

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 19/2013

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA**

BETWEEN	THE ATTORNEY GENERAL OF JAMAICA	1ST APPELLANT
AND	AARON HUTCHINSON	2ND APPELLANT
AND	CLEVELAND VASSELL	RESPONDENT

Mrs Cheryl-Lee Bolton instructed by the Director of State Proceedings for the appellants

Miss Cavelle Johnston and Miss Sue Ann Williams instructed by Townsend, Whyte and Porter for the respondent

8, 11 July 2013 and 25 September 2015

DUKHARAN JA

[1] We heard arguments in this matter on 8 July 2013 and reserved our decision to 11 July 2013. On that date we dismissed the appeal and allowed the appellants to file an amended defence (if they thought it necessary). Costs were awarded to the respondent to be taxed, if not agreed. We promised to give written reasons and now fulfill that promise. The delay is regretted.

[2] On the night of 27 October 2003, at about 8:00 pm, Cleveland Vassell (the respondent) was at the Ocho Rios market complex in Saint Ann visiting friends. While standing on the premises, Constable Aaron Hutchinson (the 2nd appellant), in the presence of other police officers demanded a search of the respondent and began to "pat" him roughly. He then ordered the respondent to go into the police car but he refused. Upon refusal, the 2nd appellant proceeded to force the respondent into the police vehicle, striking him with a baton and hitting him all over his body. The respondent was taken to the Ocho Rios Police Station where the 2nd appellant, with other police officers, began to beat him with batons all over his body. He was placed in a cell where he remained for three days with persons, he said, who appeared to be of unsound mind. He said there were faeces on the floor of the cell and the occupants were shaking the grill, screaming, yelling and behaving in an extremely boisterous manner. While in the cell, the respondent said he suffered mental anguish and a fear for his life. He was granted bail on 30 October 2003.

[3] On 9 January 2004, the respondent appeared in the Resident Magistrate's Court for the parish of Saint Ann. He was charged with the offences of malicious destruction of property, assaulting police, resisting arrest and indecent language. The charges against him were dismissed for want of prosecution.

[4] The respondent filed a claim in the Supreme Court arising out of the incident that occurred on 27 October 2003, where he was beaten and imprisoned at the instance of the 2nd appellant. The claim form and particulars of claim, as filed on 14 September

2006, stated that the 2nd appellant, being an agent and/or servant of the 1st appellant, beat the respondent all over his body with a baton without reasonable and probable cause and or without justification and consequently the respondent suffered injury, loss and damages. The respondent claimed damages against the appellants jointly and severally for assault.

[5] On 24 April 2012, the respondent applied for leave to amend the claim form and particulars of claim to include false imprisonment and malicious prosecution. Leave was granted on 27 April 2012 by Campbell J, who made an order that, inter alia, the claim form and particulars of claim filed on 14 September 2006 be amended as per the draft amended claim form and particulars of claim.

[6] Following Campbell J's order, the following grounds of appeal were filed by the appellants:

- a) That the learned Judge erred in Law when he permitted the Claim Form and Particulars of Claim filed on September 14, 2006 to be amended.
- b) That the learned Judge erred in Law when he failed to treat the torts of false imprisonment and malicious prosecution as fresh and new causes of action, the said torts not having been pleaded or alluded to in the aforesaid Claim Form and Particulars of Claim.
- c) That the learned Judge erred in Law when he failed to take into account that the granting of the amendments after the limitation period had expired would have deprived the Defendants of the Defence of Limitation.
- d) That the learned Judge erred in Law and fact when he failed to properly weigh the prejudice that the Defendants would suffer from the likely unavailability of instructions.

- e) That the learned Judge erred in Law when he found that costs were sufficient to compensate the Defendants for any prejudice they may suffer from the amendments being granted.
- f) That the learned Judge erred in Law when he failed to grant the Defendants permission to file an amended Defence.”

[7] The issues arising on this appeal are as follows:

1. Whether the torts of false imprisonment and malicious prosecution were fresh causes of action.
2. Whether the appellants would be prejudiced by the proposed amendments of the claim form and particulars of claim.
3. Whether the appellants were entitled to rely on the defence of limitation.
4. Whether costs were sufficient to compensate the appellants for any prejudice they might suffer consequent on the amendments.

[8] Grounds a, b and c will be dealt with together for convenience. Mrs Bolton for the appellants, in her written and oral submissions, submitted that rule 20.6 of the Civil Procedure Rules, 2002 (“the CPR”) would be the relevant rule for consideration in the circumstances. The said rule makes provision for amendments to a statement of case, after the end of the relevant limitation period to correct a mistake as to the name of a party only in certain circumstances. The rule provides very little help as the respondent was not seeking an amendment as to the correction of his name, but rather to include the torts of false imprisonment and malicious prosecution. It was further submitted that the torts of false imprisonment and malicious prosecution were never pleaded specifically nor did they arise on the respondent’s pleadings and as a result are new and

fresh causes of action. Counsel relied on the cases of **Clarapede & Co v Commercial Union Association** (1883) 32 WR 262 and **Cropper v Smith** (1884) 26 Ch. D 700.

[9] Counsel submitted that the respondent's amendment caused grave injustice and prejudice to the appellants as it deprived them of the benefit of a defence under the Limitation of Actions Act ("the Act"), since the fresh causes of actions were not pleaded within six years after the alleged incident and would now be statute barred. Counsel relied on the following cases: **Weldon v Neal** (1887) 19 QB 395, **Constable Newton Bowers v The Attorney General of Jamaica and George Gordon** (1991) 28 JLR 334 and **The Jamaica Railway Corporation v Mark Azan** SCCA No 115/2005, delivered on 16 February 2006

[10] Counsel submitted that the omission of false imprisonment and malicious prosecution by the respondent, allegedly due to inadvertence, was a weak reason for the said omission. The respondent and his counsel had ample time to examine the respondent's pleading, but failed to do anything with regard to the actions of false imprisonment and malicious prosecution.

[11] The appellants' counsel submitted on the remainder of the grounds, that the appellant would suffer grave injustice and prejudice should the proposed amendment be allowed. Counsel further submitted that if the amendment were allowed, the appellants would have difficulty in obtaining instructions and documents to enable them to properly defend an amended claim due to the long passage of time from the alleged occurrence of the said torts. The appellants have also contended that they will have

severe difficulty in locating court records from 2003 as well as police records from the same time.

[12] Counsel for the respondent, Miss Cavelle Johnston, in her oral and written submissions, submitted that the learned trial judge made no error in law in granting the respondent's application for court orders to amend the claim form and particulars of claim. It was submitted that the rules allow for parties to amend any part of the statement of case up until the case management hearing and thereafter only with the permission of the court. After the case management conference however, the CPR only speak to an amendment where there has been a mistake as to the parties involved or to the name of a party.

[13] It was the submission of the respondent that amendments to a statement of case after the limitation period are appropriate in the interest of justice, provided that they are not new causes of actions. Case law sets out a methodical way of determining what constitutes a new cause of action in cases when there is a matter that is already before the court. Counsel cited **Brickfield Properties Ltd v Newton; Rosebell Holdings Ltd v Newton** [1971] 3 All ER 328 and **Jamaica Railway Corporation v Azan**.

[14] Counsel further submitted that the amendment sought included changes for the originating documents, that is, the claim form and the particulars of claim, to include assault, false imprisonment, malicious prosecution and aggravated damages. The complete set of facts that gave rise to all three causes of action arose out of the single

incident and are disclosed in the further statement of case of the respondent. In this instance, the facts that gave rise to the assault also gave rise to the false imprisonment, the malicious prosecution and the aggravated damages.

[15] It was submitted by counsel that without the amendment as granted by the learned trial judge, there would be grave injustice to the respondent who would not have the opportunity to seek a remedy at trial for the potential wrongs suffered by him. It was further submitted that the amendment granted does not prejudice the position of the appellants. The appellants have already demonstrated that they are able to prepare an amended defence that properly addresses the amended claim form and amended particulars of claim.

Analysis

[16] It is noted that for the purposes of the Act, an amendment to add or substitute a new party, or a cause of action is deemed to be a separate claim and to have commenced on the same date as the original claim. Therefore, if the original claim was commenced within the relevant limitation period (six years) and an amendment is allowed, adding a party or cause of action after the expiry of the limitation period, a defendant will be deprived of the limitation defence and will usually cause injustice not compensable by an order for costs. The usual rule therefore, is that such amendments are not permitted.

[17] In assessing whether a proposed amendment in fact amounts to a new cause of action, it is necessary to consider the statement of case as a whole. To determine

whether a proposed amendment introduces a new cause of action for the purposes of the Act, it is necessary to examine the duty alleged, the nature and extent of the breach alleged and the nature and extent of the damage claimed. If the new plea introduces an essentially distinct allegation, it will be a new cause of action. As Hobhouse LJ stated in **Lloyds Banks plc v Rogers** (1996) *The Times*, 24 March 1997):

“The policy of the section is that, if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.”

[18] In **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639, it is stated that where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action.

[19] In the instant case, there is no dispute that the application to amend the statement of claim was made after the limitation period had expired. The relevant rule for consideration therefore, is rule 20.6 of the CPR. This rule provides that the amendment of a statement of case after the end of the relevant limitation period may be made where it is intended to correct a mistake as to the name of a party, in a situation where the mistake is genuine and not one which would in all circumstances cause reasonable doubt as to the identity of the party. The rule makes no provision for the substitution or addition of a new cause of action.

[20] The appellants argued that amendments may be made to a party's statement of case after the expiry of a limitation period, provided the amendment does not introduce a new cause of action after the expiry of the limitation period. It was the appellant's contention that the amendment sought by adding false imprisonment and malicious prosecution to the claim, introduced a new cause of action. The respondent's answer was that the complete set of facts that gave rise to all three causes of action arose out of the single incident and are disclosed in the further statement of case of the respondent. The facts that gave rise to the assault also gave rise to the false imprisonment, the malicious prosecution and the aggravated damages.

[21] It is clear that amendments to a statement of case after the limitation period may be appropriate in the interests of justice, provided that they are not new causes of actions. In **Brickfield Properties Ltd v Newton, Rosebell Holdings Ltd v Newton**, the court examined whether the applicable rule permitted an amendment to a statement of case after the limitation period. The court held that an additional cause of action could only be added to the statement of claim where the facts, or some part of the facts necessary to establish the claim made in the writ, would suffice to establish the additional cause of action. The court also noted that where a genuine and excusable mistake had been made and no detriment to the defendant had been shown, the judge had discretion to allow the amendment.

[22] In **Jamaica Railway Corporation v Azan**, K. Harrison JA stated:

“There is no provision however, in our Rules for the substitution or addition of a new cause of action after the

expiration of the limitation period. Our Rules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action (as opposed to a new party). In the final analysis, the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management.”

Harrison JA, in the same case, relied on **Lloyd Banks plc v Rogers and Savings and Investment Bank Ltd v Fincken** to set out the instances where an amendment may or may not take place after the limitation period has expired.

- a. If the new plea introduces an essentially distinct allegation, it will be a new cause of action. If factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.
- b. Where the only difference between the original case and the case set out in the proposed amendments is a further instant of breach, or the addition of a new remedy, there is no addition of a new cause of action.
- c. A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as to give rise to a cause of action already pleaded.

It seems clear in the present case that the facts that give rise to all three causes of action arise out of the single incident and are disclosed in the further statement of case of the respondent.

[23] In our view, it could be said that new causes of action arise, that is, false imprisonment and malicious prosecution. However, such causes of action may be added as they arise out of the same facts, or substantially the same facts, as has given

rise to a cause of action, assault, which is already pleaded. In our view, no new facts are being introduced by the respondent. He merely wishes to add false imprisonment and malicious prosecution to his statement of case which was omitted by mistake and which was already introduced in the claim. In our view, the learned trial judge did not err in granting the amendment. In the totality of the circumstances, the appellants have already demonstrated by their statement of case that they are able to prepare an amended defence that properly addresses the amended claim form and amended particulars of claim.

[24] It is based on the foregoing that we dismissed the appeal and allowed the appellants to file an amended defence (if necessary).