

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

Claim No. SLUHCv2021/0008

BETWEEN

CARLOS ST OMER qua personal
representative of the estate of the deceased
BRANDON CARLOS JR. ST OMER

Claimant

and

MARGUERITE JN BAPTISTE

Defendant

Appearances:

Gerard R. Williams for the Claimant; and
Duane Jean Baptiste and Michelle d’Auvergne for the Defendant

2021: July 28;
September 20.
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DECISION

Defendant’s application to strike out amended claim

[1] **PARIAGSINGH M, (Ag.):** The original claim filed on January 08, 2021 was brought by the claimant on behalf of the estate of the deceased against the defendant, the owner of the vehicle in which he was a passenger. At the time of his demise the deceased was an 18-year-old student. The claim sought damages for fatal injuries and included a dependency claim which listed the deceased’s mother, father and sister as his dependents.

[2] On April 06, 2021 before the first case management conference, the claimant amended his statement of claim to add two additional claimants, the second claimant who is the mother of the deceased and the third claimant who is the sister of the deceased. The amendment also sought to add an additional defendant, the estate of

the driver of the vehicle in which the deceased was a passenger. This was after the defendant filed her defence denying that the driver of her vehicle, her son, was her servant or agent at the time of the accident. The claimant also filed an amended claim form on April 09, 2021.

- [3] In the amended claim relief is sought by the second claimant (the mother) and the third claimant (the sister) as dependants of the deceased and a fresh cause of action in nervous shock is pleaded. The amended claim also adds a new first defendant, the estate of the deceased driver, the son of the defendant and damages is claimed against both defendants. The defendant now seeks to strike out the amended claim form and amended statement of case.
- [4] No formal application to strike out was filed. The issue was raised orally as a preliminary point of law. The ground of the application to strike out is that it is not necessary to add the new parties to resolve the issues in the claim and time is prescribed for the new cause of action the claimant seek to now introduce.
- [5] From the onset it is worth noting that prescription is different from limitation. The former is an absolute bar to both right and remedy, the latter being procedural.
- [6] On May 11, 2021 the first claimant filed an affidavit in reply. The distinction in the procedure between striking out and summary judgment is pellucid in the judgment of Pereira CJ in **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd, SLUHCVP2014/0024**. I do not propose to recite them. They only need be mentioned to state that no affidavit evidence is necessary in an application to strike out. The Court is only concerned with the pleadings. The defendant has not filed any affidavit in support of the application to strike out. There are no facts asserted which the claimant can dispute. The claimant's affidavit is therefore misconceived and has no relevance to the issue at bar. Accordingly, this affidavit is struck out.

[7] It is undisputed that the amended claim form and amended statement of case was filed before the first case management conference. Amendments before the date fixed for the first case management conference are permitted without permission of the court. The amendments made in this case as it relates to the claimants, adds two new claimants and one new cause of action, nervous shock. The amendment also adds a new defendant and seeks damages against him and the existing defendant as joint tortfeasors. The relevant period of prescription is not disputed. It is three years from the date of the accrual of the cause of action. In this case, by that time the amended claim was filed, the time prescribed for the bringing any new claim had passed.

[8] There are four (4) issues to be considered on this application:

- (a) Whether the new cause of action in nervous shock brought on behalf of the second and third claimants falls within the categories of amendments permissible after the period of prescription?
- (b) Whether the second and third claimants need to be added as claimants to maintain a claim as dependents?
- (c) Whether the third claimant has the locus standi at all to bring a claim as a dependent?
- (d) Whether the claim against the estate of the deceased driver is a new claim instituted after prescription?

[9] The Court can add a party to a claim after the limitation period has expired. This is provided for in Part 19 Rule 19.4 (1) CPR¹. This part allows a party to be added after the limitation period has expired if the addition is **necessary** and **the period of limitation was current when the proceedings were started**².

¹ Civil Proceedings Rules 2000 as amended.

² 19.4 (2) CPR

[10] In determining if the addition is necessary, the Court must be satisfied that the claim cannot properly be carried on by or against an existing party unless the new party is added, the interest of the former party has passed to the new party or the new party is to be substituted for a party who was named in mistake for the new party³.

Nervous shock suffered by the second and third claimants:

[11] The amended statement of case contends that the second claimant, mother of the deceased and the third claimant, sister of the deceased, were traumatised by the sudden and untimely loss of the deceased and that they both suffered nervous shock necessitating a course of therapy as prescribed by a physician.

[12] Damages are sought under article 609 and 688 of the Code of Civil Practice. Article 609 deals with damages due for a cause of action which survives on the death of a deceased. Article 688 of the Code deals with claims by dependents of a deceased. The claim by the second claimant for nervous shock is not a cause of action related to the fatal injuries claim or the dependency claim, the claim which was commenced within the time prescribed. A claim for damages for nervous shock is a separate and independent cause of action in delict for which the time prescribed is three (3) years from the accrual of the cause of action. To allow this new cause to stand now would in effect be extending the time for the second and third claimants to bring a fresh claim against the defendant. This is not permissible as time is now prescribed and the Court has no jurisdiction to do so. Accordingly, this claim for nervous shock is not maintainable by either the second and third claimants.

Adding the second and third claimants to maintain a dependency claim:

[13] It is not necessary for the second claimant to be added as a party to this claim as article 988 of the code does not require it. Article 988 (4) provides that:

³ 19.4 (3) CPR.

Every such action shall be brought **by and in the name of the executor or administrator of the person deceased**, but if in any case there is no executor or administrator of the person deceased, or if, there being such executor or administrator, no such action is, within 6 calendar months after the death of such deceased person, brought by and in the name of such executor or administrator, the action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit the action is hereby given: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint.

[14] The dependency claim of the second claimant has to be brought by the personal representative of the deceased. This has already been done in the original claim. Accordingly, it is not necessary to add the second claimant to this claim to resolve the dependency claim.

The locus of the third claimant to claim dependency:

[15] This claim is not maintainable as a matter of law. The third claimant is not a person entitled to claim dependency on the deceased under article 988 of the Code. Article 988 (3) provides that:

Every such action shall be for the benefit **of the wife or husband, and every parent and child of the person whose death has been caused**, but notwithstanding anything contained in this Code with regard to prescription, no such action shall be commenced at any time later than 3 years after the death of such deceased person.

[16] The class of persons entitled to claim dependency is set out in the article 988 of the Code. It does not permit a sibling of a deceased to claim dependency on a deceased. The legislation contemplates the spouse, parent and child of the deceased making such a claim. Accordingly, the claim of the third claimant is not maintainable in law. It is therefore not necessary to add the third claimant as a party to this claim as she has no maintainable claim as a dependent.

Addition of a new defendant and claim for damages as a joint tortfeasor:

[17] The same principles apply to adding a defendant after the expiry of the limitation period as set out above. Article 2129 of the Code operates to absolutely extinguish an action once time is prescribed. The decision in **Norman Walcott v Moeses Serieux, Civil Appeal No. 2 of 1975** remains good law. There is a fundamental difference in the nature and effect of limitation and prescription. Prescription extinguishes both the right and remedy. The Court has no discretion.

[18] Prescription must be read in the context of its difference from limitation when considering CPR19.4. In my view, if prescription extinguishes a right and remedy, once time is prescribed there can be no addition of a party after the prescribed time in relation to a new cause of action. In the instant case, the addition of the first defendant is to pursue a separate and new cause of action against him for negligence.

[19] It is not necessary to add the first defendant to resolve the issue of whether the first defendant was the servant and or agent of the owner of the vehicle. The claimant has asserted that the driver was the servant or agent of the owner and the owner has denied this. It is for both parties to lead evidence on this disputed issue.

[20] Further, it was known to the claimant when the claim was commenced that the owner of the vehicle was not the driver. This is pleaded in the statement of claim. To allow the claimant to add a new defendant in response to the defendant disputing the authority of the driver of her vehicle would be allowing the claimant to sue a new party altogether after the time has been prescribed. Litigation is not meant to be reactive; it is meant to be proactive, more so with the CPR being a frontloading system.

[21] The claimant has placed reliance on the authority of **Bryan James v The Attorney General, SLUHCVA2013/0023-24 and SLUHAP2014/0021**. In my view this authority supports a proposition contrary to the claimant's position. In **Bryan James**, the substitution did not change the cause of action pleaded. The substitution was to

substitute the Attorney General instead of the Comptroller of Customs to the defendant to the claim. The Comptroller of Customs was at all times a servant of the Attorney General. The Court granted an order under CPR 19 substituting the Attorney General for the Comptroller of Customs. This did not have the effect of instituting a new case after the prescribed time as is sought to be done by the claimant in this case. In **Bryan James**, Blenman JA reiterated that once time is prescribed, the judge has no discretion in the matter.

[22] In **David Sweetnam and Colten Enterprises Limited v The Government of Saint Lucia et al, Civil Appeal No. 42 of 2005**, Gordon JA dealt with what is required for time to stop running for the purpose of prescription. Not only must the claim be issued within the prescribed time, it must also be served within that time. This was not done and it is too late to do it now in relation to any cause not commenced within the time prescribed. It is also not necessary to add any parties to the original claim to resolve the issues arising on it.

[23] For these reasons, it is hereby ordered that:

- (a) The claimant's affidavit in reply filed on May 11, 2021 is struck out;
- (b) The claimant's amended claim form filed on April 09, 2021 and his amended statement of case filed on April 07, 2021 are both struck out; and
- (c) The matter will proceed to case management on the original claim filed.

[24] I will hear the parties on the issue of costs.

**Alvin Shiva Pariagsingh
Master (Ag.)**

By the Court,

Registrar