



[2022] JMSC Civ 100

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2021CV02209**

<b>BETWEEN</b>	<b>DAMION THOMPSON</b> <b>(Personal Representative in the Estate of Gideon Thompson)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ADMINISTRATOR GENERAL (Representative in The Estate of Owen Palmer)</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Ms Abigail Henry instructed by Nalor and Mullings for the Claimant**

**Geraldine R Bradford instructed by the Administrator General for the Defendant**

**Heard: May 19, 2022**

**FATAL ACCIDENTS – Application to Strike out claim - Time expired to file a claim under the Law Reform (Miscellaneous Provisions) Act - Application to extend time to file claim under the Fatal Accidents Act, (FAA)**

**SMITH, J (Ag.)**

**ORAI JUDGMENT delivered on June 10, 2022**

**[1]** There are two applications before this court. The Administrator General filed a Notice of Application For Court Orders on July 20, 2021 supported by an Affidavit of Urgency, requesting that the Claim filed on May 4, 2021 be struck out on the

basis that it is statute barred under the Law Reform (Miscellaneous Provisions) Act, (LRMPA. Then on April 14, 2022, the Claimant filed a Notice of Application for Court Orders requesting that the Claim Form and Particulars of Claim filed on May 4, 2021 as amended be allowed to stand and that time is extended to file a claim under the Fatal Accidents Act, (FAA).

- [2] In this matter both the claimant and the defendant perished in the accident that has led to this claim. The claimant is Damion Thompson, the son of deceased Gideon Thompson. He brought this claim in his capacity as the personal representative of his father's Estate. The defendant is the Administrator General who is the representative in the Estate of Owen Palmer.
- [3] Mr. Thompson and Mr. Palmer died on the 4<sup>th</sup> of March 2018 in a motor vehicle accident that occurred along the Old Harbour Road in the parish of St. Catherine. At the time of the accident Mr. Palmer was the driver of the motor car and Mr. Thompson a passenger in the same vehicle.
- [4] The claim was filed under the FAA and the LRMPA "for the benefit of the Estate of Gideon Thompson". On June 15, 2021. Allan Hunter, Attorney-at-law, employed to the Administrator General filed an Acknowledgment of Service indicating that they were served on May 5, 2021. The Administrator General then filed a Notice of Application for Court Orders accompanied by an Affidavit of Urgency for the claim to be struck out. The Affidavit indicated that they were served on May 5, 2021 in relation to an accident which occurred on March 4, 2018 in circumstances where they received the instrument of Administration in the estate of Owen Palmer on the 18<sup>th</sup> of January 2021. Based on the forgoing he indicated that the claim was statute barred as it was filed more than two years after the instrument of Administration.
- [5] On March 15, 2022, the claimant filed an Amended Particulars of Claim. The amended Particulars did not address the issue brought to light by the defendant. It however, indicated that the claimant received a Grant of Administration in the

Estate of Gideon Thompson on the 26<sup>th</sup> of February 2021 and confirmed that the claim was being brought for the benefit of the estate under the LRMPA. Then on April 13, 2022 the claimant filed a Further Amended Particulars of Claim. This Further Amended Particulars Claim sought to bring the claim under to the FAA for the benefit of the near relations. This was followed by the filing of a Notice of Application for Court Orders and Affidavit of Damion Thompson on April 14, 2022. This application seeks to have

1. the Claim Form and Particulars of Claim filed on May 4, 2021 as amended to stand
2. that the time be extended for filing a Claim under the Fatal Accidents Act in respect of a motor vehicle accident on the 4<sup>th</sup> day of March 2018.

**[6]** Both Applications were heard on May 19, 2022. I reserved my ruling until today. This is an oral judgment which does not seek to discuss in extenso the claim or submissions. See Note book at page 102 - 105 and Submissions filed on behalf of the Administrator General and submissions filed on behalf of the claimant on May 6, 2022.

### **Submissions on behalf of the Applicant/ Defendant**

**[7]** Counsel on behalf of the applicant argued in support of her application as well as in response to the claimant's application. She submitted that the claim was filed 21 months after the Instrument of Administration was obtained and that the LRMPA prohibits proceedings after the expiration of six months from the Grant of Administration, as such time has expired under the LRMP. She further submitted that since time had expired under the LRMPA, the Claimant was also barred from proceeding under the Fatal Accidents Act. She argued that the "LRMPA trumps the discretion of the court to extend time..." and as such no cause of action can be brought under the FAA.

[8] She relied on the cases of ***Airey v Airey [1958] EWCA Civ. J0613-1 and Shaun Baker v O'Brian Brown and Angella Scott-Smith***, unreported at 2009HCV5631 in support of her submissions.

[9] She concluded by looking at R 26.3(1) (a) of the CPR 2002 as amended and argued that “a balance of justice exercise needs to be done against the estate of Owner Palmer in terms of his ability to defend the claim, particularly since the estate has no money.”

[10] It should be noted that no mention was made of the FAA in the Affidavit of Urgency filed on July 20, 2021 in support of the Notice of Application for Court Orders. This stance in relation to the FAA was taken solely in the submissions.

#### **Submissions on behalf of the Claimant/Respondent**

[11] The claimants Attorney looked to the FAA, in particular section 3. She argued that the LRMPA does not prejudice a party bringing a claim under any other statute. She relied on the cases of ***Administrator General of Jamaica v Garmol Esso [2019] JMSC Civ. 83*** and ***Saddler v Saddler SCCA No, 57/2009***.

[12] She ended by submitting that no evidence of prejudice was put forward in relation to any prejudice to the estate of Owen Palmer. She observed that counsel representing the defendant only made submissions but that no evidence was contained in any affidavit before the court.

#### **ISSUES:**

1. Whether the Claim can be brought under the Fatal Accidents Act
2. Whether the court can extend time for the Claim to be brought under the Fatal Accident Act

#### **LAW**

[13] This Law Reform (Miscellaneous Provisions) Act, section 2 (1) says;

Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-

(a) ...

(b) ...

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) 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 thereof not later than six months after his personal representative took out representation.

## **FATAL ACCIDENTS ACT**

4.-(1) Any action brought in pursuance of the provisions shall be brought-

(a) by and in the name of the personal representative of the deceased person; or

(b) where the office of the personal representative of the deceased is vacant, or where no action has been instituted by the personal representative within six months of the date of death of the deceased person, by or in the name of all or any of the near relations of the deceased person,

and in either case any such action shall be for the benefit of this Act shall be for the benefit of the near relations of the deceased person.

(2) 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.

[14] For simplicity I have chosen to refer to the Claimant as the respondent and the defendant as the Applicant in these applications as the Defendant filed their application first. I will also deal with both applications at the same time.

[15] In Jamaica, under the Limitation of Actions Act the time given within which claims of negligence can be brought from the time the cause of action arose is six years. There is no statutory discretion to extend time beyond 6 years. See **Lance Melbourne v Wan, 22 JLR 131** at page135 and **Shaun Baker**. The two statutes germane to this case must be read and understood in that light. The LRMPA and the FAA are two independent pieces of legislation that provide ways for claims to be brought upon death that resulted from a motor vehicle accident. Both pieces of legislation stipulate how and when actions may be brought. Under the LRMPA proceedings must have been in motion before the date of death or the cause of action must have arisen no earlier than six months before death in circumstances where a claim must be filed no later than six months after an Instrument of Administration or Grant of Probate.

[16] In the instant case Mr. Gideon Thompson died in March 2018, the Administrator General obtained an Instrument of Administration on January 18, 2019. This claim was filed on May 4, 2021, clearly more than the six months given under the LRMPA. There is no authority or discretion to extend time under this Act. Counsel representing the claimant recognised this and conceded to the point during her submissions.

[17] The FAA on the other hand permits a claim to be filed within three years after death. However, in the case of ***Brown Reginald (Father and near relation of Demory Brown, Deceased), Alberta Tugman (Mother and near relation of Demory Brown, Deceased) v Balford Douglas, Andre Douglas, Deborah Douglas*** [2013] JMSC Civ. 205 at paragraph 14, Anderson K, J in discussing the **Shaun Baker** case said,

*“The court also held that a claim should be issued within the limitation period and if it is not issued within the relevant limitation period then the claim could be struck out. The court though, also held that where the claimant has a good claim, then the court should exercise its discretion and allow the claimant to file his claim outside of the limitation period...”*

It seems therefore that the Court may extend time under the FAA after the expiration of three years if the claimant has a good claim. However, this extension is not an automatic one. An application has to be made to the court for an extension of time. Where leave is not sought a party will not, in certain circumstances, be barred from proceeding.

See Phillips JA in ***Saddler v Saddler*** [2013] JMCA Civ 11. at paragraph 45,

*“... a claim which is filed out of time is not invalid, but cannot proceed, as an application for extension of time must be made and if granted, the time must be extended from the time allotted in PROSA to the date of the filing of the claim, for the claim originally filed to stand, or if the claim is not yet filed, to a determined date for the filing of same.”*

## Analysis

- [18] This is a very simple matter the points of law herein having been adjudicated upon several times in these courts. The Claim filed on May 4, 2021 stated that the Claimant brought this claim under the FAA and LRMPA for the benefit of the estate. The LRMPA at section 2(1) specifically states that it is for the benefit of the estate of the deceased person while the FAA states that actions can be brought for the benefit of the personal representatives/near relations of the deceased. Both acts stipulate a time frame within which actions may be brought after the death of a person as discussed above. Under the LRMPA the claim has failed in this regard as the Instrument was granted in January 2019. The respondent is therefore barred from taking out proceedings under this Act.
- [19] Contrary to what counsel for the Applicant has argued however, that fact does not preclude the respondent from proceeding under the FAA so long as the appropriate application has been made.
- [20] This claim was filed on May 4 almost two months after the expiration of the three years. Counsel has said that this was because she was awaiting that Grant. This was not necessary as a claim under the FAA does not require that a personal representative be appointed. This is not fatal as case law has provided guidance on how errors made by a litigant's counsel should be treated. **See *Gale v Super Drug Stores* [1996] 1 W.L.R. 1089 at 1098.** The respondent may therefore be given the opportunity to make things right so long as there is no prejudice to the defendant.
- [21] Counsel relied on the dicta of Master Tulloch-Reid in ***The Administrator General of Jamaica v Gamal Essor (Administrator Ad Litem for the Estate of Errol Essor, deceased)* [2019] JMSC Civ. 83**, to demonstrate that the court can indeed exercise its discretion to extend time under the FAA. I find it very useful. Similarly, the case of ***Saddler v Saddler***. The **Saddler case** in part, concerned the extension of time to file a claim under the **Property (Rights of Spouses) Act**



**(PROSA).** However, the Court discussed generally how to treat with an application to extend time. I am therefore assured that the claim having been filed without the leave of the court is not a nullity. It is however, not properly before the court but can be remedied if the claimants' application for an extension of time is granted.

[22] Although the FAA allows for an extension it does not assist with the circumstances to be considered. Edwards, JA (Ag), as she then was, in **Shaun Baker**, acknowledging this deficiency, looked to section 33 (3) of the UK **Limitation Act of 1980** for guidance. At paragraph 57, they are listed as follows;

- “(a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;...the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

**[23]** In her analysis however Edwards JA, (Ag) as she then was, simplified the matters to considered;

### **The length of delay**

The Grant was obtained on the 26<sup>th</sup> of February, 2021 and as such I believe counsel acted with alacrity in filing the claim. The claimant then filed two further amendments, one on March 15, 2022 to indicate the Damion Thompson had obtained letters and one on April 13, 2022 to bring the claim fully under the FAA. The claimant in this case did not sit back and allow time to pass. Even before the Grant counsel was actively taking steps to ascertain who was in charge of the defendant's estate since he also died in the accident. The affidavit discloses that as soon as the information was at hand the claim was filed.

### **Cogency of evidence**

**[24]** All that is present on the file to assist are the Particulars of Claim and the affidavit of Damion Thompson in support of the application indicating the circumstances under which his father died. No attempt has as yet been made to file any witness statements. This case was recently filed and has not yet reached the Case Management Conference stage. It is entirely possible that those documents will be filed when the time comes. I caution however that in cases of this nature it would be in the claimants' interest to file all relevant matters as soon as possible.

**[25]** The applicant has not said that they will have any difficulties defending the claim. What they have said is that the Estate has no funds to satisfy a claim of this nature should the claimant succeed. That is not a matter for the court to take into consideration. Only three years have passed since Mr. Thompson and Mr. Palmer met their demise. During that time, from the affidavit of Damion Thompson filed in response to the defendants Affidavit of Urgency, contact was made with the Administrator General, albeit without success. They were therefore put on notice that the family of Mr Gideon Thompson was making inquiries about the estate of Owen Palmer. Further, three years is not long at all. I do not believe that memories

have so faded that any person called as witness would not be able to give cogent evidence.

**[26]** The defendant/applicants has not denied liability. Their initial issue is that the claim cannot be brought under the LRMPA. When faced with the amended claim and the application for an extension of time, they argued that having failed under the LRMPA, the claimant/respondent is consequently barred under the FAA. I believe that any action taken at this stage will be too premature, as it is, this claim to date has been focused on getting its foot through the door. The Particulars filed identify how Gideon Thompson and Owen Palmer were travelling at the time of the accident. It also indicates how the accident occurred. If the claimant fails in the circumstances to provide any witness statements, then the defendant will have an opportunity to make the appropriate application then.

### **Conduct of the Defendant**

**[27]** The only issue raised in this regard is found in the affidavit of Damion Thompson. He averred that his attorney made efforts to ascertain who had conduct of Owen Palmer's Estate. Those efforts included contacting the Administrator Generals Department. The attempts bore no fruit until in or around May of 2021. No evidence of the attempts was provided, possibly because the affidavit refers to calls. I believe in the circumstances written communication would have been more appropriate. It is unfortunate that the respondent received no useful information until after the three years had passed, however, I do not have enough to say that the applicant deliberately frustrated the efforts of the respondent's attorney.

### **Extent to which the Claimant acted Properly**

**[28]** As I indicated earlier three years passed in March 2021. The claim was filed in May 2021. The accident occurred in March 2018. There was a Coroners Inquest that has not ended, in 2020 the Novel Coronavirus then descended on the entire world and most countries grounded to a halt. It became extremely difficult to

conduct business, investigations had to be made, the fruits of which have brought us here today. I cannot say that the respondent acted improperly.

## **Prejudice**

[29] Having regard to the short period of time that has elapsed I am of the view that the defendant's estate is not prejudiced. The fact that the estate maybe impecunious is not prejudice. The defendant also died in the accident and the affidavit of Damion Thompson outlines the efforts to find out who had conduct of Owen Palmers estate who was unknown to the family of Gideon Thompson. In ***Shaun Baker***, Edwards J, (Ag) as she then was, in relying on ***Cain v McKay v Hamrani*** (2009) 3 WLR 551 said at paragraph 92

*“in cases where the defendant has had early notice of the claim, the accrual of a limitation defence, certainly in England at least, is to be regarded as a windfall. In the exercise of the courts discretion under section 33, the loss of the statutory defence is to be regarded as either presenting no prejudice to the defendant or only slight prejudice. “*

[30] Although three years have passed since Owen Palmer's death there is no windfall for the defendants in this case as the FAA permits an extension. I take into consideration the fact that this Claim was filed just two months after the expiration of the three years. On the other hand, Mr. Thompson is dead and if this application is not granted then his near relations will not be able to make their claim. The Coroners Inquest is not yet concluded and this exercise it would seem, has not affected the defendants, it cannot be said that the estate has faced a trial or inquest already and is now being asked to do so again

## **Likely Prospect of Success,**

[31] This requirement was not distilled from the UK Limitation Act. See ***Shaun Baker***. As indicated previously stated, the Further Amended Particulars of Claim sets out all the ingredients to establish a claim under the FAA. No defence has been filed

by the defendants denying liability or in fact denying any aspect of the claim. Damion Thompson was 29 at the time of his father's death while his sister was 22 years. Mr. Thompson says that his father supported them up to the time of his death. Thus far, only Mr. Thompson has submitted an affidavit in support of the application. From all indications, he did not witness the accident. This case is far from trial ready. I believe it is far too early for me to make a determination as to the likely prospect of success. It is clear that all that is required is not yet before the court on both sides.

**[32]** The Further Amended Particulars of Claim filed on April 13, 2022, makes reference to Renae Patricia Thompson, sister of Mr. Damion Thompson, as a near relative. However, there is no order sought in the Notice of Application for Court Orders filed on April 14, 2022 to add her as a Claimant. As a matter of comment, Rule 19.3 allows a court to add and substitute parties. It reads,

*“(1) The court may add, substitute or remove a party on or without an application.*

*(2) An application for permission to add, substitute or remove a party may be made by –*

*(a) an existing party; or*

*(b) a person who wishes to become a party.*

*(3) ...*

*(4) No person may be added or substituted as a claimant unless that person's written consent is filed with the registry.*

*(5) The court may add, remove or substitute a party at or after the case management conference...”*

**[33]** In addition, Rule 19.4 deals with the addition or substitution of parties after the end of the relevant limitation period. It reads,

*“(1) This rule applies to a change of parties after the end of a relevant limitation period.*

*(2) The court may add or substitute a party only if –*

(a) the relevant limitation period was current when the proceedings were started; and

(b) the addition or substitution is necessary.

*(3) The addition or substitution of a party is necessary only if the court is satisfied that –*

*(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;*

*(b) the interest or liability of the former party has passed to the new party; or*

*(c) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant.”*

Rule 20.6 deals with the amendments to a statement of case after the end of the relevant limitation period.

**[34]** In my view, since the FAA gives the court the discretion to extend the time within which to file a claim then it would be open to the court, based on the rules referred to above, to allow the claimant to add his sister if he/she so desires.

### **Disposition**

**[35]** The claim is being brought two months after the period expired under the **Fatal Accidents Act**. I find the reasons for the delay understandable and acceptable. The defendant also died in the accident. The respondent did not know who he was. Attempts were then made throughout the period to ascertain who was in charge of Mr. Palmer's Estate. That information was obtained in or around May 2021. This case is in direct contradiction to the circumstances in **Shaun Baker**. This, I believe is a case that warrants the court exercising its discretion to extend time under the FAA.

**[36]** In the circumstances;

1. The application filed by the defendant on July 20, 2021 is denied

2. The Notice of Application for Court Orders filed on April 14, 2022 is granted in terms of paragraphs 1 and 2.
3. Time is extended for the defendant to file a defence within 42 days of this order.
4. The parties are referred to mediation. Said Mediation is to take place and be completed within 90 days of this order.
5. CMC is fixed for November 9, 2022 at 12 noon for 1/2 an hour.
6. Cost of this application to be cost in the claim
7. Applicants Attorney to prepare, file and serve the orders

**[37]** Applicant is granted leave to appeal.