IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

CL 1995/T188

BETWEEN	**MERVIS TAYLOR**	**CLAIMANT**
AND	**OWEN LOWE**	**DEFENDANT**
AND	**CONSTABLE PAUL O'GILVIE**	**THIRD PARTY**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**THIRD PARTY**

IN CHAMBERS

Mr. Christopher Dunkley and Mr. Keith Asher instructed by Cowan Dunkley Cowan for the defendant

Miss Carlene Larmond for the third parties

April 25, May 2, and May 9, 2006

APPLICATION TO STRIKE OUT THIRD PARTY NOTICE, PUBLIC AUTHORITIES PROTECTION ACT, SECTION 3(1) OF THE LAW REFORM (TORT-FEASORS) ACT

SYKES J

1. This is an application by Constable Paul O'Gilvie and the Attorney General of Jamaica to have the third party action against them struck out on the basis that it is statute barred. I shall state briefly how the claim arose. The claimant in his writ summons dated September 15, 1995, and statement of claim file October 4, 1995, alleged that he was hit by a motor vehicle driven by Mr. Owen Lowe, the defendant. The accident is alleged to have occurred on June 25, 1992. In his defence filed December 5, 1995, Mr. Lowe denied liability and attributed the cause of the accident to Constable O'Gilvie. It is not necessary to give more details than this. The claimant in this case did not sue the constable or the Attorney General. At the time the action was filed, the then limitation period under the Public Authorities Protection Act was one year. The effect of filing the suit at the time when it was done meant that the constable and the Attorney General had the benefit of the

limitation period. This made them immune from suit by the claimant but not immune from third party proceedings. As I shall demonstrate, the limitation period for third party actions begins from the date of judgment against the defendant. It is the fact of judgment that gives the defendant a cause of action against third parties.

2. The defendant decided to initiate third party proceedings against Constable O'Gilvie and the Attorney General. In that action the defendant is claiming a contribution or indemnity from the third parties in the event that he is found liable.

3. Having regard to how the matter has developed it is only necessary to say that the Attorney General is not challenging the order made adding him as a third party. The sole question is whether third party action is statute barred.

Miss Larmond's submissions

4. Miss Larmond submitted that the third party claim is statute barred because it was not initiated within twelve months of the date of the alleged act of negligence that gave rise to the claimant's cause of action. The then extant provision of the Public Authorities Protection Act (section 2(1)(a)) so far as material reads:

> *Where an action, prosecution, or other proceedings, is commenced against any person...*
> *(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...*

5. This provision is similar in effect to the limitation statutes discussed in the various cases to which I shall refer in this judgment. Miss Larmond also referred to section 3 (1) (c) of the Law Reform (Tort-Feasors) Act, 1946. This provision is identical in terms and effect as section 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act of 1935 enacted in England, save that the Jamaican legislation uses the word "such" instead of "that" in the expression "that damage" and that the words "whether as joint tort-feasor or otherwise" are bracketed. Counsel referred to the case of ***Lemuel Gordon (Administrator Estate Desmond Gordon, dec'd) v The Attorney General of Jamaica*** SCCA NO. 96/94 (delivered December 20, 1995) which decided that the amendment to the Public Authorities Protection Act that removed the one year limitation period did not operate retrospectively. Miss Larmond made this submission to prevent the defendant from trying to outflank her primary submission.

6. The primary case on the limitation point on which she relied was ***Merlihan v. A. C. Pope, Limited,, and J. W. Hibbert Pagnello (Third Party).***[1946] K.B. 166. In that

case, Birkett J. held that defendant could not claim a contribution from the third party because such a contribution was statute barred. The claimant in that case had not sued the third party and indeed could not sue because the claim was indeed statute barred. The accident occurred on March 15, 1943, and the suit commenced against the defendant on May 17, 1944. The defendant did not have the benefit of the protection of the relevant limitation statute. On May 15, 1945, the defendant had obtained an order joining the third party (Pagnello). At the trial the judge found that both the defendant and the third party were negligent and both caused the injury to the claimant. It was this finding that led to the defendant to pursue a contribution from Pagnello. The defendant relied on section 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) 1935 and Pagnello relied on section 21 (1) of the Limitation Act, 1939. Section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act of 1935 states

Where damage is suffered by any person as a result of a tort ... - (c) any tort-feasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

Section 21 (1) of the Limitations of Actions, 1939 states

No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued

7. His Lordship also held that the date of the cause action for the purposes of claiming a contribution arose on the date the injury was done to the claimant with the consequence being that the defendant's claim against the third party for contribution was statute barred. It is therefore clear that the major premise up on which Birkett J. rested his conclusion was that the date of the accident was the date from which time began to run when considering a third party contribution.

8. This conclusion of Birkett J. came up for examination by Cassels J. in ***Hordern-Richmond Ltd v Duncan*** [1947] K.B. 545. The implication of Birkett J.'s decision was not lost on counsel for the claimants in ***Hordern-Richmond***. The facts were that an accident occurred involving the claimants vehicle. It had struck an army lorry driven by the defendant. Four soldiers who were in the lorry were injured. No proceedings were

commenced by any of the soldiers or the defendant. The claimants, fearing that if they were sued and held liable they would not be able to be indemnified by or able to seek a contribution from the defendant, sought a declaration that if they were found liable they would be able to be indemnified or seek a contribution from the defendant under section 6 (1)(c) of the Law Reform (Married Women and Tortfeasors) Act of 1935. The claimants were trying to safe guard their position because of the decision of Birkett J. Learned King's Counsel for the claimant made the submission that the result of Birkett J's decision was that *"where a public authority would be involved as third party a person may be deprived of the benefit of the statute unless he can get a declaration within twelve months of the accident"*(see page 547). Counsel for the defendant submitted that the claimant had not been sued and neither had he been found liable to anyone thus there was no basis on which such a declaration could be granted. I have set out the submissions to demonstrate the frailty of Birkett J.'s conclusion, that is to say, it could not possibly be sound law to conclude that the date of the cause of action from the claimant's perspective is the same as the cause of action by the defendant against the third party since no contribution can be claimed unless and until the defendant is sued and found liable. It would be odd if the defendant's right to claim contribution could be determined by when the claimant filed his claim. As Mr. Dunkley pointed out, what if the claimant waited until the last day before the limitation period expired to file his action? If this were done, the defendant would be doomed and he could never claim any contribution. It would be quite something if a defendant's right to contribution or indemnity, a right conferred by statute, could be rendered nugatory by a claimant who ran down the limitation clock to the last possible date to file suit. Just this consideration alone would arouse suspicion that Birkett J.'s reasoning was faulty.

9. If Birkett J. was correct it would mean that when the legislature created third party actions they would have acted in vain. Prior to third party actions, where multiple persons were possibly liable, but the claimant chose one or two, then those luckless defendants could not recover from other persons who, on the evidence might be liable, but had the good fortune of not being sued. The third party action was created to remedy this perceived injustice. It is an action that in no way concerns the claimant except in so far as if he succeeds against the defendant then the defendant have a legal basis for the defendant to sue the third party. Lord Porter in ***George Wimpey & Co. Ltd. v.***

B.O.A.C.,[1955] A.C. 169, indicated the purpose of section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act of 1935 (section 3(1)(c) of the Law Reform (Tort-Feasors) Act (Jamaica) at page 181

> *Paragraph (c) dealt with this latter problem. Before the passing of the Act it was left to the claimant to choose his victim. The person sued, whether he was a joint or a separate tortfeasor, if he was implicated as being partly responsible for the accident, had to abide by that choice. The person damnified might sue one joint tortfeasor alone and so lay the whole burden of the wrongdoing on him, or, in the case of separate tortfeasors, might sue them one by one and recover from one alone or from such as he chose to execute judgment against, provided that he did not recover more than the greatest sum awarded or, against any defendant, more than was awarded in the action against him. The object of the Act was to cure this evil and to enable those upon whom the burden had been placed to recover a just proportion from those who shared the blame. No question arises in the present case as to what those proportions are; they have been settled by the learned judge who tried the case.*

10. Cassels J. explained the nature of third party proceedings in the following terms at pages 551-552. He said:

> *One has to bear in mind that third-party proceedings are proceedings in the nature of a separate action brought by a defendant against a third party, in which the cause of action is by no means necessarily the same as the cause of action which brings the plaintiff and the defendant before the court. The cause of action which brings a plaintiff and a defendant before the court in such a case as may arise out of this accident is negligence. The cause of action which entitles a defendant to bring a third party before the court is the liability of the third party to make contribution or to pay an indemnity. That cause of action has not arisen until the liability of the defendant has been ascertained. Under s. 39 of the Act of 1925 and the Orders and Rules of the Supreme Court governing third-party proceedings, notice of them is given to a third party before liability is established. It is one of the peculiarities of that procedure which enables this to take place before there is any liability. But the plaintiff can never get a judgment against the third party; it is only the defendant who gets a judgment against the third party. Neither, in such proceedings, could the defendant succeed and yet leave the plaintiff with judgment against the third party. It is only on the defendant being made liable that the defendant has any cause of action against the third party. Whatever for convenience of procedure may be the order for directions for the trial, however the witnesses may be called and heard, or whether the proceedings by the plaintiff against the defendant are tried at the same time as the proceedings by the defendant against the third party matters not. The position is quite clear. The proceedings by the defendant against the third party are independent of and separate from the proceedings by the plaintiff against the defendant, except that, when the defendant is made liable to the plaintiff, he then has his right open against the third party to establish, if he can, that he possesses a right to indemnity and contribution from that third party.*

11. The point is that it is inaccurate to say that the cause of action as between the defendant and the third party arose at the same time that the cause of action arose between the defendant and the claimant. The two actions are separate and distinct albeit

that until the liability of the defendant is determined there is no basis on which either an indemnity or contribution can be sought from the third party.

12. Donovan J. in ***Morgan v Ashmore, Benson, Pease & Co*** [1953] 1 W.L.R. 418 doubted, obiter, the correctness of the Birkett J.'s interpretation and application of the statutory provision Birkett J. had before him. McNair J. in ***Harvey v R.G. O'Dell Limited and another*** [1958] 2 Q.B. 78 in response to the submission by the third party that it should not contribute to the damages against the defendant because the action against him directly by the claimant was statute barred said that (a) a third party action for contribution or indemnity is sui generis and one created by statute; (b) the third party action did not arise until judgment was entered against the defendant seeking contribution and (c) there is no need to read words into section 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act.

13. The only decision I have found that may cast doubt on the third holding of McNair J. is that of the House of Lords in ***George Wimpey & Co. Ltd. v. B.O.A.C.,***[1955] A.C. 169. The facts were that the claimant, Mr. Littlewood was injured at a work site at which George Wimpey and Co. Ltd, the appellants were contractors. He sued Wimpey more than a year after the injury. Wimpey served a third party notice on B.O.A.C., a public authority, claiming a contribution if it (Wimpey) were found liable. The defendant brought a third party action against the public authority under section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act. At the time of the accident the relevant limitation period was one year. The claimant amended his claim and joined the public authority as a second defendant. The public authority defended both the third party action and the claim brought directly against it by the claimant by relying on the one year limitation period. The trial judge found for the claimant and found that both the public authority and the defendant were responsible for the claimant's injuries but that the **claimant's** action against the public authority was statute barred. Wimpey paid the claimant and pursued the contribution claim from the public authority. The judge rule in favour of the public authority on the third party claim. Wimpey appealed unsuccessfully to the Court of Appeal and the House of Lords. Wimpey was not able to recover any contribution from the public authority because, according to the majority in the House of Lords, the phrase "would if sued have been liable in damages" in section 6(1) (c) referred to a person who was not

actually sued and since the public authority was sued by the claimant and found not liable in damages then the defendant could not recover from it.

14. It is readily appreciated that the facts before me are different in that the claimant has not sued the two third parties but it shows the devastating consequences that may arise if the claimant decides to sue a defendant, from whom a contribution might have been claimed, outside of the limitation period. It does not require much imagination to conceive of a collusive action between claimant and a potential or actual third party which would be designed to saddle one or more defendants with liability. However it is the reasoning of Lord Reid that indicates the possibility of a contrary conclusion from that to which I have come in this case. Lord Reid interpreted section 6(1)(c) and concluded that it referred to two classes of person: those who were sued by the claimant and those who were not. In respect of the first class, if two or more defendants were held liable and the claimant recovered entirely from one then that one would be able to seek a contribution from the other, in pro rated according to the percentage liability found by the tribunal. The second class contemplates a hypothetical suit (hence "if sued"). Lord Reid said that the hypothetical suit as stated in the legislation imported a temporal test, that is, it had to be assessed from the time that the claimant actually initiated the claim. According to Lord Reid, since the public authority had actually been sued, it could not be looked from the hypothetical situation created by the words "if sued".

15. His Lordship accepted that "liable" in the phrase means liable by judgment. He also accepted that the expression "if sued" means if sued by the claimant. Lord Reid went on to say that a person "if sued" may be liable at one point in time and not liable at another point in time. This may come about because of a limitation statute or he may have been discharged from liability by a release. Thus the person "if sued" in these circumstances would not be liable in judgment. Lord Reid concluded that on this interpretation, the claimant would have failed because at the time the claimant initiated the suit against the defendant the one year limitation period had passed and so even if the public authority was not joined as a second defendant and therefore within the second class created by section 6(1)(c), it could not be held liable by judgment by reason of the limitation statute. He added even if the expression, "if sued" meant, "if the claimant sued when the claim for contribution was made" the public authority would have succeeded.

16. For the case that I have before me the import of Lord Reid's analysis is that the third parties, if sued, at the same time the claimant initiated action against Mr. Lowe could not have been held liable by judgment because no judgment could be entered against them because the claimant sued the defendant outside of the limitation period.

17. The question is whether Lord Reid is correct when he said that the critical time in order to determine the liability of the third party (who is not sued by the claimant) to claim for contribution is either (a) the time at which the claimant sues the defendant or (b) the time at which the claim for contribution is made. I don't think he was and these are my reasons for so concluding. He readily appreciated that the section 6(1)(a) was not happily drafted and as such he could not derive much assistance from it. He also accepted that "liable" in subsection 1(b) did not mean what it apparently meant. He declared that he could not therefore rely on subsections 1 (a) and (b) in coming to his conclusion. Lord Reid identified the mischief of subsection 1(c) as that identified by the passage cited from Lord Porter's judgment above. This is the vital part of Lord Reid's intricate analysis found at pages 189 – 190:

Next I would consider the mischief against which subsection (1) (c) is directed. Before 1935 if separate torts by two different tortfeasors contributed to cause the same damage the plaintiff could, and I think commonly did, sue and get judgment against both tortfeasors in the same action. He could then proceed to recover the damages from whichever one he chose, and the tortfeasor who had been made to pay had no right to require the other to contribute. Plainly that was thought by Parliament to be unjust and that case is undoubtedly covered by the first alternative in subsection (1) (c) "any tortfeasor liable ... may recover contribution from any other tortfeasor who is ... liable in respect of the same damage." But a plaintiff might, and sometimes did, choose to sue only one when he might have sued and succeeded against both, and the second alternative - "any tortfeasor liable ... may recover contribution from any other tortfeasor who ... would if sued have been liable in respect of the same damage" - is, I think, designed to cover that case. The second tortfeasor is put in no worse position than he would have been in if the plaintiff had taken the ordinary course of suing both.

But in cases like the present the position is very different. By virtue of statutory protection when a year had elapsed without the plaintiff raising any action B.O.A.C. had a complete defence against him and before 1935 would have been free of all liability. If the appellants' argument is right, in effect Parliament in 1935 partially withdrew that statutory protection and B.O.A.C. although not sued within the year would now be liable to make a payment in respect of the damage caused by their negligence. It is true that they are not liable to the plaintiff directly, but Wimpeys could only recover from B.O.A.C. because the negligence of B.O.A.C. caused damage to Littlewood.

If it had been intended to modify in this way the statutory protection afforded by an earlier Act I would have expected at least some indication of such an intention in section 6. But I can find none. The words of subsection (1) (c) are amply satisfied if "if sued" is held to mean "if sued at the time when action was being taken against the other

tortfeasor." I have said that for other reasons "if sued" must have a temporal connotation and, if that be so, then it seems to me that, if one merely looks at the context, that is at least as likely a connotation as any other.

18. The difficulty with this conclusion drawn from the historical development of the law is demonstrated by this question, why would Parliament wish to address the hardships caused by the inability of a defendant to recover from a third party who would have been liable if sued at the time the defendant was sued, still leave the ability to recover so dependent on the time the claimant sued? The statute was passed to create a right for the defendant (not to give the claimant an additional person to sue) since the claimant could have done that in any event before the statute. By this I mean that if there is any reason that the third party would not have been liable to the claimant in the original suit then he cannot be liable to the defendant as a third party. If it were otherwise it would mean that the defendant could recover from someone who could not have been held liable to the claimant. In my view the section does not import any temporal condition other than that the time meant in the hypothetical suit be the time at which the original cause of action arose. To my mind the difficulty in Lord Reid's analysis is that he did not address sufficiently nor explain why Parliament would create a cause of action for a defendant, designed to remove the worse effects of a claimant's election but then in the very next breath devalue and emasculate the right by leaving the defendant's ability to exercise that right, not in the hands of the defendant, but in the hands of either an honest but bumbling claimant or worse, a capricious and unscrupulous one. Either way, the possibility of a claimant running down the limitation clock for whatever reason and thus jeopardizing the defendant's ability to claim a contribution is hardly comforting. This is the point made by the dissenting judgment of Lord Keith when he said at page 196:

It is to be observed further that the construction of the statute contended for by the respondents would put it in the power of the injured party, whether by accident or design, to determine in many cases whether contribution could be got or not.

19. Lord Porter in his dissenting judgment made the point as well. I also accept the qualification made by Lord Porter. Lord Reid and in fact no member of the majority convincingly addressed this point. Viscount Simmonds limited his judgment to the precise facts before and declined to consider the issue. Lord Tucker did not address the point and in any event his judgment proceeded up on an inaccurately stated premise. He said that the legislation created a new right against joint tortfeasors that did not previously exist. That is correct, but it is also true to say that the legislation also created a right for the

defendant who was sued where none previously existed. This right was independent of the time the claimant sued.

20. The closest that Lord Reid comes to addressing this issue is where he explained that it would be odd if Parliament provided a one year limitation protection and then removed it by this legislative reform. He said that if this were intended he would have expected to find such an indication in the section and he found none (see page 189). I find that it is not quite accurate to say that Parliament removed the one year limitation period. In respect of the claimant, it accrues from the date of original tort and in the case of the defendant found liable by judgment, from that date. I am unable to see why Lord Reid concluded that interpreting the legislation in this way deprives the third party of limitation protection. It does not; it simply runs from different times depending on who is brining the action against the third party and the legal foundation for the action. It is my view that when Parliament created this action for the benefit of defendant the lawmakers expected that the limitation period in respect of this newly created cause of action would run from the time it arose which would be the time of judgment against the defendant. It is only then that an enforceable right to claim contribution arises. This is why the Parliamentarians never thought it necessary to include any words in the section dealing with the limitation period. I am not aware of any judgment from the Court of Appeal or the Judicial Committee of the Privy Council on appeal from Jamaica that has accepted Lord Reid's view of the provision and consequently I am at liberty to take a different view. In the final analysis, the position is that whatever comfort Miss Larmond might have drawn from Lord Reid was short lived.

21. The conclusion from all this then is that third party actions are sui generis in that they arise by virtue of statute and not the common law; the liability of the third party does not arise unless the defendant is found liable; the date of judgment against the defendant is the date on which the defendant's claim for contribution from third parties arises and that is the date from which the limitation period begins to run in favour of third parties. The limitation period for the purpose of third party actions does not run from the date on which the claimant's cause of action arose.

22. It follows from what I have said that in this case time has not yet begun to run for the purposes of the third party claim because the Owen Lowe has not yet been held liable.