IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M-382/1983

BETWEEN	JAMES MCLENNON	PLAINTIFF
A N D	FLORETTE CAMERON	FIRST DEFENDANT
A N D	LENFORD CAMERON	SECOND DEFENDANT

Mrs Pamela Benka-Coker instructed by Mr. Christopher Samuda of Messrs. Piper and Samuda for defendants/applicants.

Mr. Ainsworth Campbell for plaintiff/respondent.

HEARD: 7TH AND 11TH FEBRUARY, 1991

PANTON, J.

I have for consideration two motions. They are -

1. a motion to extend the time within which the applicants may apply to set aside the final judgment herein; and
2. a motion to set aside the interlocutory and final judgments entered herein in 1984.

THE BACKGROUND

On the 27th March, 1981, the respondent was injured on a road in St. Catherine by a motor vehicle driven by the second-named applicant. The respondent sued both applicants in negligence - the first-named applicant in her capacity as owner.

The writ of summons and the statement of claim were served on the first-named applicant on the 29th February, 1984 at her residence. On the 12th March, 1984, appearance was entered on behalf of both applicants by Mr. Delano St. A. Harrison, Attorney-at-Law.

By that entry of appearance, the applicants (who are wife and husband) announced that their address for the service of documents in the cause was that of Mr. Harrison at 53 Church Street, Kingston.

Thereafter, the respondent proceeded to serve all relevant documents on Mr. Harrison. Those documents included an interlocutory judgment in default of defence, a summons to proceed to assessment of damages, and a notice of

assessment of damages. Eventually, damages were assessed on the 5th December, 1984, and a writ of seizure and sale issued in February, 1985. That writ has been returned endorsed "no goods".

THE AFFIDAVITS

It is now almost ten years since the respondent received his injury. The applicants are now complaining that they did not know that a judgment had been obtained and that damages had been assessed.

In an affidavit dated 5th December, 1990, the second-named applicant deponed thus:

> "...I first became aware of these proceedings about February of this year when my said insurers communicated with me, informed me of the action and requested me to attend upon Mr. Christopher Samuda, Attorney-at-Law ..."

In a subsequent affidavit dated 5th February, 1991, he said:

> "I ... was incarcerated at the Spanish Town District Prison and had been from 1983 to 1985 ...
> Upon my release I was fully advised by the first defendant and verily believed that suit had been filed against me by one James McLennon in respect of a motor vehicle accident which occured on the 27th March, 1981, and that she had retained Mr. Delano Harrison, Attorney-at-Law with whom she had been in contact".

He went on to say further that he attended upon the said attorney-at-law and explained the circumstances of the accident.

If I am to believe the contents of the affidavit of the 5th February, 1991, then the second-named applicant could not be speaking the truth when in the earlier affidavit he had said that he became aware of the proceedings only in February of last year. Indeed, he left prison in 1985 and, according to him, that was when he was informed by his wife of the action and that an attorney-at-law had been retained on his behalf. It is to be noted further that the first-named applicant deponed as to instructing Mr. Harrison immediately on being served the documents and maintaining contact with him thereafter.

The affidavits indicate that the insurers are taking a belated interest in the proceedings. Seven years have passed while they slept. The second-named applicant claims to have reported the matter to the police as well as to the insurance company. It is reasonable to infer that the report to the insurance company would have been made within days or weeks of the accident. Why then

have they been so tardy? Why are they only now showing such interest?

The applicants in their affidavits, assert that they have a "good defence". I must assume that they communicated it to Mr. Harrison. He apparently did not think much of it. The insurers too must have known of this "good defence" all along but they all kept it to themselves until December, 1990 when the first set of affidavits were filed.

I find it interesting to note that even if one were to believe that the second-named applicant only learnt of the proceedings in February, 1990, it took him a further ten months to put his so-called "good defence" on paper.

DECISION ON THE MOTIONS

In my judgment the allegation of the existence of a "good defence" is a sham on the part of the defendants. They and their insurers are seeking to make a mockery of our judicial process. I shall not sanction their efforts.

They wish me to infer that the attorney-at-law was negligent. But, I ask myself: what have they done these past seven years to guard against the attorney's negligence, or to protect their interests? Have they reported the attorney to any disciplinary body? Have they brought an action against him for negligence? Apparently, the answer to the latter questions is "no". It may well be that they have done nothing as they have never been seriously interested in the fate of the plaintiff or of the action.

I find it impossible to exercise any discretion in favour of the applicants when I consider the circumstances that they themselves have enumerated.

There comes a time when an action has to be brought to a finality. The oft-quoted case of Evans v. Bartlam (1937) 2 A.E.R. 646 is not to be regarded as a licence for the making of tardy motions such as these that are now before me. An action cannot continue in perpetuity.

In my view it is now too late for the judgments in this matter to be set aside. More injustice would be done by setting them aside than by not doing so - even if the defence is a good one. A plaintiff who received a regular judgment in 1984 should by 1991 have collected the fruits thereof and ought to have forgotten about it. Faith in the legal and judicial systems

is not going to be maintained by setting aside judgments that have been on the books for seven years.

If the applicants are of the view that their interests were not properly addressed by their attorney-at-law, an action in negligence may well be their only course now - assuming that that too is not too late.

Both motions are hereby dismissed. The costs of these proceedings are to be the respondent's; such costs to be agreed or taxed.