



[2016] JMSC Civ 60

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2009 HCV 02489

BETWEEN

**MAUREEN LEWIS
(Estate Fredrick Lewis)**

CLAIMANT

AND

MARCIA HALL-WALKER

1st DEFENDANT

AND

DESMOND WALKER

2nd DEFENDANT

AND

GODFREY POWELL

3rd DEFENDANT

IN CHAMBERS

Mr. Donovan St. L. Williams instructed by Donovan St. L. Williams & Co. for the claimant.

Mr. Jalil S. Dabdoub and Ms. Karen E.R. Dabdoub instructed by Dabdoub, Dabdoub & Co. for the defendants.

Heard: 19th October 2012 and 28th April 2016.

Civil Law – Negligence – Motor Vehicle Accident – Fatal Accident – Letters of Administration – Application to strike out Claim – No Real Prospect of Success – Matter Statute Barred – Limitation Period Expired – Mandatory Leave needed.

CAMPBELL J;

- [1] The claimant, Mrs. Maureen Lewis, a housewife, is the wife and administratrix of the estate of the deceased, Mr. Fredrick Lewis. On 5th April 2003, the deceased was at his business place, Hi Feast Restaurant, at 115 Maxfield Avenue, when a 1989 Sedan Atkinson Tipper Truck, registered CC 2290, driven by, the 3rd defendant, Mr. Godfrey Powell, in overtaking a motor car, collided into the deceased's business place, resulting in extensive damage to the structure and the death of Mr. Fredrick Lewis.
- [2] The 1st and 2nd defendants were joint owners of the 1989 Sedan Atkinson Tipper Truck Registered, CC 2290 and insured by Jamaica International Insurance Company Limited. The 3rd defendant was at all material times the driver of the said Tipper Truck registered, CC 2290 and the servant and/or agent of the 1st and 2nd defendants.
- [3] On 12th May 2009, the claimant filed a claim seeking damages under the **Fatal Accidents Act** and the **Law Reform (Miscellaneous Provisions) Act** for the benefit of the dependents of the deceased and for his estate. On 29th May 2009, the defendants acknowledged service of the Claim Form. The Defence of the 1st and 2nd defendants were filed on 24th July 2009.
- [4] The Defence of the 1st and 2nd defendants, states at paragraph 5;
- “Paragraph 5 of the Particulars of Claim is denied and the Defendants further aver and state that the Third Defendant was driving within the speed limit and in order to avoid a collision with other motor vehicles swerved the subject vehicle and accidentally collided with the premises located at 115 Maxfield Avenue, Kingston 13. Defendants further state that the Third Defendant operated the Sedan Atkinson Tipper Truck with due diligence and care.”*
- [5] The defendants further aver and state that the claimant's claim is statute or time barred pursuant to the **Fatal Accidents Act**, the **Law Reform (Miscellaneous**

Provisions) Act and the **Limitation of Actions Act**. On 3rd March 2010, the 1st and 2nd defendants filed a Notice of Application for Court Orders seeking the following Orders;

1. *That the Claim Form and Particulars of Claim against the First and Second defendants be struck out.*
2. *That Judgment be entered in favour of the First and Second defendants.*
3. *That the costs of this Application be the First and Second defendants.*

[6] On 18th January 2012, Mrs. Maureen Hall-Walker, filed an affidavit in support of the Notice of Application for Court Orders, which stated at paragraphs 6 and 7;

“6. That I am advised by my Attorney-at-Law and do verily believe that pursuant to the Fatal Accidents Act the claim is statute barred having been filed almost six (6) years after the date of Mr. Lewis’ death .

7. That to the best of my knowledge, information and belief no order was obtained from the court by the claimant allowing a longer period within which to commence the proceedings.”

[7] The claimant submitted that Section 2(1) of the **Law Reform (Miscellaneous Provisions) Act**, 1955, provides to preserve, “... *all causes of actions subsisting against, or, as the case may be, for the benefit of his estate:...*” Additionally, Section 2(3) of the Act states; that;

“No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either -

- (a) Proceedings against him in respect of that cause of action were pending at the date of his death; or*

(b) The cause of action arose not earlier than six months before his death and proceedings are taken in respect of thereof not later than six months after his personal representative took out representation.”

[8] Mr. Williams submitted that the decision in **Harriot v Blake and the Administrator General of Jamaica** M087 of 2002, and the English Court of Appeal decision in **Airey v Airey** [1958] 2 Q.B. 301, support the proposition that the **Law Reform (Miscellaneous Provisions) Act** preserves the claimant's claim for the benefit of the estate, having been filed within the prescribed statutory time limit, of six months from the date of the granting of the Letters of Administration. That the notion that the claim is statute-barred must be refused in so far as it relates to the claim brought under the **Law Reform (Miscellaneous Provisions) Act**.

[9] Mr. Dabdoub submitted that the claimant's claim was statute-barred and that no amendment of the claim could cure the defect of the said claim and therefore it must be struck out. The **Limitation of Actions Act** provides that no cause of action shall lie after the expiry of six (6) years. The tort is particularized, the damage suffered is alleged on the 5th April, 2003. The claim was not filed until 12th May 2009. Accordingly, as the subject claim was filed on 12th May 2009, the claim is statute-barred.

[10] That Section 4(2) of the **Fatal Accidents Act**, provides;

“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.”

[11] Section 4(2) of the **Fatal Accidents Act** is mandatory. In **Attorney General v Administrator General of Jamaica (Administrator of the Estate Elaine Evans, deceased)**, SSCA No. 11/2001, at page 24, the court noted that the period between obtaining the Letters of Administration and the instituting of

proceedings was relatively short, and therefore the Court might have exercised its discretion favourably to permit commencement of proceedings. Proceedings were instituted some nine (9) months after the Letters of Administration were obtained. The Court held that the proceedings were invalid as the mandatory leave was not sought or granted. The claim was filed well over the three (3) years statutory period to file the claim pursuant to the **Fatal Accidents Act**. The deceased died on the 5th April 2003 and the proceedings were filed on the 12th May 2009, more than six (6) years after the said death and well beyond the statutory period pursuant to the **Fatal Accidents Act**. Additionally, the Administrator General granted Letters of Administration to the claimant, on or about 28th March, 2008, and the subject claim was filed on 12th May, 2009, over a year later.

[12] The defendants are seeking to strike-out the claimant's claim filed on 12th May 2009, brought by the administratrix of the estate of the deceased, who died on 5th April 2003. Letters of Administration was granted to the claimant on the 28th March 2008. The claim herein was therefore filed after the six (6) months had elapsed; more than a year after the grant of Letters of Administration. This is a period in excess of the nine (9) months that the Court had before it in the case of **Attorney General v Administrator General of Jamaica (Administrator of the Estate Elaine Evans, deceased)**. It is conceded that the application to strike-out, under the **Fatal Accidents Act**, is unassailable. The reason for the concession is that Section 4(2) of the Act provides that; "*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.*"

[13] The claimant contends, however that the claim under the **Law Reform (Miscellaneous Provisions) Act** is not statute-barred. Reference is made to Section 2(1) of the **Law Reform (Miscellaneous Provisions) Act**. Section 2(1) and Section 2 (3), should be, viewed together. Mr. Williams argued that the

statutory limitation avails a claimant in circumstances where the claimant obtains Letters of Administration, after the six (6) year period has expired. According to Mr. Williams if it were otherwise, it would have the absurd result of precluding a claimant, from claiming against the Estate of the deceased tortfeasor. I cannot agree with this submission. The standard limitation period for torts is applicable. The date of the cause of action arose on, 5th April 2003, and the action was filed on 12th May 2009. As such the matter is statute barred.

[14] In **Attorney General v Administrator General of Jamaica (Administrator of the Estate Elaine Evans, deceased)**, the Supreme Court had two summonses before it. The first summons; that of the Administrator General on behalf of the Estate, sought an extension of time to file a Statement of Claim. The defendant, Attorney General sought to dismiss the summons for want of prosecution. The Court of Appeal found that since the action is for the benefit of the Estate and not against the Estate, Section 2(3) of the **Law Reform (Miscellaneous Provisions) Act** does not apply. The Judge of the Supreme Court, in examining the **Law Reform (Miscellaneous Provisions) Act** said at page 7 of the judgment;

“Section 2(3) provides that actions against the estate should be taken not later than six months after letters of administration is granted.

However no mention is made in that subsection or any other for that matter about causes of action vested in her. The presumption therefore, is that the common law period of six years should apply.”

Further, the Court of Appeal opined;

“Therefore the standard limitation period of six years for torts is applicable for actions vested in her. Since the action is for the benefit of the Estate, time begins to run from the time Letters of Administration were granted.”

[15] The reason for the special statutory limitation as prescribed was stated at page 308 in the English Court of Appeal decision of **Airey v Airey**. It stated that, the

right to bring proceedings against the personal representatives of a deceased tortfeasor as also the right to bring proceedings against the tortfeasor himself similarly conferred on the personal representative of a deceased injured party, are entirely new rights of action created by the **Law Reform (Miscellaneous Provisions) Act**. Lord Justice Jenkins, posed the question at page 308 of the judgment;

“How, it may be asked with some force, can the Act of 1623 (The Limitation of Actions Act) be held applicable to a statutory right of action such as this, which could not possibly have been in contemplation when the Act of 1623 was passed, and was indeed a right of action, unknown to the law until the Act of 1934 ordained otherwise some 300 years later?”

[16] Based on the legal authorities, it is settled that in circumstances such as these before the court, the claimant must seek and obtain leave from the court to proceed with her claim. The statutory time periods have elapsed and as such the claim is statute-barred.

[17] The court makes the following Orders;

1. That the Claim Form and Particulars of Claim against the 1st and 2nd defendants be struck out.
2. That Judgment be entered in favour of the 1st and 2nd defendants.
3. That the costs of this Application to the 1st and 2nd defendants.