Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. P018/1993

BETWEEN	CECIL POWELL	PLAINTIFF
A N D	NEVILLE DEMSTER	1ST DEFENDANT
A N D	JOHN DALEY	2ND DEFENDANT
A N D	BRIAN MIGHTY	3RD DEFENDANT

Debayo Adedipe of Robertson Smith Ledgister and Co. for the plaintiff.

Mr. Christopher Samuda of Messrs. Piper & Samuda for the defendants.

HEARD: October 23rd and 24th, 1997

RULING IN CHAMBERS

COOKE J.

On the 29th of December 1988 the Plaintiff was a passenger in a motor vehicle owned and being driven by the 1st defendant Neville Demster. This vehicle collided with another vehicle along Main Street, Christiana in the parish of Manchester. The latter vehicle, was being driven by the 2nd defendant John Daley. It was owned by the 3rd defendant Brian Mighty. The plaintiff suffered injuries. By writ filed on the 29th January 1993 he sought to recover damages from the defendants. The 2nd and 3rd defendants now seek to dismiss the plaintiff's action for want of prosecution by way of summons dated 24th June 1997.

As between the plaintiff and 2nd and 3rd defendants a chronology of the steps in this action are as follows:-

(1) Appearance entered on 29th April 1993

(2) Defence filed on 29th April 1993

(3) Order on summons for direction 13th March 1995. In this order the plaintiff was given leave to amend the statement of claim as regards the particulars of injuries.

(4) Order on summons for direction filed 1st May, 1995.

(5) Letter requesting the action to be set down on cause list - 1st May, 1995.

Since 1st May 1995 the action has lain dormant.

In **Department of Transport v. Chris Smaller (Transport) Ltd. (1989) A.C. at p. 1203,** Lord Griffiths in his speech with which all the other Law Lords concurred delivered himself thus,

> **The principles upon which the jurisdiction to strike out for want of prosecution is exercised were settled by the Court of Appeal in Allen v. Sir Alfred McAlpine [1986] 2 Q.B. 229 and approved by the decision of this House in Birkett v. James. The power should be exercised only where court is satisfied either (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or 2.(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiffs, or between each other or between them and a third party.**

I respectfully accept this extract as definitive exposition of the relevant principles and I will be guided accordingly.

There has been inordinate and inexcusable delay since the 1st May, 1995. Mr. Adedipe counsel for the plaintiff has not and could not argue otherwise. The court will therefore now consider the issues of (1) fair trial and (2) prejudice.

Fair Trial

It is recognised that delay especially in accident cases is inimical to a fair trial. Recollection recede. The memory fades. Witnesses for one reason or another become unavailable. In this case Brian Mighty the 3rd defendant in his affidavit has stated:

> "that to my certain knowledge the second defendant has migrated in or about March or April 1994 and all efforts made by me and on my behalf to obtain information as to his present whereabouts overseas has proven futile and I am almost sure that I will not be able to ascertain same."

This second defendant John Daley it will be recalled was the driver of one of the vehicles involved in the accident. As such it would appear that he would be an essential witness on behalf of the 2nd and 3rd defendants. It is now said that this witness is unavailable. Firstly, this is no ordinary witness. He is a defendant in the suit. By migrating during the pendency of this case without making his whereabouts known either to the 3rd defendant or is legal advisers he has shown scant regard to our jurisdiction. In these circumstances he cannot hope to seek relief - from the same jurisdiction at which he has scoffed. But what about the 3rd defendant? There is no evidence that this defendant has had anything to do with the migration. To deal with this aspect, I now refer to the complaint as set out in the affidavit of Mr. Christopher Samuda.

> **Paragraph 5**
>
> That the matter proceeded to the hearing of the Summons for Directions on the 13th March 1995 at which time an appropriate order was made thereon.

> **Paragraph 6**
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> That since the making of the aforesaid order my firm has not received the attested copy order on the Summons for Directions or the usual copy letter from the Plaintiff's said Attorneys-at-Law requesting the Registrar of the Supreme Court to set down the matter on the cause list to await fixture of a trial date.

The complaint is as to the period subsequent to the 13th March 1995. This as Mr. Adedipe terms it is "the crucial period." In the way in which the 2nd and 3rd defendants have positioned their case this is indeed the crucial period. But as Brian Mighty has said (supra) John Daley had migrated

since 1994. Consequently his unavailability cannot be regarded as a relevant factor for the crucial period.

A fair trial not only concerns the issue of liability but also includes the aspect of damages. Mr. Samuda contends that the Defendants are unable to know with any certainty the extent and gravity of the plaintiff's injuries. Thus they do not know what is the case they have to meet in respect of damages. It is true that if this was the position there would be some merit. In **Gloria v. Sokoloff and Others [1969] 1 AER 204** the headnote reads:

> **"If the plaintiff has been guilty of prolonged and inexcusable delay which has seriously prejudiced the Defendants on the issue of damages so that there is a substantial risk that a fair trial of that issue cannot be had then the action may be struck out for want of prosecution even though liability has been admitted by the defendants."**

In this case it took approximately three years for the Plaintiff to produce particulars of her special damages. When these were given these particulars were vague. They could not be checked. It was for this reason that the court held that a fair trial was impossible. Here the complaint is that the Defendants have not had a medical report. But they have not requested any. The Particulars of Injury in the Amended Statement of Claim are:

(1) Multiple facial lacerations.

(2) Fractured lower 1/3 of right radius.

(3) 15% permanent loss of rotation of right wrist.

(4) Intermittent pains in right wrist and had which at times prevent plaintiff from working.

These injuries are physical. They are the type which are regularly dealt with in our courts. There is nothing particularly unusual about them. In any event if the defendants were so inclined they could have the plaintiff examined by a doctor of their choice. There can be a fair trial as regards the issue of damages.

Prejudice

The 3rd defendant Mighty says that at the relevant time of the accident the policy limit of policy of insurance was $250,000. He fears that because of the delay and the galloping inflation there will be an award of "in excess of $500,000 together with legal fees." Mr. Samuda's view is:

> That I have perused the Statement of Claim herein and am of the opinion that the value of the Plaintiff's injuries, in respect of an award for pain and suffering and loss of amenities along, in over $300,000 and that in the event this matter is permitted to proceed and the plaintiff successfully prosecutes his case, damages therefor, what with inflation will certainly exceed $400,000.

The complaint here is that the 3rd defendant would have to find from his own resources any amount over $250,000. This he says is a serious prejudice to him. Before I deal with the merit of this submission I note that the copy of the relevant policy schedule exhibit shows that, that policy was not in force at the time of the accident. That policy expired on the 3rd of December 1988. The accident took place on the 29th of December 1988. If this is so this particular submission has no basis in fact and would therefore fail.

However, on the basis that through inadvertence a wrong copy has been exhibited, I will proceed on the assumption that there was in fact a current valid policy of insurance with a limit of $250,000.

In **Department of Transport v. Chris Smaller (Transport) Ltd.** one of the issues discussed was a submission by the defendants that the plaintiff's claim exceeded its cover of insurance by £85 plus interest. As a result, that contingent liability prevented them from raising the finance with which to expand their business. Thus it was argued that this factor caused prejudice to the defendants. The court disagreed. The defendants had not demonstrated that the delay in the instant case resulted in the embarrasment claimed. However

Lord Griffiths opined as follows:

> "It would be foolish to attempt to define or categorize the type of prejudice justifying striking out an action but there can be no doubt that if the defendants had been able to establish significant damage to their business interest, flowing directly from a culpable delay of 13 months after the issue of the writ, a judge would have been entitled to regard it as prejudice justifying striking out of action."

It would seem, therefore that in a proper case the court can regard the impact of delay on a defendants financial affairs as a relevant consideration.

In **Antcliffe v. Gloucester Health Authorities [1992] W.L.R. 1042** there was inordinate and excusable delay. If the plaintiff had prosecuted the cause expeditiously the defendants would have had the benefit of insurance coverage to which it was a party. However by the time of the summons to dismiss for want of prosecution came to be heard new insurance arrangements were in operation. As a result, if successful, the defendants would have to pay out of its own funds some £300,000 a figure agreed by all parties as a realistic estimate of an award of damages. The court held that in those circumstances the delay was prejudice of a real as opposed to minimal character. The action was struck out. This case illustrates that prejudice can be of varying kinds. Questions of insurance coverage could well be quite relevant.

And now back to the case before this court. The 3rd defendant says that since there is a policy limit of $250,000, on their estimate this defendant will have to fund from his own resources a sum in excess of $200,000. I question whether the award estimated by the 3rd defendant is realistic. It will no doubt be of interest to see if this matter goes to trial what will be the submissions of his counsel as regards the quantum of damages. It would appear that the 3rd defendant now seems to have adopted a rather pessimistic view of the probable outcome of what will happen if there is a trial.

In his defence he puts the blame for the accident wholly on the 1st defendant. There is on the pleadings no basis for him to say that all liability will be cast on him.

In his affidavit Mr. Samuda set out as hereunder Consumer Price indices provided by the Statistical Institute of Jamaica.

July 1992	399.7
January 1993	423.2
July 1993	466.0
January 1994	558.9
July 1994	637.9
January 1995	701.1
July 1995	753.5
January 1996	892.1
July 1996	970.8
October 1996	994.7
January 1997	1012.8
March 1997	1025.4

Those are the indices on which the 2nd defendant bases his estimate of a very significant award. In my view they do not support his submission. As I have already said the critical period is that subsequent to 1st May 1995. If the action had been concientiously pursued it is unlikely with the undesirable pace at which actions are heard that this matter would not have been heard before 1997. It will be seen from the indices that by March 1997 there has been what I would regard as a "steading off". It is a fact that inflation in Jamaica today is no longer galloping. The submission therefore that there is a nexus between the delay in this case and inflation which would result in a substantially huge award is not well founded.

It is therefore my view that on this aspect there is not a substantial risk that the delay is likely to cause or to have caused serious prejudice to the 2nd defendant.

This summons for the reasons given is dismissed. However, I wish to add a comment. This case has been decided on its own facts and the way it has been presented. It must not be taken that this court in anyway at all smiles on inordinate and inexcusable delay. Let those who would sleep awaken.