochford 1st Defendant
Sagicor General Insurance 1st Co-Defendant

And

Shawn Cummings 2nd Defendant
Motor and General Insurance Company Ltd 2nd Co-Defendant

And

Bridget Rochford 3rd Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Ms. S. Singh for the Claimant.

Ms. N. Ramyad for the First Defendant, First Co-Defendant and Third Defendant.

Ruling on Preliminary Issue of Time Limitation

1. The Claimant was appointed the representative of the estate of Anil Alvin Mahabir (the deceased), her son, by Order dated the 24th August 2011 for the purpose of commencing legal action on behalf of the estate of the deceased. The order was however stated to be subject to the provisions of the **Limitation of Certain Actions Act Chap 7:09**

2. By Claim Form and Statement of Case filed on the 25th January 2012, the Claimant sought to recover damages for the death of the deceased under the provisions of the **Supreme Court of Judicature Act Chap 4:01** for the benefit of the estate of the deceased. The Claimant alleges negligence on the part of the First and Third Defendants out of an accident which occurred on the 14th May 2006. An Amended Claim Form and Statement of Case were filed on the 22nd August 2012. In her Amended Statement of Case, the Claimant avers that she is entitled to bring the present action by virtue of s. 5(3) of the **Limitation of Certain Actions Act**.

3. By consent, on the 18th January 2013, the claim was withdrawn against the Second Defendant and Second Co-Defendant.

4. A Defence was filed on the 2nd April 2012 on behalf of the First Defendant and the First Co-Defendant. The Defendants raised the issue of expiry of the limitation period in their Defence the claim having been filed outside of the four year limitation period provided for in s. 5 of the **Limitation of Certain Actions Act**. This is the issue to be determined by the court as a preliminary point. There were subsequently several amendments to the Defence with the last in time being the Re Re-Amended Defence filed on the 8th February 2013.

5. At a CMC held on the 1st March 2013, an order was made that the Defendants file and serve submissions on the preliminary issue by the 8th April 2013 and the Defendants complied with this order. It was also ordered that the Claimant file her submissions in reply by the 20th May 2013 and a date was set for decision. There was no compliance by

the Claimant and on the 22nd May 2013 the court extended the time for the Claimant to file submissions to the 3rd June 2013. To date there has been no compliance with the order of the court. However, by Notice of Application filed on the 28th May 2013, some 8 days after the deadline for submissions the Claimant applied for an order that she be permitted to file a Reply to the Defence on the basis that it was necessary to respond to the Defendants' averment that the claim was statute barred. The court notes at this stage that the averment that the claim was out of time arose in the Defence which was filed on 2nd April 2012. The Claimant filed an Amended Statement of Case on the 22nd August 2012, some four months thereafter, but chose not to include in the Amended Statement of Case any proper answer to the averment in respect of limitation raised in the Defence except to say that the claim is not statute barred. Further, despite the late application, the Claimant has not seen it fit to comply with the court's order for submissions. Neither has the Claimant taken the liberty of filing the submissions out of time with a view to assisting the court on either the preliminary point or her application to file a reply and its relation to the preliminary point. This is of particular gravity since it is clear that the Defendant has long complied with the order and there is now no reply to the submissions made on behalf of the Defendant. This can surely not be said to be in the best interests of the Claimant. This court considers this to be a breach in these particular circumstances to be very grave and intends to deal with the consequences of such breach. The date for decision having been previously set some three months ago, the court shall not grant any further adjournments for the purpose of submissions as a balance has to be struck between the interests of both parties. The result is that the court must give its decision without the benefit of the Claimant's submissions on the issue.

6. There are no pleadings by the Claimant in the Amended Statement of Case in relation to a dependant's claim. Thus, although the Defendants submit that there is a dependents action under the **Compensation for Injuries Act Chap 8:05**, the time limitation point ought actually to be determined with reference to s. 5(3).

7. Section 5(3) and (5) of the **Limitation of Certain Actions Act** provides:

(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.***

...

(5) For the purposes of this section “personal representative” includes any person who is or has been a personal representative of the deceased and regard shall be had to any knowledge acquired by any such person while being a personal representative.[emphasis mine]

Defendants’ Submissions

8. The Defendant submitted that the Claimant has not set out when she first acquired knowledge of the accrual of the cause of action. Therefore it was submitted that the only evidence before the court on which a determination can be made from when time ran is the date of the death of the deceased.

9. Section 7 of the Act sets out when a person first acquires knowledge of the cause of action:

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.

10. In this regard, the Defendants submitted that the Claimant would have first acquired knowledge of the accrual of the cause of action on 4th March 2006 for the following reasons:

i. As the Claimant was an adult at the time the deceased died, she would more likely than not have acquired knowledge that the deceased was involved in the said collision from which he sustained serious injuries which resulted in his death shortly thereafter.

ii. As the deceased died as a result of injuries sustained in the said collision, a reasonable person must have known that the injury was significant, and it was sufficiently serious to justify initiating legal proceedings;

- iii. *As the deceased's injuries were caused as result of the said collision, the Claimant ought to have known that the injury was attributable in whole or in part by the driver of the Third Defendant's vehicle;*
- iv. *There is no evidence before the Court for the Court to find that the Claimant was unable to ascertain the identity of the Defendants.*

11. The Defendants also contend that while the court has a discretion under s. 9 of the **Limitation of Certain Actions Act** to override the limitation period, there is nothing on record which allows the court to exercise this discretion.

12. The court must therefore determine:

- i. When time began to run, for the purpose of the limitation period.
- ii. If the action was brought out of time, whether the court ought to exercise its discretion pursuant to s. 9 of the Act.

When did time begin to run

13. Without the benefit of the Claimant's submissions, in addressing this issue the court considers three possible start dates for the running of the limitation period:

- i. The date the Claimant received any legal of other advice;
- ii. The date the Claimant was appointed representative of the estate of the deceased;
- iii. The date of death of the deceased.

DATE OF ADVICE

Knowledge

14. In this regard the court has also considered the application of the Claimant to file and serve a Reply, in order to answer the limitation point. Not to consider the contents of that

application would in the court's view deprive the Claimant of the opportunity of being heard. By way of the affidavit in support of Sasha Singh, it is deposed that the Claimant only became aware of a cause of action for the death of her son when she received advice from her previous attorney in December 2010, some four years and seven months after the death of the deceased. It is not submitted that the Claimant was unaware of her son's death but that she was unaware that she could take legal action until December 2010. That is the only answer sought to be given in reply to the pleading on limitation. A perusal of the draft Reply annexed to the said affidavit sets out the relevant averment at paragraphs 1(a), 1(b) and 1(c). They are in large measure consistent with what is set out in the affidavit. So taken at its highest, the Claimant is saying that she stood by for four years and seven months without appreciating that she could have taken legal action for her sons accidental death.

15. In ***Halford v Brookes and another*** (1991) 3 All ER 559, the English Court of Appeal considered section 14 of the Limitation Act, 1980 (“the English legislation”) which is similar to section 7 of our Act. Lord Donaldson MR stated at page 574 of the judgment as follows:

“The word (‘knowledge’) has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context ‘knowledge’ clearly does not mean ‘know for certain and beyond the possibility of contradiction’. It does, however, mean ‘knowing with sufficient confidence to justify embarking on the preliminaries to issue the writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence’”.

16. Thus, ‘knowledge of facts’ for the purposes of section 14 of the English legislation therefore did not depend on knowing with certainty and confidence with the help of legal advice that a particular claim was available, since legal advice did not fall within the category of appropriate expert advice necessary for ascertaining knowledge of a fact: See. **Halford** (supra) at page 565. This as the court understands it is also the position in this

jurisdiction and no authority to the contrary has been provided. Further, even if one was to consider the draft Reply, it is quite clear that the Claimant had knowledge of the facts including death since the date of death. In fact this is what she avers in the draft Reply was the cause of her migration to Canada.

Significant Injury

17. The circumstance of this case, however is that the death of the deceased occurred immediately following the accident by way of what the court considers to be significant injury. It is clear in the absence of evidence to the contrary that the Claimant in these circumstances would reasonably have considered it sufficiently serious to justify her instituting proceedings against a defendant who did not dispute liability and was able to satisfy a judgment. It could not therefore be the case that in these particular circumstances the Claimant could only have reasonably appreciated that she had a claim only by way of legal advice. For the avoidance of doubt this court is not saying that there will be no case in which a personal representative may only appreciate that there was a cause of action in relation to death after the expiration of the limitation period, but in the court's opinion such cases by their very nature are bound to be far and few. It is almost inconceivable that in the circumstances of this case however, the Claimant would have been so unaware.

18. The court therefore finds that in this case, the date upon which the Claimant received advice from her attorney is not the instructive date for the purpose of the calculation of the period of limitation.

19. It follows that the answer sought to be provided in the draft Reply proposed would not have made a difference to or assisted the Claimant in her arguments in relation to this preliminary point in any event.

DATE OF APPOINTMENT OF REPRESENTATIVE

20. It cannot be argued that the Claimant only obtained knowledge of the cause of action when she was appointed representative of the estate of the deceased. That is to say, that knowledge acquired before she became a representative could not count until she becomes a representative.

21. In Sarah Young and ors v Lena Pegus and ors H.C.876/2008. CV.2008-00876 a case with similar facts, Justice Rajnauth-Lee (as she then was) considered a similar issue. At para 45 of her judgment it was held that:

“It is the view of the Court that the conjoint effect of sections 5(3)(b) and 5(5) of the Act is that in the circumstances of this case time began to run from the 10th March, 2004 when the Claimants acquired knowledge of the accrual of the cause of action against the Defendants. Moreover, in the judgment of the Court, to hold that time begins to run from the date of the grant of letters of administration to the Claimants would lead to an absurdity since it would mean that a claimant may take perhaps twenty years to obtain a grant of letters of administration and would in those circumstances be entitled to rely on the provisions of sections 5(3)(b) and 5(5) of the Act and to contend that he was within time to commence a claim for the benefit of the estate of the deceased since according to the argument advanced on behalf of the Claimants time only runs from the date of the grant of letters of administration to the Claimants. In the Court’s view, such an interpretation would defeat the purposes of the Act.”[emphasis mine]

22. The court agrees that it could not have been intended that the legislation left the time period for commencing an action in these circumstances open indefinitely until representative capacity is obtained on behalf of the estate. It would be absurd to leave a possible Defendant in a state of the unknown for an indefinite period. The court notes that the Claimant only applied to be appointed representative in July 2011, a date some five years after the death of the deceased.

Date of death

23. The court considers that s. 7 is sufficiently clear on the issue of when knowledge accrues. The factors listed therein need not be all proved as the legislation ascribes knowledge on proof of any of the listed factors.

24. In this regard the court is of the view that:

- i. The Claimant, being the mother of the deceased, would more likely than not have acquired knowledge that the deceased was involved in a fatal accident shortly after the time of the accident. It has not been alleged that the Claimant found out about the death of the deceased at any date subsequent to the date of death. Death of a child is significant within the meaning of s. 7(1)(a).
- ii. Further, the circumstances of the case were that the deceased and his girlfriend had been pedestrians and that the First and Second Defendants's vehicles collided with them. In these circumstances, the Claimant ought to have known that the deceased's injuries would have been attributable in whole or in part to the act or omission of the First and Second Defendants which was alleged to have constituted negligence
- iii. The circumstances of the accident made it possible for the Claimant to ascertain the identity of the Defendants. Further, it has not been alleged by the Claimant that she could not ascertain the identities of the Defendants.

25. In the judgment of the court, for the purpose of the limitation period time should be computed from the date of death of the deceased, that is, 14th May 2006. The result is that the action, having been commenced on the 25th January 2012 it is out of time.

Section 9 Discretion

26. The court must now consider whether the circumstances of the case are such that it ought to exercise the discretion conferred in s. 9 of the Act.

27. Section 9 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.

(2) The Court shall not give a direction under this section, in which the provisions of section 6 are not applied except where the reason why the person injured could no longer maintain an action was because of the time limit established by section 5.

(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.

28. Thus, s. 9 requires the court to assess the degree of prejudice likely to be suffered by the Defendants in the event of the exercise of the power and by the Claimant in the event of a refusal to do so. Having conducted this balancing exercise and concluding that it would be inequitable not to override the limitation period, the court is then duty bound to consider all the circumstances of the case and to have regard in particular to the six specified matters in section 9 (3)

Prejudice

29. It is the Claimant's burden to prove that the Defendant will suffer no prejudice if the action (which was filed some twenty months after the expiration of the limitation period) is allowed to proceed: **Aparball et al v The AG CV2007-04365**.
30. As noted above, there are no submissions by the Claimant. The court therefore has no evidence upon which to assess this requirement.
31. In **Mitchell v. Bickraj HCA 617 of 2004** Jamadar J (as he then was), explained:

“Courts ought not to extend statutory limitation periods without good cause, and section 9 (3) describes at least six considerations which a court must have regard to. These considerations are not weighted. This is a matter which Parliament has left to the courts. The overriding consideration is “all the circumstances of the case”, which gives the court a fair measure of latitude. However, as with all judicial discretions, this one must be exercised in a fair and reasonable manner,

bearing in mind the relevant facts and applying the appropriate legal considerations. Judicial discretion is not some amorphous power to be exercised whimsically”.

32. The court agrees with and endorses the dicta set out by the Honourable Mr. Justice Jamadar. Firstly, the Claimant has not asked this court to exercise its discretion should it find favour with the preliminary point on limitation taken by the Defendant. Secondly, in the absence of any evidence or arguments as to prejudice made by the Claimants, upon whom the burden lies, the court cannot properly exercise the discretion set out in s. 9. The Claimant in this case has been given more than a reasonable opportunity to be heard in answer to the submissions but has refused to so do. To exercise the discretion in those circumstances would be to exercise judicial power whimsically.

33. The court finds therefore that the action is statute barred and cannot be maintained. The claim is therefore dismissed. The parties shall be heard on the issue of costs.

Dated this 5th day of July 2013

Ricky Rahim

Judge