[1991–92 Gib LR 36]

VICTOR v. RONCO

SUPREME COURT (Kneller, C.J.): April 4th, 1991

Limitation of Actions—tort actions—personal injury—court cautious in granting ex parte leave to commence personal injury action out of time under Limitation Ordinance, s.6(2), since defendant may be unable to refute applicant's reasons for delay and prejudiced by lapse of time

Limitation of Actions—tort actions—running of time—under Limitation Ordinance, s.5(3), time runs from plaintiff's possession of all material facts—ignorance of ability to sue is "material fact"—test of whether plaintiff took all reasonable action to ascertain facts and obtain appropriate advice is subjective, depending on circumstances and resources—no extension of time if delay caused by unreasonable failure to obtain advice or by wrong advice

The plaintiff applied for an extension of time in which to bring proceedings to recover damages for personal injury.

In April 1986, when aged 18, the plaintiff was injured in a motorcycle accident and sustained severe injuries to his leg. Having received extensive treatment for his injuries in Gibraltar, he returned to the United Kingdom in 1988 to complete his studies. At the end of that year, he spoke to a Gibraltar solicitor by telephone about the possibility of recovering damages. The solicitor was at that time under the false impression that the accident had occurred in April 1988.

The plaintiff next went to see the solicitor in April 1990, on his return from the United Kingdom, and was consequently outside the three-year limitation period for claims in negligence for personal injury under s.4(1) of the Limitation Ordinance. The plaintiff had still not fully recovered from his injuries and in future was likely to develop arthritis in his knee. The solicitor confirmed that, with the leave of the court, the could seek damages from the car driver even though the driver was uninsured. The driver was found, after enquiry, to have significant assets and income. The plaintiff applied under s.5 of the Ordinance for an extension of time in which to commence proceedings.

He submitted that (a) for the purpose of s.5 he had been unaware of the material fact that he had a cause of action until 1990, when he consulted his solicitor, which was within three years of the present application; (b) for the purposes of s.10(5), he had by telephoning his solicitor in late 1988, taken reasonable action to ascertain his rights, but had been misled

as to the available time in which to commence proceedings by the misunderstanding regarding the date of the accident; and (c) he had adduced sufficient evidence of negligence and consequent injury to establish, for the purpose of s.6(1), that he had a cause of action, apart from any defence.

Held, dismissing the application:

(1) The Limitation Ordinance prescribed a three-year limitation period for personal injury actions for reasons of public policy, namely that long delays should not prejudice defendants or make a fair trial of the issues impossible. Under s.5(1) an extension of time could be granted if the plaintiff showed that he was unaware of material facts of a decisive nature relating to his cause of action until less than three years before bringing the proposed proceedings. Under s.6(1), if he showed that he had, on the evidence accompanying his application for leave, a cause of action, and fulfilled the requirements of s.5, leave would be granted. However, the court would not allow an applicant for leave to pass the test imposed by the Ordinance too readily, since the defendant, who had no means of refuting the applicant's reasons for delay on an *ex parte* application, could be placed at a serious disadvantage in defending an action because of the lapse of time (paras. 12–13; para. 17).

(2) The fact that the plaintiff did not know he had a cause of action was a fact relating to that cause of action. Section 10(5) required that the plaintiff had been unaware of the relevant material fact, had taken all reasonable action to ascertain it; and, if that fact were ascertainable with the benefit of appropriate advice, that he had taken reasonable steps to obtain advice. Appropriate advice meant the advice of competent persons qualified to advise on medical, legal, or other aspects of the relevant fact (s.10(8)), and the test of what was reasonable for a plaintiff to do was subjective, depending on his position in life and the sources of advice at his disposal. There was no "reasonable man" test. The plaintiff had to show that he had applied within three years of being in a position to bring proceedings. This entailed knowing or believing, with the benefit of advice, that he could prove he had suffered injuries which were caused by acts or omissions of the defendant, that he had a reasonable prospect of success and was likely to recover sufficient damages to justify bringing an action (s.10(4)). Delay in bringing proceedings once in possession of the material facts of the existence, nature, and causation of his injuries, because he failed to obtain advice or obtained wrong advice, was not an excuse (paras. 7–8; paras. 14–16).

(3) In this case, the plaintiff had known the material facts relating to his injuries and their origin some time before the limitation period had expired. He had been unaware until 1990 of the material fact that he could sue the uninsured driver of the other vehicle involved in the accident. However, he had been well enough to resume his studies in the summer of 1988, and took advice when he telephoned his solicitor at the

end of that year (within the limitation period), but had compounded the solicitor's error in neglecting to contact him again until April 1990. Accordingly, he had not taken reasonable steps to ascertain his position, and his application for leave would be dismissed (paras. 19–23).

Cases cited:
(1) *Central Asbestos Co. Ltd.* v. *Dodd*, [1973] A.C. 518; [1972] 2 All E.R. 1135, applied.
(2) *Pickles* v. *National Coal Bd. (Intended Action), In re*, [1968] 1 W.L.R. 997; [1968] 2 All E.R. 598, applied.

Legislation construed:
Limitation Ordinance (1984 Edition), Long title: The relevant terms of this title are set out at para. 5
s.4(1): The relevant terms of this sub-section are set out at para. 5.
s.5(1): The relevant terms of this sub-section are set out at para. 5.
(3): The relevant terms of this sub-section are set out at para. 5.
s.6(1): The relevant terms of this sub-section are set out at para. 6.
(2): The relevant terms of this sub-section are set out at para. 6.
s.10(3): The relevant terms of this sub-section are set out at para. 6.
(4): The relevant terms of this sub-section are set out at para. 6.
(5): The relevant terms of this sub-section are set out at para. 7.
(8): The relevant terms of this sub-section are set out at para. 8.

E.C. Ellul for the plaintiff.

1 **KNELLER, C.J.:** Gerald Victor, by a summons in chambers dated June 5th, 1990, asks this court under s.5 of the Limitation Ordinance to extend the time within which he may issue proceedings in this action. An affidavit in support, of the same date, provides the background to the application, which is this. The plaintiff was involved in a traffic accident in April 1986 while riding his motorcycle. He suffered very serious injuries, mainly to his right leg. He was in and out of hospital and receiving treatment from April 1986 to some time in the summer of 1988, when he left for the United Kingdom to carry on with his studies. He had not recovered from his injuries by then and he was unable to lead a normal life and take part in many activities which most young men in their twenties do.

2 From the date of his accident until he went overseas for the next part of his education, his parents went through a most difficult and worrying period. All they wanted at that time was to see their son fully restored to his former good health. They then began to think about the possibility of recovering damages for his injuries. They had already been told by the police that the driver of the other vehicle had not been insured when the accident occurred and they thought that nothing could be done about damages.

3 The plaintiff came back to Gibraltar in December 1988 for his holidays and his parents discussed the matter with him. He then spoke to his solicitor on the telephone about his remedies and between them they decided that he would return in April 1989 and call upon his solicitor for further discussions. Unfortunately, his solicitor believed that the accident had occurred in April 1988 when, of course, it had happened in April 1986. At any rate, over the Easter holidays of 1989, for one reason or another, the plaintiff did not see his solicitor. They finally met in April 1990. The solicitor then told him that he could sue the defendant for damages even though the defendant did not have a policy of insurance. His solicitor had discovered that the defendant is a man of means who owns an expensive car and a speedboat, and has a substantial income.

4 The plaintiff was 18 at the time of his injuries in April 1986, so he would be about 23 now. His right knee has not fully recovered and the diagnosis is that he will suffer from arthritis there in the future. Annexed as an exhibit to the affidavit is a draft statement of claim that sets out a report on his medical condition prepared in June 1987. There is no need for any more details to be included in the account of the background to all this, so I now turn to the law.

5 The long title of the Ordinance is "AN ORDINANCE TO CONSOLIDATE THE LAW RELATING TO THE LIMITATION OF ACTIONS AND FOR MATTERS CONNECTED THEREWITH." The limitation period for "actions for damages for negligence . . . in respect of personal injuries to any person" is three years (see the proviso to s.4(1)). And to extend that time-limit, the plaintiff must be granted leave by the court "whether before or after the commencement of the action" (s.5(1)). The requirements of s.5(3) are fulfilled—

> "if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which was not earlier than three years before the date on which the action was brought."

6 "Any application for the leave of the court for the purposes of section 5 [is] made ex parte . . ." unless it is made after the beginning of the action (s.6(1)). Section 6(2) reads:

> "Where such an application is made before the commencement of any relevant action, the court shall grant leave if, but only if, on evidence adduced by or on behalf of the plaintiff, 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—
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> (*a*) to establish that cause of action apart from any defence under section 4(1); and

(*b*) to fulfil the requirements of section 5(3) in relation to that cause of action."

Under s.10(3), when interpreting s.5—

"reference to the material facts relating to a cause of action is a reference to any one or more of the following—

(a) the fact that personal injury resulted from the negligence constituting that cause of action;

(b) the nature or extent of the personal injuries resulting from that negligence;

(c) the fact that the personal injuries so resulting were attributable to that negligence."

Section 10(4) reads:

". . . [A]ny of the material facts relating to the cause of action should be taken, at any particular time, to mean 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, an action would have a reasonable prospect of succeeding and of resulting in an award of damages sufficient to justify the bringing of the action."

7 When will a fact be taken to have been outside the knowledge (actual or constructive) of a person? Under s.10(5), it would be 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 take and for 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 If the person at the time when he was under disability was also in the custody of a parent, then it is the parent who should be referred to instead of the intended plaintiff. Under s.10(8)—

"'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."

9 No other statute was cited. Counsel did not lay before the court any decision of a Gibraltar court on these sections of the Ordinance. 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. It is therefore appropriate to consider decisions of the United Kingdom courts.

10 The following principles may be culled from *In re Pickles* v. *National Coal Bd. (Intended Action)* (2) and *Central Asbestos Co. Ltd.* v. *Dodd* (1).

11 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.

12 The policy underlying the Ordinance is that in the interests of the administration of justice, claims, as a rule, should not be long delayed because a long delay will often seriously prejudice a defendant and make a fair trial of the issues in dispute impossible. 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 be given leave to bring his intended action, and 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).

13 If the application is made before the beginning of an action, the court has to grant leave if it appears to it 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.

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

15 Before he can reasonably bring an action, he or his advisers must know or at least believe 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. 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 (s.10(4)).

16 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 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 it is an excuse.

17 The court should safeguard the interests of defendants as well as 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.

18 The English authorities are, in my respectful view, good law and persuasive, so I will apply their principles to the facts in this matter.

19 The timetable for this application was as follows:

(i) *April 1986*: The applicant is 18 and is involved in an accident. The applicant is seriously injured. The applicant's parents are told by police that the other vehicle's owner is not insured.

(ii) *Summer 1988*: The applicant leaves for further studies in the United Kingdom.

(iii) *December 1988*: The applicant returns to Gibraltar for a holiday. The applicant telephones a solicitor for advice on his remedies for injuries and they agree they will continue discussions in April 1989. His solicitor believes the accident occurred in April 1988.

(iv) *April 1989*: The applicant returns to Gibraltar for holidays. He does not see his solicitor. The third anniversary of the accident passes. The three-year limitation period for actions for personal injuries ends.

(v) *April 1990*: The applicant and his solicitor meet in Gibraltar and the solicitor tells the applicant he can sue for damages for his personal injuries even if the other vehicle's owner was not insured. The applicant is 12 months out of time for bringing an action for damages for his personal injuries.

(vi) *June 1990*: The applicant applies for the extension of the time in which to begin his action. He is then 13–14 months out of time.

20 The material facts of a decisive character relating to his cause of action included these facts:

(a) His personal injury resulted from the negligence constituting his cause of action.

(b) The nature and extent of his injuries resulting from that negligence.

(c) The personal injuries so resulting were attributable to the negligence of the driver of the other vehicle.

21 Gerald Victor and his parents knew all those facts several years before the limitation period expired. What they did not know until April 1990, which was a year after the end of the three-year period, was that Gerald Victor could sue the uninsured driver of the other vehicle for damages for his personal injuries attributable to that driver's negligent driving of the other vehicle. This is a fact relating to his cause of action.

22 Did he or his parents take such steps as were reasonable for them to obtain legal advice? He was between 18 and 22 years old during the three years after his cause of action arose. He was engaged in "further studies." He was well enough to begin them in the summer of 1988, which was within the time-limit. He took expert advice in December 1988—which was within the three-year period—when he telephoned his solicitor but he was told to contact him in April 1989, a date the solicitor thought would be within the limitation period. This was wrong advice. He did not follow that advice for another 12 months. He compounded that error.

23 So, in my judgment, Gerald Victor has failed to show that he or his parents took such steps as were reasonable for them to obtain legal advice. They have not passed the tests the Ordinance imposes and the application must be and is dismissed. Leave is refused.

Application dismissed.