[2022] JMCA App 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL NO 57/2017

APPLICATION NO 130/2018

BETWEEN	**ISAIAH PATTEN (By next friend Joan Green)**	**APPLICANT**
AND	**KAREN CRANE**	**1ST RESPONDENT**
AND	**LLOYD MCNAB**	**2ND RESPONDENT**

Raymond Samuels instructed by Samuels and Samuels for the applicant

Joseph Willis for the respondents

4, 5 April and 6 May 2022

F WILLIAMS JA

[1] This is an application to extend time for the filing of the applicant's notice of appeal. The application to extend time was filed on 8 June 2018. It came before us for hearing on 4 April 2022, having been before the court on several previous occasions. On 9 June 2017, prior to this application, a notice of appeal had been filed on behalf of the applicant, who is represented by his next friend and mother Joan Green. However, the said notice of appeal that seeks to appeal the judgment of Gayle J ('the learned judge') dated 20 April 2017 was filed eight days out of time. In his written judgment, the learned judge had dismissed the applicant's claim against the respondents for damages in negligence.

[2] After hearing submissions in this matter, on 5 April 2022 we made the following orders:

"1. The application for extension of time to file notice of appeal is refused.

2. The notice of appeal filed on 9 June 2017 be struck out.

3. No order as to costs."

We promised then to provide brief reasons. This judgment is in fulfilment of that promise.

[3] At the start of the hearing of this application, Mr Willis, who is on the record as counsel appearing for the respondents, indicated that he had no instructions from the respondents. He further stated that his firm was in the process of removing its name from the record. On the other hand, Mr Samuels for the applicant, impressed upon the court that, having complied with previous directions given by the court for service on the respondents, he had instructions to proceed with the hearing of the application for extension of time.

[4] The court thereafter heard submissions in the matter.

Background to the claim

[5] The relevant background to the claim is that, on 27 April 1993, the applicant received serious and disabling injuries in a motor vehicle accident which occurred on the Discovery Bay Main Road in the parish of Saint Ann. The applicant, who was two years old at the time of the accident, was travelling in a motor car with his father, Joseph Patten, and two siblings, along with the 1st and 2nd respondents (the owner and driver of the motor car, respectively). During the journey the motor car overturned, and the applicant was found on the roadway.

[6] On 29 September 1998, a claim was filed on behalf of the applicant and his mother, Joan Green, against the respondents. The claim alleged that the 2nd respondent had negligently driven the motor car which resulted in the accident. The claim also averred that the doctrine of *res ispa loquitur* was applicable to the said accident. In their defence, the respondents denied liability and averred that the accident was attributable solely to the interference of the applicant's father who

grabbed the steering wheel of the motor car while it was being driven by the 2nd respondent.

[7] The claim was tried on 24 July 2009, and judgment was delivered on 20 April 2017. The learned judge found that the doctrine of *res ispa loquitur* was inapplicable to the case, as there was an explanation for how the accident had occurred. He also found that the applicant had failed to set out his case in that, while it was stated in the witness statement of Rossanni Patten that the 2nd respondent had nodded off while operating the motor car, that allegation was absent from the statement of case. The learned judge also found that the respondents were more credible and reliable than the witnesses for the applicant and held that the 2nd respondent had not nodded off while driving.

Submissions

[8] In imploring the court to grant an extension of time to regularise the late filing of the notice of appeal, Mr Samuels submitted that, pursuant to rules 1.7(2)(b) of the Court of Appeal Rules ('the CAR') this court has power to extend or shorten time for compliance with rules or directions of the court. He further submitted that the proposed appeal has a real prospect of success, that the eight days' late filing was unintentional and that the respondents would suffer no prejudice should the application be granted.

[9] Mr Samuels relied on an affidavit sworn by him on 8 June 2018 to aver that the delay in filing was caused by the over six-years passage of time between the trial date and the delivery of judgment, which resulted in a difficulty to locate court documents to prepare the notice of appeal.

[10] No submissions were advanced for the respondents.

Discussion

[11] The judgment entered in the claim by the learned judge is final in nature. Accordingly, the time for filing an appeal from that judgment would be governed by rule 1.11 of the CAR. The rule provides that:

> "(1) Except for appeals under section 256 of the Judicature (Resident Magistrates) Act, the notice of appeal must be filed at the registry and served in compliance with rule 1.15 -
>
> (a) …
>
> (b) …
>
> (c) in the case of any other appeal within 42 days of the date on which the order or judgment appealed against was made."

[12] By virtue of this provision, since judgment was delivered on 20 April 2017, the applicant would have had up to 42 days thereafter to file his notice of appeal. Thus, the permissible period for filing the appeal would have ended on 1 June 2017. Accordingly, the appeal, having been filed on 9 June 2017, would have been eight days out of time, therefore requiring the court's intervention to regularize the late filing so as to make it a valid appeal. As submitted by Mr Samuels, pursuant to rule 1.7(2)(b) of the CAR, under its general powers of management, the court, except where the rules provide to the contrary, is able to:

> "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;"

[13] Accordingly, the court's exercise of its discretion to extend time for compliance would, of necessity, involve a consideration of certain established principles. Panton JA (as he then was) in the case of **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered on 6 December 1999, opined at page 20 of the judgment that:

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider-

(i) the length of the delay;

(ii) the reasons for the delay;

(iii) whether there is an arguable case for an appeal and;

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[14] Having regard to the criteria set out above, the eight days' delay in filing could not reasonably be considered lengthy in all the circumstances of this case. The court also accepts the explanation for the delay to be a good one. The court is additionally mindful of the fact that the absence of a good reason does not automatically result in the refusal of the application for extension of time. In relation to the consideration of prejudice, the court discerns no real prejudice to the respondents, were the extension to be granted. The court finds, however, that the most important consideration in the exercise of this discretion rests on the question of whether the proposed grounds of appeal amount to an arguable case.

[15] There are six proposed grounds of appeal which are stated as follows:

"(a) The Learned Trial Judge, generally, failed to evaluate or to properly evaluate the evidence given by the Witnesses-in-Chief and elicited in cross-examination and in his recital thereof avers to conflicting and unreasonable conclusions.

(b) The Evidence of the 2nd Respondent regarding the fact that the deceased Joseph Patten and himself were in a normal conversion [sic] during the course of the journey makes it unnatural and irrational that the deceased Joseph Patten would in such circumstances grab hold of the steering wheel without reason and is not normally credible evidence that the court could believe on a balance of probabilities in preference to evidence that the 2nd

Respondent was driving in such a reckless and dangerous manner as would cause the accident.

(c) The evidence of the Appellant's witness Joseph Patten that the 2nd Respondent was operating the car in a zig zag manner and the car while being in operation by the 2nd Respondent was going two sides of the road was evidence to support the fact pleaded that the 2nd Respondent was driving in a reckless and dangerous manner albeit that the cause of the reckless and dangerous driving was the fact that the 2nd Respondent was nodding or sleeping during the process and the Learned Trial Judge was wrong in deciding that the nodding and sleeping ought to have been pleaded.

(d) The Learned Trial Judge erred in the Judgment when he ignored the Paragraphs 1 – 4 of the Appellant's Pleadings and relied heavily on Paragraph 5 – the Res Ipsa Loquitor [sic] principle.

(e) The Learned Trial Judge erred when he relied on the Civil Procedure Rules 2002 as governing the Pleadings in a case filed in the year 1998 as regards how Pleadings ought to be set out notwithstanding the Appellant stated as a fact in his pleading 'The Defendant was driving in a reckless and dangerous manner'. The Appellant did not seek to prove the cause for the manner in which the 2nd Respondent was driving and the learned Trial Judge erred in confusing the fact as pleaded with the cause which was not pleaded.

(f) The Appellant is dubious of the accuracy and the correctness of this judgment which was delivered eight years after the evidence was heard and would challenge the basis on which this judgment was prepared particularly when the learned Trial Judge in his judgment stated that "their demeanour was of critical importance to me" – paragraph 37 of Reasons for Judgment and in the circumstances there was an excessive delay in delivering judgment".

[16] In essence, the proposed grounds of appeal give rise to four issues. These are:

(i) whether the learned judge had properly evaluated the evidence - grounds (a) and (b);

(ii) whether the failure to plead the allegation that the 2nd respondent had nodded off was fatal to the success of the claim - grounds (c) and (e);

(iii) whether the learned judge gave sufficient regard to the contents of the applicant's pleadings, in particular, paragraphs 1 to 4, in relation to the pleading of *res ispa loquitur* in paragraph 5 of the statement of case - ground (d); and

(iv) whether in the circumstances of the case, the delay in the delivery of the judgment had the effect of rendering the judgment unreliable- ground (f).

Issue (i): whether the learned judge had properly evaluated the evidence - grounds (a) and (b)

Issue (iv): whether in the circumstances of the case, the delay in the delivery of the judgment had the effect of rendering the judgment unreliable - ground (f).

[17] At paragraph [3] of the judgment, the learned judge set out the respective cases of the parties. He observed that the cases were supported by witness statements and *viva voce* evidence. The learned judge also stated that the burden of proof was on the claimant and expressed the challenge presented by the effect of the passage of time on the quality of the evidence, noting that the brother of the applicant, Rosanni Patten was seven years old at the time of the accident and 23 years old at the time of giving evidence. The following extracts are the pertinent portions of his judgment.

> "[36] It is clear that there is no point of convergence between the accounts of the parties as to how the accident occurred. It is simply a question of fact as to which account is to be believed. The fundamental question is, who is responsible for the accident along the Discovery Bay main Road in the parish of St. Ann on the 27th April 1993 at about 2 p.m.
>
> [37] The resolution of this question hinges totally on the evidence of the Claimant[s'] witnesses and the defendants and their witnesses and [sic] is this a question of fact to be resolved solely on their credibility. In light of this, their demeanour was of critical importance to me and so I have

> listened to them keenly and observed them, closely while giving their testimony from the witness box. I have considered the evidence adduced in this case whilst bearing in mind at all times that it is the claimant who bears the ultimate burden of proof on a balance of probability.
>
> [38] The accident that has given rise to this claim is not of recent occurrence having taken place in April 1993. I expect that person's [sic] memory might naturally be affected with the passage of time and as such there might be faulty recollection of the event, particularly with respect to minute details, as such, I expect that the reliability and credibility of witnesses may be compromised. My task was not easy when I analysed the evidence adduced by both sides. I had difficulties deciding deliberate falsehood from innocenting [sic] lapse of memory and faulty recollection."

[18] What is clear from the dicta is that the learned judge was aware that the main issue for resolution was a question of fact which hinged on the credibility and reliability of the witnesses. That factual contention had to be decided in the light of the accident not having been recent, with the potential memory lapses of the witnesses regarding the events in question. The admonition of Lord Hodge in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 is of utmost relevance and application to the review of a learned trial judge's fact-finding duty:

> "11. It is important to recall the proper role of an appellate court in an appeal against findings of fact by a trial judge. This is relevant to the third of the grounds on which the Court of Appeal overturned the judgment of the trial judge.
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> 12. In **Thomas v Thomas** [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488:
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> > 'I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

> II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court'."

[19] For the applicant, the only evidence as to fact was adduced from Rosanni Patten. His evidence contained gaps in details pertaining to other events of that journey. He gave an account that he was on the front passenger seat and his father was sitting in the back seat with his bothers. He gave evidence that the 2nd respondent had nodded off about three times and that the car had drifted from one side of the road to another. He also testified that his father had remarked that the 2nd respondent was sleeping but denied that his father had grabbed the steering wheel. He testified that the vehicle overturned and ended up in the bushes. The 2nd respondent gave evidence that Mr Patten was sitting on the front seat and that he had grabbed the steering wheel from him which resulted in the vehicle overturning.

[20] Having had the advantage of observing the witnesses give evidence, it would have been open to the learned judge to reject or accept portions of the evidence as he deemed fit. It would have thus been open to him to have accepted the evidence for the respondents over the applicant's witness, having found the former to be more credible and reliable. In the court's view, counsel for the applicant has failed to demonstrate that, should the extension of time be granted, this court would likely be persuaded that the learned judge failed to take advantage of having seen and heard the witnesses.

[21] Though the delay is most regrettable, the written judgement does not demonstrate that its late delivery negatively affected its correctness. Further, whilst there were challenges with the evidence in the trial due to the age of the matter, the learned judge was cognizant of these challenges and resolved the issues in the claim bearing these challenges and their possible impact in mind.

Issue (ii): whether the failure to plead that the 2nd respondent had nodded off was fatal to the success of the claim – grounds (c) and (e)

Issue (iii): whether the learned judge had failed to give sufficient regard to the contents of the applicant's pleadings (in particular paragraphs 1 to 5); – ground (d)

[22] The learned judge observed in the judgment that, whilst the witness statement of Rossani Patten alleged that the 2nd respondent had nodded off while operating the motor car, there was no such mention in the statement of claim. In citing Lord Woolly MR in **McPhail v Times Newspaper Ltd** [1999] 3 All ER 775, the learned judge reiterated the important role of pleadings (now referred to as 'statements of case') in establishing the parameters of a case.

[23] The statement of claim filed on behalf of the applicant, at paragraphs 1 to 5, contains the following pleadings:

> "1. The [applicant] is an infant and he brings this action by his mother and next friend JOAN GREEN.
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> 2. [Joan Green] seeks to recover damages being expenses paid by her on account of injuries suffered by the [applicant] as a result of the Negligence of the 2nd [respondent] the servant or agent of the 1st [respondent].
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> 3. The [1st respondent] was at the material time the registered owner of motor vehicle with registration number 0824AU and the person in whose name the said motor vehicle was insured at the material time.
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> 4. The [2nd respondent] was operating the said motor vehicle at the material time as the servant or agent of the [1st respondent].
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> 5. On the 27th April, 1993 the [applicant] was a lawful passenger in the said motor vehicle and was proceeding in same from Negril in the parish of Westmoreland by way of North Coast when on reaching Discovery Bay in the Parish of Saint Ann there was a mishap and the [applicant] ISAIAH PATTEN received very serious injuries. The said mishap was due to the negligence of the [2nd respondent], the servant or agent at the material time of the [1st respondent].
>
> PARTICULARS OF NEGLIGENCE

(i) Driving in a reckless and dangerous manner

(ii) Driving fast or at a speed which was too fast having regard to the nature and condition of the road at the material time.

(iii) Failing to stop, to slow down or so to control the said motor vehicle as to avoid the mishap.

(iv) Failing to keep a proper look-out.

(v) The Plaintiff will in addition, rely on the Res Ipsa Loquitur Doctrine."

[24] The statement of claim identifies the parties to the suit and pleads that a negligent act occurred. However, as observed by the learned judge at paragraph [17] of the judgment, there is no inclusion in the statement of claim or the writ of summons of the contention that the 2nd respondent had nodded off. The allegation that the 2nd respondent had fallen asleep or nodded off while operating the motor vehicle was the nub of the applicant's case. The failure to plead such, and the further failure to seek an amendment to include it, would have been fatal to the case.

[25] As correctly reiterated by the learned judge, a claimant cannot rely solely on the contents of a witness statement to ground a claim in negligence, where the central contention in the case is omitted from the pleadings.

[26] In relation to counsel's contention that the learned trial judge had placed undue weight on the pleading of *res ipsa loquitur*, the court finds that that ground would not afford the applicant an arguable case. The learned judge relied on the dictum of Rowe P in **Courage Construction Ltd v Royal Bank Trust Co** (1992) 29 JLR 115 that "if there is evidence as to the cause of the accident, the doctrine of res ipsa loquitur has no application". It was from an application of that principle to the facts of the case that the learned judge opined (and correctly so), that, in the circumstances of the case, there was evidence as to the cause of the accident and accordingly, the doctrine *res ipsa loquitur* had no application.

[27] In the light of the above, it could not reasonably be maintained that the learned judge failed to give sufficient or proper consideration to the contents of the statements of case and the evidence. The findings of the learned judge were in keeping with a

proper assessment of the evidence adduced at trial, in tandem with the pleadings advanced by the parties. We were therefore not persuaded that any appeal would have had a realistic prospect of success, hence our orders at paragraph [2] hereof.

FRASER JA

[28] I have read, in draft, the reasons for judgment of my brother F Williams JA and agree with his reasoning. There is nothing that I wish to add.

BROWN JA (AG)

[29] I too have read the draft reasons for judgment of my brother F Williams JA. I agree with his reasoning and have nothing to add.