IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2009 HCV 5631

BETWEEN	**SHAUN BAKER**	**APPLICANT**
AND	**O'BRIAN BROWN**	**1ST RESPONDENT**
AND	**ANGELLA SCOTT-SMITH**	**2ND RESPONDENT**

Daniel Chai and Brian Moodie Instructed by Samuda and Johnson for the Applicant.
Racquel Dunbar for the Respondents.

Limitation of Actions- Application for extension of time to file claim in negligence- Law Reform (Miscellaneous Provisions) Act- Fatal Accident Act-Whether discretion to extend time exists-Statute of Limitation-Discretion to extend time under the Fatal Accidents Act-Factors to be considered thereunder.

IN CHAMBERS

Heard: April 19 and May 3, 2010

C. C. EDWARDS, J. (Ag)

The Application

1. This is an application for leave to bring a claim in negligence against the respondents, for damages under and by virtue of the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act, for which the relevant limitation periods have expired. This application is brought by Shaun Baker, father of Ondre Baker, who at six years old, was killed in a motor vehicle accident. He was hit down by a bus which was being driven by O'Brian Brown, the first respondent and which was owned by Angella Smith, the second respondent. The accident took place on October 10th, 2003.

2. The personal representative of the estate of a deceased person may apply for damages in the tort of negligence in the same manner as that person could have done, if he or she were alive. The Statute of Limitation applies to all such actions. Under the Statute of Limitations, the limitation period in Jamaica in respect of causes of actions grounded in the tort of negligence, is six years. For such actions, there is no discretion under this Act to extend time.

3. The Fatal Accidents Act creates a new cause of action in the near relations of the deceased who have suffered loss as a result of his death. The Act gives the personal representative, or the near relations of the deceased three years within which to bring a claim. It also gives the court discretion to extend the time to bring an action, if it is in the interest of justice to do so.

Chronology of Events

4. On the 10th day of October 2003 in the parish of Hanover, six year old Ondre Baker died as a result of being hit by a Toyota Hiace Bus driven by O'Brian Brown and owned by Angella Smith.

5. The case was mentioned in the coroner's court in 2004 and on the 6th January, 2009 a coroner's inquest was held into the accident. The coroner's jury by its verdict did not find anyone criminally responsible for the accident and death of Ondre Baker.

6. On August 18th, 2009 Shaun Baker applied for letters of administration in the estate of his son, Ondre Baker.

7. A notice of application for court orders was filed on August 19, 2009 requesting an order for Shaun Baker to be appointed representative of the estate of Ondre Baker, pending the grant of letters of administration, for the sole purpose of a claim.

8. On the 19th of August 2009, an affidavit of urgency was filed with the Registrar of the Supreme Court, requesting an early date for hearing, as the limitation period was about to expire. A letter was also sent to the said Registrar in the same vein.

9. On September 22, 2009, a notice of application for extension of time to make a claim under the Fatal Accidents Act was filed, the primary limitation period having expired three years previously.

10. On October 11, 2009 the limitation period expired for a claim under the Law Reform (Miscellaneous Provisions) Act.

11. A claim was filed on October 29th 2009, out of time. An amended application for court order was also filed requesting an extension of time to make a claim pursuant to the Law Reform (Miscellaneous Provisions) Act.

12. On November 17, 2009 Shaun Baker was appointed representative of the estate of Ondre Baker, by court order. The applications for extension of

time to file claim were adjourned. The matter came up for hearing on the 19th April, 2010.

The Claimant's Submissions

13. Miss Chai, firing her first salvo, submitted to the court that it was settled law that a personal representative of the deceased's estate could recover damages that a deceased could have recovered from a tortfeasor at the date of death. In support of this she cited the case of ***Rose v Ford*** (1935) 1 K.B. 99, per Greer L.J. and s. 2(1) of the Law Reform (Miscellaneous Provisions) Act.

14. Arguing that, although under the Limitation of Actions Act, (Statute of Limitations) such actions must be brought within six years of the cause of action arising, the court should have regard to the overriding objective and allow the claim to proceed, despite the expiry of the limitation period. She noted that based on Rule 1.1 of the CPR, the court had a duty to give effect to the overriding objective to deal with cases justly, when exercising any powers under the Rules. In this regard, she asked the court to exercise its inherent jurisdiction and apply the overriding objective to deal with the case justly.

15. She further noted that in cases of personal injury and death, the Limitation Act in England had been amended to give the court discretion to allow a claim to proceed, outside of the limitation period, if it is equitable to do so. This she pointed out was provided for in s. 33 of the Limitation of Actions Act 1980 (UK).

16. She also cited for the courts guidance, the consolidated appeals of **Cain v Francis and McKay v Hamlani (2009) 3 WLR 551.** She referred the court to the judgment of Smith LJ in the Court of Appeal where he said:

> ***"The basic question to be asked was whether it was fair and just in all the circumstances to expect the defendant to meet the claim on the merits, notwithstanding the delay in commencement...In fairness and justice, a tortfeasor only deserved to have his obligation to pay damages removed if the passage of time had significantly diminished his opportunity to defend himself on liability and/or quantum. The disapplication of the limitation period, which would restore his obligation to pay damages, was only prejudicial to him if his right to a fair opportunity to defend himself had been compromised... the reason for the delay might be relevant."***

17. Counsel drew the court's attention to those factors, distilled from the cases of **Cain and Mckay,** which the court ought to consider and apply in exercising its discretion. I will list them as follows:

I. Whether the passage of time had significantly diminished the defendant's opportunity and ability to defend himself;
II. The length of the delay;
III. The reason for the delay;
IV. The existence of some other remedy.

18. Miss Chai argued that the delay under the Statute of Limitation for the claim under the Law Reform (Miscellaneous Provisions) Act, was only 17 days and this was negligible. She also argued that if the applicant's claim had come in on time, the respondent's ability to defend himself would not have been compromised and the 17 days would not have made a difference.

19. Pointing to the reasons for the delay, she indicated that the applicant could not have initiated the action before being appointed as the personal representative of the deceased's estate. She claimed that the application having been made in August of 2009, it was made with dispatch. She blamed the further delay on the Registrar of the Supreme Court, who, despite the affidavit of urgency which was filed and the letter of request for an early date which was sent, did not appoint a date until November 1, 2009. In the meantime, a claim was filed on October 29, 2009.

20. Miss Chai also suggested that the applicant's behaviour could not be considered tardy or dilatory by the court, as, since the accident, he had been pursuing all avenues to ensure his son's death was properly investigated. She claimed his efforts were directly responsible for a coroner's inquest being held and that he had written numerous letters to members of the police high command, public complaints authority and the Public Defender. Having been awaiting the outcome of the coroner's inquest, he was only made aware of the decision in April 2009. This she said explains his tardiness in instructing his attorneys.

21. Counsel then pointed to the great prejudice that the applicant would suffer if he was not allowed to proceed. He had exhausted all other remedies and the civil process was his only remaining hope of redress.

22. She submitted that the primary purpose of the limitation period was to protect a defendant from the injustice of having to face a stale claim. If a claim is brought a long time after the event in question, the likelihood is that evidence which may have been available earlier may become lost and the memories of witnesses who may still be available, will inevitable have faded or become confused. She stated that, as the claim

was filed shortly after the limitation period expired, those considerations would not be applicable to this case. It is her view that the claim is no staler now, than if it had been filed on the last day of the limitation period. Moreover, as the coroner's inquest had recently been completed the witnesses' recollections would not have yet faded.

23. She reminded the court that section 4 (2) of the Fatal Accidents Act provided that a claim under the Act, must be brought within 3 years of the deceased death or within such longer period as a court may allow, if it is in the interest of justice. She suggested that the same considerations for extending time would apply to a claim under this Act. She asked the court to consider whether, in all the circumstances, the interest of justice requires that time be extended.

24. Miss Chai was of the view that in balancing the equities, it was manifestly fair and just that the applicant be allowed to make the claim under the Fatal Accidents Act, out of time.

25. In her final plea she reminded the court that the applicant had exhausted all his remedies and the civil action was is only hope of redress. She reminded the court that he had filed his application during the currency of the limitation period, thus evidencing his wish to have his claim properly brought before the court. It was her view that to close him out from the seat of justice due to 17 days dilatoriness would be manifestly unjust.

Respondent's submissions

26. Ms. Dunbar, in her submissions, pointed to Angella Smith's affidavit indicating the level of prejudice she would encounter if the court allows the claim to be filed, out of time. Firstly, she noted, there was the limit to her policy which would be the limit at the time of the accident in 2003 and not at the time of judgment, whenever that may be. She noted that even if the case was allowed to commence now, the possibility of it ending within the next 3 years was remote. Secondly, the court would have to factor in the question of interest which would accrue on damages from 2003 to the date of judgment, whenever that may be. Thirdly, there was the fact that the respondents would now have to attempt to locate witnesses after almost 7 years. This is so, despite the recently concluded coroner's inquest. Counsel pointed out that the inquest was to determine whether anyone was criminally responsible and was not in any way connected to the issue of negligence. The witnesses, even if they were available, may not be helpful at all on the issue of whether anyone was negligent.

27. Fourthly, she noted that due to the vagaries of memory, it is unlikely that persons will remember anything by time the matter comes to trial or their memories may become vague as to the details of how the accident occurred.

28. She also noted that the respondent O'Brian Brown, in his affidavit, pointed to the physical and mental impact that the accident has had on him. She further noted that it was for these reasons that limitation periods were set, that is, to prevent the cruelty of having the "sword of Damocles" over the heads of potential defendants, in perpetuity.

29. Miss Chai in response noted that in the case of O'Brian Brown there was nothing before the court to support his claims of physical and mental suffering. She noted that in any event his distress must be balanced against the mental anguish of the applicant, who had lost his six year old child. In the case of the second respondent there is nothing to show that the policy limit would not cover the judgment.

30. On the issue of delay Miss Dunbar submitted that there was no reasonable excuse for the long delay, as the applicant was a police officer who should know his rights under the law. There is no explanation why he waited until August 2009 to pursue his civil claim. She noted that all the explanations from counsel have surrounded the delay since August 2009.

31. The applicant's attorney counter argued that the delay prior to 2009 was explained by applicant's affidavit and letters which showed that he was doing everything possible to ensure justice in his son's death. His efforts resulted in the holding of the coroner's inquest.

32. In that regard Miss Dunbar submitted that the fact that counsel filed an affidavit and wrote a letter of urgency and then sat back on his laurels was not an adequate excuse. She reminded the court that it was always possible to visit with the Registrar to set a date in person. There is no explanation why that was not done when there was no response to the affidavit or the letter.

33. She further submitted that the coroner's inquest was concluded in January 2009 and the applicant still took no steps. She noted that even if it were to be accepted that he only found out the results of the inquest in April 2009, he still did not take any steps until August 2009. It is her submission that it would be unfair and unjust to allow the claim to proceed at this time, as such a case would be totally dependent on the memories of the potential witnesses.

34. To this Miss Chai responded that the inquest having been recently held, the witnesses would still be available. These witnesses would have given statements which also may still be available.

35. Miss Dunbar requested that the court, in making a determination, should allow itself to be guided by the conduct of the parties throughout.

36. She also pointed out, that allowing a claim under the Fatal Accidents Act to proceed would be a frivolous exercise, as the deceased was a 6 year old child and his father could not have been dependent on him. In support of her proposition she cited the case of the **Administrator General of Jamaica (Administrator Estate of Gladstone Keith Richardson Deceased) v Fitzroy Thomas and Others** Suit No. C.L.1988/A181 delivered October 9, 1990. She opined that the case supported the thesis that a person claiming under the act must have been a dependant on the deceased at the time of his death. In that regard, the father could not be a dependant of a 6 year old child.

37. As for the Law Reform (Miscellaneous Provisions) Act, she noted that the court would have to look at what the deceased's estate would have lost as a result of his death. She cited the case of **Rhona Hibbert (Administrator of the Estate of Matthew Maxe Morgan) v The Attorney General for Jamaica** (1988) 25 JLR 429, in support of her contention that it would be impossible to assess the loss of earnings in a very young child.

38. Counsel for the applicant maintained, that in so far as those cases cited by the respondents were concerned, the Jamaican courts have devised methods of calculating the lost years in very young children. One approach, she suggested, was to use the minimum wage, another approach was to use an average of the parent's salaries.

39. Miss Dunbar also cited **Miller v London Electrical Manufacturing Co. Ltd** (1976) 2 Lloyd's Law Reports, 284, on the point of the limitation of actions, noting that the emphasis in the cases, was on the period of time when a person knew he could bring an action. In the case of Mr. Baker, she argued, he knew he may have had some kind of claim against the defendants from 2003 but did nothing until it was extremely late. Having waited this late he has not shown that he would suffer any further prejudice; he has existed this long without making a claim. In any event, she argued, the claim would be a waste of the court's time in the long run.

40. Miss Chai in delivering her final salvo declared that the court ought to look at the applicant's conduct in making his applications, which showed deference to the court process coupled with the intent to come

before the court within time. It was conceded on behalf of the applicant, that because of the passage of time the application in the case of the Fatal Accidents Act was weak and that more guidance could have come earlier from counsel. However, she argued that under the Law Reform (Miscellaneous Provisions) Act, the time is only exceeded by 17 days.

The Relevant Statutory Provisions

41. Prior to 1846, before the first Fatal Accidents Act in England, English law gave no remedy at all to dependants in the case of death. Death did not create a cause of action. See the case of **Baker v. Bolton** (1808) 1 Camp 493. At common law death also extinguished an action in tort if one of the parties died. A personal action died with the person to whom it was attached. Today, there are two separate ways in which the law, both in England and Jamaica, enable an action for damages to be brought after death. These are under the Fatal Accidents Act (1845), for the benefit of dependants and the Law Reform (Miscellaneous provisions) Act (1955) for the benefit of the deceased's estate.

42. Contrary to Miss Chai's submission, there is no inherent jurisdiction at common law to bring an action for damages in a personal injury case where death has occurred and therefore, ipso facto, there can be no inherent jurisdiction to extend the time to bring such a case.

43. Section 3 of the Fatal Accidents Act allows an action for damages to be maintained against a person who tortuously caused the death of another, in the same manner as the person would have been entitled to do, if he had not died. Section 3 states:

> ***"Whensoever, the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect of thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."***

44. The Statutory requirement, before 1979, under the Fatal Accidents Act was that action had to be brought within a year of death. The Act was amended in 1978 and it now provides that such actions shall be commenced within three years of death or such longer period as the court may allow in the interest of justice.

45. Section 4 of the Fatal Accidents act is in the following terms;

4.- (1) Any action brought in pursuance of the provisions of this Act shall be brought-

(a) *by and in the name of the personal representative of the deceased person; or*

(b) *where the office of the personal representative of the deceased is vacant, or where no action has been instituted by the personal representative within six months of the date of death of the deceased person, by or in the name of all or any of the near relations of the deceased person,*

And in either case any such action shall be for the benefit of the near relations of the deceased person.

(2) Any such action shall be commenced within three years after the death of the deceased person or within such longer period as a court may, if satisfied that the interests of justice so require, allow.

46. Section 2 (1) of the Law Reform (Miscellaneous Provisions) Act (1955) states:

> "*Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate.*"

47. The Fatal Accidents Act therefore, subsists for the benefit of near relations, or as they are more familiarly termed in the cases, dependants, whilst the Law Reform (Miscellaneous Provisions) Act subsists for the benefit of the deceased's estate.

48. The English Statute of Limitation, Imperial Statute 21 James 1, Cap 16, of 1623, titled "An Act for Limitation of Actions and for Avoiding of Suits in Law became part of received law in Jamaica and was expressly recognized as so received by section 46 of the Jamaican Limitations of Actions Act. Under the Statute of Limitations, 1623, section 3, the limitation period in respect of matters in tort is six years. The word tort does not appear in this act. Neither does the word negligence.

49. This statute is as old and as difficult to read as it is to locate. It speaks of actions for trespass and actions on the case, as well as a "hodpodge" of various other actions. The limitation period for these actions is not uniform, (they later became uniform in England by a series of amendments) but for our purposes, the limitation period for actions on the case, a category within which this present action would fall, is stated

to be six years. There is no discretion provided for in the Act for extension of time for this form of action.

50. Section 7 of the Act provides for certain exceptions to the applicability of the limitation period for minors, married women, persons under a mental disability, persons imprisoned or overseas. However, these exceptions do not apply to actions on the case.

51. Jamaican courts have routinely treated actions in negligence as actions on the case, to which the six year limitation period applies.

52. After1623, several changes were made in England to the Limitation Act; but the period remained six years, until the Limitation act of 1954 which reduced the period to three years, for personal injury claims. The Limitation Act was amended in1975 and again in 1980, in response to recommendations in the Law Commissions Paper as well as to improve on the new provisions introduced in the Limitation Act 1963. The 1980 amendments gave the court the power to extend the limitation period, if it was equitable to do so.

53. That Act made a great change in the law of limitation in England. This change meant that, in England at least, in personal injury cases, a plaintiff is not absolutely barred by the three year time limit. The judges in England have the discretion to extend the limit where it is equitable to do so, in the circumstances of the individual case. Unfortunately, our legislators have not yet seen it fit to so extend the courts powers to exercise any such discretion and in my view outside of statute, no such discretion exists. Section 3 of the 1623 Act still applies. As Rowe J said as far back as 1985, in **Lance Melbourne** v **Wan,** 22 JLR 131 at p135:

> ***"As the law now stands there is for Jamaica a rigid rule that actions for negligence must be brought within a period of six years from the time the cause of action arose and any failure to do so will render the action statute barred."***

54. On the other hand, although the Fatal Accidents Act, section 4 (2) Jamaica, does grant the court the power to enlarge time, it does not indicate how the court is to determine or what factors the court is to apply in determining whether or not to extend time.

55. Section 11 of the Limitation Act 1980 (UK), provides a specific time limit for actions in respect of personal injuries. Section 11(3) and (4) provide that an action shall not be brought after the expiration of a period of three years after the date on which the cause of action accrued.

56. Section 33 of the said Act provides for an exception to the operation of section 11 if it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which:

    (a) the provisions of s.11...of this Act prejudice the plaintiff;
    (b) any decision of the court under this subsection would prejudice the defendant...the court may direct that those provisions shall not apply to the action.

57. In acting under section 33 the court is empowered to have regard to all the circumstances of the case and more in particular to such factors as;

    (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 11..
    (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 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;
    (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.

Analysis

58. Justice must be considered both for the applicant and for the respondents. It is only fair and just for a potential claimant, who has a good claim, not to be shut out from the courts to which he has turned for redress. It is however, also justice for a potential defendant to, at some point, be able to rest with the full knowledge that he will not be asked to answer to the merits of a claim, which due to the passage of time, he can no longer adequately respond to.

59. This would mean that the court, in balancing the scales of justice as between both parties, would necessarily have regard to several factors not least of which is the question of delay, the reasons for it and any

possible prejudice resulting therefrom. For, if a claimant has indeed rested upon his laurels until so much time has passed that it cannot fairly be expected that any cogent response can be made to his claim, then, it may indeed be unjust to allow such a claim to proceed.

60. The primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim which he never expected to have to face. See Lord Griffiths in **Donovan v Gwentoys Limited** (1990) 1WLR 472. HL

61. Now, as noted earlier, there is no discretion under the Statute of Limitation to extend time. Nor does any such discretion exist under the Law Reform (Miscellaneous Provisions) Act. However, Counsel for the applicant has asked the court to apply the overriding objective in the Supreme Court of Jamaica Civil Procedure Rules 2002 to extend time.

62. The overriding objective is contained in Rule 1.1 in the Civil Procedure Rules 2002 and states:

> (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
> (2) Dealing justly with a case includes-
> (a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;
> (b) saving expense;
> (c) dealing with it in ways which take into consideration-
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

63. As already stated, at common law death could not give rise to a cause of action and an existing cause of action died with the party. However, the victim of a tort could sue a tortfeasor at any time, without limitation. In 1623, a limitation period of six years was introduced for actions on the case, in England. It is this Act which has become received law in our jurisdiction, as a former colony of Britain.

64. This limitation period may have been the law makers' best informed estimate of when it would become unjust to allow a claim to proceed, as

between the victim and the tortfeasor, in order to protect defendants from stale claims. When one considers the historical perspective of limitation laws, it would appear that its intent was not to provide the defendant with a defence on the merits but to bar the victim from his remedy, if he comes too late. The defendant remained a tortfeasor but he could not be sued.

65. The Limitation Act therefore, recognized that there would be some prejudice to the victim who comes to court too late, in that he will be forever barred from his remedy. Megaw J, at first instance, in **Heaven v Road and Rail Wagons, Limited**, (1965) 2 All ER 409, in reviewing the cases where the court may exercise its discretion to renew an expired writ, after the limitation period, under the Fatal Accidents Act said:

> "***The defendant has his defence as of absolute right. The reasons of public policy are not far to seek. It is unfair to defendants, and it makes the administration of justice more uncertain, if litigation is delayed so that witnesses die or cannot be traced, or memories fade; and defendants are entitled to know definitely, at the expiry of some defined time, whether or not they are to be pursued in the courts.***"

66. This, in circumstances where the Judicature (Civil Procedure Code) Law provided for the power to enlarge time for renewal of the writ, as the justice of the case may require.

67. I agree with Miss Chai that the court must seek to give effect to the overriding objective when interpreting the rules or exercising any powers under the rules. Rule 1.1 therefore, gives guidance to judges in the exercise of their discretion in applying the Rules. However, the limit placed on the time for filing of cases under the Law Reform (Miscellaneous Provisions) Act is not contained in the Rules and I respectfully disagree that the overriding objective can be applied to give a court a discretion to extend time under a statutory provision, which it does not have by virtue of the enabling statute and never had at common law.

68. In any event, even for claims which have been filed within the relevant limitation period, the Rules make it clear that any amendment to the claim other than to correct a genuine mistake or the identity of a party, is prohibited by Rule 20.6 once the limitation period had expired.

69. Certainly, it is a well settled rule of practice that no proposed amendment to a claim will be allowed, if it amounts to a new cause of action, or a new claim which would deprive a defendant of an existing right under the Statute of Limitation. The overriding objective may

perhaps be prayed in aid as an exception to this rule in "very peculiar circumstances": See the judgment of Harris J.A. in **National Commercial Bank et al v Scotia Bank Trust And Merchant Bank LTD.,** Supreme Court Civil Appeal No. 22/08. However, it cannot be used in any case such as the one before me.

70. A claim must be issued within the limitation period and it is always necessary when faced with the possibility of bringing a claim, to ascertain when the relevant limitation period will expire. If a claim is issued outside of the limitation period, the defendant will generally have an indefeasible defence to the claim.

71. Furthermore, a claim which is clearly outside the relevant limitation period may also be struck out on that ground. See **Richies v DPP** (1973) 1 WLR 1019, where it was held inter alia, that; it was open to a defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court, to show that the plaintiff's cause of action was statute barred and must inevitably fail for that reason. See also the judgment of Stephenson L.J. in **Ronex Properties v John Laing** (1983) 1 Q.B. 398 at p. 408. There the learned judge of appeal in giving his observations on the limitation point concluded that:

> ***"There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiffs' claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred".***

72. I therefore conclude that, there is no discretion to extend time under the Statute of Limitations, the Law Reform (Miscellaneous Provisions) Act or the Civil Procedure Rules 2002. The Statute of Limitation is a complete bar to the claimant's claim under this head.

The Fatal Accidents Act

73. Accepting, as I do, that under the Fatal Accidents Act, there is discretion to extend time, I recognize that the Act does not state how this discretion to enlarge time is to be applied. I however, agree with the suggestion that guidance may be had from the factors specified in the English Limitation of Actions Act, section 33 and the application thereof in the cases. I will therefore, apply those factors to the case before me.

1. **Delay**

74. The reason for the 3 year delay is unclear. The affidavit of Mr. Baker and the documents attached thereto indicated that Mr. Baker had retained Counsel from as far back as 2003. Mr. Baker spent much of that time writing letters to various persons and making various accusations and allegations regarding the investigations into his son's accident. He also claimed to have been instrumental in having a coroner's inquest held, which he was "integral" in attending but claimed not to have become aware of the outcome until April 2009, even though the inquest was in January 2009.

75. He did nothing even then, until August 2009 when he applied for letters of administration and instructed Counsel to take civil proceedings against the respondents. The matter had been sent to the coroner's court from 2004, so from as early as then, Mr. Baker knew that the respondent O'Brian Brown would not be charged by the police unless he was held criminally responsible by a coroner's jury. Yet he filed no claim against the respondent at that time.

76. In **Donovan v Gwentoys Ltd** (1990) 1 WLR 472, Lord Griffiths, in the House of Lords, accepted that the relevant period of delay for the purposes of section 33 was the period after the limitation period had expired. He went on to hold however, that in weighing the degree of prejudice to the defendant the court is entitled to take into account the date upon which the claim is first made against the defendant. The Law Lord said:

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

77. He then went on to find that the defendants were faced with what he described as a truly stale claim first made upon them five years after the event. He also noted that the degree of prejudice was so manifestly great that it would be absurd not to take it into account. He said further:

> ***"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 the trial if he is not to be permitted to rely on his limitation defence".***

78. In this case, the claim is being brought a full six years after the event and three years after the limitation period expired under the Fatal Accident Act. The claimant had no reasonable reason for the delay. He knew who the tortfeasor was. He knew what had taken place, he had all the necessary information at hand to proceed and he had counsel. There is no explanation as to why he failed to give instructions to prior counsel;

unless he was of the view he had no cause of action. To say he was waiting on the coroner's inquest would be somewhat ingenious, as he is in no better position now than he was before the inquest, the respondent not having been found criminally liable. The claimant is a police officer and is taken to know facts observable by him or ascertainable by him on his own or through expert advice.

2. **Cogency of the Evidence**

79. This incident took place in 2003, so potential witnesses would be asked to recall events as at 2003. I agree that the danger inherent in this situation is somewhat ameliorated by the fact that the coroner's inquest was as recent as 2009 and there were statements and evidence given by witnesses at the inquest. However, this assumes that the witnesses in the coroner's inquest will be the same in the civil proceedings for negligence. Certainly the applicant and the respondents would be the same but who would be the supporting witnesses, if any?

80. Liability is being denied by the respondents and as such the applicant will have to prove his case, which the respondents must answer on the merits. In this regard, due to the passage of time, there is likely to be some loss of memory, bearing in mind that even if the case were allowed to go forward it will not likely come to trial until sometime thereafter. Since any extension of the limitation period is designed to specifically override the statutory defence, what is of paramount importance to the respondents is not the loss of the defence, which parliament in its wisdom saw fit to allow but the effect it will have on the respondents' ability to defend themselves on the merits of the case, both as to liability and quantum. The only question for the court on this issue then is, how does this delay affect the evidence and the ability to defend? This is usually referred to in the English cases as 'evidential or forensic prejudice". See **Cain and McKay.**

3. **Conduct of the Defendants**

81. There is nothing in the evidence which could result in any criticism of the respondents' actions.

4. **Extent to Which the Claimant Acted Promptly**

82. There is no denying that the applicant did not act promptly. Even if we accept that the time when he knew that the act of the respondent might give rise to an action in damages was after April 2009, when he became aware of the outcome of the coroner's inquest, he still did not act until August 2009.

83. Counsel attempted to attribute the delay to the fact that it was usually the case, that where an event gave rise to a criminal trial and the possibility of concurrent civil proceedings, it was a procedural requirement for the

criminal trial to proceed before the civil proceedings. This is what was generally known as the rule in **Smith v Selwyn** (1914) 3 K.B. 98. By this rule a person could not proceed with a civil action for damages where the parties are the same, based upon a felonious act committed by the defendant on a plaintiff, so long as the defendant had not yet been prosecuted. It was the rule at that time that the proper course for the court to adopt was to stay further proceedings until the defendant had been prosecuted; unless there was a reasonable excuse for not prosecuting him. This rule related to felonies only.

84. However, this rule only applied to stay the civil proceedings pending the outcome of the criminal trial; it did not prevent a claimant from bringing an action within the specified limitation period. The rule in **Smith v Selwyn** was extensively qualified in the case of **Bank of Jamaica v Dextra Bank and Trust Co** (1994) 31 JLR 3. In **Donald Panton v FIS** SCCA 110/2000, PCA NO. 95/02 delivered December 15th 2003, the CA declared that the rule no longer applied in this jurisdiction. The court in exercising its inherent jurisdiction to control its own proceedings should balance justice as between the parties, taking into consideration all the relevant factors. The burden was on the party seeking the stay, to show that the other party's right to have his claim proceed should await the conclusion of criminal proceedings.

85. In light of that, the rule in **Smith v Selwyn** could not possibly be used as an excuse by the applicant for the late filing of the claim. In any event as noted, the applicant knew that the matter was referred to the coroner's court from as far back as 2004.

86. With disaster approaching, Counsel attempted to get the wheels of the Supreme Court to turn at a faster rate, to no avail. However, it is generally expected that with a limitation period approaching, it would usually be best to make a personal visit to the court to issue proceedings or secure a date. Even a telephone call to the Registrar could have sufficed. Two letters to the Registrar in the face of impending disaster does not indicate an appreciation of the sense of urgency indicated in the affidavit of urgency filed by counsel. The delay is absolutely inexcusable and the blame cannot be placed at the feet of the Registrar.

5. **Prejudice**

87. The prejudice to the applicant if this case is not allowed to go forward is obvious. His son is dead. He wishes to claim on behalf his estate and on behalf of his near relations. If time is not extended, he will not be able to do so. The respondents will benefit from a procedural defence due to his delay. On the other hand the prejudice to the respondents if the time is extended is also obvious. They will have to answer the claim on its merits. Even if they have a good defence, they will have to expend a

great deal of time, money and energy in defending the claim. Furthermore, if they have no defence to liability, then they loose a full statutory defence.

88. In the case of the respondent O'Brian Brown, he has been absolved of all criminal responsibility but must now face the anguish of a civil trial. This is somewhat ameliorated by the fact that he did not in fact face a criminal trial. In the case of the respondent Smith, there is the prospect of being faced with the obligation to pay more interest than if the case had been brought within the time limit. The longer the delay the greater the interest on damages. There is also the question of insurance. The respondent Smith claimed that the policy limit on the insurance would be as at the date the accident occurred and would not be adequate to meet any likely judgment so long after the incident.

89. In the case of both respondents they will have to locate credible witnesses who can recall the details of the accident after the passage of such a long time. The applicant in his documentation has already accused all the witnesses at the coroner's inquest with the exception of one, of lying. Memories may have already begun to fade.

90. In **Cain and McKay** the approach of the English courts in applying section 33 seem to be one where the prejudice to a defendant was not be viewed in the light of any pecuniary prejudice or even in terms of the loss of the defence itself but only in terms on its effect on the defendant's ability to defend the claim on the merits.

91. The facts in those cases while similar to each other are factually different from the case at hand. In **Cain and McKay** the defendants had been alerted promptly about the action and had admitted liability. Negotiations were ongoing and the claimant had been paid interim sums of money. The attorneys were informed by the defendants that they should file a claim which they failed to do inside of the limitation period. The defendants then pleaded the statute bar in defence of the claim. They had no defence to liability. In one case it was a delay of a day, in the other it was a delay of just under a year.

92. It would appear from the decision in **Cain and McKay** and the authorities so ably and lucidly reviewed by the court of appeal that the general proposition is that; in cases where the defendant has had early notice of the claim, the accrual of a limitation defence, certainly in England at least, is to be regarded as a windfall. In the exercise of the courts discretion under section 33, the loss of the statutory defence is to be regarded as either presenting no prejudice to the defendant or only slight prejudice.

93. Whilst I make no definitive ruling as to whether that approach is applicable to the exercise of the discretion of the court under our Fatal Accidents Act, in the case at hand, the respondents had no notice of the claim until the earliest August 2009, latest October 2009. In such a case the accrual of the limitation defence cannot, under any circumstances, be considered a windfall. In the case of the Fatal Accidents Act the relevant delay has been over three years. The effect to the respondents in the conduct of the action despite the relatively recent coroner's inquest must be gravely prejudicial. The section refers to the interest of justice. The court therefore must do what it considers fair and just in the interest of both parties.

6. **Likely Prospect of Success**

94. Although not one of the factors in the English Act, the case of **Thompson v Brown** (1981) 1 WLR 744 HL, held; that in deciding whether to apply section 33 the court had an unfettered discretion and must consider all the circumstances and is not restricted to the factors specifically listed in s.33. I am of the firm view that the court necessarily needs to take into account the likely prospect of success, if the claim were to proceed.

95. The affidavit of Shaun Baker indicated that his son Ondre Baker was hit down by a Toyota Hiace bus registration no 4440 BH and that the accident was a result of the negligence of the first respondent. He was not prosecuted. The applicant claimed that the accident was not properly investigated and as a result he wrote letters to several persons in authority to complain.

96. The claim filed October 29, 2009 alleged that the deceased was lawfully crossing the road in the vicinity of a supermarket when the first defendant "so negligently drove and/or operated and/or managed motor vehicle registration no. 444oBH, the property of the second defendant that he caused and/or permitted the said motor vehicle to collide with Ondre Baker, who thereby sustained injury from which he died on the same day."

97. It is commonly accepted and borne out by the applicant's affidavit and accompanying documentation that his son was hit by the motor bus whilst he was attempting to cross the road. What may be gleaned from the records before the court is that the child had gone to the supermarket accompanied by other children his own age. He was the last to leave the supermarket and the others had crossed the street before him. He stepped from between two parked vehicles in front of the supermarket into the path of the respondent's bus and was killed. The respondent Brown who was the driver did not see him. It seemed to have been determined by the police that he was not at fault. He was not charged with any offence.

98. The applicant, dissatisfied with the police inaction, began an investigation of his own. During that time he made several charges and allegations against various persons involved in the case. Although he was not a witness to the accident he is of the view that the respondent had been speeding, had not been paying attention and was therefore negligent. The verdict of the coroner's jury did not find anyone criminally liable. What would be the prospect of success under the Fatal Accidents Act on the issue of liability and quantum?

99. The strength of the claim seem to have been a significant factor in **Thompson v Brown** and in **Nash** v **Eli Lilly and Co** (1993) 1 WLR 782. In **Nash** a finding that the claims were weak was regarded as an important factor in refusing to make orders under section 33. In **Long v Tolchard and Sons Ltd 1999,** The Times, 5 January 2000, it was said that if the claimant has a strong, or even cast iron case against the tortfeasor, that is an important factor to place in the balance that has to be struck between claimant and the defendant..

100. In this particular case, it is my view that the respondents would have a strong defence of inevitable accident on the facts as they appear in the application. An inevitable accident is one which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and skill.

101. In **Moore v Poyner** (1975) RTR 127, CA, the court applied an objective test in deciding the issue of liability where a child of six years old ran from an opening in front of a parked coach, just as the defendant was driving past. She was struck by the defendant's car. The court of appeal found that the defendant was not liable. The test that the court enumerated as the proper one to be applied to such cases was this:

> ***"Would it have been apparent to a reasonable man, armed with commonsense and experience of the way pedestrians, particularly children, are likely to behave in the circumstances such as were known to the defendant to exist in the present case, that he should slow down or sound his horn or both? What course of action would he have to take if he was going to make quite certain that no accident would occur? Ought he to have slowed down to such an extent that there could have been no possibility of a child's running out at any moment in front of him and his being unable to stop without striking the child? To do so he would have had to slow down to something like 5mph. Such a duty of care would be unreasonable; the chance that a child would run out at the precise moment he was passing the coach was so slight as not to require him to slow down to that extent. As***

for sounding the horn, drivers in traffic are constantly exposed to the danger of pedestrians stepping out in front of parked vehicles. It would be an impossible burden for drivers to sound their horns every time they passed a parked vehicle."

The case of **Kite v Nolan** (1983) RTR 253 CA was similarly decided.

102. Indeed, the view the police took of the facts seems to have been shared by the coroner's jury, who by their verdict have already determined that it was an inevitable accident. The coroner's inquest is inquisitorial and its verdict is not binding on any one affected by it. It therefore does not prevent civil proceedings being brought. However, the question for this court in determining this application is whether it is likely that a judge, hearing the action and applying the proper test, would come to the conclusion that the respondent was negligent. If the answer is no then that would be fatal to the applicant's case. See **Ritchie v DPP.** Now, in my humble view, if the test as stated is applied to the relevant facts on which the allegation of negligence is based, it is probable that a judge, at the trial, would not find the respondent Brown, negligent.

103. I am in no way to be understood to be saying that there can never be a case brought in negligence, where the defendant was not charged by the police or found criminally responsible by a coroner's jury. There may be cases where there is contradictory evidence on either side as to how the accident occurred which can only be resolved by the court. In my view this is not one such case. There is nothing in the documents put before me to suggest that there is any dispute on either side as to how the accident occurred.

104. This legislation provides the means by which the tortfeasor is liable in damages to compensate certain persons who have suffered financially as a result of his death. An action under the Fatal Accidents Act inures to the benefit of the deceased dependants at the time of his death. A dependant is a near relative who is able to satisfy the court that at the time of the death of the deceased, he was in receipt of a benefit from the deceased and the death has deprived him of that benefit.

105. Loss of support to some degree is essential to success under this cause of action. No near relative can succeed unless they can prove actual dependence on the deceased at or before his death or a probability that they would have received some support from him in the future if he had lived. The mere possibility that a child, when grown would have maintained his parents is not enough: **Barnett v Cohen** (1921) 2 K.B. 461.

106. The deceased in this case having died at age 6 years old, it is unlikely even if liability was established, that the applicant would recover any sums under this Act. There could be no evidence that the applicant was in any way

dependent on the six year old and had been deprived of this benefit by his death.

107. Guidance may be found in the House of Lords decision in **Taft Vale Rail Co. v Jenkins** (1911-13) ALL E R 160, where it was held that it was not necessary for the plaintiff to show that the deceased had been earning money and had contributed to the support of the plaintiff before death, provided that there was reasonable expectation of future pecuniary advantage to the plaintiff had the deceased lived. In that case the deceased was sixteen years old and had been working. According to Viscount Haldane, speaking about the rationale for an award under the English Fatal Accidents Act, (Lord Campbell's Act) said:

> ***"The basis is not what has been called solatium-that is to say, damages given for injured feelings, or on the ground of sentiment –but damages based on compensation for a pecuniary loss. But then loss may be prospective, and it is quite clear that prospective loss may be taken into account... it has been said that that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition, either in the statute or in any doctrine of law which is applicable; nor do I think that it is really established by the authorities when they are examined."***

108. Whilst the pecuniary loss may be actual or prospective (section 4 (4) of the Fatal Accidents Act), it must be shown by evidence to exist and not as a solatium. Lord Atkinson in **Taft Vale Rail** described it as a "reasonable expectation of pecuniary benefit". This must necessarily require an inference of fact; it must rest upon a basis of fact from which such a reasonable inference may be drawn. However, the authorities seem to suggest the younger the child the more unlikely that there will exist any circumstances from which the necessary inference may be drawn. In **Rhona Hibbert (Administrator of the Estate of Matthew Maxe Morgan, Deceased) v The Attorney General for Jamaica** (1988) 25 JLR 429, the deceased was 13 years old and lived at his mothers house. The claim was in respect of both mother and father. The mother did not and had never known where the father lived. Her contact with him was through his work place. The father had arranged for the child to attend secondary school. The court found there was no evidence to make an award under the Act.

109. In **Beverley Radcliffe (Administratrix of the Estate of Deon Murray Deceased) v Ralph Smith and Leroy Russell** (1988) 25 JLR 516, where the child was 131/2, there was no evidence in relation to a claim on behalf of any dependant and no award was made. In that case Panton, J., as he then

was, in referring to the lack of evidence said; ***"Indeed, I would have been surprised if such evidence was available considering the age of the deceased."***

110. In the case of a very young child such as a six year old, there would be no clear evidence of any desire or ability to assist the parents in later years. In **Barnett v Cohen** the claim of a father, who was earning a good income but who was in poor health, for damages resulting from the death of his four year old son, was dismissed. The court found that there was no reasonable probability of pecuniary benefit, only a speculative possibility. McCardie, J., in referring to the claim said that it was ***"pressed to extinction by the weight of multiplied contingencies"***.

111. According to Harvey McGregor Q.C., the learned author of McGregor on Damages, seventeenth edition at page 1373, since the decision in ***Barnett v Cohen***, no further case appears in the reports in respect of very young children. My research has shown that none can be located for any child under the age of thirteen.

Disposition

112. I wish to make it clear that in disposing of this matter, I am making no determination on the substantive case. The focus of this exercise is simply to determine where the balance of justice lies. Ms. Chai says it lies with the applicant who has lost a son due to the action of the first respondent. Ms. Dunbar says it lies with the respondents who should not have to go through the expense and anguish of a trial so long after the incident and after the limitation period had expired, when witnesses cannot be found or their memories have become vague.

113. It is always difficult for a court to do a balancing act to do justice between parties; this case has been no different.

114. The applicant in his documentation attached to his affidavit, indicated that there was a difficulty with the witnesses at the coroner's court. One had died, one did not turn up and the others barring one, in his estimation, were not truthful. These are witnesses who would have given statements to the police and were subpoenaed to appear at court. There is no indication that any of these persons will be available to the respondents as witnesses in a civil case. Any opportunity for the respondents to secure credible witnesses to meet the applicant's case on the merits may be long gone.

115. The Court rules that the time limited for filing a claim under the Law Reform (Miscellaneous Provisions) Act having expired there is no rule of law or practice or any enabling legislation allowing a court to extend time within which to file such a claim. The claim is statute barred.