JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 46/90

BEFORE: THE HON. MR. JUSTICE FORTE, J.A
THE HON. MISS JUSTICE MORGAN, J.A
THE HON. MR. JUSTICE BINGHAM, J.A (AG.)

BETWEEN	CONSTABLE NEWTON BOWERS	
A N D	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANTS/APPELLANTS
A N D	GEORGE GORDON	PLAINTIFF/RESPONDENT

Mr. Leighton Pusey and Mr. Brian Wallace
instructed by Director of State Proceedings
for Appellants

Mr. Donald Gittens instructed by Daly, Thwaites,
Watson and Campbell for Respondent

10th and 11th June and 8th July, 1991

FORTE, J.A:

This is an appeal from the judgment of Morris, J (AG) in which he awarded the respondent the sum of $37,000 damages for personal injuries suffered as a result of an assault made upon him by the appellant Constable Newton Bowers.

As the appellants abandoned their appeal in relation to the award for damages there remained only one issue for determination by this Court. Having heard the arguments of counsel on the 10th and 11th June, 1991, we decided that issue in favour of the respondent, dismissed the appeal, and awarded costs against the appellants.

In summary, the appeal raised the question of the exercise of the learned judge's discretion in granting an amendment to the the statement of claim in order to rectify a fatal omission therein, viz, to allow the plaintiff/respondent to insert in the claim the

mandatory requirement of section 33 of the Constabulary Force Act to plead the allegation of malice or absence of reasonable and probable cause in the commission of the act. The section states:-

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

In advancing the contention that the exercise of the discretion was wrong in the circumstances, counsel for the appellants based his submission mainly on the proposition that a plaintiff cannot be allowed to amend a statement of claim if in so doing he would deprive the defendant of a legal defence under the Limitation of Actions Act, this amounting also to an avoidance of the provisions of that Act.

This appeal had its beginning when the plaintiff/respondent filed a writ of summons accompanied by a statement of claim, petitioning for damages for personal injuries done to him as a result of an assault made upon him by the defendants/appellants while acting or purporting to act in the performance of his duties. The writ and the statement of claim were both dated and filed in September 1986, well within the statutory period required by the Act, the incident having occurred on the 21st December, 1983. However, while the writ of summons was in obedience to section 33 of the Constabulary Force Act, the statement of claim was void of the required allegation, which made the action liable to be non-suited, or without more mandated that judgment should be given for the defendants.

This being the situation when the cause came on for trial on the 14th May, 1990, counsel for the appellants, moved the Court,

on a preliminary point to strike out the statement of claim and enter judgment for the appellants, as with the omission of the mandatory allegations, the statement of claim disclosed no cause of action. The respondent, however, successfully made an application to amend the statement of claim to include those allegations. It is from the exercise of the discretion so exercised that the defendants/appellants now appeal, and upon which the contention outlined above has been advanced.

Though it does not affect the outcome of the appeal, it should be noted that when the issue was argued in the Court below, the allegation that the action would have been statute barred was put forward on the basis of the provisions of the Public Authorities Protection Act, causing the learned judge to find thus:-

> "The case of Hamlet Bryan vs. George Lindo (supra) and the cases cited therein establish quite clearly that a public official acting in the exercise of statutory or other authority cannot be protected by the Public Authorities Protection Act if he acts maliciously. I have already adverted to the use of the word intentionally in the Statement of Claim.
>
> I therefore uphold Mr. Gittens' submission that the acts complained of fall outside of the statutory protection on the principle laid down in the Hamlet Bryan case. That being so the operation of the Statute of Limitation is irrelevant. There can therefore be no question of an amendment of the Statement of Claim causing any injustice to the Defendants."

Before us, however, counsel for the appellants maintained that "the action would be statute barred by the six year limitation of the Limitation of Actions Act", and that the learned judge erred when he did not so rule.

Nevertheless, whether by virtue of the Public Authorities Protection Act or the Limitation of Actions Act, the point in

issue still remains, viz, whether in circumstances where an amendment would defeat the provisions of either Act, thereby depriving the defendant of a legal defence, should such an amendment be granted.

The answer to the question has long been settled and reference to the judgment of this Court in The Attorney General and Special Constable Anthony Cowell v. Anthony Richards SCCA 39/86 delivered on the 9th March, 1987 (unreported) is sufficient. The Court in dealing with the point followed and affirmed the judgment of the pre-independent Court of Appeal in Charlton v. Reid (1960) 3 WIR 33 per Rowe, P -

> "Within the experience of all the members of this Court Charlton v. Reid has been accepted and followed systematically for the past twenty-seven years."

In a case where, neither the writ of summons nor the statement of claim, had alleged the mandatory requirements of the Constabulary Force Act, the Court found that the learned judge fell into error in granting such an amendment and allowed the appeal.

In doing so, the Court accepted the words of McGregor, C.J in Charlton v. Reid (supra):-

> "There is an abundance of authority that the Court has always refused to allow a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence."

The learned Chief Justice then referred to several cases in support of his opinion, one of which is Weldon v. Neal (1887) 19 QBD 394 a case also considered in the Anthony Richards case (supra).

The case of Charlton v. Reid was a case heard in the Resident Magistrate's Court, where there is no requirement for

a writ of summons, and the omission of the words required by section 33 of the Constabulary Force Act occurred in the particulars of claim.

In the case of Weldon v. Neal (supra) the application for the amendment related to the addition of further causes of action not disclosed either in the writ of summons or the statement of claim. Of those circumstances, where the amendment if granted, would allow the claim for additional causes, which would have been statute barred if the claim for those causes were then being filed, Lord Esher stated:-

> "... amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant..." (Emphasis mine)

This case therefore is distinguishable from the case under review in two important aspects:-

(i) The amendment in the Weldon case related to the addition of causes of action, not originally claimed, while in the instant case, the writ of summons had clearly made the mandatory allegations, and the application related to an amendment of the Statement of Claim to rectify the deficiency and to bring it in line with the writ.

(ii) The writ having made the required allegations and having been filed within the statutory limitations, was valid and good, hence there would be no necessity to file and issue any new writ which would be statute barred."

In my view, the answer to the contentions advanced in this appeal by the appellants is to be found in (i) and (ii) above.

The ratio decidendi, of all the cases relied upon by the appellants, is founded on circumstances, which would permit, if the amendment were granted, the plaintiff either to add new causes of action which at the time of the amendment would be statute barred or to make good a claim which was invalid from the filing of the writ and which had it been initiated at the time of the amendment, would also be statute barred.

Neither circumstances exist in this case, where the writ of summons was filed within the statutory period and having made the allegations required by section 33 of the Constabulary Force Act is valid. In those circumstances the learned judge in my view was correct in exercising his discretion under section 259 to allow the amendment, as no prejudice to the rights of the defendant would have been committed, because the action could not be statute barred, the writ having been filed within time.

It is for the above reasons that I concurred in the decision to dismiss the appeal, and to award costs to the respondent.

MORGAN, J.A.:

I have had the advantage of perusing the judgment of Forte, J.A. and concurring as I do with the conclusion and the reasons in which they are grounded, I shall briefly indicate the grounds of my concurrence.

The Writ in this case expressly averred at paragraph 3:

> "In acting as he did on or about the 21st day of December, 1983 Constable Newton Bowers did so either maliciously or without reasonable or probable cause." [Emphasis mine]

This averment is in accordance with the requirement of section 33 of the Constabulary Force Act (recited in the judgment of Forte, J.A.). The statement of claim did not, however, satisfy section 33 in that it failed to expressly allege that he "did so either maliciously or without reasonable or probable cause". At the commencement of the trial before Morris, J. a preliminary point was taken by the applicant that this failure was fatal to the plaintiff's case and that by virtue of the Public Authorities Protection Act the matter was statute-barred.

The learned trial judge held that the Public Authorities Protection Act was not available to the appellants. He did not rule in their favour and amended the statement of claim, holding that such an amendment would not cause any injustice to the defendant.

One ground of appeal was argued:

> "That the learned trial judge erred in law when he ruled that the Plaintiff's action was not statute barred by the six year limitation of the Limitation Act in that
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> (a) the Plaintiff's failure to repeat in his Statement of Claim the required words of Section 33 of the Constabulary Force Act is deemed to be an abandonment of such words from the Statement of Claim and
>
> (b) the Plaintiff is statute-barred from amending the Statement of Claim some

> " "6 years and 5 months after the relevant event occurred in order to accord with the provisions of the Constabulary Force Act."

Counsel for the appellants submitted that the word "declaration" in section 33 of the Constabulary Force Act was the old form of what is now called a statement of claim (Odgers Principles of Pleadings and Practice 13th Ed. p. 60). Therefore, he urged, to create a cause of action it is the statement of claim (termed "declaration" in section 33) which must have the words the statute requires to be expressly pleaded. He further submitted that because the Writ is not a pleading, the presence of the words on the endorsement was not sufficient to satisfy the statute. He relied for support on the English case of **Wallis v. Jackson** (1883) 23 Ch. D. 204 in which it was held that the endorsement on the Writ was not a pleading to entitle the plaintiff to move for an Order under the Judicature Act, 1873.

It is convenient here to note that section 2 of the Judicature (Civil Procedure Code) defines "pleadings" as:

> " 'Pleading' shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence or further defence of any defendant thereto, and of the reply or further reply of the plaintiff, whether to such statement of defence or to any counter-claim of a defendant, and of the rejoinder of the defendant to any such reply as last aforesaid." [Emphasis mine]

This definition states "or summons" and by its wording is not exhaustive. This definition, also, differs substantively from the definition in the English jurisdiction where the word "summons" is specifically excluded in defining a "pleading". In the Rules of the Supreme Court, 1970 (Order 1 Rule 4) it is stated under "Definitions":

> " 'pleading' does not include a petition, summons, or preliminary act."

Whereas then, in our jurisdiction, a Writ of Summons is a pleading, it is not so in the English jurisdiction. It follows that the English authority relied on by counsel in his submission has no relevance.

In this instance the words expressly required by the Constabulary Force Act to be pleaded are included in the Writ so, as conceded by counsel on the hypothesis, a cause of action was disclosed.

The statement of claim, however, must state the material facts on which the plaintiff relies and proposes to prove, and section 33 places that special burden on a plaintiff. The matter for consideration, then, is whether or not the learned judge properly exercised his discretion under section 259 of the Judicature (Civil Procedure Code) to amend pleadings as may be necessary for the purpose of determining the real questions in controversy between the parties.

It was the submission of the appellants that an amendment would give rise to loss of his defence under the Limitation of Actions Act. This cannot be so. It is the Writ not the statement of claim which commences the action. It is the Writ from which time begins to run. This Writ was filed within the time limited for filing and any amendment of the statement of claim accompanying the Writ cannot, therefore, be affected by the Limitation of Actions Act. Any amendment of the statement of claim in these circumstances could not bring any hardship or injustice to the appellants as the facts do not create any defence available to them under that Act.

The learned trial judge properly exercised his discretion and I, too, would dismiss the appeal.

BINGHAM J.A. (AG.)

Morris J (Ag.) following a hearing commencing on May 14, 1990 and occupying his attention for some five days, on May 24, 1990 entered judgment in favour of the plaintiff/respondent against the defendants/appellants for $37,000.00 being damages for assault. This claim arose out of an incident in Montego Bay, St. James on 21st December, 1985 in which the respondent was shot and seriously injured by the first named defendant, a police constable who was carrying out certain official duties at a Pay Bill at the Parish Council offices on Payne Street in that city. As the constable was then acting in the course of his employment the second named defendant was joined as a defendant by virtue of section 13 of the Crown Proceedings Act.

Before the hearing below proceeded on the merits Morris J had overruled a preliminary objection made by learned Counsel for the appellants. It was submitted that the statement of claim in failing to plead section 33 of the Constabulary Force Act disclosed no cause of action and that following certain well established dicta no amendment could be granted by the Court as to do so would deprive the appellants of a statutory defence available to them under the Limitation Act. Section 33 reads:-

> "(33) Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant." (Emphasis mine)

The learned judge exercising his discretionary powers of amendment under section 259 and 677 of the Judicature (Civil

Procedure Code) Law, granted the amendment of the statement of claim to include the underlined words in section 33 of the said Act (referred to supra).

The defence filed amounted to a denial of the allegations as set out in the statement of claim. The first named defendant gave evidence that the shooting of the plaintiff/respondent was accidental. Before us learned Counsel for the appellants has not challenged the correctness of the decision of the learned judge as to the conclusion to which he came on the merits of the claim. Although Ground 2 of the appeal was concerned with the award for damages, this was abandoned by learned Counsel for the appellants at the commencement of the hearing of the appeal.

The sole ground which engaged our attention was Ground 1 which states:-

> "1. That the learned judge erred in law when he ruled that the plaintiff's action was not statute barred by the six year limitation Act in that:-
> (a) The Plaintiffs failure to repeat in his Statement of Claim the required words of section 33 of the Constabulary Force Act is deemed to be an abandonment of such words from the Statement of Claim and
> (b) The Plaintiff is statute barred from amending the Statement of Claim some six (6) years and five (5) months after the relevant event occurred in order to accord with the provisions of the Constabulary Force Act."

It is now well settled that a Court has always refused to allow a cause of action to be added where if it were allowed the defence of the Statute of Limitations would be defeated.

There is a long line of authorities commencing with Weldon v Neal (1887) 19 Q.B.D. 394 and continuing into this century with Reid v Charlton (1960) 3 W.I.R. 33, a decision of the former Court of Appeal which was later affirmed by the Federal Supreme Court. The latest in this line of authorities being the Attorney General and Special Constable Cowell v Anthony Richards S.C.C.A. 39/86 an

unreported judgment of this Court delivered on 9th March, 1987. From this principle the question that now falls for our determination is whether on May 14, 1990 when Morris J (Ag.) exercised his discretion in granting the amendment of the statement of claim there was a cause of action in existence in respect of the matter before him.

In order to examine this question it is first necessary to consdier the Writ and its endorsement as by section 6 of the Judicature (Civil Procedure Code) Law all civil actions in the High Court are properly instituted by the filing of a Writ of Summons. The section further requires that:-

> "Every such Writ shall before it is filed, be indorsed with a Statement of the nature of the claim made, or of the relief or remedy required in the action."

The Writ of Summons and Statement of Claim in this matter were filed on 12th September, 1986. The indorsement on the Writ in so far as material reads:-

> "The Plaintiff's claim is for damages for Assault and Battery against the Defendants for that on or about the 21st day of December, 1983, Constable Newton Bowers, then attached to the Montego Bay Police Station in Saint James, shot the Plaintiff.
>
> The Second Defendant is sued under and by virtue of the Provisions of the Government of Jamaica for that the acts complained of were committed by a member of the Jamaica Constabulary Force acting in the performance or purported performance of his duties as a servant or agent of the Crown. In acting as he did on or about the 21st day December, 1983, Constable Newton Bowers <u>did so either maliciously or without reasonable and probable cause.</u>"

(emphasis mine)

The Statement of Claim which accompanied the Writ in so far as is material reads:-

"1. The Plaintiff was at the material time was at a Parish Council Office at Payne Street, in Montego Bay, Saint James where he had gone to collect money on the 21st day of December, 1983.

2. The Second Defendant is sued under and by virtue of the Crown Proceedings Act as representative of the Government of Jamaica for that the acts complained of were committed by a member of the Jamaica Constabulary Force whilst acting in or purporting to act in the performance of his duties as a servant or agent of the Crown.

3. Alternatively, the First Defendant is sued in his own behalf.

4. On or about the 21st day of December, 1983, Constable Newton Bowers, then attached to the Montego Bay Police Station in the parish of Saint James, intentionally assaulted the Plaintiff by shooting him."

It was the omission of the words "maliciously or without reasonable and probable cause" from the Statement of Claim that provided the lever for an attack on the validity of the claim by way of the preliminary objection below and the arguments of the appellants before us.

On examination of these documents no argument could properly be advanced as to the Writ and its endorsement. It had been lodged at the Registry of the Supreme Court in compliance with the provisions of section 6 of the Code and in so far as it contained the essential requirements of section 33 of the Constabulary Force Act, it was a valid Writ. Having been lodged on 12th September, 1986, some two and one-half (2½) years following the incident out of which the claim arose it was well within the six (6) years limitation period allowed under the Limitation of Actions Act for such actions.

The Statement of Claim followed closely the wording of the endorsement on the Writ , but was clearly deficient in omitting the operative words required by section 33 of the Constabulary

Force Act (supra).

In Charlton v Reid, the omission of the words maliciously or without reasonable and probable cause from the particulars of claim filed in the Resident Magistrates Court rendered the claim bad.

In Attorney General and Cowell v Richards both the Writ and the Statement of Claim were bad, a situation which rendered the pleadings a nullity. Any amendment sought therefore would have the effect of creating a cause of action in a cause or matter that was bad ab initio.

Learned Counsel for the appellants while conceding that the Writ in this matter was valid contends that it does not fall within the definition of a pleading, since it is not a specially endorsed Writ. The term "declaration" as it appears in section 33 of the Constabulary Force Act (Supra) was the name that before the passing of the Judicature Act 1875 was given to what is now referred to as a Statement of Claim. This did not, so he argued, include a generally endorsed Writ. In my opinion this argument entirely misses the point at issue as to the real question to be resolved. Granted that on the basis of the concession made by Counsel for the appellants, the Writ is not defective once it was filed within the limitation period, time would not commence to run against the plaintiff/respondent hence the claim could not be statute barred.

On a closer examination of the Judicature (Civil Procedure Code) Law section 2 reads:-

"pleading"

> "shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence or further defence of any defendant thereto, and of the reply of the plaintiff, whether to such statement of defence or to any counterclaim of a defendant, and of the rejoinder of the defendant to any such reply as last aforesaid."

This definition which is not exhaustive including as it does Petition or Summons would include a Writ of Summons and an Originating Summons as these are documents by which proceedings in the High Court are instituted. This would clearly put to rest any argument that a Writ of Summons is not a pleading. When it is accompanied by a tatement of laim (as in the instant case) it therefore forms part of the pleadings in the matter.

Sections 259 and 677 of the Judicature (Civil Procedure Code) Law provide very wide discretionary powers for a Court to allow amendment to pleadings in such terms as may be necessary for determining the real question in controversy between the parties. These two sections read:-

> Section 259 - "The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend indorsements or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."
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> 677. "The Court may order or allow any amendment of any Writ, petition, answer, notice, or other document whatever, at any time on such terms as justice requires.
>
> It shall be lawful for the Court, and every Judge thereof, and any Judge sitting at any Circuit Court, or other Presiding Officer, at all times to amend all defects and errors in any proceeding in civil causes or matters, whether there is anything in writing to amend by or not; and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge or Presiding Officer may see fit; and all

> "such amendments as necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

On the material available before the learned judge the two factors which fall for determination and stood in the way of his discretion being exercised in the respondents' favour was whether the amendment if granted would have:-

(a) prejudiced or embarrassed the appellants

(b) caused any injustice to the appellants

Under (a) this situation could arise if the facts were such as would fall within the line of cases such as Reid v Charlton or the Attorney General and Cowell v Richards and other authorities within that category. In such circumstances the amendment would have the result of affecting the existing legal rights of the appellants. Rowe P, in Attorney General and Cowell v Richards puts it in this manner at pages 7 and 8:

> "Within the experience of all the members of this Court Charlton v Reid has been accepted and followed systematically for the past twenty seven (27) years. Patterson J gave no authoritative decision except to say that his attention has not been directed in the instant case to any prejudice or injustice which the appellants would suffer if the amendment was granted. The Statutes of Limitations provide legal defences and so we would ask what greater injustice could be done to a defendant than to find himself liable to defend a suit which is brought or continued contrary to the prevailing statute of Limitations."
>
> (emphasis mine)

The situation before Morris J (g.) and with which we are now concerned is of such a nature that when examined show that there is no question of the amendment causing any injustice to the appellants nor could they for that matter contend that the application to amend caused them any embarrassment as the information contained in both the endorsement on the Writ of Summons when read together with the Statement of Claim was sufficient to bring home forcibly to their notice the nature and extent of the claim being made against them. As Morris J (Ag.) in overruling the preliminary objection after having reviewed the arguments at page 14 of the Record said:-

> "In my view therefore this state of affairs takes the matter out of the realm of a substantive point of law into that of the procedural or formal. In the circumstances an amendment of the Statement of Claim would not deprive the defendants of valid legal defence based upon the Statute of Limitations."

In relation to the above view expressed by the learned judge I need only state that the Writ being a valid one the amendment of the claim merely sought to bring it in conformity with the endorsement on the Writ. It can be seen therefore as more in the nature of a tidying up process.

Indubitably the amendment granted did not thereby introduce any new matter. In granting it the learned judge was not seeking to give validity to a claim that was not then in existence and in my view his discretion was properly exercised.

What I have so far expressed is in my opinion sufficient to dispose of the matter. It was for these reasons that I held that the appeal be dismissed and that the judgment of the learned judge below be affirmed with costs to the respondent to be agreed or taxed.