

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 55/83

BEFORE: The Hon. Mr. Justice Rowe - President  
The Hon. Mr. Justice Carberry, J.A.  
The Hon. Mr. Justice White, J.A.

BETWEEN LANCE MELBOURNE PLAINTIFF/APPELLANT  
AND CHRISTINA WAN DEFENDANT/RESPONDENT

Messrs. Hugh Small and John Graham instructed by  
Myers, Fletcher & Gordon, Manton & Hart for  
Plaintiff/Appellant.

Messrs. Carl Rattray, Q.C., and John Vassell  
instructed by Dunn, Cox & Orrett for Defendant/Respondent.

May 17, 18; July 4, 1984  
February 22, 1985

ROWE, P.

The Statement of Claim in this action, served on the 24th November, 1982, disclosed that Lance Melbourne was 19 years and 9 months old when he was injured in a motor vehicle accident along the Windward Road in the parish of Kingston on November 21, 1970; that he was rendered unconscious for nine days. That thereafter he was for a time totally unable to speak or to walk. That he suffered severe left cortical contusion, resulting in gross paralysis of the right upper and lower limbs with a right foot drop. That there was severe cerebral contusion resulting in:

- (a) permanent brain damage;
- (b) liability to permanent post traumatic epilepsy;
- (c) extensive personality changes including marked and continuing tendencies to violent aggressive and anti-social behaviour;

- (d) inability to concentrate and greatly diminished attention span;
- (e) inability to obtain remunerative employment.

That he has a permanent deformity of the right arm, right hand and right leg and his speech is permanently impaired. The Statement of Claim charges that at the time of the accident one Evan Burey was driving the motor car in which the appellant was a passenger as the servant or agent of the defendant/respondent Christina Wan.

On the 1st of April, 1982, eleven years four months and nine days after the accident, the appellant filed an action alleging that on the 21st day of November, 1970 Evan Burey "negligently drove the defendant's motor car ..... along Windward Road ..... that it collided with a light-post, as a result of which, the plaintiff, a passenger in the said vehicle, suffered injury and incurred expense." The Statement of Claim filed on the appellant's behalf on 24th November, 1982 repeated the allegation of negligence on the part of the respondent's servant or agent and set out "Particulars of Negligence."

Within two weeks of the service of the Statement of Claim, a Defence was filed denying negligence (the driver was trying to avoid another car that encroached on his side of the road) and setting up as a further and alternative ground of defence that the action was barred by virtue of the Limitation of Actions Act. If this latter defence was good in law, no useful purpose would be served in litigating the merits of the case and, as a consequence, the appellant sought and obtained the Court's leave to argue as a preliminary issue the point of law raised on the defence as to the applicability of the Limitation of Actions Act to the instant case. Orr J. held that on the pleadings the Act complained of was done by the servant or agent of the defendant and the action was therefore an action of trespass on

the case and was statute barred For three days we listened to arguments of Counsel for both parties and on July 4, we dismissed the appeal, promising them to give written reasons for our decision. To this task we now turn.

Prior, to the year 1728, a number of Statutes of England were "received" and acted upon in Jamaica as if they formed part of the Statute Law of Jamaica. On April 10, 1728 an Act entitled "An Act for Granting a Revenue to His Majesty his heirs and successors for the support of the government of this Island and for reviving and perpetuating the Acts and Laws thereof" was passed by the Jamaican legislature which limited the automatic reception of the Laws and Statutes of England as part of the Law of Jamaica to "all such Laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as Laws in the Island save in so far as any such Laws or Statutes have been, or may be, repealed or amended by any Act of the Island."

The modern version of this declaration of automatic reception is to be found in section 14 of the Interpretation Act.

One such Statute of England which had been received into the Law of Jamaica was the Limitation of Actions Act of 1623, the full title of which was "An Act for the Limitation of such Actions, and for the avoiding of suits in law," 21 James I. Cap. 16. Express statutory recognition of its reception is contained in section 46 of the Limitation of Actions Act which, in dealing with the requirement of writing to enable time to be extended in actions of debt or upon the case grounded upon simple contract, declared that "the United Kingdom Statute 21 James I Cap. 16, ..... has been recognized and is now esteemed, used, accepted and received as one of the Statutes of this Island....." Other sections of the Limitation of Actions Act

reflect this acceptance and recognition: see sections 47, 49 and 53.

In 1881 the Jamaican legislature passed its own Limitation of Actions Statute. That was Law 12 of 1881 and was entitled "The Limitation of Actions (Land) Law." An earlier Statute Law 6 of 1873, the "Limitation of Actions (Crown)" was an Act for the General Quiet of subjects against all pretences of concealment whatsoever. Law 7 of 1888 amended the Limitation of Actions Law of 1881. A general revision of the Laws of Jamaica occurred in 1927 and a new Law, "The Prescription and Limitation of Actions Law" appeared as Chapter 390 with the long title, "A Law to Regulate Prescription and the Limitation of Actions with regard to Property." Part III of that Law dealt with Actions of Debt and Cases of Simple Contract. Section 52 had the marginal note (which summed up the effect of the section) which read:

"In actions of debt or upon the case grounded upon simple contract, no acknowledgement or promise by words only to be deemed evidence of a new or continuing contract, unless such acknowledgement or promise be in writing."

No reference was made in that section to the Imperial Statute of 1623. However, section 47 of the Limitation of Actions Law Cap. 395 of the Revised Laws of 1938 dealing with the same subject matter contained words expressly recognizing the Limitation Act of 1623, and these provisions and the other sections mentioned above have been repeated in all the later revisions of the Laws of Jamaica.

The present version of the Limitation of Actions Act is divided into four parts. Part I deals with limitation of actions in relation to land, Part II Crown Suits limitation, Part III with Boundaries and the fourth Part with limitations in relation to debt and contract.

Apparent on the face of the Statute, then, is the fact that the Limitation of Actions Act of Jamaica does not within its own four walls contain the detailed statutory provisions limiting the time within which actions in Tort may be brought. To find the applicable statutory provision for Jamaica in this regard one must have recourse to a Statute of the United Kingdom passed three hundred and sixty-two years ago. And it is fairly difficult to locate a copy of that Statute in any of the Libraries of Jamaica. As time continues to pass, the difficulty will increase.

Sections 3 and 7 of the English Limitation Act of 1623, 21 James I C.16 are relevant to the instant appeal and we will set them out hereunder:

"3."And be it further enacted, that all actions of trespass quare clausum fregit, all actions of trespass, detinue, action sur trover, and replevin for taking aways of goods and cattle, all actions of account, and upon the case, other than such accounts as concern that trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say)

(2) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass quare clausum fregit, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after;

(3) and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after;

(4) and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after.

"7. Provided nevertheless, and be it further enacted, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menance, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, femme covert, non compos mentis, imprisoned or beyond the seas; then that such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discoverd, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

No uniform period of limitation was prescribed for all forms of action. A distinction was drawn between "actions upon the case" on the one hand and "actions of trespass, assault, battery, wounding and imprisonment," on the other hand. In respect of actions upon the case the primary rule was that a six year period of limitation was created, whereas in assault the period was only four years. Actions upon the case was sub-divided into two groups, viz. "slander" and "other actions upon the case." For slander the limitation period was restricted to two years next after the words were spoken, as compared with six years for "other actions upon the case."

Statutes of limitations are said to be beneficial statutes and in the spirit of that philosophy the Act of 1623 made special provision enabling some persons who were under a legal disability to bring their actions outside of the limitation period but within a prescribed time after the removal of the disability. The disabilities referred to in section 7 of the 1623 Act are infancy, being a married woman, being of unsound mind, in prison or beyond the seas. However, the provisions of

section 7 are enumerative and in them are set out the several causes of action in respect of which the disabilities would have the effect of enlarging time within which to file the specified actions. Remembering that a period of two years was the limitation relevant to slander and six years for other actions upon the case, one finds the curious provision in section 7 "actions upon the case for words," and no reference to "actions upon the case" generally is contained in Section 7. This raised the unanswerable argument *expressio unius exclusio alterius*.

Why was this omission made in respect of the other actions upon the case, except slander? The reason is lost in antiquity. Could there have been some error in the printing and promulgation of the Statute? To so conclude would be to indulge in the most unhappy speculation.

Though we listened at length and were referred to several cases and learned authors as to the origin of the action for negligence and the distinction between trespass and case, in my view it is now too late to say that an action for negligence as a result of a motor vehicle accident on the public highway is not an action upon the case. All the authorities draw the distinction between trespass *vi et armis*, the direct injury, and trespass upon the case, the indirect injury. Baron Parke in delivering judgment in Sharrod v. London and North Western Railway Co. [1849] Ex. Rep. 580 (154 E.R. 1345) said at p. 585:

"Now the law is well established, on the one hand, that, whenever the injury done to the plaintiff results from the direct force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant, and be negligent not wilful, case is the only remedy against the master."

Professors Winfield and Goodhart writing in [1933] Vol. 49 of the Law Quarterly Review at p. 359 in an article "Trespass and Negligence" set out at p. 366 in a neat fashion the distinction between trespass and trespass upon the case as it stood in the middle of the 19th century. They set out inter alia four propositions which have been renumbered:

- "(a) If the injury were wilful and immediate, trespass only would lie.
- (b) If it were immediate, but not wilful, either trespass or case would lie.
- (c) If it were not immediate, but only consequential, case alone would lie.
- (d) If it were due to the negligence of the defendant's servants, case alone would lie against the defendant unless the harm followed upon, or was comprised in, his specific order to the servant, in which case trespass would lie against him; e.g. where he sits beside his servant while the latter is driving the master's gig."

The pleadings in the instant case reveal that the action was founded in negligence, so said the endorsement on the writ, so said the Statement of Claim. Mr. Small lucidly argued that an action to recover compensation for injuries caused by a collision on the highway would have been maintainable as an action in trespass vi et armis on the analogy of the several decided cases in which the master being present in his carriage was held to be responsible in trespass for the driving of his servant which caused injury to one using the highway. This argument foundered on the lack of any factual basis for its support. There was absolutely no allegation in the Statement of Claim that the respondent was in the motor car at the time of the accident or that she gave <sup>any</sup> specific instructions to the driver of the motor car. Nor apparently was it possible to make such an allegation on the evidence known to the plaintiff.



The Jamaican Courts have over the years treated actions for negligence as actions upon the case to which the six year period of limitation applies. Martins Tours Ltd., v. Senta Gilmore [1969] 11 J.L.R. proceeded on the basis that the six year limitation rule applied to a case of negligence, the issue there being whether although the writ was filed within the six year period, service outside that limit was defective and should be set aside. The Court quoted with approval a passage from the judgment of Slessor L.J., in Dawkins v. Lord Penrhyn [1938] 3 All E.R. 764 and in which there was a specific reference to the exception provisions of section 7 of the 1623 Limitation Act. Ten years after Martin's Tours v. Gilmore in giving the judgment in Muir v. Morris [1979] 28 W.I.R. 131, I said:

"On 9th March 1976 the respondent filed a writ of summons grounded in negligence alleging that the cause of action arose on March 1970. Actions on the case, (other than slander) were by the Imperial Statute 21 Jac. 1 c 16, s 3 barred after six years. This Statute is declared by s. 46 of the Limitation of Actions Act to be recognized and is now esteemed, used, accepted and received as one of the laws of this Island.' For no discernible reason the plaintiff delayed the commencement of his action until the very last day but one."

As the law now stands there is for Jamaica a rigid rule that actions for negligence must be brought within a period of six years from the time the cause of action arose and any failure so to do will render the action statute barred. Sections 3 and 7 of the 1623 Limitation Act were repealed in England by the Limitation Act, 1939, (2 & 3 Geo. 6 c. 21). A uniform limitation period of 6 years was prescribed for all actions founded on simple contract or on tort and that time could be extended, if the person against whom it was running was under a disability, to a date not exceeding one year from the date when the person ceased

to be under disability. (See sections 2 and 22 thereof.)  
 Modifications were made to the Limitations Act of 1939 in  
 England in 1954 and again in 1975 whereby new time limits were  
 imposed for personal injury cases arising out of actions for  
 negligence, nuisance or breach of duty. For these types of  
 cases the time limit for bringing actions was reduced to three  
 years with power to the Court to disregard the time limit if  
 it would be inequitable to prevent the actions from proceeding.

The Parliament of Jamaica has had previous opportunities  
 to address itself to the necessity of providing a relevant time  
 limit beyond which actions in tort ought not to be commenced in  
 Jamaica. This is demonstrated by the earlier references herein to  
 the occasions when the Limitation Act of 1882 has been amended.  
 As far as I know, it was not the fault of the appellant that  
 an action was not brought in his name within time to obtain damages  
 for his exceptionally severe injuries. No one protected him then  
 and upon his coming of age, the law as it now stands has shut  
 him out from ever raising the issue. This cannot be right. The  
 Limitation of Actions Act ought to be amended as a matter of  
 national priority to set an appropriate time limit in actions for  
 tort and especially for personal injuries and to give protection  
 to those under disability by preserving their rights until a  
 prescribed period has elapsed after the cessation of the disability.

CARBERRY J.A.

I have had the opportunity of reading in draft the judgment of Rowe P. (as he now is), setting out reasons for our dismissal of this appeal on the 4th July, 1984.

I agree with his reasons, and add a few words of my own only out of deference to the arguments that were put before us, and by way of comment on the situation revealed in this case. The accident took place on the 21st November, 1970, when the injured plaintiff, then a boy of 10 years old, was a passenger in a car, owned by the defendant Christina Wan and driven by one Evan Burey, which crashed into a utility pole along the Windward road. The Plaintiff thereby received injuries so severe that he will never recover from them for the balance of his life. The writ claiming damages for that injury was not filed until the 1st April, 1982, nearly 12 years later. No explanation was ever offered before us to explain this delay though of course the Plaintiff for some eleven years of this period was an infant, and any action on his behalf would have had to be brought by "a next friend" i.e. parent or guardian.

Rowe P., has commented on the hardship that has thus befallen the Plaintiff in having his action statute barred, possibly through no fault of his own. It is however as well to bear in mind that there are also hardships that might have befallen the defendant had the action not been statute barred. In Letang v. Cooper (1964) 2 All E.R. 929; (1965) 1 Q.B. 232, Diplock L.J., (as he then was) remarked at p. 936 C:

"The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depends on oral testimony. This mischief, the only mischief against which the section is directed, is the same in all actions in which damages are claimed in respect of personal injuries."

In this case the Defence alleged that the driver struck the utility pole in trying to avoid a car that came out suddenly onto his side of the road. There is no suggestion that the Defendant was present in the car at the time of the accident. The defence would rest entirely on the availability or otherwise of the driver, and any chance of recourse against the car alleged to have been the real cause of the accident would long ago have died. The Plaintiff also, considering his handicaps due to the injuries he received, may of course have been similarly placed. It may not be inappropriate to remember that in England the various Motor Vehicle Insurance companies have united in setting up a fund available for ex-gratia payments to persons injured in motor vehicle accidents for which no one is legally to blame.

As has been indicated by Rowe P., we in Jamaica are still affected by the English Statute of Limitations of 1623, 21 James I.C. 16. It is a statute "received" into our own Statute of Limitations: see sections 46, 47, 49 and 53. What has happened in the past is that we have from time to time re-enacted in Jamaica various Limitation of Actions statutes passed in England, dealing with real property, mercantile law et cetera, but have failed to keep up to date, and in particular to adopt legislation comparable to the English Limitation Act of 1939, or The Law Reform (Limitation of Actions & C) Act, 1954.

The consequence of this is that in 1984 the argument before us became one as to which was the appropriate form of action available to the Plaintiff, trespass or case? Could the Plaintiff bring his action as one of trespass so as to get the benefit of an extension due to disability, which applied to trespass but not to case? In construing this statute we were dealing with English law at a period in which the forms of action themselves had not fully developed, and which antedated by several

hundred years the emergence of negligence as an independent tort. Professor Maitland in the latter part of the nineteenth century, even after the passage of the Common Law Procedure Act, remarked "the forms of action we have buried but they still rule us from their graves." In construing the Act of 1623 this was alas too true, and it was unavoidable. In my opinion the Plaintiff's action in this case was, on the authorities, correctly construed as an action on the case. To take a second quotation from the Judgment of Baron Parke in Sharrod v. London and North Western Railway Co., (1849) 4 Exch 580; (154 E.R. 1345) at p. 586:<sup>2</sup>

"Our opinion is, that, in all cases where a master gives the direction and control over a carriage or animal, or chattel, to another rational agent, the master is only responsible in an action on the case, for want of skill or care of the agent - no more; consequently, this action (of trespass) cannot be supported." (emphasis supplied)

Baron Parke had remarked earlier:

"Trespass will not lie against him unless the act was done by his command that is, unless either the particular act which constitutes the trespass is ordered to be done, by the principal, or some act which comprises it; or some act which leads by a physical necessity to the act complained of. ...."

There was of course no suggestion of this in the Statement of Claim, nor was the Plaintiff in any position to make such an allegation.

One further word: Rowe P., in his judgment has remarked of the 1623 Act that "No uniform period of limitation was prescribed for all forms of action." Our own Law Reform Committee, as long ago as 1966 under the chairmanship of the then Attorney General and Minister of Justice, the late V.B. Grant Q.C., devoted a considerable period of time to consideration of our own

Limitation of Actions Act, and the English Act of 1939, and went so far as to submit recommendations for the enactment of a new statute of limitations based on the 1939 Act. That no further action has been taken on it since then is a matter for some regret. It might be noted that the amendment to the 1939 Act, made in England in 1954, to cut down the period of limitation for bringing personal injury actions from six years to three years, has led on occasion to attempts to revive the forms of action, and Plaintiffs in negligence actions, barred by the three year period, have attempted to present their case as a case of trespass, to which the six year period still applied. The courts have been faced with a problem similar to that raised in our instant case, but have found it possible to so interpret the new wording of the Limitation of Actions Act as to defeat the attempt to evade it: see Kruber v. Crzesiak (1963) V.L.R. 621 (an Australian case on a similar statute) followed by the Court of Appeal in England in Letang v. Cooper (1964) 2 All E.R. 929; (1965) 1 Q.B. 232: a case in which a lady sunbathing in Cornwall on a piece of grass where cars parked, was runover by a driver parking his Jaguar motor car who did not expect or see her. She brought her action more than three years after the accident, and argued that she was suing in trespass to which a six year limitation applied. The attempt to evade the limitation period did not succeed. The court there was able to avoid the invitation to go back to the old forms of action, and Lord Denning M.R. found himself able to say "The truth is that the distinction between trespass and case is obsolete. We have a different division altogether....."

For the reasons given by Rowe P., and above, the Courts in Jamaica are not able to ignore that distinction in these cases, and the need to revise our Statute of Limitations and to bring it into the twentieth century remains a current problem for our legislature, though whether we update it to 1939 or to 1954 must be a matter for their anxious consideration.

WHITE, J.A.:

I am in total agreement with the reasoning expressed by both Rowe, P. and Carberry, J.A. in this case. I share their sentiments. It is indeed lamentable that in this day and age the law should be in this sorry state. And I join in expressing the hope that Parliament will speedily amend the law.