BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No.1200 of 2017

BETWEEN:

GILLIAN DOWRICH **CLAIMANT/APPLICANT**

AND

THE ATTORNEY GENERAL **DEFENDANT/RESPONDENT**

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

2019: May 23
2020: June 11

Appearances:

Ms. Shelly-Ann Seecharan, attorney-at-law for the Claimant/Applicant

Ms. Jennifer Small in association with Ms. Ann Marie Coombes, attorneys-at-law for the Defendant/Respondent

DECISION

INTRODUCTION

[1] By Notice of Application filed on 9th January, 2019 the Claimant/Applicant applied to the court pursuant to **Parts 11** and **17** of the **Supreme Court (Civil Procedure) Rules, 2008 (CPR)** for orders that: (1) the Claim Form and Statement of Claim filed on 11th August, 2017 be amended; (2) for an extension of time to file the application; and (3) that costs of the application be dealt with at trial.

[2] The grounds of application are:

> "2. …In the haste to ensure that the limitation period was complied with, there was a miscommunication

between the Claimant and Counsel as to the precise manner in which she sustained that injury. That error was reflected in para. 4 of the Statement of Claim.

3. In the process of taking further instructions from the Claimant in 2018, it became apparent to Counsel that an amendment to the Statement of Claim was required in order to accurately reflect the manner in which the Claimant suffered her injury.

4. It is clear too, that the medical evidence supports another head of loss, specifically, disadvantage in the labour market.

5. The Defendant will suffer no prejudice in its defence of this claim, resulting from the requested amendments. The amendments will better assist in determining the facts in issue.

6. The Claimant also seeks an extension of time for filing of the instant application. The deadline for filing was over looked by Counsel. The Defendant will suffer no prejudice by the granting of the said extension."

BACKGROUND

[3] By Claim Form and Statement of Claim filed on 10th August, 2017, the Claimant/Applicant, "the Applicant", a registered nurse in the Ministry of Health who was assigned to the Brandford Taitt Polyclinic, claimed against the Defendant/Respondent, "the Respondent", damages for breach of statutory and common law duties which caused her personal injury.

[4] The Respondent was sued pursuant to the Crown Proceedings Act, Chapter 197, the Occupiers Liability Act, Chapter 208 and the Safety and Health at Work Act, No. 12 of 2005.

[5] Paragraph 4 of the Statement of Claim is as follows:

> "On or about the 11th day of August, 2014, at approximately 9:15 a.m., whilst in the course of her duties, the Claimant was stationed in the Dressing Room of the clinic sitting in a wooden chair. She was about to get up from the chair, when the back of the chair broke and she fell to the ground. As a result she felt pain in her lower back. At that time the Claimant was still under medical care for an old injury and the fall exacerbated that injury."

[6] In her affidavit in support of her application filed on 9th January, 2019 the Applicant stated:

> "2. I instructed Sir Richard L. Cheltenham, Q.C. in respect of my accident which took place on 11th August, 2014, at my workplace, the Brandford Taitt Polyclinic in Black Rock, St. Michael where I am a registered nurse. In August, 2017, the limitation period for the filing of a claim in my matter was about to expire and a draft claim was prepared.
>
> 3. In the haste to get the claim filed, an error was made at para. 4 of the Statement of Claim which dealt with the manner in which I came by my injury. That error was not appreciated prior to the filing of the claim, but only sometime later in March, 2018 when the matter first came before the court."

[7] The main amendment being sought replaces part of paragraph 4 of the Statement of Claim. It provides:

> *"5. While sitting in the chair, the Claimant reached down into a cupboard to get gauze and then sat erect in the chair. On sitting fully back in the chair, the back of the chair broke away as shown in the photograph taken by Staff Nurse Betty Mitchell on 11th August, 2014, and transmitted to*

> *the Claimant attached hereto as GD-4. The Claimant thereby began to fall backwards towards the floor. The Claimant stretched out her left hand to break her fall. The Claimant's left hand made contact with the floor, thereby stopping her fall. The Claimant remained seated in the chair at all times. However, in breaking her fall she felt immediate pain in her left shoulder and neck."*

[8] Under "Particulars of Loss and Injuries" the Applicant seeks to substitute the words: "The Claimant suffered immediate and severe pain in her "lower back", with the words *"left shoulder and neck"*. She asks that the word "cervical" be deleted from the portion of the sentence that reads:

> "She was initially diagnosed with tenderness of the *cervical* spine at L1-L5 and lower back pain."

[9] She wants to add the word "left" to the part of the sentence which sets out her complaint about "pain to the left side of her neck radiating to her left shoulder down to the left side of her trunk and *left* buttocks."

[10] The Applicant also wants to add the word "bilateral" to the following sentence:

> "Due to the severity of the injury sustained by the Claimant, she has been and continues to be under the care of Dr. Harley Moseley, III who has diagnosed her with chronic myofascial pain syndrome, sacro-ileitis and occipital *bilateral* neuralgia. Treatment included trigger point injections to try to alleviate the pain."

[11] The Applicant wants to add the following sentence to the above paragraph:

> *"As a result of the repeated injections the Claimant suffered an abscess in her head which had to be removed*

surgically on 30th April, 2018, at the Queen Elizabeth Hospital".

[12] Under the proposed amendment the claim includes:

> "3. *General damages for disadvantage on the labour market;*
> 4. *General damages for past household help/nursing;*
> 5. General Damages for future household help/*nursing*;"

[13] The Defence was filed on 5th December, 2017. The Respondent denied breach of duty of care, that it caused or contributed to the alleged accident, negligence or breach of employers' duty of care or statutory duty of care and that the Applicant was entitled to the relief which she sought or any relief.

[14] The Respondent also specifically denied that the Applicant suffered injury or exacerbation of an existing injury as a result of negligence or breach of statutory duty. Further, that the Applicant suffered pain, personal injury, loss and damage as a result of any negligent acts or omissions and that there was a breach of duty to provide the Applicant with a safe working environment.

[15] The Applicant was put to strict proof of the particulars alleged. Paragraphs 4 and 7 of the Defence are as follows:

> "4. Save that the back of the chair in which the Claimant was seated broke, paragraph 4 of the Statement of Claim is denied. Investigations reveal that the Claimant did not fall from the said chair but remained seated in the chair after its back broke off."
>
> 7. "Further and/or in the alternative, the Defendant contends that any injury and/or exacerbation of an existing injury resulting from a fall, as alleged, would more likely have occurred as a result of the

> 3 or 4 falls suffered by the Claimant over the period 2012 to 2013 as stated in the medical report of Dr. Harley Moseley date 23rd February 2015 and annexed to the Claimant's Statement of Claim as GD-1."

[16] The Respondent's Affidavit in Response, which was sworn by Ms. Small, was filed on 22nd May, 2019. The contents of this affidavit were accurately described by Ms. Seecheram as "submissions". The contents are the same as the oral submissions made by Counsel to the court on behalf of the Respondent and consequently will be set out below.

Applicant's Submissions

[17] Ms. Seecharan submitted that the amendments being sought were not significant and did not amount to a material change. She said that the fact that the chair back broke was not in dispute. It was still the Applicant's case that she suffered injury when the chair back broke.

[18] She stated that the Applicant developed an abscess after the claim was filed. This was related to the accident. The Applicant had to receive injections repeatedly and this resulted in the abscess.

[19] With respect to the new head of damages for disadvantage in the labour market, she stated that the Applicant continues to work as a nurse but she now has a disability.

[20] Counsel did not consider that the proposed changes could amount to a new claim.

[21] She reiterated that an error was made because the claim was hurriedly filed just before the limitation date was about to expire. She maintained that the amendment was necessary to correct the error and give more particulars.

[22] She submitted that the Defendant would sustain no prejudice which could not be compensated by costs.

[23] Counsel referred to the principles on which permission is granted. She was guided by Blackstone's Civil Procedure 2010, Chapter 31.

[24] She contended that the court had a general discretion to permit amendments where this was just and proportionate.

Respondent's Submissions

[25] Ms. Small queried why the application was brought pursuant to **Part 17** of the **CPR** which was concerned with interim remedies. She was of the opinion that **Part 17** was not applicable to this application.

[26] She contended that the alleged error referred to in paragraph 3 of the Applicant's affidavit was so substantial that it amounted to a material change of facts and as such an entirely new claim.

[27] Counsel also stated that the Applicant ought to have known how she sustained her injuries and the areas of her body which were injured when she was instructing her attorney at law.

[28] She felt that the amendment was not minor and would amount to a different version of events and that a new set of injuries were being substituted while injuries previously stated were not being pursued.

[29] Ms. Small submitted that by signing the Certificate of Truth, the Applicant verified that the version of facts therein were true and to present an entirely new account of the incident after the Defence was filed, also sworn to as true, amounted to an abuse of process.

[30] Ms. Small submitted that if granted the amendment would result in a new claim, which would be statute barred. She also submitted that the amendment would cause substantial prejudice to the Respondent with

respect to the defence it wanted to raise and the likely award of damages to be paid if found liable.

[31] She noted that the new set of injuries and new head of damages would increase the claim and this could not be sufficiently compensated by an award of costs. She asked that the application be denied.

REPLY

[32] Ms. Seecharan maintained that an error was made. She did not agree that **Part 17** was not the appropriate Part for this application. She pointed out that there was no sanction in the Rules with respect to the Certificate of Truth. She stated that the court had the power to allow the amendment and asked the court to do so.

DISCUSSION

[33] The issue is whether the application to amend should be granted. Integral to the resolution of this matter will be the court's findings on the following: New cause of action, abuse of process, injustice and costs.

[34] The court's jurisdiction to permit changes to a statement of case is found at **Part 20** of the **CPR**.

> **20.1(2)** The court may give permission to amend a statement of case at a case management conference or, at any time after a case management conference, upon an application being made to the court.
>
> **20.2(1)** This rule applies to a change in a statement of case after the end of a relevant period of limitation.
>
> (2) The court may allow an amendment, the effect of which will be to add or substitute a new claim, if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

[35] The basis on which the court allows amendments is as follows:

> "Permission is generally granted where there is no prejudice to other parties, and in general there is no prejudice if the other parties are adequately protected by the usual order that the costs of and occasioned by the amendments are paid by the amending party."[1]

[36] The principle from the case ***Clarapede and Co. v. Commercial Union Association (1883)*** 32 WR 262 has been applied in ***Charlesworth v. Relay Roads Ltd.*** [2000] 1 WLR 230 and ***James Martin Scobie v. Fairview Land Ltd.*** [2008] EWHC 147.

[37] The principle as stated by **Brett M.R** is as follows:

> "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs."[2]

[38] In ***Charlesworth v. Relay Roads Ltd.*** (supra) the court considered an application to amend. The applicable principles were discussed. After referring to the above stated principle, **Neuberger J** made a comment which is pertinent to the matter under discussion. He said:

> "I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity."[3]

[39] In ***James Martin Scobie and Others v. Fairview Land Ltd.*** (supra) **Akenhead J** said:

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[1] Blackstone's Civil Practice 2011. Chapter 31.1

[2] Clarapede and Co. v. Commercial Union Association at page 263

[3] Page 235G

> "12…I proceed upon the basic principle that amendments ought in general to be granted to enable the real disputes between the parties to be adjudicated upon unless there is prejudice to the other party which can not be compensated for by a costs order or unless there is harm occasioned to the administration of justice."

[40] In answering the question whether there is any injustice that cannot be compensated in costs, the court has to determine whether the Respondent will suffer any prejudice through the amendments and whether the Claimant can pay the usual costs order.[4]

(a) The Application

[41] The Respondent's position with respect to **Part 17** is well founded. This Part deals with interim remedies. **Part 20** is concerned with changes to statement of case and therefore it is appropriate to utilize this Part when making an application to amend a statement of case.

(b) New Cause of Action

[42] The definition of **Diplock LJ** in ***Letang v. Cooper*** [1965] 1 QB 232 at 242 is a good place to start the discussion of this aspect of the matter. He said:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain a remedy against another person."

[43] A "new cause of action" is defined in Black's Law Dictionary, 9th edition, page 251 as:

> "A claim not arising out of or relating to the conduct, occurrence or transaction contained in the original pleading."

[4] Blackstone. Chapter 31.4

[44] The court is required to consider the whole statement of case in its effort to assess whether the proposed amendment amounts to a new cause of action or is a mere clarification of an existing cause of action. (***Leeds and Holbeck Building Society v. Ellis*** (2000) LTL 5/10/2000)[5]

[45] In ***Evans v. Ciq Mon Cymru Ltd.*** [2008] EWCA Civ 390, [2008] 1 WLR 2675 **Toulson LJ** said:

> "26. [I]n asking whether the proposed amendment was, in truth, an amendment to raise a new cause of action or merely to clarify an internal inconsistency in the pleaded case, it is proper to look at the pleaded case as a whole."

[46] One is also reminded that the overriding objective is still very relevant in this process. In ***British Credit Trust Holding v. UK Insurance Ltd.*** [2003] EWHC 2404 (Comm) **Morison J** said:

> "33. If I permit the Particulars of Claim to be amended to give effect to what the Claimant always intended am I permitting an amendment which amounts to a new cause of action? The answer to that question lies, I think, by keeping well in mind the overriding objective."

[47] I note, having examined the Defence, that the fact that the Applicant was seated in a chair at the time of the incident is not in dispute. The proposed amendment adds detail to what the Applicant did while seated in the chair. She reached into the cupboard for the gauze. On sitting back up the chair back broke. The important change lies in the fact that she did not actually fall but broke the fall with her hand. She felt pain in her "left shoulder" as opposed to her "lower back". The fact that she did not fall from the chair is in consonance with the Respondent's position, based on investigations. (See paragraph 4 of the Defence at paragraph 15 above).

[5] Ibid Chapter 31.19

[48] Under the proposed amendment the allegation that the Applicant was under medical care for an old injury which was exacerbated by the fall is being withdrawn. This allegation cannot be sustained if there was no fall but paragraph 7 of the Statement of Claim remains unchanged. This indicates that the issue of exacerbation of an existing injury has not been abandoned.

[49] Paragraph 7 of the Amended Statement of Claim (paragraph 6 in the original claim) provides:

> "The Claimant will further contend that the Defendant breached its statutory obligations under the Occupiers Liability Act, Cap 208 and the Safety and Health At Work Act, No. 12 of 2005, and thereby, caused her injury and/or an exacerbation of an existing one."

[50] In essence therefore the proposed amendment affects whether the Applicant fell from the chair and where she felt pain, with added particulars pertaining to what she did while sitting in the chair.

The Reports

[51] The medical reports which were filed can be of assistance in this matter and I will refer to them.

[52] In ***Evans v. Cig Mon Cymru Ltd.*** (supra) the court held that it was permissible to read the claim form together with the particulars of claim and medical report to determine what the claim intended to cover.[6] **Toulson LJ** stated that the just approach was to look at the totality of the documents served.

[53] **Arden LJ** was of the opinion that the protocol letter and the solicitor's letter were relevant. She said that account must be taken of the factual matrix. "That matrix would include communication

[6] Ibid. Chapter 31.19

between the parties before or at the same time of service of the claim form." She referred to **Lord Steyn** in ***R (Daly) v. Secretary of the State*** [2001] 2 AC 538 at [28] who said: "in law, context is everything".

[54] Two reports were filed with the Statement of Claim. The report of Dr. Melissa Walcott Pusey, Managing Physiotherapist of Total Therapy Inc. dated 23rd February, 2017, which indicated that the Applicant was referred to physiotherapy on 5th April, 2015 by Dr. Harley Moseley III, states:

> "She sat in a wooden chair which subsequently broke. She tried to break the fall with her left hand and when she tried to get up she noticed that she had pain in her neck, left hand and lower back. She went to the doctor on call that examined her and treated her with medication and sick leave…."

[55] This report was submitted to the Applicant's Counsel before the Statement of Claim was filed and is largely, though not completely, consistent with the proposed amendment. Therefore it lends some credibility to Ms. Seecharan's contention that an error was made.

[56] Dr. Moseley's report dated 23rd February, 2015 related to the Applicant's visit on 27th January, 2015. The relevant statement adds a little twist to the facts as it relates to the "collapsed" chair. It reads:

> "At work she continues to aggravate her pain. This was further complicated when the chair she was sitting on, its back rest dropped out and the chair collapsed."

[57] It is reasonable to infer that if the chair collapsed the person who was seated on it would have fallen. Consequently, the doctor stated, in the said report, that the fall could have aggravated the Applicant's pain. This statement is favourable to the Applicant, yet the amendment is

being sought. Clearly, the authors of these two reports understood the factual circumstances somewhat differently. A definitive clarification of the facts on which the Applicant intends to rely, is required.

[58] At the heart of this application is the Applicant's claim that an error was made. Therefore the statement of **Millett LJ** in ***Gale v. Superdrug Stores Plc.*** [1996] 1WLR 1089 at 1098 – 1099 is of significance. He said:

> "The administration of justice is a human activity, and accordingly cannot be made immune from human error. When a litigant or his advisor makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for…amendment of pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice."

(c) New Injuries

[59] The Respondent contends that the Applicant wants to substitute "an entirely new set of injuries". The proposed changes are set out at paragraphs 8 – 11 above. It is difficult to see how these changes all translate into new injuries. The first change has to do with where the Applicant felt pain. The tenderness to the spine remains at L1 – L5 and the left buttock is specified. It should be noted that no changes are proposed to Dr. Pusey's initial diagnosis.

[60] I agree that the proposed amendment about the abscess is a new addition to "injuries". The medical report to link the abscess to the incident is vital. It has not been filed with the application.

[61] There must be a relationship between the original act and the consequences it produces. A Defendant will only be liable if his act or omission caused the injury. If the abscess is indeed connected to the incident, then it is appropriate to have it included.

(d) New heads of claim

[62] It is proposed that two new heads be added to the Statement of Claim. There are: "General damages for disadvantage on the labour market" and "General damages for past household help/nursing". These heads are not novel or unusual for this type of litigation. That the latter head may have been erroneously excluded in the rush to file the claim, is not farfetched.

[63] The modern approach is said to be flexible, with amendments being granted in accordance with the justice of the case.[7] Amendments may be allowed adding heads of claim which have arisen after the commencement of proceedings, ***British Credit Trust Holdings v. UK Insurance*** (supra) and also after the expiry of the limitation date, ***Finlan v. Eyton Morris Winfield*** [2007] 4 All ER 143.

(e) New Claim – Statute Barred

[64] The Respondent submits that the proposed amendment will give rise to a new claim which is statute barred. The original Statement of Claim was filed on 10th August, 2017. The amendment is being sought after the period of limitation has expired.

[65] A new claim is defined in **section 57.(1)(a)(ii)A** of the **Limitation of Actions Act, Chapter 231** as any claim involving the addition or substitution of a new cause of action.

[7] Ibid. Chapter 31.10

[66] For the purposes of this Act, a new claim made in the course of any action shall be deemed to be a separate action and to have been commenced on the same date as the original action. **(Section 57.2.(b))**.

[67] An amendment after the limitation period has expired is governed by **section 57**. Where the new cause of action arises out of the same facts or substantially the same facts as are already in issue in the original claim, **section 57.(6)(a)** permits the rules of court to allow the Claimant to add the new claim.

[68] To determine whether a proposed amendment introduces a new cause of action for the purposes of LA 1980, s35(5)(a) UK **(section 57.6(a) Limitation of Actions Act, Chapter 231)**, the court must examine the duty alleged, the nature and extent of the breach and the extent of damages claimed.

> "If the new plea introduces an essentially distinct allegation it will be a new cause of action."[8]

1. The duty alleged

[69] Where a new duty or obligation is added by the amendment this usually raises a new cause of action but where additional facts or better particulars are pleaded, allegedly constituting a breach of duty, already pleaded this will not be considered a new cause of action. ***Darlington Building Society v. O'Rouke James Scourfield*** [1999] PNLR 365.[9]

[70] In the proposed amendment no changes are to be made to the duty alleged.

[8] Ibid. Chapter 31.19
[9] Ibid

2. The nature and extent of the breach

[71] There are no proposed changes to the "Particulars of Negligence and Breach of Statutory duty" which detailed the "negligent acts/or omissions."

3. The extent of the damage claimed

[72] Pain, suffering and loss of amenities remain unchanged in the proposed amendment. Under the heading of "Special Damages," the cost of an M.R.I. is proposed. Two heads of damages, as stated previously, are proposed also.

[73] Having assessed the proposed amendment using the requisite criteria, I am not satisfied that it will "introduce an essentially distinct allegation" and therefore a new cause of action for the purposes of **section 57.(6)(a)** of the **Limitation of Actions Act, Chapter 231**. As a consequence **Rule 20.2(2)** is not applicable.

(f) Statement of truth/Abuse of process

[74] I now turn to the submission that it is an abuse of process to verify and certify one version of events and injuries as true and then by amendment to substitute another version of events and a new set of injuries and to verify and certify the same as true.

[75] **Rule 3.12** of the **CPR** makes provision for a statement of truth. It is considered so important that on application the court may strike out a statement of case which has not been verified by a statement of truth (**Rule 3.13(1)**).

[76] The requirement for a statement of truth has been seen as a deterrent to parties advancing cases which are "inherently untrue or wholly speculative".

> "The principal reason for the requirement for a statement of case to be verified by a statement of truth is to ensure that litigants do not lightly put forward false cases".[10]

[77] Under **CPR, r.32.14(1) (U.K.)** a person who makes a false statement in a document verified by a statement of truth, or who causes such a statement to be made without an honest belief in its truth is guilty of contempt of court.

[78] Ms. Seecharan correctly pointed out that there was no sanction in the **CPR 2008**. I do not interpret this as an indication that the court is powerless to act in the face of a deliberate untruth. The court has power under **Rule 26.3.3(a)** to strike out a statement of case which is an abuse of the court's process or is likely to obstruct the just disposal of proceedings. Of course, striking out is regarded as draconian and an act of last resort, to be utilized where the matter cannot be addressed in a less harsh way.

[79] In ***Hunter v. Chief Constable of West Midlands Police*** [1982] AC 529 at 536, **Lord Diplock** defines this power as:

> "[T]he inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into dispute among right thinking people."

[80] In ***Johnson v. Gore Wood & Co. (a firm)*** [2001] 1 All ER 481 at 499, **Lord Bingham** makes the point that one cannot comprehensively list all possible forms of abuse, therefore one cannot formulate any hard

[10] Ibid. Chapter 23.16

and fast rule to determine whether or not abuse is to be found on the given facts.

[81] Having alleged abuse of process, the Respondent has the burden of proof. The argument that the Applicant ought to have known how she sustained her injuries and the specific areas of her body where she was injured, is not sufficient to discharge this burden. Evidence of a wilful or deliberate act on the Applicant's part is required. This has not been provided.

(g) Prejudice/Injustice

[82] In essence, the Defence consists of denials of allegations, breach of duty and breach of the relevant legislation.

[83] Ms. Small argues that the Respondent will suffer substantial prejudice if the application is granted. This relates to the defence to be raised and the likelihood that the damages to be paid could increase, if the Respondent is found liable. Apart from these blanket statements, no explanation was forthcoming as to why or how the Respondent's defence will suffer prejudice and the court cannot speculate. Likewise counsel's assessment or estimation of the extent to which it was anticipated that an award of damages could increase, was not forthcoming.

[84] The proposed amendment will mean that both parties are in agreement that the Applicant did not fall from the chair on which she was seated when the back of the chair broke.

[85] Paragraph 7 of the Defence is quoted at paragraph 15 above. In it the Respondent contended that any injury and/or exacerbation of an existing injury would more likely have occurred as a result of the three or four falls suffered by the Applicant over the period 2012 to

2013. It is unclear why this position would be affected by the proposed amendment.

[86] Concerning the exacerbation of existing injury, the Respondent's responsibility for a "quantifiable part" of the Applicant's disability must be proved. The Applicant has the burden of proving her case. The court will do "the best it can using its common sense…to achieve justice"[11] to the parties.

[87] It seems to me that it would be easier to prove injury from a fall as opposed to injury while sitting in the chair. If indeed a case is affected it appears to be the Applicant's rather than the Respondent's. The Applicant would have to justify a substantial award. A party would only be liable to the extent of its contribution to the disability or caused the injury.

[88] Though she did not belabour the point, Ms. Small made mention of the lack of medical evidence to support the application. A higher award could emanate from the inclusion of the "abscess" and "disability in the labour market", thus the prejudice of which she speaks. I refer to this because the notion that it was "clear" that the medical evidence supported "disadvantage in the labour market" as stated at ground 4 of the application, is not well founded.

[89] Dr. Moseley's report is largely concerned with the injuries sustained in the motor vehicular accident. I am not prepared to say that the chair incident has not contributed to this head but the issues are not straight forward. The Respondent's contribution, if any, must still be properly articulated. Further medical evidence is required to substantiate the claim, but experience has taught that litigants do not receive their

[11] Holtby v. Brigham & Cowan (Hull) Ltd. [2000]3 All ER 421 CA para 20 per Stuart-Smith LJ.

medical reports in a timely fashion. Therefore it would not be prudent to delay this application until all the reports are received.

[90] Even if, as argued, the likelihood of an increased award is an injustice which can not be compensated in costs, this does not mean that the application should be refused. The overriding objective requires that the matter be dealt with justly. The court therefore must balance considerations of justice between the parties.

[91] The balance of justice between the parties boils down to the following: If the Applicant is not afforded the opportunity to correct the "error" she will have to pursue this matter on the pleadings as filed. Her case could be negatively impacted and she could be deprived of a just award. On the other hand, if the application is granted there is a risk that the Respondent may be required to pay an increased award, if found liable.

[92] In ***Gabriel v. Haywood*** [2004] EWHC 2363 (TCC), the court found that the Defendant was deprived of a limitation defence and could not be compensated in costs. **Judge Richard Havery, QC** took the position that justice was the paramount consideration. The fact that the Defendant could not be compensated in costs was said to be the lesser evil. The amendment was allowed because it was required in the interest of justice.

(h) Costs

[93] The general principle is that the costs of and occasioned by the amendment are to be paid by the party seeking the amendment.

[94] In answering the question whether the Applicant can pay the usual costs order, it should be noted that her means have not been set out before the court. Her counsel has not indicated that she cannot pay.

Apparently, she is still employed as a nurse. Leave to file the application to amend was sought and granted at the first case management conference and court appearances were limited. This is an "early" application. The costs order, in these circumstances, will not be prohibitive. I believe that I can safely conclude that the Applicant can pay.

[95] The Applicant has asked, in the Notice of Application, that costs of this application be dealt with at trial. No reason was advanced for this request and the Respondent has made no response.

CONCLUSION

[96] The affidavit of counsel for the Respondent is not a document of fact but consists of legal submissions. Consequently it provides no answer to the Applicant's affidavit filed in support of this application. The Applicant's affidavit is therefore uncontested.

[97] The Claim Form and Statement of Claim were filed one day short of the third anniversary of the incident. This lends credence to the Applicant's statement that the draft claim was prepared close to the expiry of limitation period in August and that, in the haste to file it, an error was made. The error was only discovered in March 2018.

[98] Ms. Seecharan described it as "miscommunication" between the Applicant and her attorney Sir Richard Cheltenham, QC. I accept that this is true.

[99] The court has no evidence on which to hold that the Applicant deliberately swore to a falsehood when she swore to and signed her statement of truth (certificate of truth). I hold that there is no evidence of abuse of process.

[100] I have fully considered the "whole" statement of case, proposed amendment and relevant aspects of the reports. At the core of this matter is what transpired when the back of the chair broke as the Applicant was sitting in it. Did she fall or did she break the fall with her hand? Clearly there is factual confusion which needs to be clarified. The proposed amendment will clarify the factual situation pertaining to the incident. The changes can properly be seen as arising out of the "occurrence in the original pleading".

[101] I therefore do not agree that the changes "amount to a substantially different version of the events" as argued. I also do not agree that the label "material change" is applicable, rather they amount to a clarification of the existing cause of action.

[102] There is no factual support for the bald assertion that "an entirely new set of injuries" have been proposed "whilst the previously alleged injuries are no longer pursued". The proposed changes to injuries are neither significant nor wide ranging. The proposed inclusion of the abscess is probably the most important.

[103] The proposed amendment does not introduce a new claim for purposes of the **Limitation of Actions Act Chapter 231**, thus the claim is not statute barred. Consequently the Respondent has not been deprived of a limitation defence and will not suffer an injustice which is not compensable by an order for costs.

[104] I am not persuaded that an order for costs will not be an adequate remedy to compensate the Respondent. I am not satisfied that the Respondent will suffer any injustice. The likelihood of having to pay a higher award is not a sufficient reason to justify refusal of the application.

[105] The matter must be dealt with justly. This requirement will be satisfied if the Applicant is allowed to amend her Claim Form and Statement of Claim.

DISPOSAL

[106]

(1) The Applicant is granted an extension of time to comply with the order made on 19th March, 2018.

(2) The Applicant is granted leave to amend the Claim Form and Statement of Claim filed on 10th August, 2017 in accordance with the Draft Amended Claim Form and Statement of Claim.

(3) The Applicant has a period of 28 days to file and serve the Amended Claim Form and Statement of Claim.

(4) The Respondent has a period of 28 days to file and serve an Amended Defence.

(5) The costs of and occasioned by this application are to be paid by the Applicant.

(6) I will hear counsel on whether assessment should be dealt with at the trial stage.

Ms. Deborah Holder, BSS
Master of the High Court