SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 596 OF 1994

BETWEEN:

PATRICK MORILLE

Plaintiff

and

(1) PAUL PIERRE
(2) JOSEPH RAMNAL

Defendants

Appearances:

Mr. Alberton Richelieu for the Plaintiff.
Mr. Kenneth A.H. Foster for the Defendants.

2000: July 25
2001 May 02

JUDGMENT

[1] HARIPRASHAD-CHARLES J. This is indeed an unfortunate case. On 16th day of June 1993, the Plaintiff, a young man of 35, suffered severe multiple injuries as a result of a motor vehicular accident on the Castries/ Gros Islet Highway in the vicinity of Bois d'Orange in the Quarter of Gros Islet. On 27th day of June 1994, the First-named Defendant was convicted of the offence of driving without due care and attention contrary to section 53 (1) of the Motor Vehicle and Road Traffic Act, No.23 of 1988.

[2] On 9th day of August 1994 the Plaintiff filed a Writ of Summons endorsed with Statement of Claim seeking special damages of $65,263.00 and other relief for personal injuries allegedly sustained as a result of the said vehicular accident. On 26th day of September

1996, the Plaintiff filed an amended Statement of Claim pursuant to Order 20 of the Rules of the Supreme Court seeking increased special damages of an aggregate of $199,258.05.

[3] The amended Statement of Claim was personally served on the Defendants on 28th day of September 1996. With alacrity, the Defendants entered appearance three days later.

[4] On 27th day of November 1996, the Plaintiff entered a Default Judgment against the Defendants.

[5] On 25th day of March 1997, a Summons for Assessment of Damages was filed by the Plaintiff which was served upon the Defendants on 22nd day of April 1997. Two days later, the Defendants filed a Summons to set aside the Default Judgment.

[6] On 14th day of October 1997, the Defendants filed a Notice of Motion to deem the matter abandoned under Order 34. Then on 29th day of January 1998, the Defendants filed another Notice of Motion to deem the said matter abandoned.

[7] A perusal of the Record of the Court revealed that except for the grant of adjournments, nothing significantly transpired during several court hearings prior to the 6th day of November 1998 when Mitchell J. [Ag.] heard the quadrupled pending interlocutory applications and made the following Order:

(1) That the three [3] applications by the Defendants be dismissed;

(2) That the application by the Plaintiff for Assessment of Damages be dismissed; and

(3) That costs be costs in the cause.

[8] En passant, I observe that Counsel for the Plaintiff, Ms. Brender Portland was present at the hearing before Mitchell J.[Ag.] and the Defendants' Counsel, Mr. Kenneth Foster, Q.C. was regrettably absent.

[9] In dealing with the Plaintiff's Summons for Assessment of Damages, this is what Mitchell J.[Ag.] had to say at page 2 of his judgment:

> " A Summons for Damages to be assessed must be based on a Judgment. Such a Summons cannot be filed before the Judgment. In any event, this Judgment even if it were filed before the Summons for Assessment of Damages could not have founded the Summons. *To found such a Summons, the Judgment should include the authorizing words "and damages to be assessed" or some similar wording. In this case, the Default Judgment in question is for special damages of $199,268.05 with interest and costs. It does not authorize an Assessment of Damages* [my emphasis]. Finally, the Summons for Assessment of Damages should be dismissed because it is not supported by any affidavit evidence. The Summons is dismissed."

[10] There has been no appeal against the Judgment of Mitchell J.[Ag.] but consequent upon the delivery of the said Judgment, a somewhat unusual turn of events ensued.

[11] On 26th day of March 1999, the Plaintiff filed a Notice withdrawing the Default Judgment dated 27th day of November 1996. No leave or order of the Court was sought and or obtained.

[12] The unfortunate chronology of events continued. Having unilaterally withdrawn the aforesaid Default Judgment, the Plaintiff was successful in obtaining another Default Judgment on 24th day of January 2000 in the following terms:

> "No Defence having been entered by the Defendant herein it is this day adjudged the Defendant do pay to the Plaintiff Damages to be assessed interest thereon and costs."

[13] Then on 22nd day of March 2000, the Plaintiff filed another Summons for Assessment of Damages pursuant to Judgment in Default of Defence dated 24th day of January 2000. Accompanying this Summons was a properly drawn up affidavit.

[14] On 20th day of June 2000, I ordered that written skeletal arguments and submissions be exchanged on or before 21st day of July 2000 and that the matter be finally adjourned to 25th day of July 2000.

[15] On 25th day of July 2000, the Court reserved Judgment without hearing Counsel.

[16] The crux of the Plaintiff's contention is that the Summons for Assessment of Damages should not be dismissed for the following reasons:

(i) It is a proper application before the Court; by Summons and Affidavit with List of Documents.

(ii) The Doctrine of Res Judicata cannot be raised and is not applicable as the application was not heard and or dismissed on its merits.

(iii) Proceeding with the matter six [6] years later is not beyond the limitation period as the Application for Summons for the Assessment of Damages is a continuation of the proceedings subsequent to the filing of a Judgment in Default of Defence on the 8th day of February 2000.

(i) Proper Application before the Court

[17] The Plaintiff contended that the Summons for Assessment of Damages is a proper application before the Court. He gave no reason for such contention. The Defendants, on the other hand argued that the application before the Court is a new application for damages to be assessed which could have been dealt with fully at the first instance if the Plaintiff was more attentive.

[18] I agree with the Defendants. The Learned Trial Judge heard the Summons for Assessment of Damages and dismissed it. But, I do not agree with the Defendants that the Summons was dismissed on its merits. There was a procedural error since the authorizing words were missing. The Plaintiff felt that there was no reason to appeal and perhaps, rightly so. He then used the judgment of Mitchell J.[Ag.]] as his guide and corrected diligently all of the deficiencies that were so patent in the previous Summons for Assessment of Damages.

[19] In my opinion, the steps taken by the Plaintiff consequent upon the Judgment of Mitchell J.[Ag.] were erroneous. Rules of Practice and Procedure were breached when the Plaintiff withdrew the Default Judgment and substituted it with another Default Judgment without leave of the Court. In my opinion, the Plaintiff could have utilized the provisions of Order 19 Rule 9 and seek to either vary or set aside the Default Judgment. By filing another Summons for Assessment of Damages, I am of the view that the Plaintiff is now seeking to have the matter reheard based on evidence which were available at the hearing before Mitchell J.[Ag.] but which were not advanced. The affidavit evidence which is attached to the Summons does not speak of any fresh evidence. I opined that the Summons for Assessment of Damages was adequately dealt with by Mitchell J.[Ag.]. In the absence of any new circumstance or fresh evidence, a second application of the same nature cannot be entertained by the Court and I so hold.

(ii) Doctrine of Res Judicata

[20] The Plaintiff argued that the doctrine of *res judicata* cannot be raised and is not applicable as the Summons for Assessment of Damages application was not heard and or dismissed on its merits. I have no difficulty in accepting that the plea of *res judicata* is untenable where there has been no final determination on the merits: See: Swift v Charles Mc Enearney & Co. Ltd. [1971] 16 WIR 391.

[21] In fact, the Defendants themselves have argued that the doctrine of *res judicata* does not arise. What the Defendants are relying upon is the rule in Henderson v Henderson (1843) 3 Hare 100 which was applied in the recent case of Barrow v Bankside Agency Ltd and Others [1996] 1 WLR 257. In the Henderson's case, Sir Thomas Bingham, M.R. expressed the rule thus:

> "The rule in Henderson v Henderson is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to Court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the

> doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppresses by successive suits when one would do. That is the abuse at which the rule is directed."

[22] Clearly, the rule in Henderson v Henderson contemplates a hearing and decision on the merits and if in a subsequent action a new feature of claim or a new point of defence is set up, this could successfully be met by the plea of estoppel as a matter of record. I therefore do not agree with the submission of the Defendants that the rule in Henderson v Henderson is applicable in this case.

[23] The question raised in the instant case is however novel: how should a Court adjudicate in such an unusual case which was not heard and dismissed on its merits? In my opinion, the Plaintiff was confused as to what steps to take and was desperate to include the authorizing words "and damages to be assessed." As I have previously stated, he may have succeeded in seeking to move the Court to vary or set aside the Default Judgment under Order 19 Rule 9. But instead, he unilaterally withdrew a Judgment of the Court and substituted it with another Judgment without leave of the Court, In my opinion, the course taken was procedurally incorrect and it did not conform with the Rules of the Supreme Court.

[24] For the reasons given, I am of the view that the doctrine of res judicata as well as the rule in Henderson v Henderson are inapplicable in the instant matter which was not heard and determined on its merits.

(iii) ABANDONMENT

[25] The Plaintiff is seeking an Order from the Court to dismiss the Defendants' motion to deem the matter abandoned under the draconian Order 34. The Plaintiff presented numerous judicial authorities emanating from our jurisdiction to substantiate his argument. In my opinion, Mitchell J.[Ag.] adequately dealt with this issue. At page 3 of the Judgment, the Learned Judge said:

> "In any event, both Notices of Motion were to the knowledge of the Defendants filed after a Judgment had been entered in the matter. Order 34 does not contemplate a suit being deemed abandoned after a judgment has been entered in the matter. However, Counsel was not present to explain why he chose this procedure. The two Notices of Motion are dismissed."

[26] I am a bit astonished that this issue was so heavily canvassed before this Court even after such lucid and accurate pronouncement. I say no more on it.

CONCLUSION

[27] Accordingly, I dismiss the Summons for Assessment of Damages with Costs.

INDRA HARIPRASHAD-CHARLES

High Court Judge