



NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007/HCV 03957

BETWEEN	NORRIS FRANCIS	CLAIMANT
AND	THE JAMAICA RAILWAY CORPORATION	1 <sup>ST</sup> DEFENDANT
AND	THE JAMAICA ALUMINUM JAMAICA LIMITED t/a WINDALCO	2 <sup>ND</sup> DEFENDANT

Mr. Dale Staple for Claimant instructed by Kinghorn and Kinghorn

Mr. Alexander Williams for 1<sup>st</sup> Defendant instructed by Usim Williams and Co.

Mr. Emile Leiba for 2<sup>nd</sup> Defendant instructed by Myers Fletcher & Gordon

Heard May 27 and June 1, 2009

McDonald J

On January 5, 2009 Notice of Application was filed for summary judgment to be entered in favour of the 1<sup>st</sup> Defendant.

The grounds on which the 1<sup>st</sup> Defendant/Applicant is seeking the order is that the Claimant has no real prospect of succeeding on the claim against the 1<sup>st</sup> Defendant from the admissions made in the defence of the 2<sup>nd</sup> Defendant and the law.

Mr. Williams, in my view correctly identified the issues which the Court must determine at the hearing as:-

- (1) Whether or not the 1<sup>st</sup> Defendant can rely on the defence of limitation, as set out in section 67 of the Jamaica Railway Corporation Act.

(2) Whether or not the Claimant can in any event succeed in negligence, against the 1<sup>st</sup> Defendant given the pleadings of all the parties.

The Claimant in his Particulars of Claim alleges inter alia

- (i) That the 1<sup>st</sup> Defendant was the owner and/or operator and/or in sole control of a certain train line.
- (ii) That the 1<sup>st</sup> Defendant negligently controlled, managed and/or supervised the use of the said train line, thereby causing the accident.

There is no allegation that the 1<sup>st</sup> Defendant owned and or operated the train.

The averments against the 1<sup>st</sup> Defendant is as owner and operator of the train line.

The 2<sup>nd</sup> Defendant at paragraphs 4, 7 and 9 of its Defence admit that the train was being operated by its servants and/or agents.

It is clear that there is no allegation that the 1<sup>st</sup> Defendant was vicariously liable for the operation of the train, but only directly liable for the alleged negligent control and/or management of the train line.

I am of the view that the 1<sup>st</sup> Defendant's direct liability in relation to the control and management of the train line is a statutory one.

Section 7 of the Jamaica Railway Corporation Act states:-

“It shall be the duty of the Corporation – to manage and operate in accordance with this Act the railway.....”

Section 2 of the Act defines railway as including all “immovable property owned or used by the Corporation for or in connection with the public carriage of passengers and goods by road, rail or inland waterway .....

This would include the rail line.

Section 67 of Jamaica Railway Corporation Act reads as follows:-

“No suit against the Corporation or any servant of the Corporation for any act done in pursuance or execution or intended execution of any law or of any public duty or authority or in respect of any alleged neglect or default in the execution of such law, duty or authority, shall lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of damage or injury, within twelve months next after the ceasing thereof.....”

Mr. Williams submitted that where the Railway Corporation is exercising its public duty there is a one year limitation period within which to commence suit.

He stated that the cause of action which is the subject matter of this claim arose on the 29<sup>th</sup> January 2004 but the claim was filed over three years afterwards.

Hence the action not having been commenced within 12 months the claim is statute barred.

Mr. Williams asserted that where in Section 67 it speaks of ‘within twelve months next after the ceasing thereof’ the words ceasing thereof is referable to ceasing of the act, neglect or default complained of.

He referred the court to *Millen v University Hospital of the West Indies Board of Management* Volume 44 West Indies Reports page 274 where Carberry JA proffered an interpretation of Section 2 of the Public Authorities Protection Act (before (a) was deleted by Act 9 of 1995) which reads:-

“2 – (1) Where any action, prosecution, or other proceeding, is commenced against any person for any act done in pursuance or execution, or intended execution, of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect: (a) the action,

prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within one year next after the ceasing thereof...."  
[Emphasis mine]

The words underlined are identical to those contained in Section 67 of the Jamaica Railway Corporation Act and are an aid in the interpretation of the latter Act.

In Millen's case (supra) the plaintiff attended the ante-natal clinic of the hospital. On 14<sup>th</sup> December 1973 she was fitted with a Shirodliia suture to enable her to carry the child to full term. The suture would normally be removed two weeks before expected delivery.

The plaintiff went into labour unexpectedly and was taken to hospital. Her child was born on 4<sup>th</sup> March 1974. Following her discharge, from hospital she suffered pain and discomfort.

A private doctor on examination found remains of the suture which he removed.

The plaintiff sued the hospital for negligence, by issuing a Writ on 14<sup>th</sup> April 1980. She claimed for negligence in failing to remove the suture after the birth. On appeal it was held that the doctors had not been negligent in their treatment of the plaintiff at the time of her delivery, but that the hospital had been negligent in its post-natal care of the plaintiff.

I am of the view that in Millen's case Carberry JA was dealing with a continuing act ie post natal care and had to come to a conclusion as to when it would cease under Section 2(1) of the Public Authorities Protection Act for the

time to run. He concluded that the most favourable relevant time was when the plaintiff was discharged from hospital.

Carberry JA said “continuing injury or damage has been limited to cases where there is a continuance of the original act eg in cases of subsidence as and when it occurs”.

The Claimant’s position is that Section 67 of the Jamaica Railway Corporation Act provides that if the damage or injury is a continuous one, then the time which the Claimant would be able to sue would be 12 months next after the injury or damage has ceased.

The Claimant deposed that he was discharged from the Orthopaedic clinic of the University Hospital of the West Indies on November 7, 2008, and is still undergoing treatment at the neurology clinic. Mr. Staple submitted that in the circumstances, the Claimant falls in the exception to Section 67 of the Act as there is a continuance of injury. He said that the dicta of Carberry JA in the Millen’s case suggest that continuance of injury stopped once the patient has been discharged from hospital.

Mr. Staple submitted that if one applied the dicta of Carberry JA properly and to do justice to the parties, the Claimant would say that the cut off point for him to have brought his action would be 7<sup>th</sup> November 2009 – one (1) year after he had been discharged from the orthopaedic clinic.

It is clear that Section 67 of the Railway Corporation Act sets out a period of limitation, and any period of limitation must be measured from the date the cause of action arises. Aside from the interpretation of Millen’s case applying the

natural and ordinary rules of statutory interpretation, it must follow that the caveat in the case of continuance of damage or injury relates to the cause of action rather than the injuries of the affected party.

I agree with Mr. Leiba's observation that in respect of statutes limiting cause of action and time for bringing action – the only time the state of the Claimant is relevant is whether or not it prevents him from bringing a claim eg a minor; non compos mentis, trust cases

I find that the phrase continuance of damage or injury in Section 67 of the Jamaica Railway Corporation Act speaks to a continuing breach of duty by the Jamaica Railway Corporation rather than a continuance of injury by the Claimant as a consequence of a single act itself.

The exception in Section 67 is limited to cases where there is a continuance of the original act.

In the instant case, one is not dealing with a continuous act but what may be described as a "one off" act of breach of statutory duty on the 29<sup>th</sup> January 2004.

Consequently when the suit was filed in 2007 it would be statute barred. In my opinion the case of Millen is only applicable in so far as its interpretation of those particular words in the Act are concerned. The facts and date of discharge are not relevant to the instant case.

Order in terms of paragraphs 1 and 2 of Notice of Application for Court Order dated 5<sup>th</sup> January 2009.