[1988–90 Gib LR 7]

BORRELL v. ATTORNEY-GENERAL

SUPREME COURT (Kneller, C.J.): March 25th, 1988

Evidence—medical evidence—personal injury—plaintiff to obtain medical advice before commencing personal injury action against employer—cannot require employer to provide medical report on which to base action—extension of time under Limitation Ordinance, s.5 not available when delay due to plaintiff's unreasonable failure to obtain supporting factual information

Limitation of actions—extension of time—unreasonable failure to produce evidence—extension of time under Limitation Ordinance, s.5 not available when delay due to plaintiff's unreasonable failure to obtain factual information to support claim—plaintiff in personal injury action against government employer cannot rely on employer to produce medical report on which claim based—to avoid prejudice to defendant caused by undue delay, tests in s.5 not readily satisfied

Limitation of actions—extension of time—quality of legal advice—delay by plaintiff not excused by absence or poor quality of legal advice—advice as to whether or how to bring claim need not come from solicitor if reasonable to obtain from other source, e.g. trade union—reasonableness test subjective

Limitation of actions—tort actions—running of time—for purposes of Limitation Ordinance, s.4(1) and s.5(3), time runs from date of knowledge of "material facts of a decisive character"—includes injury and attributability to defendant's negligence—"material facts of a decisive character" not contained in Government medical report relating to injury—ignorance of ability to sue a "material fact" but no extension of time if plaintiff's failure to obtain correct advice unreasonable

The plaintiff applied for more time to file a writ seeking damages for personal injury.

The plaintiff had been employed by the Government, and was injured when, in July 1984, he fell down an allegedly dangerous staircase that he was required to use at work. In April 1987, the Department of Labour and Social Security, as a result of the plaintiff's statutory disability claim, assessed his disability at 15% and granted him a "disablement gratuity" of £1,570, whereupon the plaintiff, for the first time, consulted a solicitor to ascertain whether this was sufficient compensation. The plaintiff's solicitor asked for copies of the medical reports on the plaintiff's injuries from the Government in May 1987, and in August 1987 prepared a draft writ and statement of claim, but did not issue them as the Government had not yet provided the information requested.

The plaintiff submitted that (a) he was not out of time due to the provisions of the Limitation Ordinance, s.4(1) (a proviso which provided a three-year limitation period for personal injury actions), as material facts (in the form of the assessment of the disability and quantification of the compensation), which he had had to consider before deciding whether or not to pursue a claim against the Government, had not been provided until April 1987, with the result that the limitation period ran from then, in accordance with the provisions of s.5(3) of the Ordinance; (b) it was impossible for him to lodge a full statement of claim in the absence of a final medical report from the Government, which had not yet been issued; and (c) the purpose of the Ordinance was to shield defendants from delayed claims, where the delay was prejudicial to the defendant; here, the delay was not prejudicial, as the Government had been given constructive notice of the plaintiff's common law claim by his earlier statutory claim for disability benefit.

The defendant submitted in reply that (a) the plaintiff was out of time and had not shown that material facts of a decisive character were outside his knowledge and so was unable to invoke the extension provisions made in s.5(3) of the Ordinance; (b) the plaintiff could easily have consulted a doctor for a medical report, which was the usual course of action for those in his position, rather than insisting that the defendant provide one and refusing to proceed until it did; and (c) the test in s.5(3) of the Ordinance was a difficult one for defendants to satisfy, with the burden of proof resting on the plaintiff, as the Ordinance's purpose was the protection of defendants; here, the plaintiff had waited nearly three years before indicating his intention to make a claim, and should not be excused from compliance with the Ordinance as insufficient proof had been adduced.

Held, dismissing the application,

(1) The plaintiff had failed to show that any material facts were outside his knowledge, and had thus failed to bring himself within the exception to the limitation period provided in the Limitation Ordinance, s.5(3). While the Government had taken nearly three years to assess the extent of the plaintiff's disability and the consequent level of compensation that he

would receive, neither this assessment nor the medical report (which had not yet been issued) contained material facts. The plaintiff's trade union could easily have advised him to obtain medical advice from a doctor, which was the normal course of action for potential plaintiffs; the fact that the advice given to the plaintiff might have been of poor quality did not affect the operation of the Limitation Ordinance. Material facts, for the purposes of s.5(3) of the Ordinance, included the plaintiff's knowledge of the injury, and its attributability to the alleged negligence, both of which had been known to the plaintiff in July 1984. The fact that a plaintiff did not know that he had a cause of action was also a fact; however, it was also necessary for him to take such steps as were reasonable in order to ascertain the nature and cause of his injury and advice relating to it (paras. 23–24; para. 28; paras. 31–32).

(2) It was for plaintiffs to ensure that they had sufficient material to put a draft statement of claim before the court; in order to obtain leave to bring an action, a potential plaintiff had to believe that he could establish that he had suffered an injury which was caused by the negligent act or default of the defendant, and had to be able to show that a reasonable person with his knowledge would also know that he was likely to obtain sufficient damages to justify his bringing an action. This entailed taking such steps as were reasonable to ascertain the nature and cause of the injury, and its ramifications for a possible claim. A plaintiff need not necessarily consult a solicitor for such advice: it might be reasonable for a manual worker to obtain legal advice from his union (the reasonableness test being a subjective one). However, it was quite another matter for him to insist on waiting for the defendant to provide the material on which he intended to base his claim before presenting it to the court (paras. 24–27).

(3) Intending plaintiffs should not be allowed too readily to satisfy the tests imposed in s.5 of the Ordinance for the extension of the time allowed to them for lodging claims. The purpose of the Ordinance was to ensure the administration of justice by preventing defendants from being prejudiced by unduly delayed claims (para. 20; para. 29).

Cases cited:

(1) *Central Asbestos Co. Ltd.* v. *Dodd*, [1973] A.C. 518; [1972] 3 W.L.R. 333; [1972] 2 All E.R. 1135; [1972] 2 Lloyd's Rep. 413; (1972), 116 Sol. Jo. 584, applied.

(2) *Pickles* v. *National Coal Bd. (Intended Action)*, [1968] 1 W.L.R. 997; [1968] 2 All E.R. 598; (1968), 112 Sol. Jo. 354, applied.

Legislation construed:

Limitation Ordinance (1984 Edition), s.4(1):

"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—

(a) actions founded on simple contract or on tort;

. . .
Provided that, in the case of actions for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

s.5(1): "Section 4(1) (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—
(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
(b) the requirements of subsection (3) of this section are fulfilled.

s.5(3): The relevant terms of this section are set out at para. 14.

s.10: The relevant terms of this section are set out at para. 16.

C. Finch for the plaintiff;
K.W. Harris, *Senior Crown Counsel* and *J.M.P. Nuñez*, *Crown Counsel*, for the defendant.

1 **KNELLER, C.J.:** Mr. Borrell, the plaintiff, asks this court to extend the time for filing his writ for damages for personal injuries, and seeks an order that he should pay the costs of this application to the Attorney-General, the defendant, in any event. The defendant urges the court not to extend the time for bringing this action but supports the plaintiff's request that the plaintiff should pay the costs of this move in the litigation.

2 The plaintiff comes to court by way of a summons in chambers of December 17th, 1987, expressed to be brought under the Limitation Ordinance, s.5. The summons is supported by an affidavit of the same date of the plaintiff's solicitor, Mr. Finch, together with six annexures which are letters dated between May 3rd and August 10th, 1987, between Mr. Finch and the City Electrical Engineer, and between Mr. Finch and Mr. Harris, Senior Crown Counsel, for the Attorney-General who is to be sued, I suppose, because he stands notionally for the City Electrical Engineer. The affidavit and its annexures tell the following story.

3 On July 5th, 1984, Mr. Borrell was employed by the Electrical Department. Each working day, all the Electrical Department employees had to go up a flight of stairs on its premises in Town Range and "clock in," or else they would not have been paid, however hard they laboured from morning to evening. The staircase was narrow and steep. There was no handrail. The stairs were not fitted with any material to prevent someone using them from slipping. The workers and their union complained about all this to the City Electrical Engineer, but he was deaf to all

they said. On July 5th, 1984, Mr. Borrell, Mr. Duarte, Mr. Lavagna, Mr. Gonzalez and Mr. Pilcher came down the staircase. Mr. Borrell slipped, fell and severely injured his right arm. He was taken to a hospital and operated on, and lost the full use of his right hand and arm for the rest of his life.

4 Two months short of three years from the date of the accident, Mr. Finch wrote to the City Electrical Engineer and recited most of what has been set out. He concluded this letter of May 4th, 1987 by asking if the City Electrical Department accepted responsibility for the dangerous state of the stairs and for the loss and damage that they had caused Mr. Borrell. The Electrical Department returned Mr. Finch's letter and told him that it occupied the building but the Public Works Department owned it. Mr. Finch wrote to the Director of Public Works on May 11th in the same terms and on June 25th, Mr. Harris, Senior Crown Counsel, wrote to Mr. Finch saying that the Director had sent that letter of May 11th to him and asked him to answer it. Mr. Harris told Mr. Finch that the Electrical Department did not admit liability and went on to ask for details of Mr. Borrell's claim. His last question was why Mr. Borrell had taken so long to herald his intention to make a claim against Government. Mr. Harris called it "a very substantial delay."

5 Mr. Finch received that letter on July 20th, and replied on July 21st. He explained that the delay was due to Mr. Borrell waiting for his injuries to heal and for the extent of the injury to his arm to be assessed. He could not make any claim before he knew the answers to those matters. And, Mr. Finch went on, it was not until April 9th, 1987 that the Department of Labour and Social Security, which had the medical reports relating to Mr. Borrell's accident and injuries, assessed his disability for life at 15% and granted him £1,570 as "a disablement gratuity." This sum, Mr. Finch reminded Mr. Harris, would have to be taken into account by the court assessing the damages to which Mr. Borrell would be entitled if he proved liability. Meanwhile, Mr. Borrell was asking the union to supply details of its complaints about the stairs to the Electrical Department and petitioning the Department of Labour and Social Security for the medical report on his injuries. All this was on July 21st, 1987, over three years after Mr. Borrell fell and injured his right arm.

6 Six days later, Mr. Harris wrote to Mr. Finch and thanked him for his letter setting out why Mr. Borrell had not warned Government that he was going to claim damages for his injuries. Mr. Harris added that he had asked the staff in the Supreme Court Registry whether Mr. Borrell had issued a writ, and the answer was that he had not done so. He then politely enquired whether Mr. Finch had any comments to make on the provisions of s.4(1) of the Limitation Ordinance. Mr. Finch did have some comments. He put them in a letter, dated August 3rd. He pointed out that Government took three years to assess Mr. Borrell's degree of disability and the amount

of compensation that he should receive. Mr. Finch said that these were crucial matters for Mr. Borrell to ponder before he could sue Government. No proceedings could start without a final medical report and an assessment of Mr. Borrell's degree of disability, and consequent compensation.

7 Furthermore, Mr. Finch revealed, Mr. Borrell had never consulted any solicitor other than Finch & Partners, and then not until the Department of Labour and Social Security told Mr. Borrell that his "disablement gratuity" was £1,570. Mr. Finch concluded with a tinge of irony: "It is not uncommon for lay clients to be unacquainted with the provisions of the limitation legislation."

8 None of this daunted Mr. Harris. He was Acting Attorney-General when he replied on August 6th. He asserted that because Mr. Borrell was ignorant of the Limitation Ordinance he could not circumvent the requirements of s.5(3) of the Ordinance. And, Mr. Harris asked, why the delay in (a) Mr. Borrell instructing Mr. Finch within the limitation period; and (b) Mr. Borrell warning the Government that he was going to claim against it?

9 That concludes, in my view, a fair summary of Mr. Finch's letters to authority on behalf of Mr. Borrell and the replies of Mr. Harris, the Senior Crown Counsel or Acting Attorney-General for Government.

10 Back we go now to the affidavit of Mr. Finch. He swore that he was not approached by Mr. Borrell until some time in April 1987. This is 2¾ years after Mr. Borrell says that he fell down those stairs. Mr. Borrell began by asking Mr. Finch if £1,570 was enough compensation for his suffering. Mr. Finch opined that Mr. Borrell "could have but not necessarily did have a further claim against Government in respect of the dangerous condition of the premises in which he [Mr. Borrell] was required to work."

11 Mr. Finch also asserts in his affidavit that the defendant and the Government have not dealt with any matter set out in his first letter of May 4th, 1987. He has not received the medical reports on Mr. Borrell's accident, injuries, treatment and ultimate condition, although he asked for them within the limitation period. He prepared a draft writ and Statement of Claim in August 1987, but without copies of the documents that the Government had withheld Mr. Borrell could not issue his writ.

12 Mr. Finch, in urging the court to extend the time in which Mr. Borrell had to file and issue his writ, harped on these matters. There was no affidavit in reply from the defendant. Whether the court says yea or nay to Mr. Borrell is a matter for its discretion. The application can be made *ex parte* but, as a measure of his *bona fides*, Mr. Borrell had made it *inter partes*. Mr. Borrell's first claim against the Government was under the Social Security (Employment Injuries Insurance) Ordinance, so Government had not been caught unawares in mid-1987 when he asked it to

admit liability at common law. When Mr. Harris asked for particulars, Mr. Finch thought that he did so for the purpose of collecting material on which he could take instructions later. Mr. Borrell could not know if he had a claim until he had seen the medical reports. The union had confirmed that complaints had been made about these allegedly perilous steps. The limitation period was a shield for defendants against delayed claims which put the defendant at a disadvantage.

13 Mr. Nuñez, for the respondent, asked for the application to be dismissed with costs. Mr. Finch, he claimed, had been put on notice by Mr. Harris that further delay after June 25th, 1987 by Mr. Borrell might be fatal to any action against the Government of which he might be thinking. There was no explanation by Mr. Borrell in any affidavit for any delay before or after June 25th. Mr. Borrell had not, it seemed, approached any solicitor between mid-July 1984 and May 1987, and he had not explained why this was so. He had, however, approached his union from time to time. The disablement allowance was not paid by Government. Mr. Borrell's claim need not depend on the Department of Labour and Social Security's medical reports. He was entitled to consult a private doctor of his choice. It was agreed that the limitation period for Mr. Borrell's intended action is three years from the date on which the cause of action accrued according to the proviso to the Limitation Ordinance, s.4(1).

14 There was also no dissent from the fact that limitation is not a defence to Mr. Borrell's intended action if, either before or after he begins it, the court grants him leave to begin or to continue it provided it is proved that the material facts of a decisive character "were at all times outside [Mr. Borrell's] knowledge (actual or constructive) . . . until a date which was not earlier than three years before the date on which the action was brought"(s.5(3)).

15 It is clear that the burden of proving that the material facts relating to his cause of action were or included facts of a decisive character that were at all times outside his knowledge (actual or constructive) until July 6th, 1987 or later lies upon Mr. Borrell.

16 Section 10 of the Limitation Ordinance makes the following provisions:

> "(3) In sections 5 to 9 reference to the material facts relating to a cause of action is a reference to any one or more of the following that is to say—
>
> (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;
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> (b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;
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> (c) the fact that the personal injuries so resulting were

> attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.
>
> (4) For the purposes of sections 5 to 9 any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from any defence under section 4(1) or so much of section 7 of the Contract and Tort Ordinance as requires actions under Part IV thereof to be commenced within three years after the death of the deceased) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.
>
> (5) . . . [A] fact shall, at any time, be taken to have been outside the knowledge (actual or constructive) of a person if, but only if,—
>
> (a) he did not then know that fact;
>
> (b) in so far as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and
>
> (c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances . . .
>
> (8) In this section "appropriate advice", in relation to any fact or circumstances, means the advice of competent persons qualified, in their respective spheres, to advise on the medical, legal and other aspects of that fact or those circumstances, as the case may be."

17 No other statute was cited. Counsel did not lay before the court any decision of a Gibraltar court on these sections of the Ordinance, and I have not found one.

18 The Ordinance was assented to and commenced on December 24th, 1960. Its English sources are the Limitation Act 1939; the Law Reform (Limitation of Actions, *etc*.) Act 1954; the Limitation Act 1963, and the Law Reform (Miscellaneous Provisions) Act 1971. Mr. Nuñez's authorities were *Pickles* v. *National Coal Bd. (Intended Action)* (2) and *Central Asbestos Co. Ltd.* v. *Dodd* (1) and from these the following principles may be culled.

19 An application for extension of time or leave to proceed should be intituled *In re A B* v. *C (Intended Action)* and be brought *ex parte* by originating summons with an affidavit in support and a draft statement of claim annexed to it (Rules of the Supreme Court, O.110). The deponent of the affidavit should be the applicant or his legal adviser and he should reveal, among other things, the age and occupation of the proposed plaintiff and the date he realized he had this injury.

20 The policy lying behind the Ordinance is that in the interest of the administration of justice, claims should not as a rule be delayed for a long time, because a long delay will often seriously prejudice a defendant and make a fair trial of the issues in dispute impossible.

21 The House of Assembly has decreed that the public interest demands that the writ in an action for damages in respect of alleged personal injuries said to have been caused by negligence, nuisance or breach of duty should be issued within three years. So the proposed plaintiff has to get leave to bring his intended action, and actually has to bring his action within three years of the time when he gets to know (actually or constructively) the material facts (those facts being of a decisive character).

22 If the application is made before the beginning of an action, the court has to grant leave if it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action that evidence would, in the absence of any evidence to the contrary, be sufficient to establish that cause of action.

23 The cause of the injury, or its attributability to the alleged negligence or breach of duty, is a material fact. The Ordinance says so. Otherwise, it would be not a fact but a matter of law.

24 The fact that a man does not know that he has a cause of action is a fact relating to that cause of action. The proposed plaintiff must have taken such steps as were reasonable for him in order to find out what his injury was, what caused it, and to obtain advice. Then he will know whether or not he has a worthwhile action.

25 What is "reasonable" for him to do depends to some extent on his "position in life" or his "walk of life." Thus it will be reasonable for, say, a miner or lathe operator to treat his union's officials as his legal advisers in some circumstances. The test is subjective and "the reasonable man" is irrelevant.

26 Before he can reasonably bring an action, the potential plaintiff or his advisers must know—or at least believe—that he can establish that (a) he has suffered certain injuries, (b) the defendant has done or failed to do certain acts, (c) his injuries were caused by those acts or omissions, and (d) those acts or omissions involved negligence or a breach of duty.

27 He must show that, having obtained appropriate advice, a reasonable person—not a lawyer—with his knowledge would know not only that he had a reasonable prospect of success but also that he was likely to obtain sufficient damages to justify the bringing of an action.

28 Once he knows all the material and decisive facts, if he fails to appreciate his likelihood of success in an action because he did not take expert advice or because he obtained wrong advice (which would be his misfortune) his tardiness in bringing his action is not excused. Ignorance of the law as a rule is not an excuse and this Ordinance does not say that it is an excuse.

29 The court should safeguard the interests of defendants as well as those of plaintiffs. An intending plaintiff should not be allowed too readily or too easily to pass the tests which the Ordinance imposes. A defendant can be at a serious disadvantage owing to the lapse of time. A dishonest plaintiff may advance reasons for delay which a defendant has no means of refuting.

30 The English authorities are in my respectful view good law and persuasive, so I will apply their principles to the facts in this matter. Mr. Borrell knew at once that he had suffered some damage on July 5th, 1984. He had an operation on his right arm. He lost the full use of his right hand and arm for the rest of his life. He knew that he had slipped on the stairs that his employers provided for him to use to "clock in." His union told him that the employers had been warned about the danger of those stairs to their employees and that they had done nothing to remedy this. He was aware that his injuries were due to the defendant's fault in not making the stairs safe. He claimed and obtained disability benefit. He has not specified who advised him to make this move. He has not indicated what his occupation was at the time.

31 If the union's officials helped him get his compensation, they could have and should have advised him to sue for negligence or neglect of duty, or both, if the compensation was inadequate for the injuries. They did not depend on the medical report held by his employer or the Director of Labour and Social Security. He or his union could have and should have arranged for another medical examination report on his injuries and treatment and subsequent condition. This is a normal manoeuvre for a proposed plaintiff in such an intended action. He still has not done this. It does not amount to a satisfactory explanation for a delay, especially that which follows a clear warning that the limitation period is near its end, to submit that no action can be taken in such litigation until the proposed defendant provides sufficient material for the plaintiff or his advisers to consider.

32 Mr. Borrell's draft statement of claim was not laid before the court. Again it is not in my judgment a reasonable excuse for him to say that he need not do this until the defendant gives him the material on which it can

be drawn. One of the consequences of that default is that it is difficult for him to show he has a reasonable prospect of success or that he is likely to obtain sufficient damages to justify the bringing of an action. He failed to obtain advice on all this or he was given incorrect advice.

33 He has not persuaded this court that he should have leave to proceed or have the time in which to file and serve his writ extended. He must pay the costs of this application.

Application dismissed.