DAMAGES | Fatal Accident

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C. L. 1974/A 035

THE ADMINISTRATOR GENERAL OF JAMAICA
(Administrator Estate Maud Parker, Deceased)

v.

E.A. LAI CONSTRUCTION LIMITED

July 21, 22, 31.

Mr. W. B. Frankson and Mrs. M. E. Forte for Plaintiff
Mr. R.H. Williams Q.C. for Defendants.

J U D G M E N T

This is an unfortunate case. On the 6th August, 1970, Miss Maud Parker, the mother of five children received injuries when a "back-hoe" owned by the defendants and operated by one of their employees pinned her against the steps of a building on which she had been sitting. She succumbed to her injuries on the 8th August, 1970. She was survived by her five illegitimate children, all dependent on her, and also by her mother Miss Epsie Cox. Miss Parker who died intestate, left no estate. Her mother never applied for Letters of Administration.

On the 21st February 1973, the Administrator General was advised of Miss Parker's death, and he applied for and obtained on the 31st October 1973, a grant of letters of administration in her esta[te]. On the 2nd April, 1974 the Administrator General as administrator o[f] her estate, filed a writ against the defendants alleging negligence, and claiming damages both under the Law Reform (Miscellaneous Provis[ions] Act and the Fatal Accidents Act.

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The defendants denied any liability and averred as well that the action was barred by reason of section 4 of the Fatal Accidents Act, in that the action was not commenced within 12 calendar months of the death of the late Miss Parker. At the hearing, the defendants who called no witnesses, relied entirely on submissions made by their attorney, Mr. R.H. Williams Q.C.

The issues of fact in relation to liability can be dealt with quite shortly. On the day of this unfortunate accident, 6th August, 1970 there had been some rain which had caused the grassy area where the defendants's tractors were usually parked, to become slippery. When the operator of the tractor entered the compound, he was required to describe a circle, to enable him to back into his parking slot. It was in the course of this manoeuvre that the tractor developed a skid, got out of control and despite the efforts of the operator to bring it under control, crushed Miss Parker against some steps, and resulted in her untimely death.

These circumstances showed, and this was conceded by the defendants, that the doctrine of 'res ipsa loquitur' applied. It was contended on behalf of the defendants, however, that they had discharged the evidential burden on them, although they had called no evidence themselves. They relied on certain evidence given by a Mr. McDonald, a witness for the plaintiff, and indeed, the only witness called to relate the circumstances of the accident. The significant evidence, it was urged, was, that when the tractor skidded, the operator had done his best to correct it, and that when he was driving into the compound, he had done so normally as he usually did, "not recklessly".

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It was clear that the prevailing conditions viz. wet grass, required the exercise of reasonable care and skill on the part of the driver in parking the tractor, especially as he had to manoeuvre this unwieldy vehicle in a circle on a treacherous surface. It was not enough for the defendants, in my view, to point to the fact that the driver entered normally as he "usually does". The defendants were obliged to show that their servant or agent, the driver of this "Back-hoe" had, in fact, exercised the due care and attention that the particular circumstances warranted. The evidence which, it was urged on me, was apt to do so, fell short of the standard required. The evidence of the skid in this case, is some evidence of negligence, the more so, when the defendants called no one to explain it. Richley v. Faull (1965) 3 All E.R. 109. On the question of liability, I cannot therefore acquit the defendants of the negligence alleged against them : the plaintiff is entitled to succeed on this issue . I so find.

I turn now to deal with the defence under section 4 of the Fatal Accidents Act. For purposes of the defence, the material part of the section is the proviso , which is in the following terms :-

> "Provided always, that not more than one action shall lie for
> "and in respect of the same subject matter of complaint and
> "that every such action shall be commenced within twelve calendar
> "months after the death of such deceased person."

Mr. Frankson, on behalf of the plaintiff, deployed the full range of his skill in an endeavour to persuade the court, that the words - "every such action shall be commenced within twelve calendar months after the death of such deceased person", should be construed to mean, within twelve calendar months of an administrator obtaining a grant of letters of administration. This was indeed a formidable task.

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I would summarize the plaintiff's arguments in this way. In the first place it was said, a cause of action cannot accrue unless there is in existence a person capable of suing and another capable of being sued. An action under the Fatal Accidents Act may only be brought by a personal representative on behalf of the dependents. This deceased died intestate, accordingly there was no executor. An administrator does not come into being until one is constituted by a court upon a grant of letters of administration. Although the mother of the deceased was entitled to apply for administration under section 11(2) of the Intestates' Estates and Property Charges Act, there was a statutory duty on the Administrator General to apply for letters of administration, as minors were involved. Even if it were to be submitted that nevertheless, the mother, Miss Cox, could have applied, she would have been precluded from doing so three months after death, because the duty then devolved on the Administrator General to apply for a grant by virtue of section 12 of the Administrator General Act.

This act also requires the Collector of Taxes to advise the Administrator General of deaths within his tax-district, but this duty, the evidence of Mrs. Lamb, an officer of the Administrator Generals Department shews, is only exercisable where the deceased's name is on his tax-roll and therefore left land. The deceased left no property, so the Administrator General was not advised by the Collector of Taxes. He was not advised of the death until 21st February, 1973. At that date, there were two persons who potentially qualified to apply for a grant of Letters of Administration, viz, the mother of the deceased and the Administrator General. The latter qualified when a grant was made to him on the 31st October, 1973. Time did not begin to run against him until then. This was so because the persons for whose benefit the action could have been brought were under the disability of infancy and time could not run against them.

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The date of grant should be regarded as the relevant date as well because of the provisions of section 8 of the Limitation of Actions Act; which enacts as follows :-

> "An administrator claiming the estate or interest of the "deceased person of whose chattels he shall have been appointed "administrator shall be deemed to claim as if there had been no "interval of time between the death of such deceased person "and the grant of the letters of administration."

This provision should be interpreted as being of general application although the section in which it fell, was within that part of the Act concerned with actions regarding land. The effect of this section was to merge the date of death and the date of grant of letters of administration, and make the relevant date, that of a grant of letters of administration.

Finally, in construing the proviso of section 4 of the Fatal Accidents Act, I was exhorted to apply the same principle enunciated by Abott C.J., in Murray v. East India Co., (1814-23)All E.R. (Rep.) 227 at page 232, where he is reported as saying - "The several statutes of limitation being all "in pari materia ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same".

So far as the defendants were concerned, Mr. Williams in reply, allowed that the arguments put forward were as ingenious as they were novel, but the proposition contended for, was unsupported by authority and was inconsistent with the precise words of the proviso to section 4. In fine, Mr. Frankson had engaged in an exercise of sheer irrelevancy.

I have set out the arguments of the plaintiff, and indeed, taken time to consider, because I was impressed with the motive which prompted the arguments. Moreover, I considered that some deference, if not respect was due to hard work and industry and no lack of skill on the part of learned counsel, in a good cause.

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The principle that a cause of action cannot exist unless there be also a person in existence capable of suing was enunciated by Abbott C.J in Murray v. East India Co. (Supra). The learned Chief Justice then referred to 3 Statutes which might properly be called Statutes of Limitation. The sort of provisions recited were " so that they take their action or pursue their rights within 5 years next after such action right etc., to them accrued - 4 Hen. 7, Cap. 24; "that no person or persons shall make entry into any land ..... but within 20 years next after his or their right or title which shall hereafter first descend or accrue to the same - the Limitation Act 1623.

The third enactment (inter alia) limited the time for suing out writs of right, writs of possession and seisin to some time of the accrual of a cause of action. The ascertainment of the date when a cause of action accrued, was crucial in the case before the learned Chief Justice. In the event he decided that the action accrued from the date of the grant of letters of administration and not when certain bills of exchange fell due. The precise words which created the period of limitation, were in "six years next after the cause of such actions". Clearly in that situation it was logical in construing the Acts to say that a cause of action occure when there is capacity in the potential parties to the action. Where however a particular statute sets out the date from which time is to be reckoned that is when the action accrued it is wholly unnecessary to apply any legal principle to discover that date. I would say that the formulation of Abbott C.J is relevant only in circumstances where the ascertainment of a date of the accrual of a cause of action has to be determined. It does not apply when a particular statute limits the time within which an action may be brought by reference to a specific starting point.

This principle was applied in a case when the corporate existence of a defendant company had ceased to exist, because it had been dissolved by the revolutionary Russian Government. In re Russo - Asiatic Bank (1934) All E.R (Rep) 558. This case involved the application of the Limitation Act 1623.

It applies also where a defendant is protected by diplomatic previlege. See Musurus Bey v. Gadban (1894) 2. Q.B. 352.

The importance of there being a party "capable of suing" has been shown where an administrator purports to file suit before a grant of letters of administration. Thus in Ingall v. Moran (1944) K.B 160 the plaintiff issued a writ in an action under the Law Reform (Miscellaneous Provisions) Act 1934 claiming ~~the~~ to sue in a representative capacity as administrator of his son's estate, but failed to take out letter of administration until nearly two months after the date of the writ.

It was held that the action was incompetent on the date of the filing of the writ. It was shown that an administrator's title after grant does not relate back to the date of death, so that, if the action has accrued, time runs against the administrator. Luxmoore L.J page 169 said -

> "No proper action was commenced before the statutory period of limitation expired. That period expired before any grant of administration was obtained, and the right of action was lost to the intestate's estate".

This is enough to dispose of Mr. Farkson's point that time could not run against the Administrator General.

As to the argument that section 8 of the Limitation of Actions Act should be read into the proviso to section 4 of the Fatal Accident Act, the principle of 'generalia specialibus non derogant' applies : General provisions will not abrogate special provisions. The fatal

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Accidents Act was passed in 1845; it created a new specie of action and included in its provisions, its own limitation mechanism. The Limitation of Actions Act, a general Act, was passed in 1881.

In the interpretation of Statutes, it is a cardinal rule that each enactment must be construed according to its own subject matter and terms. Section 8 is included in that part of the Act headed "Part 1 - Limitation of Actions (Land). A 'chose in action' is clearly not land or an estate or interest in land. The purpose of this section was to equate the position of administrators and executors. An executor's title relates back to the death of the testator, but so far as an administrator's is concerned, there would be an interval of time when no right of action could accrue. For the purposes of limiting the time for actions for the recovery of land, by administrators section 8 was therefore necessary. The section is thus confined within its heading.

It was also faintly suggested that in the same way that courts have invoked the doctrines of Equity to mitigate the harsh rigours of the commonlaw, (an example being cited was the doctrine of concealed fraud,) so I was invited to evolve a doctrine that where an administrator was unaware of the death of the deceased, then time should not run against him until he was granted letters of administration. The principles of Equity are now well defined, and it is now too late to attempt to formulate new principles, especially when the Legislature has made its intentions clear in unambiguous terms. The doctrine of concealed fraud it must be noted has assumed statutory form by section 27 of the Limitation of Action Act. Time in any other case begins to run even though a plaintiff might be ignorant of his right of action. See R.B. Policies at Lloyd's v. Butler (1950) 1 K.B.76.

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The relevant portion of the proviso upon which the defendants based their defence is - 'provided that any such action should be commenced within 12 calendar months after the death of such deceased person' The words (underlined) are clear and unambiguous; no legal principle has to be applied to ascertain the date of the accrual of the cause of the action. It is a matter of looking at two dates, viz, the date of the commencement of the action and the date of death. That is a question of fact. In this case, the action was commenced by a writ dated and filed on the 2nd April 1974. The deceased died on the 8th August 1970. The action was not therefore commenced within twelve calendar months of the death of Miss Parker. Accordingly, the statutory defence succeeds, and that part of the plaintiff's claim under the Fatal Accidents Act fails.

In the result, the plaintiff is entitled to succeed on the claim under the Law Reform (Miscellaneous) Provisions Act for loss of expectation of life. I am constrained to say in agreement with Mr. Williams that the evidence adduced on this part of the claim was less than meagre. The deceased was aged 28 years when she died, and had by then, borne five children by at least four different fathers, the ages of the children ranging from 12 years to 5 years. Up to her death, I would doubt that the life led by the late Miss Parker was calculated to lead to a future of happiness. Doing the best I can, ~~and~~ however, and giving due regard to considerations in assessing damages of the prospects of a predominantly happy life, and as well, the decline in the value of money, I allow $1000 as damages under that Act. No amount was claimed for funeral expenses, and none is therefore allowed.

There will be judgment for the plaintiff in that sum with costs to be taxed or agreed.

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The result is unfortunate. Five young children are left to the ministrations of a grandmother and such assistance as the several fathers may be provoked to offer. There will be no financial cushion of damages under the Fatal Accidents Act. A twelve month limitation period is, in my view short, in a country where the majority of citizens are ignorant of their legal rights, litigation is expensive and no legal-aid in civil proceedings exists. It is however a matter for the legislature to determine the nature and extent of change. The courts must give effect to the clear words of the statute. To propound a principle that "within twelve months of death" means 'within twelve months of the grant of letters of administration, is to do violence to language. To accede to the arguments so valiantly put forward on behalf of the plaintiff, would, I venture to think lead to great uncertainty and ~~instead~~ indeed injustice.

An executor would presumably have twelve months from the date of death, while an administrator would have twelve months after grant to file the action. A defence would depend on whether the victim of an accident, died testate or intestate. If he died intestate, an administrator could could postpone applying for letters of administration, indefinitely. The witnesses for the defendant may have died or gone overseas by then. There would in reality be no limitation to the action, it would be a situation of unpredictability and capriciousness.

However much the call to do a great right and do a little wrong, calls forth one's sympathy, yet, it must not be; the court must do right according to Law. The defendants ~~has~~ have a defence given ~~him~~ them by law. This is not the case in which I can be other than a "Portia man". (Russell L.J in Syndall v. Castings Ltd. (1966) 3 All E.R. at page 779.

Boyd Carey
Judge (Ag.)