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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. A126/1990

BETWEEN	EASTON ANDERSON (By virtue of section 23 of the Fatal Accidents Amendment Act, he being father of the deceased, Delroy Anderson	CLAIMANT
AND	THE ATTORNEY GENERAL	DEFENDANT

Norman Samuels for the Plaintiff.

Mr. Cochrane instructed by Director of State Proceedings for the Defendant.

Heard: 1st February and 3rd March 2005

Campbell, J.

The Plaintiff claims, as a near relative of the deceased, that on the 8th day of May 1990, the deceased was the member of a police party that went in search of a suspected felon, Joseph Adams, and in a failed attempt to apprehend the felon, one of the deceased colleagues shot and killed him.

The Plaintiff filed his Writ of Summons 10th May 1990 and the Statement of Claim on 11th November 1991.

The Defendant entered appearance on the 4th September 1990 and on the 30th December 1991, filed a Consent to File Defence out of Time and their Defence, which alleged at para 3.

It is admitted that a party of police officers were dispatched to apprehend the suspected felon, Joseph Adams on the date mentioned save as aforesaid.

Paragraph 3 of the Statement of Claim is denied. Further, the defendant will say at the trial that the deceased, Delroy Anderson was shot by the said Joseph Adams and that the deceased died in the Kingston Public Hospital on the 6th May 1990.

The Plaintiff in his Reply denied that the deceased was killed by the felon, Joseph Adams.

On 22nd October 1993, the Defendant filed Notice of Intention to Amend their Defence by inserting:

"In the alternative, the Defendants will contend that the cause of action of negligence was pleaded for the first time in the Statement of Claim and is statute barred by virtue of Section 2(1)(a) of the Public Authorities Protection Act.

On 4th February 2004, the Defendant's filed a Notice of Application for Court Orders and sought an Order, inter alia:

(1) The Claim be struck out as having disclosed no reasonable cause of action under and virtue of section 2 (1) (a) of the Public Authorities Protection Act, and being frivolous, vexatious and an abuse of the process of the Court.

On the ground that; the claim for negligence is statute barred under and virtue of section 2(1) (a) of the Public Authorities Protection Act.

The Affidavit in support of Notice of Application alleged:

(3) That Writ of Summons and Statement of Claim were on the Director of State Proceedings on the 10th day of July 1990 and the 11th day of November 1991 respectively.

(4) That the cause of negligence arose on or about the 8th day of May 1990.

(5) That by virtue of the Public Authorities Protection Act, the Claimant had a year from the date when the cause of action arose to file his Writ.

(6) That the Claimant filed his Writ outside the statutory period and in the circumstances his claim is statute barred.

(7) That this is a valid defence to the Claimant's cause of action and the Defendant prays that this honourable Court will make an order in terms of the Notice of Application for Court Orders filed herein.

In support of the application the Court was referred to Civil Procedure Rule 26.3.1 and the case of Riches vs DPP (1973) 2 All ER 935.

Crown Counsel submitted that the Jamaica Courts have held that if the Defendant has a defence pursuant to the Limitation Act, he ought not to be deprived of it.

Mr. Samuels argued that the affidavit in support of the application did not disclose that the Writ of Summons was filed out of time.

That the heading of the Claim CL 126 of 1990 indicates that the action was commenced in 1990, the same year as the cause of action which arose on 8th May 1990.

Mr. Samuels further submitted that the Defendant could not rely on the Public Authorities Protection Act because Section 2.1 of that Act made no mention of "frivolous, vexatious and an abuse of the process of the Court." And in that respect the Order as sought was ambiguous.

Crown Counsel conceded that there was an error in the affidavit in support of his application, and the Writ was in fact filed within the statutory period. It appears properly framed the complaint should have been to the date of service of the Statement of Claim as the date when "the new cause of action" of negligence was served on the Defendant, that being the 11th day of November 1991, which would be outwith the statutory period. Crown Counsel nonetheless, advanced the following submission: That a Claimant was not allowed to plead a new cause of action in his Statement of Claim if it is not alluded to in his Writ of Summons. He further argued that, in those circumstances, it was permissible to apply for a striking-out Order and referred the Court to the decision in Riches v DPP (1973) 2 ALL ER 935, where at Page 941, after making reference to the case of Dismore v Milton (1938) 3 ALL ER 762, Stephenson, LJ. said:

> "But I agree with his comments on that case. It seems to me that that case is, I now say, a decision that the Court cannot strike out a claim which is statute barred on the ground that it is an abuse of the process of the Court, where it is clear from the terms of the summons that the statute is going to be relied on and where, as here,

> Counsel has told the Court that he has express instructions to rely on the statue. Even in such a case, there may be a possibility of a Defendant bringing himself into one of the exceptions which avoid the statute and make it inapplicable. Again, however, this is not such a case ..... I think it would be absurd for the Court, faced with an application such as this, to strike out, under its inherent jurisdiction or under the rules, a claim as an abuse of the process of the Court, to shut its eyes to the Act that there is going to be raised an apparently unanswerable plea of the Limitation Act 1939. That was the view of the Court in Wenlock v Shimwell, to which Davies, LJ has referred, and was clearly the view of Lord Denning, MR in Hanratty case in the passage which Davies, LJ has also cited, why should such a claim not be an abuse of the process of the Court? Why should not the court exercise its inherent jurisdiction to stay or dismiss an action which must fail."

Mr. Samuels submitted that if the Statement of Claim was filed after the Writ of Summons, then it could alter or expand what was stated in the Writ. Such alteration or expansion was permissible if the cause of Action in the Statement of Claim, although not specifically mentioned in the Writ, arises from the facts or circumstances pleaded in the Writ. The pleadings in the Statement of Claim is a mere expansion of the Writ, and cannot be regarded as a new cause of action. It is only when it can be regarded as a new cause of action that the question of being statute-barred rises. He referred the Court to the,

The Supreme Court Practice – Order 18, R15.2 which states;

> A Statement of Claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the Writ or arises from facts which are the same as, or include or form part of facts, giving rise to a cause of action so mentioned; but, subject to that, a Plaintiff may, in his Statement of Claim, alter, modify or extend any claim made by him in the endorsement of the Writ without amending the endorsement.

The issue is whether negligence is mentioned in the Writ or arises from facts which are the same as, or include or form part of facts, giving rise to a claim of negligence.

The facts that are alleged by the Plaintiff include the facts that the deceased was a member of a police party that went to apprehend a felon. It includes the allegation that members of the police party were acting in lawful execution of their duties as members of the J.C.F. and that whilst so acting, one of the party shot and killed the deceased. There is the allegation that it was falsely, maliciously and without reasonable or probable causes.

Crown Counsel gave no particulars why the Statement of Claim, which was served on the 11th November 1991 ought to be considered a new cause of action and could be said not to have arisen from facts alleged in the Writ.

The allegations in the Writ supports a claim for negligence. The contention being that members of police party owed the deceased a duty of

care, which was breached when he was shot and killed by one of them without reasonable and probable cause. The facts alleged in the Writ are the same as the facts which give rise to a cause of action of negligence.

A defect in the Writ may be cured by a proper Statement of Claim which may operate in the same way as the obtaining of Leave to Amend. In Hill v Luton Corporations [1951] 2 KB 387 at page 391, Devlin J said:

> "But the principle which permits the Plaintiff to cure defects in his writ by a proper statement of claim operates in the same way as if he were given the right to amend without leave. It is then immaterial that the amendment, whether it be made by delivery of a statement of claim or otherwise, is made after the expiry of the period: it is merely a step in the action which can be taken at any time which the rules permit. The writ is the only step in the action which is required to be taken before the expiry of the period."

The Writ of Summons having alleged facts which support a claim of negligence, the Statement of Claim that expands those facts, is not a new "cause of action". The application to strike out the Writ is dismissed.

Cost of the application to the Claimant, to be agreed or taxed.