

2. She now wishes to sue the defendant. She has filed her writ and statement of claim but because that was done 1 year and 9 months after the expiry of the statutory limitation period, she needs and applies for the Court's dispensation from the statutory time limits.

3. Section 13(3) and (4) of the Limitation Law ("the Law") provide respectively that:

"(3) An action to which this section applies [(which includes an action for personal injuries of the kind proposed to be brought by the plaintiff)] shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5).

(4) Except where subsection (5) applies the period applicable is three years from –

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

(b) the date of knowledge (if later) of the person injured."

4. In inviting the Court to exercise its undisputed discretion given to dispense with the time limit by section 9 (3) of the Law, the plaintiff relies upon her explanations for not suing within the limitation period of 3 years prescribed by section 13 of the Law (above). First, she emphasizes the pivotal event of her termination of employment due to the effects of the injury. It was by that event which occurred on the 22nd June 2010, that it was finally and clearly brought home to her that the injury would have a lasting and devastating impact upon her financial circumstances. Indeed she had had no intention of suing, despite the chronic nature of her condition, until the realisation was brought home to her that she would be unable to earn a living because of the injury. Her losses could be very significant in financial terms. While she formerly earned C\$3771 per month as a Government Auditor, she now receives only \$885 per month by way of pension – her entitlement to which has been severely reduced because of her early termination of employment. At age 41 and no longer employable, she would seek to be compensated for loss of earnings to normal retirement age, loss of the larger pension she would have

earned at that age and her loss would reflect her earning potential as the holder of a bachelor's degree in accounting. She also speaks to her intention to have completed her professional qualifications as a chartered accountant and thus to have attained an even greater earning potential.

5. As a matter of the test of proportionality – that propounded by the English Court of Appeal in *Robinson v St. Helens Metropolitan Borough Council* [2002] ELR 681 – it is an important factor for me to consider in the exercise of discretion whether to grant dispensation from the statutory time limit, that there has been a serious effect on the plaintiff's health or enjoyment of life and employability.
6. On the basis of the pleadings in this case, that test of proportionality is, in my view, satisfied.
7. I am also advised by the case law to consider other reasons why a plaintiff may have delayed in taking action – being all along aware of her injury – and so have failed to claim within the limitation period.
8. The plaintiff explains in this regard that, because of the former matrimonial relationship including the interest of the children of the marriage, she was naturally hesitant to sue the defendant as the father of her children. This natural forbearance is quite understandable and, as explained in *McCafferty v Metropolitan Police District Receiver* [1977] 2 All E.R. 756, the Court will generally look favourably on an applicant who is inclined to be non-litigious in such circumstances.
9. Here the delay of one year and nine months while not *de minimis* or negligible, is well within the extent of delay for which dispensation may be granted by the exercise of the discretion. In *Buck v English Electric Co. Ltd.* [1978] 1 All E.R 271, the English Court

of Appeal allowed a delay of 12 years even while stating that a delay of five years would in the usual case, create a rebuttable assumption of excessive delay.

10. There are 6 specific factors set out in section 39 (3) of the Law to which, at least, the Court must in particular have regard when considering an application for dispensation.
11. Of paramount importance as Parker LJ stated in *Hartley v Birmingham City Council* [1992] 2 All E.R. 213, is “the effect of the delay on the proposed defendants ability to defend”. In this context, the question of whether the defendant’s ability to recall, marshal and present the evidence in support of his defence will be prejudiced by the delay, will be of great concern. In other words, a question of paramount importance that the Court must answer is whether the defendant’s case may be prejudiced because of the delay. Here the defendant says he would be prejudiced.
12. As Mrs. Reid describes the nature of the possible prejudice it would be in this way:

“The Defendant was entitled to consider that the matter was formally behind him. It is definitely a reality that the details of that eventful day [1st January 2006] would present difficulties for him at this stage.... (It) was a traumatic event and he has made great effort to put it behind him at this stage. Further, the evidence would require him to call the children of the parties as the witnesses, which he is greatly loathe to do, as the children have suffered greatly already during the problems of the marriage and the subsequent divorce.”

13. By that I understand the defendant to be saying that he would have great difficulty recalling the events of the 1st January 2006 on his own and so would need to rely on the children as witnesses to the event, something which he does not wish to do and should not be required to do and which would be harmful to them. He (and implicitly they) had a right to expect that the incident was a thing of the past. The avoidance of that right, which is primarily regarded by the Law as a vested right, would be, in and of itself, prejudicial to him.

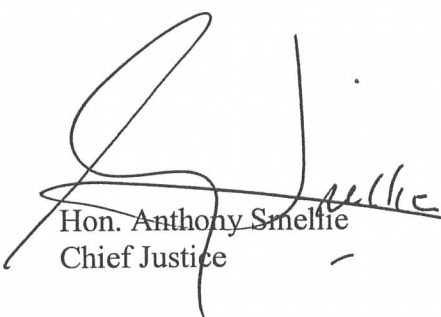
14. As to the proportionality of allowing the claim to be presented against him, the defendant also says I should consider the likely length and cost of a trial (including as it will impact upon the public purse in terms of legal aid to the plaintiff and judicial and court time) and the likely outcome. In this regard he explains that even if the plaintiff succeeds, as he is a defendant of very limited means she cannot hope to recover enough damages to justify the disproportionate costs and expenses. See *Donovan v Gwentys Ltd [1990] 1 All E.R. 1018.*
15. In my view, the balance in the exercise of discretion comes down in this case in favour of the plaintiff. The prejudice to her of being denied the opportunity to prosecute a claim presented as a clearly viable claim for very significant damages outweighs the concerns over potential prejudice to the defendant.
16. Notwithstanding the passage of time I consider that the defendant will be able to marshal whatever evidence he might properly need to support his defence.
17. Much, if not all, of the evidence likely to be adduced in the case is already a matter of record, either with the court, the police or with the hospitals and doctors. Evidence from the plaintiff's point of view as to any quantum of pecuniary damages will also likely be a matter of record with her former employer the Government or which can be extrapolated from those records.
18. In other words, very little if anything would have transpired during the delay of one year and nine months that may be expected to affect, in any prejudicial way, the presentation of the evidence on behalf of either the plaintiff or the defendant in this case.
19. Nor should the plaintiff's natural reluctance and forbearance at bringing her claim be allowed to redound to her potentially great detriment by the disallowance of the

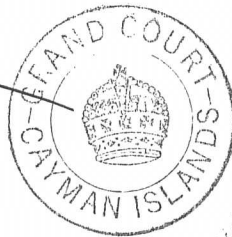
application now. *Knipe v British Railways Board* [1972] 1 All E.R. 673 advises that in these circumstances, her knowledge all along of her injury should not be allowed to militate against the bringing of her claim when she had her naturally understandable reasons for not suing before.

20. And while the defendant is a man of very limited means as the evidence presently shows, he is also a man with greater potential earning capacity than he realizes at present – a relevant factor in considering whether a suit against him may be the kind of exercise in futility that he suggests. I do not consider that his own subjective view of the matter as expressed in that way can be allowed to hold sway: *Walkley v Precision Forgings Ltd* [1979] 2 All E.R. 548.

21. I grant the applicant's application for the extension of the limitation period under section 13 of the Law to allow her to proceed with the action.

22. As she is legally aided I make no order as to the costs on this application.


Hon. Anthony Smellie
Chief Justice



20th June 2011