**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No. CV1349 of 2016**

**BETWEEN:**

| | |
|---|---|
| **EARL GIBSON** | **FIRST CLAIMANT** |
| **ELMA GIBSON** | **SECOND CLAIMANT** |

**AND**

| | |
|---|---|
| **KIBWE MCCOLLIN** | **DEFENDANT** |

***Before Master Deborah Holder, BSS, Master of the High Court***

**2019: June 6**

**Appearances:**

**Mr. Kenrick Wiltshire, Attorney-at-Law for the Claimants**

**Ms. Alicia Archer, Attorney-at-Law for the Defendant**

## DECISION

### Introduction

[1] On 14th February 2017, the Claimants filed this application with supporting affidavits seeking a direction and/or order under **section 52** of the **Limitation of Actions Act** Chapter 231, that the provision of **section 20.(2)** of the said Act shall not apply to the Claimants' cause of action on the ground that its application would result in severe prejudice to the Claimants.

[2] Proceedings in the substantive matter commenced by Claim form and Statement of Claim which were filed on 14th October, 2016. In this matter

the Claimants are seeking damages for personal injuries and loss which they sustained in a road accident on 19th March, 2013. On that date the First Claimant was driving motor car J505 with the Second Claimant as a front seat passenger, along Charles Rowe Bridge Road, St. George, when the Defendant who was driving XH246 collided with the rear of J505. According to the Claimants the collision was caused solely by the negligence of the Defendant.

[3] In his Defence, the Defendant admitted that the collision occurred on 13th March, 2013 but denied that it was caused solely by his negligence. However he pleaded that the claim had not been filed within the period limited for filing of claims relating to personal injuries.

[4] **(a) <u>The Claimants' Affidavit</u>**

The Claimants deposed that the police attended the accident and the Defendant admitted that he collided with the rear of their vehicle. They both sustained injuries as a result and the vehicle was damaged.

[5] Shortly after the collision the Claimants' insurers informed them that the Defendant's insurers had admitted liability and had agreed to repair the motor car J505 and to compensate them for their injuries and loss.

[6] The Defendant's insurers compensated the First Claimant for the damage to the car and provided him with a hired car while it was being repaired.

[7] The Claimants were both treated by Dr. Thompson and the First Claimant was also treated by Dr. John Gill. They subsequently retained counsel. They were aware of correspondence between their counsel and the insurers and also that a quantified claim was invited.

[8] They both tried to get the medical reports. They received Dr. Thompson's report dated 30th April, 2016 during the month of May 2016. The First Claimant did not receive Dr. Gill's report.

[9] They stated that the Defendant's insurers were informed of the accident either the same day or the following day and they were led to believe that the claim would have been settled.

[10] **(b) <u>Mr. Wiltshire's Affidavit</u>**

Mr. Wiltshire deposed that he was retained by the Claimants during the month of April 2013. He contacted the Claimants' insurers who told him that the Defendant's insurers had admitted liability for the accident and had agreed to compensate the Claimants for damage to the vehicle and personal injuries and loss.

[11] He wrote the Claims Manager of the Defendant's insurers on 11th April, 2013 on the matter and sent him a reminder on 3rd May, 2013. He received a response on 13th May, 2013. In spite of the wording he understood it as an acceptance of liability because of his previous dealings with the said company. Also, other insurance companies used similar worded letters which they treat as admissions of liability. He also stated that the language is widely used as such in the legal and insurance professions.

[12] The letter dated 13th May, 2013 stated:

> "Thank you for your letter of April 11, 2013 in connection with the above matter.
>
> Our investigations into this matter continues and at the moment we are not in a position to comment on liability.
>
> However in the interest of time and entirely without prejudice to liability, we would be interested to see the quantified claim on behalf of your clients. Do note that this request is not to be considered as an admission of liability.
>
> We look forward to hearing from you."

[13] He also deposed that the Claimants were under Dr. Thompson's care for about three years. He tried unsuccessfully to obtain the medical reports from Dr. Thompson and Dr. Gill. He called their offices and sent letters.

Dr. Thompson's report was received after the limitation period had elapsed, but Dr. Gill's report was not received.

[14] He nevertheless proceeded to quantify the claim without Dr. Gill's report, perhaps to the disadvantage of the First Claimant, and submitted it on 13th June, 2016.

[15] By letter dated 8th July, 2016 he wrote Mr. Adrian Layne, Managing Director of BGI insurers and submitted a letter dated 7th July, 2016 from Alvin Trucking with respect to loss of earnings. On 25th July, 2016 he also wrote Mr. Layne asking for a response.

[16] In the middle of August 2016 he spoke to another employee who informed him that Mr. Layne was absent form work because of an accident. She told him that the Trinidadians would have been in the island within days and he would get an offer shortly.

[17] On 2nd September, 2016, attorney-at-law Ms. Evadne Brewster-Wiltshire telephoned Shawn Ifill, another employee of the Defendant's insurers and he promised to get back to them with a response. When contacted on 6th September, 2016 Mr. Ifill promised to respond and stated that the claim was under review.

[18] On 7th September, 2016 he received a "Without Prejudice" letter signed by Claims Associate Shawn Ifill in the following terms:

> "Thank you for your letter dated July 25, 2016 in connection with the above captioned matter.
>
> Unfortunately, we are unable to assist on this occasion as the Statute of Limitation has expired in this matter and we have closed our files and removed our reserves against these claims.
>
> We trust you appreciate the position."

[19] Mr. Wiltshire promptly called Mr. Ifill and voiced his disgust. The latter told him to write a letter which he would pass to his supervisors. He hand

delivered a letter the said day requesting a response by 25th September, 2016. There was no response so he filed the claim.

**(c) The Defendant's Affidavit in Response**

[20] The Defendant, responding on behalf of his insurers, admitted that Mr. Wiltshire spoke to the two named employees who promised to discuss the matter with their seniors from the head office in Antigua but they never indicated that there would have been a favourable outcome. In any event the discussions with the employees took place five and six months respectively after the expiration of the limitation period.

[21] He referred to the insurers' letter dated 13th May, 2013 and deposed that liability was never admitted either orally or in writing. He stated that even though the insurers had paid for the repairs to the vehicle and provided a rental car they never promised to settle any further claims.

[22] He also added that the insurers received no further correspondence between the letter dated 13th May 2013 and the expiration of limitation. The next correspondence was the quantified claim which was received three months after the limitation period. Consequently they were entitled to believe that the matter was dropped. He too, not having heard anything further about the matter until he was served with the Claim form three (3) years and seven (7) months after the accident was also entitled to believe that the matter was closed.

**The Claimants' Submissions**

[23] Mr. Wiltshire expressed the opinion that it was unreasonable, unconscionable and in bad faith for the Defendant and his insurers to rely on the limitation period as a defence. They were notified of the accident the very day it occurred by the Claimants and by letter dated 11th April, 2013 from the Claimants' Counsel. They repaired the Claimant's car

within three weeks and provided a hired car while it was being repaired. They also invited a quantified claim from the Claimants.

[24] He argued that to allow the Defendant and his insurers to rely on limitation would be to allow them to benefit from a windfall to which they were not entitled.

[25] He also said that after the limitation period had expired they accepted the quantified claim and made promises to settle for three clear months. In this regard he blames them for part of the delay in his filing the claim.

[26] He contended that they were fully aware of accident and the Claimants' injuries and that based on the events that occurred it was reasonable for the Claimants and their counsel to infer that liability was accepted.

[27] He stated that the Claimants were under medical care for three years and the quantified claim could not be prepared earlier because the medical reports were not available.

[28] He was of the opinion that the delay could not affect the cogency of the evidence because the parties were still available and the insurers took all "relevant details" and photographs at the scene of the accident.

[29] Mr. Wiltshire also contended that the Defendant was solely responsible for the collision and that the Claimants had a strong case. He said that unlike the Defendant, the Claimants would suffer prejudice if they were not allowed to proceed.

[30] He felt that the insurer's letter dated 13th May, 2013 was a "standard formula" used by insurers generally and the Defendant's insurers in particular even when liability was not in issue. Further, even though the letter did not state that liability was accepted, it did not state that liability was denied. Nevertheless, the court was not prohibited from granting the enlargement of time, however the letter was construed.

[31] He interpreted the words "we have closed our files and removed our reserves" in the letter of 6th September, 2016 as an indication that they had put reserves in place and queried why they had done this if liability was not accepted. He urged that court to find that they did accept liability.

[32] He argued that since the Claimants were not warned or notified by the insurers of their intention to close their file and take the limitation point if the claim was not received before the limitation period had elapsed, they were now estopped from raising it as a defence.

[33] Counsel asked the court to consider three cases from the High Court of Barbados, in support of the above arguments.

[34] In ***Lester McDonald Daniel v. M and W Jordan Enterprises Inc. and Adrian Maynard***. No 844/2007 (BB2009 HC 11) the plaintiff sustained personal injuries in an accident on 31st December 2002 and filed his claim on the 10th May, 2007. Limitation was raised as a defence and the plaintiff sought an enlargement of time. The insurers were notified by letter dated 27th June, 2003, that is, six months after the accident. The insurers settled the claim with respect to the car within the limitation period.

[35] The court held that the defendants had early notification of the nature of the plaintiff's claim. Prior to the expiry of the limitation period they had satisfied themselves of the defendants' liability for the accident and had settled that portion of the claim. The court was satisfied that this would have led the plaintiff and his attorney-at-law to believe that liability was not in issue and that since the insurers did not warn the claimants that they intended to close their file and take the limitation point if the claim was not received within the limitation period, the defendants and their insurers were estopped from raising the point at that stage.

[36] In ***Best v. C P Hotels (Barbados) Inc.*** CV185/2004 (BB 2005 HC 28) the plaintiff was injured on her job on 24th November, 1997 and her employer sent her to the company's doctor. On 16th February, 1998 her attorney-at-law wrote the defendant claiming damages for injury on the ground of negligence and copied the letter to the defendant's insurers. In a "without prejudice" letter dated 14th May, 1998, the insurers invited the submission of a quantified claim. The plaintiff was referred for a test in Trinidad and the insurers paid for and organised travel arrangements to Trinidad.

[37] The plaintiff was awaiting medical reports. Four years and six months had elapsed before she submitted the reports or corresponded with the insurers.

[38] **Inniss J** felt that the defendant's conduct in paying for the MRI and making travel arrangements had to be considered. He said that while liability was not actually accepted, a reasonable inference was raised that there was no problem with respect to liability. The Defendant was promptly notified and the cogency of the evidence was not likely to be affected by the delay. The enlargement was granted.

[39] In ***Angela Watkins v. Marlene Holder and Brian Holder*** nos. 2173 of 2002 and 2555 of 2002, the plaintiff was involved in a collision and suffered injuries. Two weeks later her lawyers informed the insurers. Four months later the insurers in a "without prejudice" letter invited a quantified claim. The plaintiff's counsel went about gathering medical reports and documents with respect to pecuniary loss and the claim was submitted less than five months after the limitation period had expired.

[40] **Moore J** found that the claim was not stale. The defendant was promptly notified. It was held that the defendant's ability to defend the action was not affected by the delay. He considered the prejudice to the defendants

and felt that it would be inequitable to deprive the plaintiff of the right to argue her claim.

**The Defendant's Submissions**

[41] Ms. Archer submitted that the Claimants' application should be refused. She stated that in the circumstances of this case it would not be fair and equitable to allow the Claimants' to proceed out of time.

[42] In her opinion there was no reasonable explanation for the delay in instituting legal proceedings since the Claimants' attorney-at-law was aware of the limitation period as evidenced by his letter dated 26th January, 2016 to Dr. Thompson, approximately three months before that period elapsed.

[43] She also argued that there was no reasonable explanation for the Claimants' delay in filing a protective claim when it became apparent that the limitation date was about to expire.

[44] She contended that there was no reasonable explanation for the Claimants' failure to correspond with the Defendant for the period 19th March, 2013 – 13th June, 2016.

[45] Ms. Archer suggested that if the Claimants were having difficulty obtaining medical reports from their doctors they could have been referred to other medical practitioners and/or they could have made a complaint to the Medical Council in respect of the doctor's failure.

[46] She also contended that the without prejudice quantified claim was submitted five months after the limitation period had passed therefore the Defendant's insurers was not in a position to know the nature and/or extent of the claim. Moreover, the Defendant's insurers were at pains to indicate that there was no acceptance of liability.

[47] Counsel submitted that, not having heard anything whatsoever from the Claimants, the Defendant and his insurers proceeded on the basis that the Claimants were no longer proceeding. In the circumstances of this case the Defendant could not be said to enjoy the benefit of a windfall by the application of the limitation defence, instead there were being asked to face a stale claim. She added that since no claim was made within the limitation period no reserves were allocated for the matter.

[48] She suggested that the Defendant would be prejudiced in his ability to defend the claim as a result of the delay. Also, that the insurers would not be able to request an independent medical examination of the Claimants' condition. In addition she stated that it would be impossible to trace third party witnesses. She claimed that the "police officer was not a witness but merely took a report."

[49] It was also suggested that the Claimants suffered no disability through change of attorney-at-law or otherwise.

[50] Ms. Archer cited ***Ramsden v Lee [1992] 2 All ER 204***, where the courts powers under **section 33** of the 1980 Act of the U.K. **(section 52(1) of the Barbados Act)** were considered. It was held that the court must have regard to all the circumstances of the case in exercising its discretion whether to disapply the limitation period. The Court of Appeal applied the dictum of **Lord Diplock** in ***Thompson v. Brown Construction (Ebbw Vale) Ltd. [1981] 2 All ER 296.***

[51] Ms. Archer also cited ***Hartley v. Birmingham [1992] 2 All ER 213*** where the court held that the only proper question for the judge to ask himself in exercising his unfettered discretion whether to disapply a limitation period under **section 33.(1)** was whether it would be equitable, that is, fair and just, to allow the action to proceed. In this regard account must be taken of

the prejudice to both the plaintiff and the defendant, the specific matters mentioned in **section 33.3** and all the circumstances of the case.

[52] She also referred to propositions which were established by **Lord Diplock** in ***Thompson v. Brown Construction (Ebbw Vale) Ltd. (supra)***.

[53] Counsel discussed ***Donovan v. Gwentoys Ltd. [1990] 1 All ER 1018***. In that case the letter of intent did not specify the date of the accident, the nature of injury or negligence alleged. The writ was issued the following month, that is, five months after the expiry of the limitation period. The plaintiff was not aware of the specifics of the allegation until the statement of claim was issued another three months later, the nature of the claim was revealed one year later when the medical report was provided and the date of the accident was not identified until a further five months had elapsed.

[54] The House of Lords reiterated that the judge's unfettered discretion under section 33(1) of the 1980 Act was not fettered by section 33(3) which sets out the matters to which the court was to have regard in exercising its discretion.

[55] It was held that the judge was wrong to concentrate only on the 5½ months delay after the expiry of the limitation period and he should have taken into account the circumstances arising within the limitation period especially the fact that the Defendant was not notified of the claim until 5 years after the accident occurred. The balance of prejudice came down in favour of the Defendant since it would be inequitable to require them to meet a claim they would have utmost difficulty defending.

[56] **Lord Griffiths** said at page 1023(g) that the section is not intended to fetter the court's discretion but to "focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the

exercise of the discretion and which must be taken into consideration by the judge."

**The Law**

[57] **Limitation of Actions Act** Chapter 231.

"**20. (1)** This section applies to an action for damages for

(a) negligence;

(b) nuisance; or

(c) breach of duty, whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or of any such provision,

when 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) Except where subsection (3) applies, no action to which this section applies may be brought after the expiration of the period of 3 years from the later of the following dates

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

(b) the date on which the person injured acquired knowledge of his cause of action."

*Exclusion of Time Limit in Respect of Personal Injuries or Death*

"**52(1)** If the court considers that it would be equitable to allow an action to proceed having regard to the degree to which

(a) the provisions of section 20 or 22 prejudice the plaintiff or any person whom he represents; or

(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 do not apply to any specified cause of action to which the action relates.

**53(1)** In acting under section 52 the court must 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 20 or, as the case may be, by section 22;

(c) the conduct of the defendant after the cause of action arose, including the extent, if any, 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;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and

> (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 might have received."

**Discussion**

***The Issue***

[58] The only issue is whether the application should be granted.

***The Evidence***

[59] In my opinion there is no significant divide between the parties with respect to the evidence. The Defendant is in no position to dispute that the Claimants' insurers told them that the Defendant's insurers had admitted liability for damage to the vehicle and personal injuries and loss. The Defendant has admitted that his insurers paid for repairs to the vehicle and provided a hired car. It is also not disputed that the Defendant's insurers were given early notice and a quantified claim was invited.

[60] The disagreement has to do with the interpretation of the letter dated 7th September, 2016 as well as whether the Defendant's insurers, through their employees, continued to promise to settle after the limitation period had expired as stated by Mr. Wiltshire or whether they merely promised to discuss the matter.

***The Purpose of the Limitation Period***

[61] The expiration of the limitation period provides the Defendant with a complete defence. However as the court endeavours to determine whether it is equitable, that is fair and just to allow an action to proceed, it is essential that one does not lose sight of the purpose of the limitation period.

[62] In ***Best v C.P. Hotels (Barbados) Inc.*** CV 185 of 2004 (BB 205 HC 28) **Inniss J** aptly explained it as follows:

> "[21] The purpose of the legislation is not to provide a tortfeasor with a route to escape payment of its just debts arising out of its negligence, but rather to prevent a defendant from being taken by surprise when confronted by a claim a long time after the incident out of which the claim arose. In such circumstances the defendant would have had no opportunity to make provision for the claim or alternatively, prepare its defence."

[63] The oft-quoted **Lord Griffiths** in ***Donovan v. Gwentoys Ltd.*** (supra) at page 1024.f put it this way:

> "The primary purpose of the limitation period is to protect the defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal."

[64] The correct approach to be taken by the court in matters of this sort has been discussed in cases such as ***Ramsden v. Lee*** and ***Hartley v. Birmingham City District Council*** which were previously cited.

[65] It is settled that the court's discretion to disapply a limitation period is unfettered. Thus **Dillon LJ** in ***Ramsden v. Lee*** (supra) endorsed the position taken by **Lord Diplock** in ***Thompson v. Brown Construction (Ebbw Vale) Ltd.*** (supra).

[66] He said at page 208 j:

> "Lord Diplock goes on to stress that what the court has to decide is whether it would be equitable to allow the action to proceed, and he points to the fact that under the section the court has to have regard to all the circumstances of the case not merely the six matters singled out for particular mention."

***Prejudice and Delay***

[67] Prejudice and delay are always inextricably linked in these matters. Ms. Archer submits that the Defendant will suffer prejudice as a result of the

delay. Mr. Wiltshire disagrees. She supports the opinion of **Lord Oliver of Aylmerton** in ***Donovan v. Gwentoys Ltd. (supra)*** at page 1025 that:

> "A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost."

[68] In ***Thompson v. Brown Construction (Ebbw Vale) Ltd.*** (supra) **Lord Diplock** made the point that where a court gave a direction that the primary limitation period shall not apply, the only effect of such a direction was to deprive the defendant of a complete defence to an action.

[69] He continued at page 301 e, f:

> "A direction under the section must therefore always be highly prejudicial to the defendant, for even if he also has a good defence on the merits he is put to the expenditure of time and energy and money in establishing it; while if, as in the instant case, he has no defence as to liability he has everything to lose if a discretion is given under the section. On the other hand if, as in the instant case, the time elapsed after the expiration of the primary limitation is very short, what the defendant loses in consequence of a direction might be regarded as being in the nature of a windfall."

[70] The issue was put in perspective by the statement of **Parker LJ** in ***Hartley v. Birmingham*** (supra) at page 224 f, g:

> "In my view, however, as the prejudice resulting from the loss of the limitation defence will always or almost always be balanced by the prejudice to the plaintiff from the operation of the limitation provision the loss of the defence *as such* will be of little importance. What is of paramount importance is the effect of the delay on the defendant's ability to defend."

***(a) The Length of and Reason for Delay***

[71] The relevant period of delay is the delay subsequent to the expiry date to which the court must have regard under **section 33.3(a)** and **4** of Limitation Act 1980 U.K. **(section 53(1)(a) Barbados)** but the court can take into account all the circumstances arising within the limitation period. (See ***Donovan v. Gwentoys.*** supra)

[72] In this matter the Claimants continued to be treated for their injuries. The reason given for the delay was that, in spite of their efforts they were unable to get the medical reports in order to quantify the claim. The reports were received approximately two months after the limitation period.

[73] In both ***Best v. C.P. Hotels (B'dos) Inc.*** and ***Lester Daniel v. M and W Jordan Enterprises*** (supra) the court considered the part played by the plaintiff's attorney-at-law in the delay. In the former case **Inniss J** stated that the plaintiff's attorney-at-law ought to have shown greater alacrity in seeking to obtain medical reports and/or in keeping the Defendant's attorney-at-law up to date on the progress of the matter.

[74] In the latter case **Crane-Scott J** said that the lack of communication was on both sides. She said that the conduct of the Defendant's insurers in not sending a further reminder or notification to the plaintiff's attorney-at-law before closing its file is a circumstance which must be weighted in the balance alongside the apparent dilatoriness on the part of the plaintiff's attorney-at-law in not getting back to the insurer before the expiry of the limitation period.

[75] I agree with the view that lack of communication is a circumstance that ought to be weighed in the balance. There was no communication between Mr. Wiltshire and the Defendant's insurers after the quantified claim was invited, until it was submitted, three months after the expiry date.

[76] On the evidence before this court neither the Claimants nor their attorney-at-law can be considered blameworthy for their failure to secure the medical reports before the period of limitation had expired. However Mr. Wiltshire cannot escape responsibility for failure to communicate with the insurers. In addition this court will not absolve the Defendant's insurers of responsibility for communicating with the Claimant's attorney-at-law. I believe that they ought to have done so before they closed their file and removed their reserves.

***The Date or Time of Notification***

[77] The delay between the accident and the Defendant being informed of the claim is always regarded as being of considerable importance even though it is not one of the particular matters to which the court is required to have regard under **section 33.3** of the Limitation Act 1980 UK **(Section 53.(1) Barbados Act)**.

[78] In ***Donovan v. Gwentoys*** (supra) **Lord Griffiths** at page 1024 h indicated that he was in agreement with a passage from the judgment of **Smith Stuart LJ** in the Court of Appeal who made the point that the time of notification of the claim is always regarded as an extremely important consideration and even though the court is not required to take it into account under **section 33.(3)** of the UK Act it may come in under paragraph (e).

[79] **Lord Griffiths** continued at 1024 j:

> "In weighing the degree of prejudice suffered by a defendant it must always be relevant to consider when the defendant first had notification of the claim and thus the opportunity he will have to meet the claim at trial if he is not to be permitted to rely on his limitation defence."

[80] The following passage is explanatory:

> "The reason is that a defendant who is informed of a potential claim at an early stage has the opportunity to investigate the facts while the events are still fresh in witnesses memories, even if the proceedings are issued rather late, and hence cannot complain of significant prejudice under s.33(3)(b). This seems to have been a significant factor in Thompson v. Brown [1981] 1 WLR 744 and also in Hartley v. Birmingham City District Council [1992] 1 WLR 968." (Blackstone's Civil Practice 2011 Chapter 10:51).

***(b) The Cogency of the Evidence***

[81] > "If a claim is brought a long time after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk." (Ibid Chapter 10.5)

The question of cogency in paragraph (b) is only concerned with the loss or adverse effect on evidence through passage of time. (Ibid Chapter 10.49)

[82] Mr. Wiltshire argues that the evidence will not be affected in any way by the delay. Therefore he has voiced support for the statement of **Inniss J** in ***Best v. C.P. Hotels B'dos Inc.*** (supra) at paragraph [22]. He stated that the general principle was that if the delay did not seriously affect the evidence the court would exercise its discretionary power to grant an extension. Likewise, in ***Angela Watkins v. Marlene Holder and Brian Holder*** (supra) **Moore J** also reiterated the same principle.

[83] Given the time of notification and the length of delay, Ms. Archer's argument with respect to the Defendant's inability to trace third party witnesses rings hollow. In the letter dated 13th May, 2013 the insurers said that their investigations in this matter were continuing. It is reasonable to infer that they would have traced their witnesses some time ago and taken

their statements. It is highly unlikely that they would all be suffering from such faded memories that they could no longer provide useful evidence or that they all could not be located.

[84] I also find no merit in Ms. Archer's assertion that the police officer who came to the scene of the accident "merely took a report." This is certainly inconsistent with the role of the police officer whose duty it is to investigate road accidents and where appropriate present the evidence to the various courts.

***(c) The Conduct of the Defendant after the cause of action arose***

[85] The Defendant repaired the vehicle, provided a hired car and invited the Claimants to submit a quantified claim.

[86] For reasons previously mentioned the Claimants and Mr. Wiltshire believed that liability was accepted and the claim would have been settled. Without having the benefit of his experience with that insurer and others to draw on, I must agree with Ms. Archer that liability was not accepted in the letter dated 13th May, 2013 which invited the quantified claim.

[87] In my opinion the act of repairing the car is significant. It is difficult to believe that the insurers would have repaired the vehicle without having addressed the issue of liability. Obviously satisfied that they were liable, the vehicle was repaired in a very short period of time. They also must have addressed their mind to the fact that two persons were travelling in the vehicle. It is difficult to comprehend why the vehicle and its passengers were treated differently.

[88] I agree with **Crane-Scott J** in ***Lester McDonald Daniel v. M and W Jordan Enterprises Inc. and Adrian Maynard*** (supra) (paragraph 35 above) that this conduct would have led the Claimants and their Counsel to believe that liability was not in issue.

[89] She also said:

> "[31]…[T]his Court finds that it was both unreasonable and unconscionable for the defendants' insurers to sit back no doubt with the view of taking the benefit of the limitation point without first informing the plaintiff or his attorney-at-law prior to the expiry of the limitation period that it proposed to do so."

***(d) Disability of the Plaintiff arising after the date of cause of action***

[90] The period of disability referred to in paragraph (d) is one of mental disability arising after the accrual of the cause of action. There is no evidence that the Claimants suffered any mental disability.

***(e) The extent to which the Plaintiff acted promptly and reasonably***

[91] It is not disputed that there was early notification of the Defendant.

***(f) The steps taken to obtain medical reports and legal advice***

[92] The Claimants retained Mr. Wiltshire shortly after the accident. Their efforts to secure the medical reports were already mentioned. Copies of the letters which were sent to the doctors were put into evidence.

**The Balance of Prejudice**

[93] The Claimants had a good reason for the delay. The timely notification of the Defendant's insurers gave them the opportunity to investigate the accident. It is not likely that the Defendant's ability to defend the case would be affected. On the other hand they Claimants suffered personal injuries and loss (as evidenced by the medical reports attached to the claim) and if the relief sought were not granted they would not be compensated.

[94] The balance of prejudice lies with the Claimants.

**<u>Conclusion</u>**

[95] I have considered all arguments, the evidence and the law. I have taken into account all the circumstances of the case. This is not a stale claim. This is not a claim that the defendant "never expected to have to deal." The insurers had ample opportunity to carry out their investigations and locate potential witnesses. I do not believe that the seven month delay will affect the cogency of the evidence.

[96] The parties ought to have communicated with each other before the period of limitation expired but the Claimants and Mr. Wiltshire reasonably believed that liability was not in issue. The act of settling the claim with respect to the vehicle in no small measure contributed to this view. Even after the quantified claim was submitted there was no immediate rejection of it. It took another four months for this to be done. Mr. Wiltshire's account of his interaction with the employees of the Defendant's insurers is credible.

[97] It is equitable to allow the Claimants' action to proceed.

**Disposal**

[98] The Claimants' application is granted.

(1) **Section 20(2)** of the **Limitation of Actions Act** Chapter 231 shall not apply to the Claimants' cause of action.

(2) The time limited for filing the Claimants' cause of action is enlarged to include 14th October, 2016, the date when the claim was filed.

(3) The technical defence of limitation having been defeated, the Defence filed on 21st December, 2016 does not meet the requirements of Part 10.5 of the Civil Procedure Rules, 2008. The Defendant is at liberty to file and serve an Amended Defence on or before 26th June, 2019.

(4) The costs of this application will be the Claimants' in any event.

**Ms. Deborah Holder, BSS**
**Master of the High Court**