

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.25 OF 2003

BETWEEN:

BRENTLIE CHARLES aka BRENTLEY CHARLES

Appellant

and

MARCUS CORRIDON

Respondent

Before:

The Hon. Mr. Adrian Saunders
The Hon Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Rochelle Forde and Ms. Nicole Sylvester for the Appellant
Mr. Samuel Commissiong with Ms Suzanne Commissiong for the Respondent

2004: March 3;
June 21.

JUDGMENT

- [1] GORDON, J.A.: On the 13th June 1998 the Appellant was struck by a motor vehicle driven by the Respondent and commenced this action for damages for personal injuries. The injuries suffered were multiple lacerations and abrasions about the face, neck, hands and feet and a compound fracture of the left leg. He was admitted to hospital for the treatment of all of his injuries. He had plating of the fracture of the left tibia. He was discharged on 13th July 1998.
- [2] On 21st April 1999 the Appellant was readmitted to the Kingstown General Hospital as he had developed a fistula in the area of the left leg fracture resulting

in osteomyelitis of the tibia. He was treated and discharged on the 24th April 1999. The Appellant was again admitted to the Kingstown General Hospital on the 14th May 1999, this time for a non-healing ulcer on his left leg associated with the accident. He discharged himself from the hospital on the 21st May 1999. Between that time and the 10th February 2000 when he was readmitted to hospital, the Appellant made several visits to the orthopaedic outpatient clinic. The latter re-admission to hospital was for wound debridement and to treat the osteomyelitis. He was discharged from hospital on the 16th February 2000. Subsequent thereto, the Appellant attended a district clinic and the orthopaedic clinic at the hospital on a regular basis. The Appellant was again readmitted to the hospital on the 12th September 2001 and had a sequestrectomy and debridement performed on the 18th of that month. His date of discharge on that occasion is not in evidence.

- [3] Some time in 2001, the Appellant visited the law offices of O.R. Sylvester & Co and as a result of that visit a letter was written by those lawyers on his behalf to the insurance company of the Respondent dated 5th June 2001. Part of that letter read "We... were informed to forward all bills and report to you which we now forwarded.[sic]"
- [4] On the 15th November 2002, the Appellant, through his solicitors caused a Claim Form with Statement of Claim to be filed claiming against the Respondent for Special Damages, General Damages, interest and the costs of the action. The Respondent filed a defence, albeit out of time, but with the concurrence of the Appellant's lawyers, in which he pleaded that the action was barred by section 13 of the Statute of Limitation Cap 90 of the Laws of Saint Vincent and the Grenadines.
- [5] At a Case Management Conference an Order dated 2nd April 2003 was made that included the following: "Leave be granted to the Claimant (Appellant) to make application under Section 33 of Cap. 90 (Limitation Act)". The Application came on for hearing before the learned Master who ruled on the issue on October 31, 2003.

The learned Master ruled that Section 33 of the Limitation Act did not apply to this action and hence the Appellant's claim was statute barred. In the course of his written reasons for his decision, the learned Master said the following:

"The burden is on the Claimant in this instant to demonstrate that it would be equitable to allow this claim to proceed. On the evidence before me I do not consider that the Claimant has discharged this burden."

[6] The Appellant, being dissatisfied with the decision of the learned Master has appealed to this Court on a number of grounds.

[7] Section 33 of the Limitation Act Cap 90 of the laws of Saint Vincent and the Grenadines reads in part as follows:

"33.(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-

(a) the provisions of section 13 or 14 prejudice the plaintiff or any person he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

...

(3) In acting under this section the court shall have regard to all of the circumstances of the case and in particular to-

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is, or is likely to be, less cogent than if the action had been brought within the time allowed by section 13, or as the case may be, section 14;

(c) ...

(d) The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) ...

(f) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[8] The Appellant concedes that the three year period stipulated in the Limitation Act was exceeded by him prior to the filing of his suit, but argues that a court in

exercising the discretion granted by section 33 of the Limitation Act to waive the effects of Section 13 must have regard to certain criteria set forth in the section. Specifically, the court in coming to its decision must have regard to the prejudice that would be done to the claimant by the strict application of section 13, and the prejudice done to a defendant if a claimant were relieved from such stricture. Section 33 states that the court must weigh all of the circumstances of the case in coming to its decision, and in particular the length and reasons for the delay, the extent to which the delay is likely to derogate from the cogency of the evidence to be adduced by either side, the duration of any disability of the claimant arising after the date of the accrual of the cause of action, and, any steps taken by the claimant to obtain medical or legal advice and the nature of such advice. (Section 33 (3))

- [9] In *Firman v Ellis*¹ Denning M.R., in speaking of the equivalent section in the Limitation Act 1975, said the following:

“Although those committees [Law reform committees] did not accept the proposal for a general discretion, nevertheless, when Parliament passed the Act of 1975, it did give the Court a general discretion. Section 2D, as I read it, gives a wide discretion to the court which is not limited to a “residual class of case” at all. It is not limited to “exceptional cases”. It gives the court a discretion to extend the time in all cases where the three-year limitation has expired before the issue of the writ. It retains three years as the normal period of limitation...but it confers on the court an unfettered discretion to extend the three-year period in any case in which it considers it equitable to do so”

- [10] By definition the exercise of a court's discretion to allow an action to proceed after the expiry of the primary period of limitation must prejudice a defendant by removing the statutory defence. Hence I would interpret the language of section 33 (1) (b) (prejudice to the defendant) as meaning a prejudice other than or additional to the bare loss of the statutory defence.

¹ [1978] 1 QB 886

- [11] Having said the above, however, this does not mean that a claimant can come to the court pleading for the exercise of its discretion unless he can show that his behaviour is worthy of the exercise of the court's discretion in his favour. In the instant case the Claimant offers as exculpation for his delay two principal factors, namely, that he was severely injured, and, secondly, that he was impecunious.
- [12] With regard to the first reason proffered by the Claimant, in his affidavit of the 15th April 2003 he give a history of not only multiple periods of in-patient stays at the general hospital, but also he speaks of having been advised not to move around. He further states that within two months of being able to move around he contacted his solicitors. As against this evidence of the Claimant, the Defendant states in his affidavit that it is not true that the Claimant was hospitalized all the time because he, the Defendant had seen him from time to time about the streets of Campden Park. This is a direct conflict of evidence, which, fortunately, does not need to be resolved by this court in the context of the Claimant's second reason for delay.
- [13] The Claimant alleges in his affidavit that having enquired of his solicitors the cost of instituting proceedings, he found himself bereft of the funds to even make a deposit on the legal fees. He states that he tried to obtain the funds by raising a loan but was unsuccessful due to his inability to show means of repayment. The Defendant does not deny that the Claimant was impoverished but states that this was because the Claimant does not work, rather he idles the day away about the streets of Campden Park. The Defendant gives no basis for the implication that the Claimant could work if he wanted to. It is a reasonable inference that the Claimant could not work because of the injuries he suffered. The Court takes judicial notice of the fact that there is no system for Legal Aid available in St. Vincent, so that, absent a lawyer prepared to take on pro bono work, the Claimant found himself with a potential cause of action without the means to prosecute it.

[14] I am of the view that the above circumstances are appropriate for the exercise of the Court's discretion in favour of the Claimant. The Limitation Act requires, however, that the Court also look at the prejudice such a decision would cause to the Defendant. As stated above, I discount (not dismiss) the prejudice of the loss of the defence of the action being statute barred. The Defendant's affidavit in response to the Claimant's affidavit does not advance any prejudice that the Defendant would suffer. The Defendant's affidavit speaks to his anticipation of the eventual hearing of a police case of assault deriving from the same incident, leading to the inference that the facts and evidence are clear in the memory of the Defendant. Thus there should be no diminution of quality of the evidence to be led in this matter.

[15] For the reasons above I would allow the appeal and order that pursuant to Section 33 of the Limitation Act, Cap 90 of the Laws of Saint Vincent and the Grenadines, 1990, the three-year limitation period set by Section 13 of the said Act shall not apply to this action. In the circumstances, I would make no order as to costs.

Michael Gordon, QC
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

I concur.

[Sgd.]
Brian Alleyne, SC
Justice of Appeal