Sup. Court — Reading — whether each or any of statement of claim is improper, frivolous, vexatious and/or an abuse of process of Court — allegation that defendant convicted of careless driving — motion to strike out — whether material — whether evidence Sec. 168(1) Civil Procedure Code — whether delay affects matters.

MOTION TO STRIKE OUT SECTION OF ST. OF CLAIM granted

Cases referred to (P1) ✓comp

Civil Procedure

Evidence

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S. 268 of 1990

BETWEEN	FLORENCE SAMUELS	PLAINTIFF
A N D	MICHAEL DAVIS	RESPONDENT

SUIT NO. C.L. W270 of 1990

BETWEEN	PETER WILLIAMS JNR. (An infant by his father and next friend PETER WILLIAMS SNR.)	PLAINTIFF
A N D	MICHAEL DAVIS	DEFENDANT

SUIT NO. C.L. W 271 of 1990

BETWEEN	PETER WILLIAMS	PLAINTIFF
A N D	MICHAEL DAVIS	DEFENDANT

SUIT NO. C.L. W 272 of 1990

BETWEEN	SHEREEN WILLIAMS	PLAINTIFF
A N D	MICHAEL DAVIS	DEFENDANT

Christopher Samuda instructed by Piper & Samuda for the Defendant Applicant.

Clarke Cousins & André Earl instructed by Messrs. Rattray, Patterson & Rattray for the Plaintiffs/Respondents.

Heard on the 11th day of March 1993

Delivered on the 2nd day of June 1993

COURTENAY ORR J.

These actions sound in negligence and arise out of a motor vehicle accident which occurred on the 26th day of March, 1988.

This is a motion by the defendant to strike out a section of the plaintiffs' statements of claim on the ground that it is improper, frivolous, vexatious and/or an abuse of the process of the Court.

The offending passage which is identical in all the statements of claim appears as a part of paragraph 4 in the statements of claim.

The words complained of read as follows:

> "for which he was prosecuted for careless driving convicted and fined $200.00 or 30 days at hard labour in the Santa Cruz Traffic Court on the 8th day of April, 1988".

During the course of Mr. Clarke Cousins' submissions, it became clear that it would not be possible for him to complete them that day and it would probably be some while before the matter would be set down for completion because both Counsel would be unavailable the next day a Friday, and the Court would be engaged in criminal work during the first six and a half weeks of the Midsummer Term, and it was unlikely that it could be heard before the end of the Hilary Term. At the Court's suggestion it was agreed that to alleviate the need to have another date set by the Registrar and to speed up the completion of the matter, Mr Cousins should complete his submissions in writing.

I received Mr. Cousins' submissions in the week ending 28th May 1993, while in the Saint James Circuit Court.

This judgment fulfills my promise to give judgment as soon as possible after receipt of the submissions.

Mr. Samuda, for the applicant, submitted that the ratio decidendi in the case of Hollington vs Hawthorn (1943) 2 All E.R. 35 made the fact that the defendant had been convicted inadmissible in evidence to prove that the defendant was negligent. The pleading was therefore irrelevant and improper, frivolous, vexatious and an abuse of the process of the Court.

He pointed out that no statute had been passed in Jamaica to contravene the principle laid down in the case, which he submitted is still good law for the Courts of Jamaica; English cases decided since the Civil Evidence Act of 1968 must be looked at in the light of that statute.

Submissions were made for the Respondent by both Mr. Clarke Cousins and Mr. Andre Earl. Mr. Earl referred the Court to section 18 of the Evidence Act, and submitted that, that section made the fact of the defendant's conviction admissible.

It reads as follows:

> "A witness in any cause may be QUESTIONED as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, IF HE EITHER DENIES THE FACT, OR REFUSES TO ANSWER, IT SHALL BE LAWFUL FOR THE OPPOSITE PARTY TO PROVE SUCH CONVICTION; and a certificate containing the substance and the effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the Clerk of the Court or other Officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such Clerk or officer shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same".

(emphasis mine)

The short answer to this argument is that section 18 of the Evidence Act deals with cross-examination as to credit, on the matter of previous convictions and permits the proof of a conviction if it is not admitted by the witness so cross-examined. It does not provide that the conviction is evidence of the facts on which it was based.

It means therefore that the proof of any conviction of the defendant on a charge arising out of the accident, the subject matter of this suit, has to await the entry of the defendant into the witness box, an event which may or may not take place depending on the strength of the evidence which the plaintiff produces.

The section therefore does not anticipate such evidence being led in examination-in-chief, as part of the plaintiff's case. How then may he seek to plead the conviction?

Mr. Karl's second argument turned on the interpretation of section 238 of the Civil Procedure Code, which said he, is the authority for the motion. He submitted that two exercises were necessary: an examination of the meaning of the words of the section, and a consideration of the principles which should guide the Court in dealing with this motion.

Section 238 reads as follows:

> "The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

Mr. Marl referred the Court to the treatise PLEADINGS; PRINCIPLES AND PRACTICE BY JACOB AND [illegible]. He quoted from page 215 of that work to show that the jurisdiction under this rule is discretionary and should be exercised having regard to all the circumstances of the offending pleading, a reasonable latitude should be given. He adopted the view of the learned authors that this procedure should only be used when it can clearly be seen that:

> "(a) a claim or answer is on the face of it obviously unsustainable.
>
> (b) the case is clear beyond doubt
>
> (c) the case is unarguable".

The other plinth of his submissions on section 238 related to the need for the application to be made promptly. I shall deal with this later.

I now turn to the written submissions by the respondents' attorneys. The Court wishes to pay tribute to the care with which the points have been researched and presented in them. The pith of these submissions is contained in paragraph 2 where it is suggested that:

> "The grant or refusal of the Order sought depends on whether the rule in Newtnorn (1943) 2 All E.R. 35 continues to form part of the rules of evidence in Jamaica in civil cases".

I find the use of the word "continues" strange in view of counsel's later statement that they have been unable to find a single reported decision of the Supreme Court or the Court of Appeal in which that case was followed.

Counsel for the respondents list an impressive array of criticisms of the rule for example, the Fifteenth Report of the Law Reform Committee of England (Cmnd. 3331) on The Law of Evidence in Civil Cases, declared that the rule "offends one's sense of justice"; in Jorgenson v New Zealand (Auckland) 41 (1968) N.Z. L.R. 961 the New Zealand Court of Appeal declined to follow it; in McIlkenny v Chief Constable (1980) 2 All E.R. 227 Lord Denning, who when at the bar was counsel for Mr Newthorn, stated that it was wrongly decided. This was echoed by Lord Diplock when McIlkenny's case reached the House of Lords as Hunter v Chief Constable of West Midlands (1981) 3 All E.R. 727.

In addition they offered compelling examples of how it works injustice. I entirely agree that Hollington's case (supra) is a bad decision, but I hold that it is the law of Jamaica. Nor is that an end of the matter.

The respondents, to be successful, must cross an even more fundamental hurdle namely Section 158 (1) of the Civil Procedure Code. It states in part:

> "Every pleading shall contain, and contain only, a statement, in a summary form, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved ..."

(my emphasis)

Even if evidence of the conviction of the defendant were admissible in the plaintiffs' evidence in chief, it would not be proper to plead it.

The draftsman of the English Civil Evidence Act 1968, recognised this difficulty and the act provides that criminal convictions are admissible in evidence in civil proceeding to the extent that such proof shifts the burden of proof to the convicted party. It goes further and requires the party seeking to prove such a conviction to plead it, even though it is a matter of evidence.

Hence even if I were to hold that Bollington vs Newthorne does not apply in Jamaica, the offending passage could still not be pleaded because it is merely a matter of evidence.

What must be borne in mind is the pivotal role of pleadings in civil litigation, and the essential dichotomy between evidence and pleadings which exists in the system of pleadings as practiced here and in England.

Sir Jack Jacob wrote:

> "Pleadings do not only define the issues between the parties for the final decision of the Court at the trial; they manifest and exert their importance throughout the whole process of the litigation ..... They limit the ambit and range of the discovery of documents and the interrogatories which may be ordered ..... They act as a measure for comparing the EVIDENCE of a party WITH THE CASE he HAS PLEADED. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial...."

(emphasis mine)

(1960) CURRENT LEGAL PROBLEMS pp. 179 - 175 QUOTED IN JACOB & GOLDREIN supra p. 11.

The function of evidence is to prove or disprove those facts which are in issue between the parties. On the other hand, unlike the role of evidence, the function of pleadings is to identify or define the issues between the parties.

Because of this Jacob and Goldrein point out at page 49 of the work cited:

> "Thus evidence has generally no place in the system of pleadings. A paragraph, therefore which amounts to pleading evidence, ought to be struck out".

The learned authors then quote a dictum of Lord Denman C.J. in support of that statement.

> "It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation."

Williams vs Wilcox (1838) 8 Ad. & E 314 at 331.

The authors conclude.

> "All facts which tend to prove the fact in issue will be relevant at the trial, but they are not material facts for pleading purposes".

I hold therefore that the pleading is frivolous in that it is irrelevant and immaterial.

I also regard it as embarrassing because it states immaterial matter and seeks to raise an irrelevant issue, and is quite unnecessary and irrelevant.

The only question that remains is whether the Court should grant this application in view of the delay in bringing it. Mr. Earl rightly pointed out that such applications should be made promptly. At the date of hearing pleadings had closed; the usual letter to the Registrar requesting that the matter be set down on the cause list for trial had been written. He referred to Section 272 F of the Civil Procedure Code which enjoins that all interlocutory applications should be made on the summons for directions. The order for directions was made on the 14th day of December 1992.

But the Court has a discretion to grant the motion. I consider it extremely important for the development of our jurisprudence that proper pleading be practiced. In Jacob and Goldrein (supra) at page 217, the learned authors state that exceptionally, an application such as this may be made after pleadings have closed. I accept this as a correct statement of the law. I also regard the circumstances of this case as exceptional in view of the nature of the offending pleading.

The motion is therefore granted. Costs to the applicant to be taxed if not agreed.

[illegible]

(1) [illegible]

(2) [illegible] (1949) NZLR 161

(3) [illegible] (19[illegible]) [illegible] 7

(4) [illegible] (1981) 3 All ER [illegible]

(5) Williams v. Wilcox (1838) 8 [illegible] 314.