



[2019] JMSC Civ. 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 00674

BETWEEN	KEO THOMPSON	CLAIMANT
AND	VALBERT JOHNSON	1st DEFENDANT
AND	DAVID WRIGHT	2nd DEFENDANT
AND	PHILLIP BROWN	3rd DEFENDANT

IN CHAMBERS

Mr. Jordan Chin instructed by Samuda and Johnson for the 1st and 2nd Defendants

Heard: 8th May, 2017 & 2nd April, 2019

Civil Practice and Procedure– Notice of Application to file Ancillary Claim - Rule 18.5 of the Civil Procedure Rules - Whether Ancillary Claim statute barred - Law Reform (Tort-feasors) Act.

Cor: Rattray, J.

[1] This is an Application filed on the 12th August, 2015 by the 1st Defendant, Valbert Johnson, seeking permission to file an Ancillary Claim for indemnity and contribution against Phillip Brown, the 3rd Defendant and a Third Party, Clifford Dixon. By way of Claim Form and Particulars of Claim filed on the 31st January, 2012, the Claimant Keo Thompson seeks to recover damages for personal injuries he allegedly sustained on the 20th March, 2011. On that date, the Claimant contended that he was lawfully executing

his duties as a police officer along the Osbourne Store main road in the parish of Clarendon, when he was struck by the 1st Defendant's motor vehicle registered FW3413, that was being driven by David Wright, the 2nd Defendant.

[2] The 1st and 2nd Defendants in their Amended Defence filed on the 22nd January, 2015, denied that the 1st Defendant's motor vehicle collided into the Claimant. They contend that on the 20th March, 2011, the 2nd Defendant was driving along the Osbourne Store main road, when suddenly the 3rd Defendant, the driver of motor vehicle registered CH4721, drove out into the path of the 2nd Defendant causing him to swerve in an effort to avoid a collision. This they contend ultimately led to the 2nd Defendant losing control of the said motor vehicle which then collided with a police vehicle that was parked along the road.

[3] Before Counsel Mr. Chin began his submissions, the Court enquired of him whether the Ancillary Claim was now statute barred, in light of the fact that the accident which gave rise to the Claimant's cause of action occurred in March, 2011, and no Ancillary Claim had as yet been issued by the Court. In response, Counsel maintained that the Ancillary Claim was not statute barred, as the limitation period for third party proceedings did not run from the date of the Claimant's cause of action, but from the date that judgment is entered against his client, the 1st Defendant.

[4] In support of his contention, he relied on the case of **Mervis Taylor v Owen Lowe, Constable Paul O'gilvie and The Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Suit No. C.L.1995/T188, a judgment delivered on the 9th May, 2006. In that case, an application was filed to have the third party proceedings brought against Constable O'gilvie and the Attorney General of Jamaica struck out, as the third parties contended that the action was statute barred. Sykes J (as he then was) in his judgment, extensively examined the provisions and the history of the **Law Reform (Tort-feasors) Act**. The learned Judge was of the view that the liability of a third party does not arise unless the Defendant has been found liable. Further he opined that the date of judgment against a Defendant is the date from which that Defendant can make a claim for contribution from a third party. The learned Judge concluded that it is that judgment date

from which the limitation period would begin to run against the Defendant. In the final analysis, Sykes J came to the conclusion that the action was not statute barred, as time had not yet started to run, because up to that date, the Defendant had not been found liable.

[5] Counsel Mr. Chin also relied on the **Law Reform (Tort-feasors) Act** to support his argument that the Ancillary Claim was not to be treated as being statute barred. In particular, he cited section 3 (1) of the Act, which reads: -

“Where damage is suffered by any person as a result of a tort (whether or not such tort is also a crime)-

(a) judgment recovered against any tort-feasor liable in respect of such damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage;

(b) if more than one action is brought in respect of such damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of such person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

(c) any tort-feasor liable in respect of such damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, (whether as a joint tort-feasor or otherwise) so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought.”

[6] Rule 18.1 (2) (b) of the **Civil Procedure Rules (CPR)** states that: -

“An “ancillary claim” is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes –

(b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy;”

[7] Rule 18.5 of the **CPR** outlines the procedure for making an Ancillary Claim, and provides as follows: -

“(1) A defendant may make an ancillary claim without the court’s permission if -

(a) in the case of a counterclaim, it is filed with the defence;

or

(b) in any other case, the ancillary claim form is filed before or at the same time as the defence is filed.

(This rule does not apply to an ancillary claim under rule 18.4.)

(2) Where either -

(a) rule 18.3; or

(b) paragraph (1),

does not apply, an ancillary claim may be made only if the court gives permission.

(3) An application for permission under paragraph (2) may be made without notice unless the court directs otherwise.

(4) The applicant must attach to the application a draft of the proposed ancillary claim form and ancillary particulars of claim.

(5) The ancillary claim is made when the ancillary claim form is issued.”

[8] The case of **Medical and Immunodiagnostic Laboratory Limited v Dorett O’Meally Johnson** [2010] JMCA Civ. 42, offers assistance to the issue at hand. This was an appeal from the judgment of Master George (Ag) (as she then was), where she dismissed Medical and Immunodiagnostic Laboratory Limited’s Application for permission to file an Ancillary Claim and to join an Ancillary Defendant, Timos Trading Limited, to the proceedings. The ground on which the dismissal was based was that the Ancillary Claim was statute barred.

[9] On appeal, Phillips JA in determining whether the Ancillary Claim was statute barred, counted from the date when the facts that gave rise to the cause of action (negligence) in the main claim came into existence, and in so doing came to the conclusion that the Ancillary Claim was not statute barred. The learned Judge of Appeal by tabulating the time from when the facts that gave rise to the cause of action in the main claim, in order to determine whether the Ancillary Claim was statute barred, suggested that the limitation period for the cause of action in an Ancillary Claim seeking a contribution or an indemnity, begins to run from the date that the facts that gave rise to the cause of action in the main claim came into existence.

[10] In the case before the Court, the Claimant's cause of action which is grounded in negligence arose on the 20th March, 2011, the date of the incident. The 1st Defendant's cause of action for the proposed Ancillary Claim is also grounded in negligence. Harrison JA in **Bartholomew Brown and Anor v Jamaica National Building Society** [2010] JMCA Civ. 7, noted: -

*"[40] ...that actions based on ... tort (the latter falling within the category of "actions on the case") are barred by section 111, subsection (1) and (2) respectively of the 1623 statute after six years (see **Muir v Morris** (1979) 16 JLR 398, 399, per Rowe JA)."*

[11] Negligence has a limitation period of six (6) years because it is an "action on the case." Rowe P in the case of **Lance Melbourne v Christina Wan** (1985) 22 JLR 131, stated at page 135 that: -

*"The Jamaican courts have over the years treated actions for negligence as actions upon the case to which the six year period of limitation applies. **Martins Tours Ltd. v Senta Gilmore** [1969] 11 JLR...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 so to do will render the action statute barred."*

[12] In applying the reasoning from the above cited case of **Medical and Immunodiagnostic Laboratory Limited**, the 1st Defendant's proposed Ancillary Claim in this matter would be statute barred. This is so because the six (6) year limitation period for commencing the action had elapsed before any Ancillary Claim had been issued by the Court. I am of the view, that if an Ancillary Claimant, in this case the 1st Defendant, seeks to commence his Ancillary Claim within the main claim (that is, with the same claim number), then the limitation period for the filing of such an Ancillary Claim would start to run from the time the cause of action arose in the main claim. On the facts of the present case, any such Application at this time is destined to fail, as the window for instituting any Ancillary proceedings closed six (6) years after the incident, which occurred on the 20th March, 2011.

[13] However, the **Law Reform (Tort-feasors) Act** is of some relevance in this matter. Notably, this Act was not mentioned in the case of **Medical and Immunodiagnostic Laboratory Limited**. Section 3 (1) (c) of that Act indicates that "*any tort-feasor liable in*

respect of such damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage..." That particular section confers the right on a Defendant, once found liable, to commence third party proceedings to recover a contribution from any other tort-feasor, whether or not that other tort-feasor was a party to the claim. A judgment has to be entered against a Defendant before that litigant can commence third party proceedings for a contribution under that Act. Sykes J concluded in the **Mervis Taylor** case, that under section 3 (1) of the Act, the limitation period for third party proceedings would begin to run from the date of judgment against a Defendant, and that it is that judgment which provides a Defendant with his cause of action. A separate claim would therefore have to be brought once judgment is entered against the 1st Defendant and the limitation period in respect of that claim would begin to run from the date of judgment against him.

[14] In applying the reasoning of Sykes J as set out in the above mentioned case of **Mervis Taylor**, it is clear that a judgment has not been entered against the 1st Defendant in this matter. As such, time would not begin to run for the purpose of initiating third party proceedings under the **Law Reform (Tort-feasors) Act**. It follows therefore, that since time has not begun to run, then no cause of action has as yet been established under the said Act. The 1st Defendant would therefore have to wait until a judgment has been entered against him, before he could utilise the provisions of the **Law Reform (Tort-feasors) Act**.

[15] In the circumstances it is hereby ordered that: -

- a) The Notice of Application for Court Orders filed on the 12th August, 2015, is refused;
- b) No Order as to costs;
- c) Leave to appeal refused.