AVM CS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 109/99

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**CLARENCE RICKETTS**	**PLAINTIFF/ APPELLANT**
A N D	**TROPIGAS S.A. LTD.**	**1ST DEFENDANT/ RESPONDENT**
A N D	**IZETTE ROBINSON**	**2ND DEFENDANT**
A N D	**UNITED DIARY FARMERS LTD. (In receivership)**	**3RD DEFENDANT**
A N D	**HARTMAN HARRISON**	**4TH DEFENDANT**

Dennis Morrison, Q.C. instructed by Dunn, Cox, Orrett & Ashenheim for Appellant

Mrs. Michelle Champagnie instructed by Myers Fletcher & Gordon for first Defendant/Respondent

3rd, 4th, April and 31st July , 2000

FORTE, P.

I have read in draft the judgment of Langrin, JA and agree with his reasoning and conclusion therein. There is nothing further I wish to add.

LANGRIN, J.A.

This is an appeal from a judgment of Mrs. Justice Harris, J. dismissing the appellant's action against the first respondent on the basis that it is barred by the operation of the rules relating to cause of action estoppel.

BACKGROUND FACTS:

On June 26, 1987 a motor vehicle accident occurred, which involved Clarence Ricketts and Izette Robinson ,the driver of the first respondent, Tropigas S.A. Ltd. A writ of summons dated 31st October, 1988 was issued by the respondent claiming damages in relation to their vehicle. A defence was filed on the plaintiff's behalf and there was also a counterclaim setting out particulars of special damage tc the extent of $80,170 in relation to the motor vehicle he was operating at the time of the incident. So in that action the plaintiff was really a defendant who counter - claimed that the collision was caused by the negligence of the driver of the plaintiff's (Tropigas) motor vehicle. Final judgment in this action was delivered on December 11, 1991. On November 13, 1991 the action was the subject of a judgment by consent whereby the appellant was adjudged to be 35% liable, the 1st respondent 50% and the 3rd respondent 15%. Consent judgment stated inter alia: "hat there be judgment on the counter – claim for the first defendant against the plaintiff in the sum of $46,085.00. Clarence Ricketts therefore received in the judgment approximately fifty percent of the sum set out in his counter

- claim. It is to be noted that Tropigas received as against Clarence Ricketts the sum of $13,945.96 for their claim.

However, in a writ of summons dated June 24, 1993 and days before the expiration of the limitation period Clarence Ricketts claimed for personal injuries suffered as a result of the same motor vehicle accident. The endorsement on the writ noted that the plaintiff's claim was for damages for negligence arising out of the motor vehicle accident... as a result of which the plaintiff suffered personal injuries, loss and damage and incurred expenses. Therefore in the counterclaim in the first action as well as in the subsequent action negligence was pleaded.

The first respondent, Tropigas filed an application to strike out this action on the following grounds:

(1) That substantively the same cause of action was previously litigated and the issue raised in the suit currently before the Court could have been raised in the previous suit in respect of which a Final Judgment by consent was entered on November 13, 1991;

(2) A consent judgment was entered in that suit which included an award in favour of Clarence Ricketts on his counterclaim against Tropigas S.A. Ltd. and therefore Clarence Ricketts is estopped from making a further claim arising out of the same motor vehicle accident which was the subject matter of the previous suit.

This application was heard and determined by Mrs. Justice Harris, J. who in a well reasoned judgment came to the conclusion that Ricketts

should not be allowed to pursue this subsequent action and therefore the action was struck out.

The grounds of appeal are as stated as follows:

(1) The learned judge erred in law in holding that the plaintiff/appellant was estopped from bringing the instant action due to a previous consent judgment entered pursuant to Suit No. C.L.T. 129 of 1988.

(2) The learned judge erred in law in failing to follow the rule in ***Brunsden v Humphrey*** (1881-5) All E.R Rep. 357, in that the learned judge failed to find that two distinct and separate causes of action exist in the instant matter and as such the consent judgment of Suit No. C.L.T. 129 of 1988 could not have merged with the cause of action in the instant case.

(3) The learned judge exercised her discretion upon wrong principles in refusing to find special circumstances, thus exempting the instant action from the general rule in ***Henderson v Henderson*** (1843-60 All E.R. Rep. 378.

(4) The learned judge exercised her discretion upon wrong principles in that the court's inherent jurisdiction to strike out actions should only be exercised in plain and obvious cases and should not be exercised when the pleadings disclose a serious cause of action and/or important question of law as was disclosed in the instant case".

Mr. Dennis Morrison, Q. C. on behalf of the appellant argued inter alia that the learned judge erred in law in holding that the plaintiff appellant was estopped from bringing the instant action due to a previous consent judgment entered in the first suit. He referred to the

case of ***Henderson v Henderson*** [1843-60] All E.R Rep. 378 which states the principle in relation to the rule relating to cause of action estoppel and the often quoted dictum of Wigram V.C. at page 381 (I) which is set out as follows:

> "...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court required the parties to that litigation to bring forward their whole case, and will not, (except under special circumstances), permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of **res judicata** applies, except in special cases, not only to points upon which the court actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

It was observed that the principle as laid down in ***Henderson's*** case excepted cases of special circumstances.

Great reliance was also placed on the case of ***Brunsden v Humphrey*** [1881-5] All E.R. Rep. 357. In this case the plaintiff sued to recover damages in the County Court for injury to his cab in a collision caused by the negligence of the defendant's servants. The plaintiff obtained judgment and an award for damages. Subsequently, the

plaintiff launched another suit in the High Court to recover damages for personal injury which he had suffered in the same collision. The majority (Sir Baliol Brett, M.R; and Bowen, L.J (Lord Coleridge, C.J. disstenting on the facts)] held that: "the damage to the cab and the personal injury suffered by the plaintiff constituted two distinct causes of action, and, therefore, the judgment recovered in the County Court was no bar to the subsequent action in the High Court". Sir Baliol Brett M.R. nc:ted at p. 360:

> "Therefore the question is whether the causes of action are the same, because the law is that a person cannot in different actions recover successive amounts of damages for the same cause of action, but he must when he first brings the action recover all the damages to which he is entitled in respect of that cause of action".

He further stated:

> "When this rule is applied to damages which are or must be known to the plaintiff at the time of the first action, I have always thought it a good rule; but when applied to cases where the damage is not known at the time of the first action, but develops itself afterwards, and when the claim is made bonafide for ulterior damages, and could not in fact have been made at the time of the first action because the further damage was not known, I have always been of opinion that it is a harsh rule..."

Bowen, L.J. at page 361 addressed the issue in this way:

> "It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, How far is the cause which

> is being litigated afresh the same cause in substance with that which has been the subject of the previous suit?"

In considering whether in the case of an accident caused by negligent driving in which both the goods and the person of the plaintiff are injured there is one cause of action only, or two causes of action which are severable and distinct, Bowen, L.J noted at page 363:

> "Two separate kinds of injury were in fact inflicted and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff was not actionable at all for it was not a wrongful act at all, till a wrong arose out of the damage which it caused".

Later he stated:

> "Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action".

Lord Coleridge, C.J. in his dissenting judgment noted at pg. 364:

> "...that the injury done to the plaintiff is injury done to him, at one and the same moment, by one and the same act, in respect of different rights – i.e. his person and his goods – I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers, which contain his leg, and his coatsleeve, which contains his arms, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it".

It is of significance that ***Henderson's*** case was not cited in ***Brunsden.***

Counsel for the appellant also made reference to the case of ***Talbot v Berkshire County Council*** [1993] 4 All E.R. 9. In this case Talbot and his passenger were both injured in a motor vehicle accident, when his car ran into a tree as he drove through water lying on the road. A Third Party notice was issued by Talbot's solicitors to the defendant, Highway Authority alleging nuisance on the highway and negligence. This notice was only related to a claim for contribution as between joint tortteasors and there was no claim for personal injuries. The solicitor, however, did not inform the plaintiff accordingly. The passengers, meanwhile in an action against ***Talbot*** also joined the Highway Authority and was successful. Subsequently, ***Talbot*** issued a writ against the Authority claiming damages for personal injuries. The issue before the Court was whether the plaintiff was barred by the doctrine **res judicata** from bringing the action or whether there were special circumstances which enabled the Court to permit the action to be pursued. It was held that the plaintiff's claim was barred by cause of action estoppel, and there were no special circumstances working against the application of the rule. In ***Talbot's*** case the injuries were serious. The Court in applying ***Henderson*** observed at pg. 13:

> "The rule is thus in two parts. The first relates to those points which were actually decided by the Court; this is **res judicata** in the strict sense.

> Secondly, those which might have been brought forward at the time, but were not.
>
> The second is not a true case of **res judicata** but rather is founded upon the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the Court will stay or strike out the subsequent action as an abuse of process".

Stuart – Smith L.J. observed that ***Henderson*** appears to have escaped attention in the field of personal litigation. In reference to ***Hunsden*** he noted that had ***Henderson*** been cited the decision might have been different. The learned judge further stated at page 15:

> "In my judgment there is no reason why the rule in ***Henderson v Henderson*** should not apply in personal injury actions. Indeed there is every reason why it should. It is a salutary rule. It avoids unnecessary proceedings involving expense to the parties and waste of court time which could be available to others; it prevents stale claims being brought long after the event, which is the bane of this type of litigation; it enables the defendant to know the extent of his potential liability in respect of any one event; this is important for insurance companies who have to make provision for claims and it may also affect their conduct of negotiations, their defence and any question of appeal".

On the issue of special circumstances the learned judge stated at page 16:

> "The mere fact that a party is precluded by the rule from advancing a claim will inevitably involve some injustice to him, if it is or may be a good claim; but that cannot of itself amount to a special

> circumstance, since otherwise the rule would never have any application. The court has to consider why the claim was not brought in the earlier proceedings. The plaintiff may not have known of the claim at that time (see for example ***Lawlor v Gray*** [1984] 3 All E.R. 345, where the claim for interest by the revenue which the plaintiff sought to pass on to the defendant had not been made at the time of earlier proceedings); or there may have been some agreement between the parties that the claim should be held in abeyance to abide the outcome of the first proceedings; or some representation may have been made to the plaintiff upon which he has relied, so that he did not bring the claim earlier. These would be examples of special circumstances, though of course they are not intended to be an exhaustive list".

Mann L.J. in his judgment observed that ***Talbot's*** solicitors could have attached a claim for personal injury to the Third Party notice but he did not do so and was opposed by a cause of action estoppel. At page 18 he noted:

> "It is contrary to public policy and abusive of process that matters which could have been litigated in earlier proceedings should thereafter be allowed to proceed... The rule is a salutary one. It prevents prolixity in litigation and encourages the earliest resolution of disputes".

Mr. Morrison, Q.C. was careful to point out to this Court that notwithstanding the fact that ***Brunsden's*** case has been criticized it has never been overruled.

Reference was made to the case of ***The Indian Endurance Republic of India v India Steamship Co. Ltd*** [1993] 1All E.R. 998. This case involved a claim for damage and loss of cargo. An action was brought in India for short delivery but before judgment was given an action was brought in England in respect of the whole loss. Lord Goff in his judgment albeit obiter stated at p. 1006:

> "In these circumstances, the case is very different from a simple action in negligence, as for example a running down action, where damage is of the essence of the claim in the sense that damage must be proved to establish the cause of action. In such a case, it is theoretically possible to segregate different causes of action by refererice to different heads of damage".

After noting the case of ***Brunsden v Humphrey*** (supra) Lord Goff continued:

> "The decision has not been without its critics who prefer the dissenting judgment of Lord Coleridge C.J., but so narrow an approach is not in any event possible in a contractual context, where proof of damage is not necessary to establish the cause of action".

In ***Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd. & Anr*** [1975] A.C. 581 the Court observed that there is a wider sense in which the doctrine of **res judicata** may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could

and therefore should have been litigated in earlier proceedings. The Court also noted that :

> "...nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule". (page 590)

Attention was also drawn to the case of ***Brisbane City Council and Another v Attorney General for Queensland*** [1978] 3 All E.R. 30. Lord Wilberforce made reference to the whole issue of abuse of process then stated at page 36:

> "This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is danger of a party being shut out from bringing forward a genuine subject of litigation".

Learned Queen's Counsel for the appellant, in the alternative submitted that there are special circumstances in the instant case which operate to make the doctrine inapplicable. These are as follows:

> "1. The very serious personal injuries sustained by the appellant, resulting in a disability of at least 60% of the whole person.
>
> 2. The fact that the 1st Respondent consented to a judgment acknowledging that it was 50% liable for the collision in which the Appellant sustained his injuries.
>
> 3. The fact that the Appellant was counter claiming Defendant in the previous proceedings.

4. The fact that the second action was fi ed within the limitation period.

5. The fact there was no prejudice alleged or proved by the 1st Respondent arising from the failure of the Appellant to bring forward his claim for personal injuries in the first action."

Mrs. Michelle Champagnie, learned Counsel for the first respondent relied on the case of ***Letang v Cooper*** [1965] 1Q.B 232. In this case the plaintiff was injured when the defendant drove his car over her legs while she was sunbathing on a piece of grass which was used as a car park. She claimed damages for loss and injury caused to her by the defendant's negligence in driving his car and/or the commission by him of a trespass to the person to the plaintiff. The Court held, inter alia, that the plaintiff's cause of action was an action for negligence and as such was statute barred. Diplock L.J. in his judgment at p. 242 defined a cause of action:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

It is clear she submitted that in light of the above case the distinction between the causes of action which is being urged on the Court is in this case not a valid distinction. The plaintiff in this case has only one cause of action which is negligence and that was the cause of

action in the first suit which was now again being raised in the instant appeal.

Reliance was also placed on ***Wain v F. Sherwood & Sons Transport Ltd.*** (The Times Law Report July 16,1998, page 440). The facts are quite similar to the instant appeal. The plaintiff was involved in a road traffic accident. An action was brought to recover for the damage to the vehicle but there was no claim for personal injuries. The action was successful and the plaintiff recovered an award of £450. However, subsequently, a second suit was brought to recover for the plaintiff's back injury.

The defense argued that the action was barred by cause of action estoppel. They brought a preliminary hearing to have the matter struck out for abuse of process. The judgment was delivered by Lord Justice Chadwick who said:

> "The rule in ***Henderson*** prevented parties re-opening a cause of action previously litigated on a different issue which could have been raised before unless there were special circumstances which permitted an exception to the rule".(page 441).

Reference was made to the ***Talbot*** case and the special circumstances set out in that case. Chadwick L.J. then observed that the plaintiff knew he was suffering from back pain which had been attributed to the earlier

accident at the time of the hearing of the first action, and the failure to amend that action to include personal injury was due to adviser error. The Court rejected the argument that the adviser's error amounted to a special circumstance and noted also that "... the potential injustice to the plaintiff who had no remedy for his injuries did not outweigh the public interest on which the rule in **Henderson** was based".

In the case of ***Greenhalgh v Mallard*** [1947] 2All ER 255, the English Court of Appeal refused to allow a claim to proceed where it was based on the same transaction and relied on the same facts in a previous case between the parties.

In the instant appeal no explanation has been given as to why the claim was not brought in the earlier proceedings. Examples of what would constitute special circumstances were given by Stuart-Smith L.J. in the ***Tabot*** case (supra) and these were stated as follows:

(a) the plaintiff may not have known of the claim at that time;

(b) there may have been some agreement between the parties that the claim should be held in abeyance to abide the outcome of the first proceedings; and

(c) some representation may have been made to the plaintiff upon which he has relied, so that he did not bring the claim earlier.

There is nothing in the instant appeal which comes close to any of the examples given. The fact that the plaintiff's personal injuries are serious and/or severe is not a special circumstance.

A judgment by consent or default is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. The authority for that proposition is: ***Re South American & Mexican Co. Exp. Bank of England*** [1895] 1 Ch. 37 where Vaughn Williams J. at p. 45 had this to say:

> "It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the state that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end'.

In my judgment the rule in ***Henderson v Henderson*** (supra) should be applied in personal injury actions. The fact that negligence is the only cause of action in this case, it would be a dangerous precedent to split actions that could be heard together thus wasting judicial time. All claims which can be heard together should be so done in order to avoid multiplicity of proceedings. Nothing new, which could properly be

regarded as special circumstances has emerged since the first proceedings.

The estoppel does not arise where there are exceptional circumstances but for reasons previously stated there are no exceptional circumstances which have emerged in this appeal.

For the reasons given, I would dismiss the appeal with costs to the respondents to be agreed or taxed.

PANTON, J.A:

I have read the draft of the judgment written by my learned brother Langrin, J.A. I agree with the reasoning therein, and the conclusion that the appeal should be dismissed. I wish to add that I find the judgment of Lord Justice Chadwick in ***Wain v F. Sherwood and Sons Transport Ltd.*** (The Times Law Report, July 16, 1998, at page 441) very persuasive.