



[2021] JMSC Civ. 92

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV01456

In the estate of Ricardo Wood, late of 783
Waterford Parkway, Waterford P O, St
Catherine, deceased, intestate

BETWEEN

SONIA WOOD

CLAIMANT

(sues as mother, near relative and next of kin
Ricardo Wood, deceased, intestate)

AND

ATTORNEY GENERAL OF JAMAICA

DEFENDANT

IN CHAMBERS (VIA ZOOM)

Ms Victoria Brown and Mrs Karlia Carty-Dinnal instructed by Victoria W Brown and Associates Attorneys-at-law for the Claimant.

Mr Robert Clarke instructed by the Director of State Proceedings Attorney-at-law for the Defendant.

HEARD: April 19, 2021 and May 4, 2021

Civil Procedure - Application for extension of time to file claim under Section 4(2) of the Fatal Accidents Act, Application for permission for claim form and particulars of claim filed out of time to stand, application to strike out claim, alternatively, application to file defence out of time. CPR 26.4 and 26.8 and 10.3(9)

CORAM: MOTT TULLOCH-REID J (AG)

BACKGROUND

- [1] On May 14, 2020 the Claimant filed an application for court orders, an affidavit in support, a claim form and particulars of claim. The claim form and particulars of claim were intended to bring a claim against the Defendant under the Fatal Accidents Act (“FAA”) and the Law Reform (Miscellaneous Provisions) Act (“LRMPA”) for the wrongful death of Ricardo Wood, the Claimant’s son. The allegation is that Ricardo Wood was shot and killed by police officers. The application sought orders extending the time in which the claim under the FAA could be brought and seeking permission from the court to allow the initiating documents, filed out of time to stand. The application also sought orders that the applicant, Sonia Wood, be appointed administratrix *ad collegenda* bona for the estate of the deceased for the purposes of bringing the claim.
- [2] I also have before me the Defendant’s application to strike out the claim as an abuse of process and alternatively for time to file the defence. This application will depend on the outcome of the Claimant’s application and so I will give primary focus, at least initially, to the Claimant’s application.

The LRMPA

- [3] The Claimant did not make an application to enlarge the time to bring the claim under the LRMPA. Perhaps she is aware that with respect to the LRMPA time does not start to run with respect to the limitation period until an administrator has been appointed. For this principle of law, see the Court of Appeal decision in the case of ***Attorney General v Administrator General of Jamaica (estate Elaine Evans) SCCA No 11/2001 heard on December 3, 2001 and July 29, 2005*** in which Downer JA said at page 7 of the judgment:

“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 Administration were granted”.

No administrator has as yet been appointed and as such time has not started to run as it relates to the LRMPA. It is true, as stated in the Defendant’s application, that the Claimant has no standing to bring the claim pursuant to the LRMPA as she had not been appointed personal representative in the estate of Ricardo Wood’s. The defect can be remedied when the Claimant is appointed personal representative and the initiating documents amended.

The FAA

[4] The Claimant’s application emphasises the FAA in particular section 4(2). Section 4(2) reads as follows:

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.

The section is clear. The Court has a discretion to enlarge the time within which the claim made pursuant to this statute is made. The Claimant asks that I enlarge the time because it would be just in the circumstances. She explains the lateness in which her claim is being made as being as a result of the tardy way in which the various Government Departments conducted themselves in seeking to determine her son’s cause of death. The Coroner’s inquest took a long time to be completed, the Public Defender did not get back to her until almost ten years after the death of her son. Ricardo Wood died on August 26, 2009 but she did not get a response from the Office of the Public Defender to her many follow up queries on how the case was progressing until May 16, 2019. In their response, the Public Defender enclosed a letter from INDECOM, which had missing pages, dated December 22, 2017. It would have been useful if counsel for the Claimant had contacted INDECOM to obtain the missing pages rather than putting an incomplete document before the Court. I do not know when this letter came to the Public Defender’s

attention but the recommendation from INDECOM was that Ms Wood should seek redress in the civil courts. Having heard from the Public Defender, Ms Wood waited one year before she took any steps to initiate the claim in these courts. She has given no explanation for waiting for one year before commencing proceedings.

[5] I should also point out that both police officers who were implicated in the death of Ricardo Wood were charged with murder in 2016 according to Mrs Woods' evidence but that the criminal hearing has been stayed as the witnesses are unavailable – one is dead, the other has migrated allegedly in fear of her life.

[6] The FAA gives the Court the discretion to enlarge time. It however does not set out how the discretion is to be applied. I must therefore look to the case law for assistance. The cases suggest that in exercising its discretion the Court may consider the following factors:

- (a) delay
- (b) cogency of evidence
- (c) real prospect of success at trial
- (d) conduct of the defendants
- (e) extent to which the claimant acted promptly
- (f) prejudice

Delay, extent to which the claimant acted promptly and prejudice to the Defendant

[7] Ms Wood did not retain counsel in this matter until 2020. She was not aware until 2019 that she should do so as she has indicated that none of the entities from whom she sought assistance ever told her that she should seek legal advice. It was not until she got the letter from INDECOM that she was aware that she should seek civil redress. I accept Ms Woods' explanation. She is a caregiver and does not seem to be knowledgeable about legal issues. I am however mindful of the fact that ignorance of the law is no defence.

[8] In **Donovan v Gwentoy's Ltd [1990] 1 WLR 472** Lord Griffiths said

“The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to deal.”

[9] The cause of action in this case arose in 2009, the claim and application to enlarge time were filed in 2020, almost 10 years later. In the case of **Shaun Baker v O'Brian Brown and Angella Scott-Smith 2009 HCV 05631 heard on April 19 and May 3, 2010** six years had passed between the time when the cause of action arose in 2003 and the filing of the application in 2009. Edwards J (Ag) as she then was, held that the delay was excessive especially in circumstances where the claimant had access to counsel and was armed with all the information he needed to proceed to the filing a claim. This is not so in the case before me and so I must treat with this case on its own special facts. However, this does not mean that I am not very aware of the ten-year delay in seeking to bring the claim.

[10] I must therefore weigh the degree of prejudice that will be suffered by the Defendant who will be asked to meet an extremely stale claim against the prejudice the Claimant, who has lost a son, will suffer if she is not allowed to initiate proceedings. In the **Donovan v Gwentoy's case**, Lord Griffiths also had to contemplate a similar issue and noted that

“In weighing the degree of prejudice suffered by a defendant it must always be relevant to consider when the defendant first had notification of the claim and thus the opportunity he will have to meet the claim at the trial if he is not permitted to rely on his limitation defence.”

[11] The prejudice to the Claimant if the application to enlarge time does not have a favourable result is obvious. Her son is dead and she will not be able to get civil redress as the Defendant will have taken the benefit of her limitation defence. The prejudice to the Defendant if time is enlarged is also very obvious. She will be

asked to answer to a claim which is already 10 years old and will even be older by the time the matter is scheduled for trial. Already trial dates are being set in 2026 and in this case the pleadings have not yet been completed. What of the availability of witnesses? Will the Defendant be able to locate witnesses so late in the day? Are the police officers still employed to the State? If not, can they be located as it is from them that instructions must be taken. I do not have this information before me because the Defendant did not respond to the Claimant's affidavit.

[12] In the **Shaun Baker case** Edwards J summarised her understanding of the law by saying at paragraph 92 of the judgment that:

“The general proposition is that; 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 court’s 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.”

Like the defendants in the **Shaun Baker case**, the defendant in the case before me did not know of the claim until a lot of time had passed since the cause of action had occurred. In the case before me, 10 years have passed since the after the cause of action arose and 7 years have passed since the limitation period has expired. Section 4(2) of the FAA says I am to exercise my discretion in the interest of justice. Justice must be considered not just for the claimant but the defendant. To have the defendant in this case answer a claim in excess of 10 years old would indeed be prejudicial.

[13] The next question I must answer is did the Claimant act promptly in bringing the claim. On her evidence she learnt that she could bring a claim in May 2019. She however did not do so until May 2020. In my view she did not act promptly after

becoming aware that she could bring a claim. She has given no reason for the one-year delay. All she has said is that having been so advised via the INDECOM letter, she spoke with friends and family members who encouraged her to file the claim. Ms Wood has unfortunately not sought to explain why it would take her one whole year before actually doing so.

Likelihood of success

[14] I will now consider the Claimant's likelihood of success if the matter goes to trial. The result of a Coroner's inquest is that the police officers who were implicated in the shooting were charged for murder in 2016. This is the evidence of the Claimant which is supported by the letter prepared by the Office of the Public Defender and INDECOM's report. The Claimant has not indicated whether any of the investigating officers from INDECOM will be called as witnesses. They would however not be able to give first hand evidence of what took place on the day, they would only be able to give the results of their investigations. The alleged witnesses on behalf of the Claimant are unavailable. The Claimant would therefore have no eye witnesses. I remind myself however that in the civil court the standard that is to be achieved is on the balance of probabilities not beyond reasonable doubt. So I must ask myself, on a balance of probabilities, does the Claimant have a claim for wrongful death which has a real prospect of succeeding? I would say yes, even in the face of the absence of the eye witnesses. The Claimant would still be in a position to call the INDECOM investigators to assist her in her claim.

[15] The most important question now is how best will the interest of justice be served in this very difficult situation. A mother wants justice for the wrongful death of her son. She has gotten no redress in the criminal courts and now seeks it in the civil court, albeit 10 years later. She has just recently obtained counsel and was navigating the whole system seeking justice by herself without the assistance of anyone with legal know how. Is the door to restitution to be shut in her face because of her ignorance? And what about the Defendant? She has by now formed an expectation that she will not have to face a claim. She did nothing wrong, it is the servants and/or agents of the Crown who are allegedly at fault. Can

she now find them or any witnesses to the incident so many years later to get their instructions so that she can lodge a defence? And if the witnesses can be found, can they remember the details of what took place on that fateful day ten years ago? The Affidavit sworn to by Mr Ricardo Maddan, one of the counsel instructed by the Director of State Proceedings, does not raise any of these concerns. He has simply deponed that should the court permit the claim form and particulars of claim to stand (thus enlarging time) the Defendant would need time to liaise with the Commissioner of Police to take instructions and that the attorneys for the Defendant are also trying to obtain documents from the Coroner's Court which they need in order to put forward the appropriate defence. The only concern which the Defendant has raised is the issue of the expiration of the limitation period, which would have been a stronger defence if the Court had no discretion to enlarge time in the interest of justice.

Concluding Remarks

[16] I am making no determination of the substantive case at this point in time. My sole role is to consider whether the Claimant's claim has a real likelihood of succeeding. I find that it does. I have considered the other issues such as delay and prejudice to the Claimant and to the Defendant and while admittedly the delay is excessive, I do not find that it was by any inaction on the part of the Claimant. I believe that in a situation such as this, where no legal advice was given to her and she took the steps she best knew to get justice for her son, that the delay has been explained and that the explanation is reasonable. I believe the Claimant should be given the opportunity to have her day in Court. I have weighed the prejudice the Claimant is likely to suffer if I do not grant the orders against the prejudice the Defendant will suffer if I do and I find that in the circumstances the prejudice to the Claimant would be more significant and her application will be granted. If, however, at the Case Management or before, the Court or the parties form the view that witnesses for the Claimant, including INDECOM investigators will not be available at the trial, the Court can then make the order which would be best at that time.

[17] Counsel for the Claimant should use the opportunity to relook at the claim being brought under the LRMPA and file amended initiating documents to name the correct party in the claim.

[18] I therefore order as follows:

- a. The time within which the Claimant is permitted to file a claim under the Fatal Accident Act is extended to May 14, 2020.
- b. The Claim Form and Particulars of Claim filed on May 14, 2020 and served on the Defendant are allowed to stand.
- c. Sonia Wood is appointed *administratrix ad litem* in the estate of Ricardo Wood for the purpose of bringing the claim.
- d. The Defendant is to file and serve a Defence to the claim on or before June 30, 2021.
- e. The parties are to attend mediation on or before September 30, 2021.
- f. Should mediation be unsuccessful the parties are to attend Case Management Conference on December 6, 2021 at 12:00pm for ½ hour.
- g. Costs in the Claimant's and the Defendant's application are to be costs in the claim.
- h. The Claimant's attorneys-at-law are to file and serve the Formal Order.