Judgment Book
SUPREME COURT
KINGSTON
JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN CARMEN MASON PLAINTIFF

AND L. H. McLEAN DEFENDANT

Heard: March 26, 27, 1979;
June 25; July 13, 1979

COR: THE HONOURABLE MR. JUSTICE THEOBALDS

Mr. Roy Fairclough instructed by Mr. Ronald G. Thwaites for plaintiff.

Mr. L. H. McLean for defendant.

J U D G M E N T

Theobalds, J.:

In this action the plaintiff sought to recover damages from the defendant: her claim was framed in both contract and tort. She had been injured in 1970 by a passing motor car while walking along the Washington Boulevard in the parish of Saint Andrew, in circumstances in which liability on the part of the driver of that car could not have been in dispute. I say this because other pedestrians who were injured in the very same accident had their claims for compensation settled by the insurers of the motor vehicle concerned without resort to litigation. Coincidentally, the defendant in this suit, Mr. L. H. McLean, in his capacity of attorney-at-law, engaged in private practice, represented these other injured parties and was successful in obtaining settlements of their respective claims. The relevance of this will become apparent later. Mrs. Carmen Mason, a housewife, and plaintiff in this action, consulted the defendant. This was some time in 1974 - the accident having occurred on the 5th September, 1970. She too wished to obtain compensation for her injury and loss of property from the delinquent motorist. She was actually introduced to Mr. McLean by a Miss Norma Morgan for whom Mr. McLean had already secured a satisfactory settlement from the insurance company involved. The defendant agreed to undertake the work involved in obtaining compensation for the plaintiff and the agreement

was that defendant would be paid out of whatever might be obtained by way of compensation. Subsequent to the defendant accepting the plaintiff's matter, on one of her visits to the defendant's office, the defendant advised her that her claim was now statute barred and he would have to negotiate for an out of court settlement. In due course the insurance company who had settled at least three other claims called "snap". They refused to continue to negotiate a settlement on the ground that Mrs. Mason's claim was statute barred.

It was the plaintiff's contention that failure to file a writ on her behalf before the expiration of the statutory six year period amounted to negligence on the defendant's part. Additionally, the plaintiff claimed that the relationship between herself and the defendant was also one of contract and that this contract had been breached by the defendant's failure to ensure that her action had been filed in time as this was the main lever under which negotiations on her behalf could proceed with the hope of any degree of success. The plaintiff claimed as damages the compensation to which she would have been entitled as the party from whom she had requested Mr. McLean to obtain compensation on her behalf was entirely responsible for such injury and loss as she had suffered, and had suit been filed in time it was beyond any question she would have recovered from either the negligent motorist or his insurers.

The defence as stated at paragraph (2) although contained in one sentence is best set out in extenso:

> " The defendant admits having been consulted but denies having been consulted on the matter of placing in suit the matters referred to in the plaintiff's statement of claim as alleged in paragraphs 3, 4, 5 & 6 therein and further denies that as alleged there was any agreement between the plaintiff and the defendant giving rise to any duty of care or contractual duty on the part of the defendant to the plaintiff in so far as the filing of the said suit is concerned or in so far as would place on the defendant any obligation or any duty of care either under the Common Law or under any Statute in that the plaintiff never consulted the defendant in so far as the filing of a claim or a suit is concerned but the plaintiff some time in August 1974 during consultation with the defendant requested the defendant to enter into negotiations only in so far as to recover compensation on her behalf by such negotiations for an amicable settlement and never did instruct him either

" expressley or impliedly to file suit. "

It seems a complete and fair paraphrase of this statement to say that the defendant is denying the existence of any agreement or undertaking by him to file suit on behalf of the plaintiff and without such an agreement there could be no duty of care the sine qua non of any action based on tort. Any agreement that there was had been in relation to negotiation only and the defendant had negotiated and thereby discharged his obligation.

A belated attempt by way of a closing submission to the effect that in personal injury claims, judges have a discretion to override the statutory limitation period of six years was advanced on the authority of Firman v. Ellis /1978/ 2 All E.R.851. Such a discretion now exists in England by virtue of a 1975 amendment to the Limitation Act 1939 but no similar or comparable legislation exists in Jamaica, and so it follows there could be no merit in this submission.

On the issue of strict liability it is not without significance that all the exhibits pertaining thereto were produced by the defendant. Exhibit 3 is headed "Retainer" and is a printed form which was presented by the defendant to the plaintiff and signed by her on his request. For purposes of clarity, it is copied below.

" RETAINER

I CARMEN MASON, 46 Abernothy Drive, Boulevard P.A. St. Andrew HEREBY RETAIN MR. L. H. McLEAN and/or any other Legal Practitioner he may choose to act on my behalf in the case of Motor vehicle accident 5th Sept. 1970 on the Washington Boulevard.

I agree to pay fees of a reasonable sum ..... Dollars ..... Cents ($.....) Should I fail to pay the full fees as agreed, he is entitled to retain such sums as have been paid by me for services rendered and is not OBLIGED to appear for me and is entitled to conclude that his retainer has been determined by me.

Dated the 20th day of Aug. 1974

Witness:-

Sgd. X C Mason Mrs. "

It contains such expression as:

(i) "to act on my behalf in the case of, "

(ii) "to appear for me".

In spite of this very telling evidence to the contrary, the defendant maintained that the agreement was in respect of amicable negotiation only. It went no further than that. I had no difficulty in concluding that this was not in fact so. The plaintiff's version was that she told defendant "I met an accident and I would like you to take the case for compensation for me." After several more visits to the defendant's office and being told that the matter was proceeding fairly well, the plaintiff was suddenly confronted with the news that the defendant was off the Island and on his return from America the defendant himself advised her that her claim was statute barred but that he would try to settle it out of Court.

Another exhibit produced by the defendant was a Writ of Summons filed by him on the plaintiff's behalf (Exhibit 4). This Writ is dated 16th August, 1976, and as stated therein the accident took place on the 5th day of September, 1970. Had it been filed at any time up to and including the 4th September, 1976, the plaintiff's suit would have been in time. There is a note on the Writ, however, which indicates that it was not filed until the 11th of October, 1976, some five weeks out of time. The defendant claimed that he got instructions from the plaintiff to file a writ some time in October 1976, but at no time was this ever suggested to the plaintiff. In one instance defendant swore that he filed a writ because he appreciated that "the statute of Limitation is not automatic, it is a point which has to be taken by the defendant" and at another stage, the defendant stated that "he had forgotten about the statute bar".

On the question of fees there was similar inconsistency in the defendant's version. Originally, said he, the agreement was for a reasonable sum only and this sum was to cover professional charges up to negotiation stage only. But he filed a writ and, according to him, on plaintiff's instructions, in October 1976, so to do. There was no evidence, indeed, quite the contrary, that on receiving

such instructions a fee for the filing of any writ was either charged or paid. On this issue, I accepted the plaintiff's contention that she gave no further instructions to file suit. It almost borders on the ludicrous for an attorney to say that his client "would have to advise herself of the limitation period and come in and give me further instructions to file a writ," or to aver that an agreement in any form "placed no onus on me .... to take care that any Statute of Limitation would not operate against me."

Perhaps, the coupe de grâce delivered by the defendant to his own case is his statement that he back dated the writ in an effort to assist Mrs. Mason. If nothing else, this did irreparable damage to his own credibility. This coupled with the final address of the defendant that he understood the retainer, Exhibit (3), from its express provisions to mean that he would only be required to negotiate and thereafter he would expect instructions to proceed with Court litigation by filing of suit, must surely place on the defendant a duty not only to at least advise his client that the time for filing suit was approaching but also a duty to protect her interest by filing a writ even without her express instructions so to do, for provided he acted in perfect good faith and with a single view to the interests of his client, he would not be responsible for any mistake. See Swinfer v. Lord Chelmsford (1860) 5 H & N 890 - 920.

To close on the issue of liability, it is my view, on this evidence, that there was an obligation owed by the defendant to the plaintiff both in contract and in tort. There was:

(i) a duty to carry out negotiations;

(ii) a duty to complete these negotiations before the expiration of the limitation period;

(iii) if this could not be achieved, a duty to advise the client that a writ should be filed either for the purpose of going to litigation or at least to keep alive the claim for the purpose of completing an out of court settlement;

(iv) a duty to alert his client of any factor which might affect her claim.

It would follow from this last item that even upon this defendant's interpretation of Exhibit 3, since his ability to negotiate would be undermined and limited by the passing of the statutory period, he owed a duty to advise the plaintiff that time was running out and as to the necessity to file a writ to protect her interests.

On the issue of damages, it would follow that a duty to take care, having been established, the measure of damages would be the full amount of the pecuniary loss which the client sustains as a result of this breach of such duty. This plaintiff is therefore to be compensated to the extent that she would have benefited had action been filed and pursued to a conclusion. See Kitchen v. R. A. F. Assocn. and Others [1958] 2 All E.R. 250. It seems beyond any question that had an action been brought it must have succeeded. The evidence of the defendant and of the witness Miss Norma Morgan indicate that whatever difficulties, if any, existed in relationship to proving liability against the driver of the car had been surmounted for three other claims arising from the same accident had been settled and the facts in Mrs. Mason's case were no different from these three others. There was no real issue in relation to special damages. Indeed, the amount proved amounted to more than was set out in the Statement of Claim. As there was no application to amend, the amount awarded was limited to the $409.20 set out on the Statement of Claim and to this was added an amount, $1,500.00, for general damages. Judgment was accordingly entered for the plaintiff for $1,909.20, with costs of trial to be taxed or agreed.
