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**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. HCV 4385 OF 2009**

**IN CHAMBERS**

**BETWEEN      JENETTA JOHNSON-STEWART                      CLAIMANT**  
(Personal Representative and mother  
of the deceased Andre Linton Blair)

**AND              ATTORNEY-GENERAL OF JAMAICA                      DEFENDANT**

Tameka Jordon instructed by Jacqueline Samuels-Brown for the Claimant

Lisa White instructed by the Director of State Proceedings for the  
Defendant

**Heard: September 1, 3 and December 17, 2009**

**Jones J:**

[1] It is sometimes said that what is written in the statute book is not necessarily an indication of how the law will be applied. This is particularly so where the statute provides for a discretion to be exercised.

[2] Section 4 (2) of the Fatal Accident Act provides for a three year limitation period or a longer period granted by a court in the interest of justice. Jenetta Johnson-Stewart (hereafter called the Applicant) says that she did not know that a civil suit could be brought against the Government of Jamaica for the wrongful death of her son. When it was brought to her attention, the time for filing a claim under the statute had expired. Does the statute provide a discretion to extend the limitation period beyond three years? If so, is it in the interest of justice to do so?

[3] The factual basis of the Applicant's claim can be found in the Claim and Particulars of Claim filed on August 26, 2009, on her behalf by Tameka Jordan an Attorney at Law. She alleges that sometime on September 7, 2003, her son Andre Blair (deceased) was driving his white 1990 Toyota Corolla motor car with three men who were chartered passengers. When they reached in the vicinity of Compound in the Central Village area he was signalled by members of the Jamaica Constabulary Force to stop his vehicle. He was unable or afraid to stop the vehicle as a result of the acts of the chartered passengers. The police officers fired at the vehicle causing it to stop in the vicinity of a police station. When Andre Blair (deceased) exited the vehicle with his hands in the air he was shot while unarmed.

[4] In an Application for Court Orders dated August 26, 2009, filed on her behalf by Tameka Jordan, the Applicant requested:

- a) That permission be granted to her to file the claim out of time under the Fatal Accidents Act;
- b) That the Claim Form and Particulars of Claim filed on the August 26, 2009 stand;
- c) That she be appointed Administrator ad colligendo bona for the estate of her deceased son for the purpose of bringing a claim until the court issues a full or normal Grant of Administration.

[5] On September 1, 2009, the court after hearing submissions on both sides ordered that the Claim Form and Particulars of Claim stand and that the Applicant be appointed Administrator ad colligenda bona for the estate of Andre Linton Blair (deceased). The court reserved its

decision on the application to extend time to file their claim under the Fatal Accidents Act.

- [6] In an Affidavit in support of the application for the extension filed on behalf of the Applicant by Tameka Jordan an Attorney at Law, she says that a coroner's inquest was ordered by the Director of Public Prosecution but to date there has been no inquiry. In addition, she says that she was informed by the Applicant that a complaint was made to the Police Complaints Authority but there has been no response from this body also.
- [7] Three years later the Applicant went to an Attorney at Law for assistance. She was advised that that she could file a claim against the government but was not aware that she could bring claim in the civil court and be compensated for her son's death. This she says is the reason for the delay in pursuing the civil claim.
- [8] The factual basis of this application for an extension of time is that the Applicant was ignorant of her rights to seek civil redress for the death of her son. When she became aware of this, the time for filing a claim under the Fatal Accidents Act had passed.
- [9] The Applicant contends that the Act confers a discretion on a judge to extend the period beyond the three years as the interest of justice requires. The statute itself provides no guidelines for the exercise of the discretion. Counsel for the Applicant relies on the case of **Carlton Edwards et al v. Attorney General (unreported) Claim No.146 HCV 2004** decision on October 10, 2007, in which the court in refusing to exercise its discretion to extend the limitation period made it clear that relevant and admissible material must be placed before the court for this to be done.

[10] In that case, the Defendant took no steps to rectify the situation after being notified that the limitation point would be taken. This situation continued until the eve of the limitation period

[11] Coke defined discretion thus:

"Discretion is a science of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private effections": **See Jowitts Dictionary of English Law Vol. 1, 2<sup>nd</sup> Edition**

[12] Undoubtedly, this court has a discretion to extend the time under the Fatal Accidents Act beyond the three years. However, I agree with my brother Sykes J. in **Carlton Edwards et al** that there must be a good reason or explanation for the delay together with evidence on which the Court can rely to exercise its discretion. In addition, this evidence should be relevant and admissible.

[13] In this case, the Applicant contends that this court has good reason to exercise its discretion and extend the time for filing under the Fatal Accidents Act beyond the three years limitation. First, she says that ignorance of one's legal right is one important consideration in the exercise of the discretion. The authority in support of this proposition is the case of **Halford v. Brookes [1991] 3 All ER 559**. In that case the Court of Appeal of the United Kingdom held inter alia:

"When considering whether to exercise its discretionary power under s 33 of the 1980 Act to allow an action to proceed after the primary limitation period had expired, the court was entitled to take into account the plaintiff's ignorance of his legal rights when considering the reasons for the delay in bringing the action. Since no legitimate criticism could be

levelled against the plaintiff in respect of the delay in view of the fact that she had acted promptly once she knew of the existence of the civil remedy and had done all that could reasonably be expected of her, and since the delay would not jeopardise the fairness of the trial by rendering the evidence against the defendants less cogent...the judge had been wrong not to exercise his discretion under s 33 to disapply the three-year limitation period."

[14] I agree with the Respondent that the case of *Halford v Brookes* is distinguishable on its facts from this case. First, in that case the Claimant acted promptly once she knew that a civil remedy was available to her. In this case, the Claimant acted three years after the limitation period had expired. Second, the Claimant in *Halford v Brookes* sought legal advice just prior to the end of the limitation period. In this case, the Applicant sought advice several years after. Third, Sec 33 of the Limitation of Actions Act 1980—the statute applied in *Halford v Brookes*—contains provisions that are much wider in scope than Sec 4 (2) of the Jamaican Fatal Accidents Act. Fourth, the delay in *Halford v Brookes* was not considered by the court to be prejudicial to the Defendant. In this case, the contention of the Defendant is that it is.

[15] Furthermore, there is grave doubt as to whether the proposed evidence—foreshadowed in the Affidavit of Tameka Jordan—is admissible. The Applicant, who provided the information, was not a witness to the shooting of her son and there is no indication by what means the information was obtained. She has not said whether there were witnesses to the incident from whom she obtained the statements. Accordingly, this court is driven to conclude that the information relating to the incident which is included in the Affidavit of Tameka Jordan is hearsay and unless consented to by the Respondent inadmissible.

- [16] The second important consideration in determining whether to exercise my discretion in this case, is the balance of prejudice. The Applicant contends that if she is not allowed to make a claim under the Fatal Accidents Act the award will be reduced. She says that her claim will be limited to the Law Reform (Miscellaneous Provisions) Act. She argues that the only prejudice to the Defendant from the extension sought is the deprivation of a "windfall defence". Furthermore, any evidence required by the Respondent is easily obtained as the matter is the subject of a coroner's inquest.
- [17] In my judgment, the Respondent would on balance be prejudiced if the court grants the Application to Extend Time for the filing of a claim under the Fatal Accidents Act. Firstly, delay by itself is a prejudice. The cause of action arose in 2003 and is barred under the Limitations statute in 2006. The Respondent by relying on the fact that claims after 2006 are statute barred would be expected to take a different posture with regard to the protection and retention of records and evidence. Secondly, relevant information relating to the claim has been and continues to reside with the Applicant or her attorney from 2003 up to today's date. Thirdly, there is no evidence that new factual information has been unearthed by the Applicant which allows her to pursue her claim at this time.
- [18] Finally, the Applicant maintains a claim in relation to the Law Reform Miscellaneous Provisions Act and, therefore, it cannot be said that she is totally prejudiced if she is not allowed to claim under the Fatal Accidents Act. For this and the above reasons, the Application to Extend Time under the Fatal Accidents Act beyond the three years is refused. As the Applicant succeeded on one part and failed on the other, there shall be no order as to costs.