COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/01123

B E T W E E N

DION GARDINER

Claimant

AND

BYRON KNOWLES

Defendant

Before: The Honourable Madam Justice Simone I Fitzcharles

Appearances: Mr Ashley Williams for the Claimant

Mrs Vanessa Carlino for the Defendant

31 March 2025

RULING

FITZCHARLES, J.

The Applications

1. On 15 June 2017 an explosion occurred aboard the Motor Vessel, 'Sun Up Sun Down' (the "Accident"). More than 3 years after the Accident, the Claimant brought this action against the Defendant for damages for personal injuries, loss and damage he allegedly sustained as a result of the Accident. The Claimant pleads that he was employed by the Defendant and working aboard the Motor Vessel 'Sun Up Sun Down' when the Accident occurred.

2. This ruling concerns applications before the Court which have been brought by both parties. Those applications are:

(1) A Notice of Application filed by the Claimant on 1 October 2024 for: (i) sanctions against the Defendant pursuant to the **Supreme Court Civil Procedure Rules, 2022** ("CPR"), **Rule 26.7**; (ii) for Judgment on Admissions pursuant to **CPR Rule 14.4(1)**; and (iii) for a wasted costs order; and

(2) A Notice of Application filed by the Defendant on 08 October 2024 for an Order: (i) that the Claimant's case be struck out pursuant to **CPR Rule 26.3(c)** as frivolous, vexatious, scandalous and an abuse of process or likely to obstruct the just disposal of the proceedings because the causes of action asserted are statute-barred pursuant to **Section 5(1)** of the **Limitation Act, 1995, Chapter 83**; and (ii) that the Claimant pay costs to the Defendant.

3. On 19 September 2024, the first case management conference in this matter took place. At that hearing, Counsel for the Defendant, Mrs Ilsha McPhee, foreshadowed that an application to strike out the Claimant's case would be brought. Having heard from both Counsel present, the Court gave directions for the filing of the foreshadowed application of the Defendant, along with supporting evidence, if any, and for the exchange of submissions. The Court also set the date for that application to be heard and tentative dates were reserved for a trial, if necessary.

4. The Defendant was 10 days tardy in filing the foreshadowed strike out application. Therefore, the Claimant sought that the Court impose sanctions, enter Judgment on Admissions against the Defendant and order that wasted costs be paid.

5. On 31 March 2025, the Court heard the arguments of the Claimant as presented by Counsel for the Claimant, Mr Ashley Williams, and the argument of the Defendant as presented by Counsel for the Defendant, Mrs Vanessa Carlino. The Court also considered the pleaded cases as set forth in the Generally Indorsed Writ of Summons filed on 13 November 2020, the Statement of Claim filed on 29 April 2024 within the Fixed Date Claim filed on even date, the Defence filed on 24 May 2024 and the Reply to Defence filed on 27 May 2024. Along with the Notices of Application referred to in paragraph 2 of this ruling, the Court also considered the Affidavit of Dion Gardiner filed on 01 October 2024, the Affidavit of Byron Knowles filed on 8 October 2024, the written Skeleton Submissions of the Claimant dated 4 December 2024 and the Written Submission of Defendant dated 20 December 2024.

Sanctions for Late Filing of Application

6. The Claimant asserts that the Court ordered that the Defendant's Notice of Application be filed on or before 27 September 2024 and that in breach of the directions of the Court, the Defendant's application was not filed until 8 October 2024. This is uncontroverted. Further, there is no explanation in the evidence presented by the Defendant as to why the filing was some 10 days late. However, no specific sanction was specified by the Court for non-compliance with the timelines, as the Court did not deem it necessary or practicable upon the giving of initial directions to do so.

7. The Claimant seeks sanctions against the Defendant and relies upon **CPR Rule 26.7** which provides:

> "26.7(4) If a party has failed to comply with any of these rules, a direction or any order, where no express sanction for non-compliance is imposed by the rule, direction or the order the party in default may make an application under rule 26.9.
>
> "(5) If a rule, practice direction or order –
>
> (a) requires a party to do something by a specified date; and
>
> (b) does not specify the consequences of failure to comply,

the time for doing the act in question may be extended by agreement in writing between the parties provided that the extension does not affect the date of any hearing or the trial.

[Emphasis added]

8. **CPR Rule 26.9** is also applicable to the circumstances in which the parties find themselves. That Rule provides:

"26.9 General power of the Court to rectify matters

"(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction.

"(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders.

"(3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the Court may make an order to put matters right.

"(4) The Court may make such an order on what or without an application by a party."

9. It is clear that no extension of time was agreed amongst the parties although such agreement would have been permissible by the **CPR Rule 26.7(5)(b).** The date of the hearing was some months away (in February 2025) from the date of the actual late filing (in October 2024). Therefore, such date was not jeopardized by the late filing. Moreover, the trial dates were merely tentative. It is for these reasons that the Court will not choose, in these circumstances, to exercise its discretion to make a wasted costs order. The Court clearly has a discretion, as stated in **CPR Rule 71.9**, as to "(a) whether costs are payable by one party to another; (b) when to assess costs; (c) the amount of those costs; and (d) when they are to be paid."

10. The Claimant argues also that a wasted costs order should be made because the Case Management Conference was not completed, given the nature of the application to strike out the

claim as foreshadowed by the Defendant at the Case Management Conference. However, it is wholly appropriate for a party to use the occasion of a case management conference to apprise the Court and other parties in the case that one will apply for the claim to be struck out. Clearly there is utility in refraining from giving the usual full directions for a case when it is anticipated that an application will be made that could expunge the action. I observe also that by his application for Judgment on Admissions, the Claimant has done a similar thing in that his application, too, may pre-empt the necessity for a trial, thereby rendering the giving of directions for a trial that might never happen somewhat wasteful.

11. The Court has the power to put right any failure to comply with its directions without an application from the disobedient party. On the other hand, the Court does not encourage disobedience of its orders and directions, and notes that no explanation was given by the Defendant as to why the application which ought to have been filed on 27 September 2024 was filed instead on 08 October 2025. The point was addressed neither in evidence nor given any attention in submissions of the Defendant. In the circumstances, while the Court does not opt to make a wasted costs order as applied for by the Claimant, the Court will exercise its discretion to reflect the default of the Defendant in the order as to costs, which will be addressed at the conclusion of this Ruling.

Strike Out for Exceeding Limitation Period

12. The primary issue is whether Mr Gardiner's claim is statute-barred and should therefore be struck out.

Pleadings

13. The Claimant has pleaded that he suffered personal injuries, loss and damage in the Accident of 15 June 2017 while he was working aboard the Motor Vessel Sun Up Sun Down in the employ of the Defendant. He alleges that the Accident and his resultant alleged injuries and loss were caused by the negligence of the Defendant. The Claimant therefore brought a claim against the Defendant seeking to recover damages, which was encapsulated in his Generally Indorsed Writ of Summons filed on 13 November 2020.

14. By his Statement of Claim filed on 29 April 2024, the Claimant enumerates the injuries for which he claims damages as (1) Post Traumatic Stress Disorder; (2) L4/5 mild bilateral facet arthropathy, mild diffuse posterior disc bulge and a central radial annular fissure; (3) L5, S1 mild bilateral facet arthropathy, mild diffuse posterior disc bulge and a left lateral radial annular tear; (4) Mild right S1 radiculopathy; and (5) Burns. The Claimant pleaded also that "[a]s a result of the injuries the Claimant has experienced loss of amenities which has negatively impacted his lifestyle including his sexual performance and ability to perform certain forms of labour / work."

15. The Claimant attached, amongst other documents, several medical reports and letters of a medical nature to his pleadings. The Court perused the pleadings and attachments to the Statement of Claim.

16. In response to the Defendant's pleading of a limitation defence, the Claimant, in his Reply to Defence, averred as follows:

> "In relation to paragraph 11 of the Defendant's defence, the claimant avers that section 9(2)(b) of the Limitation Act, outlines that it is three years from the date of the Claimant's knowledge. In this regard, the Claimant asserts that he was not made aware of the full extent of his injuries and disabilities until in or around 9th February 2019, and a generally indorsed Writ was filed within three years of him becoming aware of this knowledge." [Emphasis added].

17. In support of this application to strike out the Claimant's case, the Defendant exhibited to the Affidavit of Byron Knowles three of the medical reports (produced by the Claimant with his Statement of Claim). The medical reports put into the evidence of the Defendant are:

(1) Medical Report dated 22 June 2017 of Dr James Iferenta FRCS, CPE;

(2) Medical Report dated 19 February 2019 from Dr. Ian McDowell MBBS, MD, FRCSC Neurosurgery of Caribbean Neurosurgical Services; and

(3) Medical Report dated 20 September 2019 of Dr Timothy Barrett M.B, B.S., MSc. Psych of Holistic Health Services Ltd.

18. The Defendant, in his Defence filed on 24 May 2024, denied liability and negligence and reserved the right to put questions to medical doctors upon whose testimony the Claimant would rely at trial. The Defendant further pleaded, amongst other defences, a limitation defence on the basis that in breach of the Limitation Act, the Claimant's alleged cause of action was not brought within 3 years of the date the cause of action arose.

Defendant's Arguments to Strike Out the Action

19. In support of the Defendant's application to strike out the action, the Defendant states in his evidence that immediately after the Accident on 15 June 2017, the Claimant went to Doctors Hospital accompanied by the Defendant and there the Accident and Emergency Department assessed the Claimant for potential injuries. The Claimant was treated for his injuries on the day of the Accident and was therefore fully aware of the injuries he sustained.

20. The Defendant referred to a medical report dated 7 February 2019 and prepared by Dr. Ian McDowell. The Defendant asserts that in this medical report, the physician noted that the Claimant initially presented to Dr. McDowell on the 19th July 2018. Dr. McDowell stated that the Claimant suffered from flash burns to the face and complained of an "immediate onset of lower back pain radiating down to his right lower extremity". The Defendant pointed out that later in his report the physician attributed the back pain to a 'pre-existing condition'.

21. The Defendant further avers that a report was prepared by Dr. Timothy Barrett wherein he states that he evaluated the Claimant on behalf of the National Insurance Board. Dr Barrett diagnosed the Claimant with post-traumatic stress disorder. The Defendant avers that he believes the medical reports to which he referred are true and correct and that the Claimant was aware of the potential seriousness of his injuries at the date the incident occurred.

22. Counsel for the Defendant, Mrs Vanessa Carlino, submits that the Claimant's cause of action ought to have been brought within 3 years of the date of the Accident. Counsel further argues that the Claimant was aware of the significance and extent of his injuries on 17 June 2017, and therefore had until 17 June 2020 to file his claim. Further, the Claimant knew that the

alleged injuries could be attributable to the Defendant. Counsel contends that despite the Claimant's knowledge, he slept on his rights by bringing the claim almost 6 months past the limitation period for doing so.

23. Mrs Carlino asserts for the Defendant, that no rule or statute gives the Court vested authority to extend time in these circumstances where the claim has been brought outside the limitation period.

24. Counsel, in the Written Submissions of the Defendant, relies on Sections 9 and 10 of the Limitation Act, Chapter 83, CPR 26.3 (a) through (c), and the cases of **Dobbie v Medway Health Authority** [1994] 4 All ER 450, **Lucretia Rolle v The Airport Authority** SCCivApp No 119 of 2021, **Girten v Andreu** [1998] BHS J No 164 and **Neilly v Federal Management Systems (Bahamas) Ltd** [2011] 2 BHS J No 21.

Claimant's Arguments Against Strike Out

25. Counsel for the Claimant, Mr Ashley Williams, in oral argument and relying on the Skeleton Arguments for the Claimant, stated that the limitation period for bringing this action did not begin to run until the Claimant became fully aware of the material facts surrounding his injuries. The knowledge that would trigger his awareness and the start of the limitation period, Counsel submits, is defined by **Section 10** of the **Limitation Act**.

26. Mr Williams asserts that it was only in or around February 2019 that the Claimant acquired the knowledge that: (1) his injury was significant enough to justify legal action, (2) the injury was attributable to the Defendant's actions or omissions, and (3) that the Defendant was the proper party to this claim. Having taken this position, the Claimant acknowledges in his argument that in accordance with **section 10(3)** of the **Limitation Act**, any such knowledge which would activate the start of the 3-year limitation period, includes facts which the Claimant might reasonably have acquired through reasonable diligence, including seeking medical or expert advice.

27. Counsel contends that prior to February 2019, the Claimant did not possess sufficient facts to establish the basis for legal proceedings, because Mr Gardiner did not receive a definitive

diagnosis linking "the injury" to the Defendant's conduct. Further, it is argued that the Claimant "did not realize the injury's significance until in or around February 2019 upon receiving the medical report" from Dr McDowell.

28. The Claimant relies upon the medical reports he produced with his Statement of Claim, particularly that of Dr McDowell, **Sections 9** and **10** of the **Limitation Act**, and upon the Bahamian Court of Appeal case of **Lucretia Rolle v The Airport Authority** SCCivApp No 119 of 2021.

Statutory Framework and Other Relevant Law

29. The Defendant relies upon **CPR Rule 26.3(1)(c)** to support the strike out of this action. According to that Rule, the Court may strike out a statement of case or part thereof "if it appears to the Court that the statement of case is frivolous, vexatious, scandalous, or an abuse of process of the Court or is likely to obstruct the just disposal of the proceedings." The Defendant submits that the jurisdiction to strike out the claim is available in this case because the Claimant has exceeded the limitation period for bringing an action of this nature. The Court agrees that such application would be appropriate if the action is statute-barred.

30. In **Girten v Andreu** [1998] BHS J. No 164, where it was plain that the second defendant would rely upon limitation provisions of the Limitation Act in an application to strike out the claim on the inherent power of the Court, *Sawyer CJ* (as she then was) found apposite the following observations of Stephenson LJ in **Ronex Properties Ltd v John Laing Construction Ltd** [1983] QB 398:

> "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 plaintiff's claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred...".

31. The main pillar of the argument for strike out is found in the **Limitation Act, Chapter 83**. Firstly, **section 5(1)** prescribes a six-year limitation period for the bringing of actions

founded on simple contract (including quasi contract) or on tort, amongst other specified types of actions. However, there is a proviso to **section 5(1)** which excludes the effect of that section from any action for which a shorter limitation period is prescribed by any other provision of the Limitation Act. Actions for personal injuries fall within the proviso for they are dealt with by another provision of the Act which prescribes a shorter limitation period.

32. At **sections 9** and **10** of the **Limitation Act**, there are specific provisions which govern actions for damages in respect of personal injuries, amongst other actions. It is necessary to set out the relevant portions of those provisions. **Section 9** provides, in part:

> "9. (1) Subject to subsection (6), this section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by any written law or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.
>
> "(2) Subject to subsection (3), an action which this section applies shall not be brought after the expiry of three years from –
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date (if later) of the plaintiff's knowledge…".
>
> [Emphasis added].

33. Following this, **section 10** encapsulates the requirements of 'knowledge' of a claimant. The date upon which 'knowledge' arises and its nature are set forth in detail. **Section 10** provides:

> "10. (1) In section 9, references to a person's date of knowledge are references to the date on which that person first had knowledge of the following facts –
>
> (a) that the injury in question was significant;
>
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
>
> (c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

"(2) For the purposes of this section, an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify the institution of proceedings against a defendant who did not dispute liability and was able to satisfy a judgment.

"(3) For the purposes of this section, a person's knowledge includes knowledge which such person might reasonably be expected to acquire –

(a) from facts observable or ascertainable by such person; or
(b) from facts ascertainable by such person with the help of such medical or other expert advice as it is reasonable, in the circumstances, to seek,

but there shall not be attributed to a person by virtue of this subsection knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and where appropriate to act on) that advice."

34. Therefore, the Claimant's knowledge of the personal injury would start the time running for bringing his claim. In relation to that knowledge, in the case of **Halford v Brookes** [1991] 3 All ER 559 at 573, Lord Donaldson of Lymington MR stated:

"In this context "knowledge" clearly does not mean "know for certain and beyond possibility of contradiction". It does, however, mean "know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence."

35. Of this 'knowledge', in **Dobbie v Medway Health Authority** [1994] 4 All ER 450 at 455j, *Sir Thomas Bingham MR* opined:

"This test is not in my judgment hard to apply. It involves ascertaining the personal injury on which the claim is founded and asking when the claimant knew of it. In the case of an

> insidious disease or a delayed result of a surgical mishap, this knowledge may come well after the suffering of the disease or the performance of the surgery. But, more usually, the claimant knows that he has suffered personal injury as soon or almost as soon as he does so…
>
> "Time starts to run against the claimant when he knows that the personal injury on which he founds his claim is capable of being attributed to something done or not done by the defendant whom he wishes to sue. This condition is not satisfied where a man knows he has a disabling cough or shortness of breath but does not know that his injured condition has anything to do with his working conditions. It is satisfied when he knows that his injured condition is capable of being attributed to his working conditions, even though he has no inkling that his employer may have been at fault…
>
> "In *Broadley v Guy Clapham & Co* [1994] 4 All ER 439 the plaintiff suffered nerve palsy in her left leg, resulting in foot drop, following an operation on her knee. Balcombe LJ held that the plaintiff's claim was statute-barred because she had, more than the prescribed period before the issue of proceedings, known that the operation had been carried out in such a way that something had gone wrong, causing injury to her foot, or alternatively that the operation had been carried out in such a way as to damage a nerve, thereby causing foot drop. Leggatt LJ, agreeing with Balcombe and Hoffmann LJJ, held that the plaintiff had, on the facts, had constructive knowledge since she had had such specific knowledge, soon after the operation, of an act or omission which might amount to negligence as would have enabled her to investigate it timeously…".

36. In these matters, the Court is called upon to consider whether and when there existed facts which, acting reasonably, a claimant could acquire from his own observations or with the help of an expert, so as to imbue such claimant with knowledge of the significance of the injury and that it was attributable to any degree to the defendant's act or omission complained of as negligent.

37. The law definitively declares that an action for damages in respect of personal injuries shall not be brought after three years have expired since the date of the accrual of the cause of

action or the date of the plaintiff's knowledge (if later). There is no discretion in the Court to extend the limitation period for this kind of action beyond the statutory allowance. In **Neilly v Federal Management Systems (Bahamas) Ltd** [2011] 2 BHS J No 21, the plaintiff claimed damages for personal injuries incurred in an accident on 8 February 2005. However, working under the misapprehension that settlement negotiations were afoot and that there had been an acceptance of liability on the part of insurers for the defendant, the plaintiff did not commence her action against the defendant until 23 February 2009. The defendant took the position that the action was statute-barred and time could not be extended by the Court. The plaintiff then argued that since she did not receive the physician's report on her injuries until 30 May 2009, she brought her action within the statutory limitation period. On the evidence, *Barnett CJ* (as he then was) disagreed. The Court was of the view that the plaintiff was aware of her injuries and their scope prior to 23 February 2006 which was three years immediately preceding the issue of the writ. Further, *Barnett CJ* opined:

> "38. There is no power in the Court to extend the limitation period specified in section 9 of the Limitation Act of The Bahamas. Although The Bahamas statute is patterned on the English 1980 Limitation Act, the Parliament of The Bahamas did not include a section equivalent to section 33 of the English statute…".

38. In **Neilly** the Court set out section 33 of the English 1980 Limitation Act which provides that the court, if it appears equitable, may allow an action to proceed having regard to the degree to which the plaintiff is prejudiced by an application of certain Limitation Act provisions. The section gives the Court a discretion, if the plaintiff meets certain criteria, to extend time for that plaintiff to bring an action outside of the limitation period. The point Barnett CJ made in relation to this is that there is no such provision granting such a discretion in the Bahamian Limitation Act.

39. As for the onus of proof, the Claimant bears the initial burden of proving that his case was brought within the time constraints allowed by the Limitation Act; if he satisfactorily discharges the same, the onus shifts to the Defendant. This was described by *Charles J* (as she then was) in the case of **Candice Marshall v Rock of Ages Funeral Chapel & Crematorium et al**, 2015/CLE/gen/00930, as the Court stated:

"[24] Notwithstanding that the Defendants have raised the preliminary point that this action is statute-barred, the burden of proving that the cause of action has been brought within the requisite time frame is upon Ms Marshall. This was affirmed by the House of Lords in **Cartledge and others v Jopling & Sons Ltd.** [1963] AC 758 which affirmed the Court of Appeal's position that the plaintiff bears the burden of proving that his cause of action accrued within the relevant period of the Statute of Lmitation. At page 784, Lord Pearce had this to say:

> 'I agree with the judgments of the Court of Appeal and I share their regret. I would only wish to add a gloss to what was said on the onus of proof in the case of the plaintiff South. I agree that when a defendant raises the Statute of Limitations the initial onus is on the plaintiff to prove that his cause of action accrued within the statutory period. When, however, a plaintiff has proved an accrual of damage within the six years (for instance, the diagnosis by X-ray in 1953 of hitherto unsuspected pneumoconiosis), the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date…'."

[Emphasis added].

Medical Reports / Evidence

40. It is accepted by both parties that the Accident occurred on 15 June 2017 when there was an explosion on the Motor Vessel 'Sun Up Sun Down'. It is further accepted that the Claimant immediately attended Doctors Hospital's Accident and Emergency Department after the Accident where he was assessed and treated for his injuries.

41. By a record of the Emergency Department of Doctors Hospital which appears to have been dictated or transcribed by Dr James Iferenta (TEMS) on 16 June 2017, it is reported that Dion Maurice Gardiner born on 13 September 1972 was treated for the complaint of a Flame, Scald, Flash burn to the scalp which is recorded as mild. It is reported that he had associated symptoms of a change in skin texture and tingling. He was examined for limitations and the physicians noted that there were "no limitations". The circumstances of the Claimant's injuries were recorded as "working on boat which caught fire, explosion occurred". Pain intensity was noted on the report as "2". It appears the patient was discharged and his condition noted as

"IMPROVED". The diagnosis was "Erythema" and he would implement "HOME SELF-CARE". It appears he was prescribed a painkiller – Acetaminophen. The Claimant was given a follow up appointment for wound care to take place on 17 June 2017. Dr Iferenta then noted that the date he signed the report was 4 July 2017.

42. The Claimant produced results of a chest x-ray by Dr Sharma and results were reported in a Radiology Report dated 22 June 2017, the result of which was normal, save that the Claimant had mild lower thoracic dextro-scoliosis. Further, based upon reports produced by the Claimant, on 28 February 2018 Dr Philip Huyler BA BS DC of The Natural Health and Research Institute reported that the Claimant presented himself on 29 January 2018 for treatment of a "Low Back Pain" condition. After describing details of the Accident, Dr Huyler reported of the Claimant:

> "The patient was transported by ambulance to Doctors Hospital, suffering from burns and Low Back Pain (LBP) condition. He was treated, but to date he is still experiencing Lower Back problems. The patient is currently receiving treatment for his condition (from January 29, 2018 to the present).

43. Dr Ian McDowell produced a Medical Report in respect of the Claimant's medical condition which is dated 7 February 2019. However, the doctor records in his report that the Claimant first presented to him on 19 July 2018 with the complaints as follows:

> "PRESENTING COMPLAINT:
> Lower Back Pain
> …
> Headaches
> Insomnia
> Erectile Dysfunction
> Diminished Libido
> Nightmares / Flashbacks
> Dysphagia
> HISTORY OF PRESENTING COMPLAINT:
> "While working as a boat captain in June 2017 he was onboard a small watercraft when there was an explosion and he was thrown backwards landing on his back.

He [the Claimant] suffered flash burns to his face and torso and had immediate onset of lower back pain radiating down his right lower extremity.

Since the Accident he has had difficulty sleeping with his night hours plagued by nightmares and flashbacks to the Accident. He has had diminished libido and erectile dysfunction which has created marital discord and contributed to a poor self image.

He complained of blurred vision with associated dry eyes bilaterally since the time of the accident and difficulty in swallowing.

CLINICAL COURSE:

He initially presented to my office on 19/07/18 with the above stated complaints having undergone conservative measures without benefit under other clinicians.

… He has been seen and continues to be followed by Dr T Barrett for a moderately severe post-traumatic stress disorder.

He has undergone a series of three sequential lumbar epidural steroid injections without long term benefit.

…

CONCLUSION:

1. Moderately severe post-traumatic stress disorder as a result of the blast injury sustained on 15/06/17.
2. Age related presbyopia unrelated to the Accident of 15/06/17.
3. Lumbago with a right S1 radiculopathy superimposed on previously asymptomatic pre-existing degenerative changes of his lumbar spine. This has occurred as a direct result of the blunt force trauma to his lumbar region sustained in the blast accident of 15/06/17.

PROGNOSIS:

1. The prognosis for his post-traumatic stress disorder should be addressed by his attending psychiatrist Dr T Barrett.
2. …
3. His lumbago and associated radiculopathy will be addressed by surgical exploration…In the event that he does not respond he will continue to require a further twenty sessions of physical therapy. Given the extent of the degenerative changes seen on the MRI and the physical nature of his employment the natural

> history of his underlying disease is such that his traumatic injury can be seen to have accelerated the onset of his symptoms but would not cause long term sequelae distinguishable from his pre-existing disease after a five years window."
>
> [Emphasis added].

44. Also attached to the Claimant's Statement of Claim is a physician's letter dated 7 February 2019 which is addressed to Dr P Whitfield and repeats parts of the report as set out by Dr Ian McDowell of the same date. In this letter, the physician states the following to Dr P Whitfield, the Medical Director for the National Insurance Board in relation to the back injury:

> "He [Mr Gardiner, the Claimant] was symptomatic prior to his accident in June 2017 during which he was thrown bodily against an ungiving object thus suffering significant blunt force trauma to his lumbar region. His complaints have been constant over the past eighteen months and have not responded to conservative measures including three epidural injections."

45. Lastly, the Court examined the medical report authored by Dr Timothy Barrett dated 20 September 2019. The Claimant, according to this report, began seeing Dr Barrett more than a year before this report was written. For the purposes of this application, the salient portions of that report are set out below. It took the form of a letter written to then Counsel for the Claimant, Mr Vincent A Peet LLB (Hons) in part, as follows:

> "Re: Dion Gardiner – DOB: September 13, 1972
>
> "I was asked to assess Mr Gardiner in August, 2018, by the National Insurance Board. The referral specifically said, "Evaluation only, Post Industrial Accident". Mr Gardiner was seen for initial evaluation on the 21st August, 2018, in my office. He explained to me that he was involved in an incident on the boat where he worked and suffered burns and other injuries as a result of an explosion…He said the explosion knocked him backwards and that he felt very lucky not to have been injured more severely…
>
> "Since the incident he is experiencing insomnia, diaphoresis, flashbacks and problems with attention and concentration. Additionally he has been experiencing chronic back

pain for which he is being seen and treated by Dr Ian McDowell. He also complained of irritability and was concerned about how this would affect his relationship with his family.

"I made a diagnosis of Post-Traumatic Stress Disorder and started him on a course of Amitriptyline which was intended to improve both his sleep and his mood. Additionally, it would aid with pain management. Since my initial evaluation of Mr Gardiner I have seen him on nine occasions. He continues to suffer with chronic back pain as well as lingering symptoms of Post-Traumatic Stress Disorder, like avoidance and flashbacks. He is very afraid of going back on a boat and is concerned how this will affect his ability to earn a living in the future.

IMPRESSION

Mr Gardiner suffered a frightening accident while at work in June 2017. Since that incident he has been unable to perform his usual job function and has chronic symptoms of pain in his lower back as well as lingering symptoms of Post Traumatic Stress Disorder. His sleep and therefore his quality of life is disturbed and his outlook for the future looks bleak at this time especially in relation to his fear of returning to his usual line of work. The counseling sessions have helped along with the medication and will probably need to be continued for at least one year…".

[Emphasis added].

Discussion and Disposition

46. The Claimant has brought this action for damages for having sustained the following injuries in the Accident, for which he faults the Defendant:

(1) Post Traumatic Stress Disorder;

(2) L4/5 mild bilateral facet arthropathy, mild diffuse posterior disc bulge and a central radial annular fissure;

(3) L5, S1 mild bilateral facet arthropathy, mild diffuse posterior disc bulge and a left lateral radial annular tear;

(4) Mild right S1 radiculopathy; and

(5) Burns

47. The injuries complained of by the Claimant fall within 3 categories – back injury, burns and post-traumatic stress disorder. In his pleadings the Claimant also complains that these injuries have had a negative impact on his lifestyle. On a careful examination of the medical reports upon which the Claimant relies for his evidence, the Court accepts that in relation to the back pain to which he attributes items (2), (3) and (4) immediately above, the Claimant felt these ill-effects very shortly after the accident. Further, those symptoms of back pain persisted since the Accident. Moreover, the Claimant reported to the physicians who examined him that he had no such symptoms before the Accident. This is clear from the medical reports reviewed above.

48. In relation to the burns complained of by the Claimant, again from an examination of the medical reports after the date of the Accident, no complaints are made of burns after the day the Claimant was seen in the Emergency Department at Doctors Hospital. Such burns were described as flash burns or scalding. It appears no dressings were necessary and a painkiller was recommended. However, what the Court finds relevant for this enquiry is that immediately after the Accident, the Claimant knew he experienced burns or scalding in the Accident which he did not have pre-Accident.

49. Turning now to the complaint of Post-Traumatic Stress Disorder, it is noted that Dr Barrett first saw the Claimant on 21 August 2018 and diagnosed the condition. What the Claimant told Dr Barrett was that since the incident his sleep had been poor, he had been afraid to work on a boat and he suffered flashbacks of the Accident. These symptoms occurred since the date of the Accident. There is no statement from the physicians or evidence adduced to the effect that these sufferings were delayed or experienced 5 or 6 months after the Accident.

50. To answer the issue as to whether the claim is statute-barred, the Court must explore when the operative date of knowledge arose. This would trigger the onset of the calculation of the 3-year limitation period. The Claimant submits that he was not made aware of the full extent of his injuries and disabilities until in or around 9th February 2019.

51. Based on the requirements of the law, the Court observes three factors:

(1) the operative date of knowledge would be (as is relevant to this case) when Mr Gardiner knew his injuries were significant;

(2) an injury is significant if the Claimant would reasonably have considered it serious enough to justify commencing proceedings against the Defendant; and

(3) the facts reasonably observable and ascertainable by the Claimant and his belief concerning those facts are relevant.

52. Taking the back injury or injuries and the burns together, it should be noted that the medical reports denote a pre-existing injury which, according to Dr McDowell, was exacerbated by the Accident, but the effects of which were to abate in 5 years so as not to be distinct from the pre-existing injury. However, in my opinion, based on facts observable and ascertainable by the Claimant since the date of the Accident, the claim for the back injuries which the Claimant brought against the Defendant was capable of being brought well within 3 years of the date of the Accident. His medical evidence supported that he experienced "immediate onset" of lower back pain from the date of the Accident, the pain persisted since the explosion occurred, and the Claimant told his doctors that he did not have this pain before the Accident. It is also obvious that the Claimant was aware of, and treated for, the burns which were sustained in the Accident and for which he has brought this action. Since the Accident the Claimant's physicians state he has diminished libido and erectile dysfunction, amongst other ill effects. These are all facts which were reasonably observable and ascertainable by the Claimant since, or very shortly after, the date of the Accident.

53. The Accident occurred on 15 June 2017. Apart from going to the hospital on that date and for a follow up chest x-ray, the Claimant appears to have waited until 29 January 2018 to seek medical advice about his injuries, but knew of the significance of these injuries and that they could be attributed to his Accident at work months before he did so. These effects the Claimant felt immediately after the Accident and consistently onwards, would have prompted a reasonable claimant to commence an investigation for the purposes of bringing these proceedings so that within the 3-year period given by the law, he could have brought his action. In the Court's view, to bring the claim in respect of the burns, back injuries and lifestyle effects allegedly

brought on by these injuries against the Defendant almost 6 months outside of the 3-year limitation period is too late.

54. In relation to the claim for Post-Traumatic Stress Disorder, based on the medical evidence adduced by the Claimant, the Court is satisfied that the Claimant knew since the date of the Accident that he suffered certain symptoms such as: (1) difficulty sleeping, (2) being plagued by nightmares, (3) reliving the Accident, (4) diminished libido, (5) erectile dysfunction, and (6) an inability to work on a boat due to fear of performing his usual job functions. It appears on 21 August 2018 the Claimant was seen and formally diagnosed by Dr Barrett as having "lingering symptoms of Post-Traumatic Stress Disorder". The evidence therefore shows that since 15 June 2017, the date of the Accident, the Claimant could not work on a boat and that he experienced the above-listed symptoms. These symptoms would obviously be distressing if experienced, even in the short-term, by the average person, and would be considered significant. However, it appears that even though the Claimant could not earn a livelihood at his usual job due to fear and could not sleep or concentrate normally (amongst other activities) since 15 June 2017, he did not seek advice concerning these issues until more than a year later. This does not accord with reasonable diligence. In the view of the Court, the eventual formal diagnosis of Post-Traumatic Stress Disorder did not give rise to the date of knowledge. From those facts observable and ascertainable by the Claimant himself since the date of the Accident, the Claimant knew and experienced sufficiently serious symptoms to have formed the belief that his injury was significant and attributable to the Accident at work. It was then incumbent upon the Claimant to investigate it timeously.

55. In **Candice Marshall v Rock of Ages Funeral Chapel & Crematorium et al**, 2015/CLE/gen/00930, *Charles J* (as she then was) relied upon the English case of **Jan Collins v Tesco Stores** [2003] EWCA Civ 1308 as follows:

> "The brief facts are that the Claimant was employed by the Defendant as a petrol kiosk attendant. Part of her duties involved re-stocking goods. She had to collect them in a metal cage from a nearby store. She claimed that she had injured her right shoulder and that the Defendant was to blame. Her evidence was that she had first had pain in her shoulder in late 1996 but she was not absent from work until 26 June 1998. She remained

off work until 13 November 1999 but thereafter, she returned to work for short periods of time. On 14 January 1998, she went to a Consultant Rheumatologist. On 26 June 1998, she went to a Physiotherapist who told her that the strain in her shoulder had been caused by heavy lifting. She issued a Claim Form on 26 January 2001. The Defendant pleaded limitation. The Judge found for the Claimant on the issue on the basis that she had become aware of the significance of the injury when she went to see the Physiotherapist and the fact that she knew moving the metal cages caused pain did not mean that she knew her injury was attributable to her work. On appeal, it was held that the Claimant's symptoms, treatment and absence from work meant that by January 1998, she had knowledge of a significant injury. The link necessary to establish knowledge in terms of attributability was clear by the same date."

56. It is therefore not necessarily so that a claimant will not be imbued with knowledge of the significance of his injury and its attributability until he is formally diagnosed. In situations, such as was seen in the Tesco Stores case, the claimant's experiences may be considered sufficient to cause him or her to be so imbued. Indeed, the same was seen in **Candace Marshall's** case, where the Court found:

"[51] ...In any event, the effect of not having a conclusion on her medical condition would have had a very limited effect, if any on her knowledge of the significance of the injury. As reiterated, what is relevant are the facts reasonably observable and ascertainable by Ms Marshall and her belief based on those existing circumstances. Nothwithstanding that Ms Marshall did not know what her prognosis was, she knew all the other facts.

"[52] Ms Marshall's belief between the incident and her 2010 PMH visit must have been that the injury was significant, as she was induced to visit PMH again by increased pain. Ms Marshall's conduct was consistent with the belief that her injury was significant, not having worked since the incident. Further, the loss of the many amenities she suffered must have triggered some belief that her injury was significant...".

57. It is the Court's view that in relation to the post-traumatic stress disorder claim, the fact that the Claimant was having flashbacks of the incident, poor sleep and was unable to work on a

boat to earn his livelihood as usual since the date of the Accident must have prompted him to believe his injury was significant. The medical visit in August 2018 confirmed the significance of the injury, but well before that time (in excess of a year prior) Mr Gardiner ceased to work on boats. The facts reasonably observable and ascertainable to Mr Gardiner, (not excluding the loss of amenities he claimed to have suffered), must have triggered the belief that he suffered a significant injury which was attributable to the Accident. If acting reasonably, this should have prompted him to embark earlier upon enquiries which would have put him in a position to bring his action within the 3-year time limit. In the circumstances, the Claimant has not discharged his burden of proving that his claim was brought within the time constraints prescribed by statute.

58. Having regard to the pleadings, the evidence and the legal submissions of both sides, the Court finds that the Claimant's action ought to be struck out for having been brought outside of the statutory time limit.

Judgment On Admissions

59. I have dealt with the Strike Out Application before the Judgment on Admissions Application for the simple reason that the success of the former engenders the failure of the latter. However, it is my view that even if the limitation point did not prevail to put an end to this action, as it has, the Court would not have found in favour of granting judgment on admissions. On the Claimant's submissions, while he is of the view that a duty of care is established as owed by the Defendant to the Claimant, he submits that the Court must embark on "a thorough examination of whether this duty was breached". His submissions raise questions, such as whether the Defendant failed to maintain safe premises, whether the Defendant failed to train or supervise the Claimant, if he in fact owed such duties, whether he knew of hazards and whether he failed to address known hazards, to enumerate only a few of the many questions which would have exercised the mind of the Court in establishing liability in this case. Such foundational facts would first have had to be established on the evidence at trial before the Court could safely find the Defendant liable in negligence. This is particularly so since the Defendant filed a Defence by which he denies liability and admits only that an accident occurred on the date and at the place alleged. This raises a triable issue, and I am not satisfied that there is an unequivocal admission upon which a judgment on admissions can be founded.

60. In my judgment, a trial of the issues cannot take place as the limitation period for bringing an action for personal injuries, loss and damage had elapsed before the filing of this action and the Court has no power to enlarge that time. For the reasons given, the Court orders that:

(1) the Claimant's action be struck out;

(2) the application for judgment on admissions be dismissed; and

(3) costs be awarded:

(i) to the Defendant in relation to the applications for judgment on admissions and the application to strike out the claim, and

(ii) to the Claimant in respect of the application for sanctions due to the Defendant's breach of the directions as to the time set by the Court for the filing of the strike out application.

Dated 30 December 2025

Simone I Fitzcharles

Justice