

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cv.A. 261 of 2008**

**BETWEEN**

**RAMESH SEEBALACK**

**APPELLANT**

**AND**

**CHARMAINE BERNARD**

**(Legal Personal Representative of the estate of Reagan Nicky Bernard)**

**RESPONDENT**

**PANEL**

**M. Warner, J.A.**

**W.N. kangaloo, J.A.**

**S. John, J.A.**

**APPEARANCES:**

**Mr. Ronnie Persad, instructed by Ms. A. Hasnain on behalf of the Appellant**

**Mr. A. Ramlogan holding for Ms. C. Bhagwandeem on behalf of the Respondent**

**Mr. R. Khan (interested party) on behalf of Capital Insurance**

**DATE DELIVERED: 31<sup>st</sup> March, 2009**

**Delivered by M. Warner, J.A.**

I have read in draft the judgments delivered by Warner, J.A. and Kangaloo J.A. I agree with them and I have nothing to add.

S. John  
Justice of Appeal

## J U D G M E N T

1. This is an appeal from a decision of Bereaux J. in which he granted the respondent/plaintiff leave to amend her statement of case to include particulars of general and special damages. The appellant, one of three co-defendants has appealed the judge's decision.

2. The respondent issued a claim form and statement of case on the 23<sup>rd</sup> February, 2006 in which, as attorney and legal personal representative of the estate of one Ricky Bernard, deceased, she sought damages against the owner, and the driver of a vehicle which was involved in an accident in which Ricky Bernard, a pedestrian, was killed in 2002. The insurer of the vehicle was sued as a co-defendant under the provisions of section 10A of the Motor Vehicles (Third Party Risks) Amendment Act 1996.

3. The respondent's case is founded on the alleged negligence of the appellant, the owner of the vehicle and the co-defendant, Kemchan Ramcharan, who is sued as the appellant's servant and or agent. The following is a chronology of the relevant proceedings in the Court below:

23 <sup>rd</sup> February 2006	Claim form and statement of case issued. No substantive plea or particulars made or given in relation to damages.
30 <sup>th</sup> June, 2006	First case management conference before the Honourable Mr. Justice N. Bereaux. Permission granted to claimant to amend claim form and statement of case.
4 <sup>th</sup> July, 2006	Amended Claim form and statement of case issued. Amendment introduces the agency between the first and second defendants. Still no substantive plea or particulars made or given in relation to damages.
21 <sup>st</sup> April, 2008	Further case management conference.

26 <sup>th</sup> May, 2008	Final case management conference held directions, including directions for filing and exchanging of witness statements given. Pre-trial review fixed for 10 <sup>th</sup> October, 2008.
17 <sup>th</sup> July, 2008	Claimant's list of documents filed, disclosing, inter alia, receipt from Dass Funeral Home dated 3 <sup>rd</sup> July, 2008 and pay sheets dated 19 <sup>th</sup> May 2000 to 25 <sup>th</sup> October, 2002 from Rick's Lumber yard detailing the income of the deceased.
17 <sup>th</sup> July, 2008	Witness statement of claimant filed.
15 <sup>th</sup> August, 2008	Claimant's bundle of documents unagreed filed. It includes inter alia, receipt from Dass Funeral Home dated 3 <sup>rd</sup> July, 2008, and pay sheets dated 19 <sup>th</sup> May 2000 to 25 <sup>th</sup> October, 2002 from Rick's Lumber yard detailing the income of the deceased.
30 <sup>th</sup> September, 2008	Witness statement of the second defendant filed.
10 <sup>th</sup> October, 2008	Pre-trial review re-listed to 11 <sup>th</sup> November, 2008.
11 <sup>th</sup> November, 2008	First pre-trial review.
27 <sup>th</sup> November, 2008	Claimant's notice of application for a re-amendment of the amended statement of case issued, supported by affidavit of the claimant.
4 <sup>th</sup> , December, 2008	Order made by Bereaux J. granting leave to the claimant to re-amend the statement of case to include particulars of special and general damages.
5 <sup>th</sup> December, 2008	Re-amended statement of case issued.

4. The chronology shows that in August 2008 the respondent provided a list of documents in which she disclosed a receipt for payment to Dass Funeral Home, for funeral expenses of the deceased and copies of pay sheets from Rick's Lumber yard, the respondent's employer. The deceased was a part owner of the business. The production of the receipts seems to indicate that she believed that she had given notice of her intention to claim special damages in the nature of funeral expenses and that she had signalled her intent to seek general damages for "the lost years."

5. Regrettably, it was not until November 2008, after the first pre-trial review, that a notice of an application to re-amend was filed, supported by the respondent's affidavit. The appellant filed no affidavit in reply.

6. Part 20 of the Civil Proceedings Rules 1998 (the C.P.R.) reads

**"Changes to statement of case**

- 20.1 (1) A statement of case may be changed at any time prior to a case management conference without the court's permission.
- (2) The court may give permission to change a statement of case at a case management conference.
- (3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.
- (4) A statement of case may not be changed without permission under this rule if the change is one to which rule 19.2 (change of parties) applies.
- (5) Any amended statement of case must be filed promptly at the court office.
- (6) Where a statement of case is amended, the amendments must be verified by a certificate of truth unless the court orders otherwise."

The use of the word "amended" in 20. 1 (5) and (6) was a matter which was of concern to the judge.

7. In reaching his decision Bereaux J. reasoned:

***"I note as well that Part 20, is unlike the English CPR which speaks of "amend" (as opposed to "change"). In my judgment, that difference is significant. Use of the word "amend" in Part 20 rule (3) would have permitted the inflexible interpretation sought to put on the rule by Mr. Persad.***

***"Change" on the other hands connotes an alteration of the tenor and character of the statement of case or defence. As such an amendment which clarifies but keeps intact the basic character of the statement of case or defence does not "change" it. Indeed it permits both claimant and defendant to advance the matter more quickly to trial by clarifying the issues sought."***

***The re-amendment sought by the claimant in no way changed her case or the substance of the statement of case. It simply provided particulars of special damages and general damages. In my***

***judgment, the refusal of the amendment would severely inhibit the claimant's ability to prove her damages and, bearing in mind the allegations of how the deceased met his untimely death, would have produced, if she succeeded on her substantive action, an unjust result in terms of quantum of damages she would recover. There was not prejudice to the defendant who was compensated in costs, more so, since it is still quite early in the proceedings. Indeed the particulars would assist the defendant in knowing quite clearly the claim he has to defend."***

8. The re-amendment which the judge allowed permitted the respondent to make a substantial claim for general damages based on the "lost years principle," in the sum of \$391,595.52, and special damages of \$8,625.00 and \$1,200.00. Mr. Ramlogan did press the point that the rules did not specifically require that "how far one had to go in pleading general damages"

9. The respondent advanced two reasons for the shortcomings of her case, in her affidavit filed on the 27<sup>th</sup> November, 2008. Firstly, she deposed that she had misplaced the original receipt for funeral expenses and secondly that because of her intense grief, she did not return to her brother's place of work for several years after his untimely death. This information was provided to her Attorney-at-Law in or about July 2008. It was apparently accepted by the judge.

10. The first question which the judge had to consider was whether the change was necessary because of "some change in circumstances which became known after the first case management conference." As part of the new landscape, when the court exercises a discretion, or interprets the meaning of any rule it must seek to give effect to the overriding objective.

11. The overriding objective of the Rules, is to enable the court to deal with cases justly. I cite the relevant provision for ease of reference.

**“The overriding objective**

- 1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
- (2) Dealing justly with the case includes-
- (a) ensuring, so far as is practicable, that the parties are on equal footing;
  - (b) saving expense;
  - (c) dealing with cases in ways in which are proportionate to-
    - i. the amount of money involved;
    - ii. the importance of the case;
    - iii. the complexity of the issues; and
    - iv. the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously; and
  - (e) allotting to it an appropriate share of the court’s resources while taking into account the need to allot resources to other cases.”

12. I now return to the expression “some change of circumstances” in Part 20. The rule is couched with awareness that the factors covered by its broad sweep would necessarily be multifarious. However, the rule limits the court, in the exercise of its discretion, to circumstances which became known after the first case management conference.

13. The court must take into account all relevant circumstances in considering all the possibilities available to it. In fact all parties must help the court to further the overriding objective. It is no longer appropriate to “let sleeping dogs lie” (See **Asiansky Properties Television plc and Anor v Bayer – Rosin (a firm) [2001] EWCA Civ. 1792**).

14. It is also an important fact that a case management judge is seized of the conduct of the case and is aware of its history. A court of appeal will only interfere if the judge is plainly wrong or has ignored a relevant direction.

15. The judge, in construing Rule 20, held that “change” connotes an alteration of the tenor and character of the statement or defence – an amendment which clarifies but keeps intact the basic character of the statement of case or defence does not change it. Mr. Ramlogan supports that interpretation.

16. I am of the view however that the words “change” and ‘amend’ as they are used in Part 20 are interchangeable. Any other interpretation would mean that the Rules make no provision for amendment. This would be the only logical inference which would be consistent with the judge’s reasoning.

17. The expression “some change of circumstances” is of considerable significance and this was the first issue the judge had to decide. What therefore, comprises “some change of circumstances?” I treat the question in this way. If, for example, after a first case management conference, in a personal injury claim, an injury is aggravated, or in an action for detinue, the subject property is destroyed, it is easily discernible that those features may well amount to a “change of circumstances.” However, an enlightened understanding of the law, or where a litigant is suddenly urged in whatever fashion to prosecute his case with due diligence or despatch, are not matters which constitute a change of circumstances, as envisaged by the Rule.

18. The judge has not demonstrated in his reasons that he directed his mind to these matters. He appeared to have been deflected by the use of the word “change,” an issue which I have already considered.

19. I now come to the case of **Vinos v Marks and Spencer plc [2001] 3 All E.R. 784.** which explains the impact, of the overriding objective. This was an action for damages for personal injuries the claimant issued proceedings one week before the expiry of the limitation period. He did not serve the claim form until 9 days after the 4 month period

provided by the rule (7(5)2) had elapsed. The delay could not be related to any difficulty over service, which was a requirement for extension of time.

20. The Court of Appeal, in agreement with the judge in the court below held that neither the overriding objective nor the court's case management powers enable the court to do what the rule expressly forbade. Peter Gibson L. J. in appraising the role of the overriding objective said:

***“The construction of the Civil Procedures Rules, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the Civil Procedure Rules, unlike their predecessors, spell out in Part 1 the overriding objective of the new procedural code. The court must seek to give effect so that objective when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1(2) of the word “seek” acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.”***

21. Mr. Ramlogan challenged the court's reasoning in Vinos. He argued that the rules had to be administered in a manner which was consistent with the overriding objective. He cited Jamaican authorities decided before and after the corresponding rule had been amended. What is clear to me however is that there was obviously a state of uncertainty, which led to amendment.

22. To return to the matter at hand, it is the duty of the claimant to set out in his statement of case, a short statement of all the facts on which he relies and to identify or annex a copy of any document which he considers necessary to his case. In a claim for personal injury there are additional requirements (See Part 8.6 and 8.10). While there is no specific rule which requires that general damages, (which in the present case includes

damages for the lost years), be pleaded all the facts on which a claimant relies, must be particularised. The present claim, in my view, will be caught by Part 8.6. This answers completely, Mr. Ramlogan's argument that the application affects damages alone.

23. The judge also stated that his approach was consistent with the provisions of section 20 the Supreme Court of the Judicature Act which provides:

***"The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act and the Constitution shall in every cause or matter pending before the Court grant, either absolutely or on such terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by him in the case or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."***

#### **Emphasis added**

While I agree that the purpose of the provision was to "perfect the fusion of law and equity", section 20 does give the court wide powers of amendment. (See observations of Fraser J.A. in **Bernard v Jennings 13 WIR 501 at 506**). I do not however believe that the respondent can advance that her "claim" was properly brought forward, having regard to contemporary principles and practice.

24. The philosophy underlying the radical change of the procedural rules is to counter delay and reduce costs. Even if I were minded to adopt a more liberal construction to the expression "some change of circumstances," this is not a case which would qualify. The respondent's affidavit is vague and it does suggest that key aspects of the case have not been brought forward.

25. The English rule (See Part 17 of the Civil Procedure Amendment Rules 2000) is considerably more flexible, in that it allows amendment to a statement of case after service, with consent of all other parties, or with permission of the court. The rigidity with which the local rule is drafted, does indicate that much stricter standards have been set. As has been the Jamaican experience, it may well be that the potential factors for and against amendment must now be considered, without rolling back the clock to more lax times. As the English rule demonstrates, the ultimate responsibility for the efficiency of the system rests with the court.

26. I would therefore allow the appeal on the ground that the judge ignored a relevant direction given to him by Part 20.1 (3). The respondent will pay the appellant's costs assessed in the sum of \$5000.00 which represent two-thirds of the costs of the application below. The order in the court below for the respondent to pay the appellant's costs will remain.

Margot Warner  
Justice of Appeal