

Alexandrine Austin and others - - - - - - *Appellants*

v.

Gene Hart - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD & TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY 1983

Present at the Hearing :

LORD FRASER OF TULLYBELTON

LORD SIMON OF GLAISDALE

LORD KEITH OF KINKEL

LORD BRIDGE OF HARWICH

LORD TEMPLEMAN

[*Delivered by* LORD TEMPLEMAN]

In these proceedings the respondent has so far successfully argued that the appellants were too hasty by three months and too tardy by six months in the issue of proceedings.

By his last will dated 12th September 1970 Simon Austin appointed his brother William Austin and one Ramesh L. Maharaj to be his executors. The dispositions of the estate of Simon Austin contained in his will are not material to this appeal.

On 3rd May 1974 Simon Austin was a passenger in a motor car driven by the respondent Gene Hart. The car ran off the road and collided with a bridge. Simon Austin received injuries from which he died the following day, 4th May 1974.

Section 3 of the Compensation for Injuries Ordinance [Ch. 5 No. 5] of Trinidad and Tobago creates the right to maintain an action against and to recover damages from any tortfeasor who causes death by his wrongful act, neglect or default. By section 6 of the Ordinance such an action can only be commenced within 12 months from the time of death.

Section 8 of the Ordinance is in these terms:—

“ 8(1) Every action in respect of injury resulting in death shall be for the benefit of the wife, husband, parent, and child, as the case may be, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

(2) If there be no executor or administrator of the person deceased, or if although there be such executor or administrator no such action shall, within six months after the death of such deceased person, have been brought by and in the name of his executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator."

The benefit of a right of action for injuries resulting in death thus belongs to the specified dependants who are relatives of the deceased. The benefit of the right of action does not form part of the estate of the deceased or devolve under the provisions of his will. The Ordinance provides machinery for the action to be brought by personal representatives of the deceased as trustees for the dependants or, in certain circumstances, for one or more of the dependants themselves to bring the action as trustee or trustees, for all the dependants.

Simon Austin was survived by four dependants entitled to the benefit of any action maintainable against the respondent for causing the death of Simon Austin by negligent driving. Those dependants were the first appellant, who was the mother of Simon Austin, and the remaining appellants who were the children of Simon Austin.

On 8th May 1974 Ramesh L. Maharaj renounced probate of the will of Simon Austin.

By writ dated 2nd August 1974 issued in the Trinidad and Tobago High Court and accompanied by a statement of claim, the appellants asserted their rights as dependants of Simon Austin under the Ordinance and claimed damages from the respondent for negligently causing the death of Simon Austin. At the date of that writ no one had proved the will or taken out letters of administration to the estate of Simon Austin.

By a defence dated 28th October 1974 the respondent denied negligence. He did not question the right of the appellants to bring the proceedings.

During the six months after the death of Simon Austin, ending on 3rd November 1974, no executor or administrator of Simon Austin brought proceedings against the respondent. On and from 4th May 1975, the first anniversary of the death of Simon Austin, section 6 of the Ordinance barred the right of any executor or administrator or dependant to commence proceedings against the respondent in respect of the death of Simon Austin.

The respondent applied and was granted leave to amend his defence which was amended on 9th July 1975. By the amendment the respondent contended that "the Court has no jurisdiction in terms of Section 8 of the . . . Ordinance . . . to entertain the claim herein or to enter any judgment thereon for the reason that by his will dated 12th September 1970, the deceased Simon Austin appointed two executors in one of whom namely, William Austin, the right to bring an action under the said Ordinance was vested at all material times". Unless the only material time was the date of the issue of the writ that amendment was plainly inaccurate or at any rate incomplete because on any footing a right to bring an action under the Ordinance was vested in the appellants from 4th November 1974 to 4th May 1975. Probate of the will of Simon Austin was eventually granted to William Austin on 28th May 1976 but any right vested in him to bring an action against the respondent in respect of the death of Simon Austin had ceased on 4th May 1975.

If there was any substance in the amendment to the defence made by leave on 9th July 1975 and if such an amendment was necessary to defeat the claims put forward by the appellants then it is surprising that the amendment was only put forward after the limitation period had expired and even more surprising that leave to amend was granted. The respondent by his initial defence served on 28th October 1974 had led the appellants to assume that the respondent only intended to defend the proceedings on their merits. Accidentally or by design the respondent delayed putting forward any claim that the proceedings were invalid until, by the expiration of the limitation period, the appellants were no longer able to institute fresh proceedings.

In the High Court of Trinidad and Tobago Alcalde Warner J. dismissed the appellants' action against the respondent, holding on a preliminary point that the court had no jurisdiction to entertain the appellants' claim. At the date of the writ on 2nd August 1974 there was an executor of Simon Austin, namely William Austin, and six months had not elapsed since the death of the deceased. The learned Judge, supported by a majority of the Court of Appeal of Trinidad and Tobago (Corbin and Hassanali J.J.A.), concluded that the action was and remained a nullity because the appellants were not entitled to issue a writ when they did so on 2nd August 1974.

For the purposes of this appeal their Lordships are content to assume, without deciding, that by the law of Trinidad and Tobago an executor who has not proved the will is nevertheless an executor within the meaning of section 8 of the Ordinance. The issue of the writ by the appellants was therefore premature. If before 4th November 1974 William Austin had brought valid proceedings against the respondent, the appellants would have been unable to maintain their action. But William Austin did not issue a writ and by 4th November 1974 the appellants were persons who were entitled to bring and had brought proceedings against the respondent under the Ordinance. In *Seward v. The Vera Cruz* (1884) 10 A.C. 59, at page 67, Lord Selborne pointed out that section 7 of Lord Campbell's Act which corresponded to section 3 of the Ordinance created a new cause of action "given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor". It would be unfortunate if the existence of an executor, known or unknown to the dependants, invalidated an action which at all times belonged in equity to the dependants merely because the dependants did not sue in point of form in the name of the executor but sued in their own names. Of course if the dependants were supplanted by the executor, if, for example, William Austin had himself brought proceedings within six months of the death of Simon Austin, then the action by the dependants could have been stayed or dismissed. That possibility is no reason for the court to refuse to entertain an action which the dependants in fact became entitled to initiate and pursue before their right to do so was challenged.

Section 8 (2) of the Ordinance does not expressly invalidate any action by a dependant within six months of the death if at the date of the writ there exists an executor or administrator. By 4th November 1974 it was certain that the dependants were entitled to bring proceedings, because it was certain that no executor or administrator had brought an action within that period of six months. Their Lordships are not convinced that a premature action is irregular although it may be stayed or dismissed if within six months of the death another action is brought by the executor or administrator. Their Lordships are satisfied that, if a premature action is irregular and the irregularity is of a kind, which, as in the instant case,

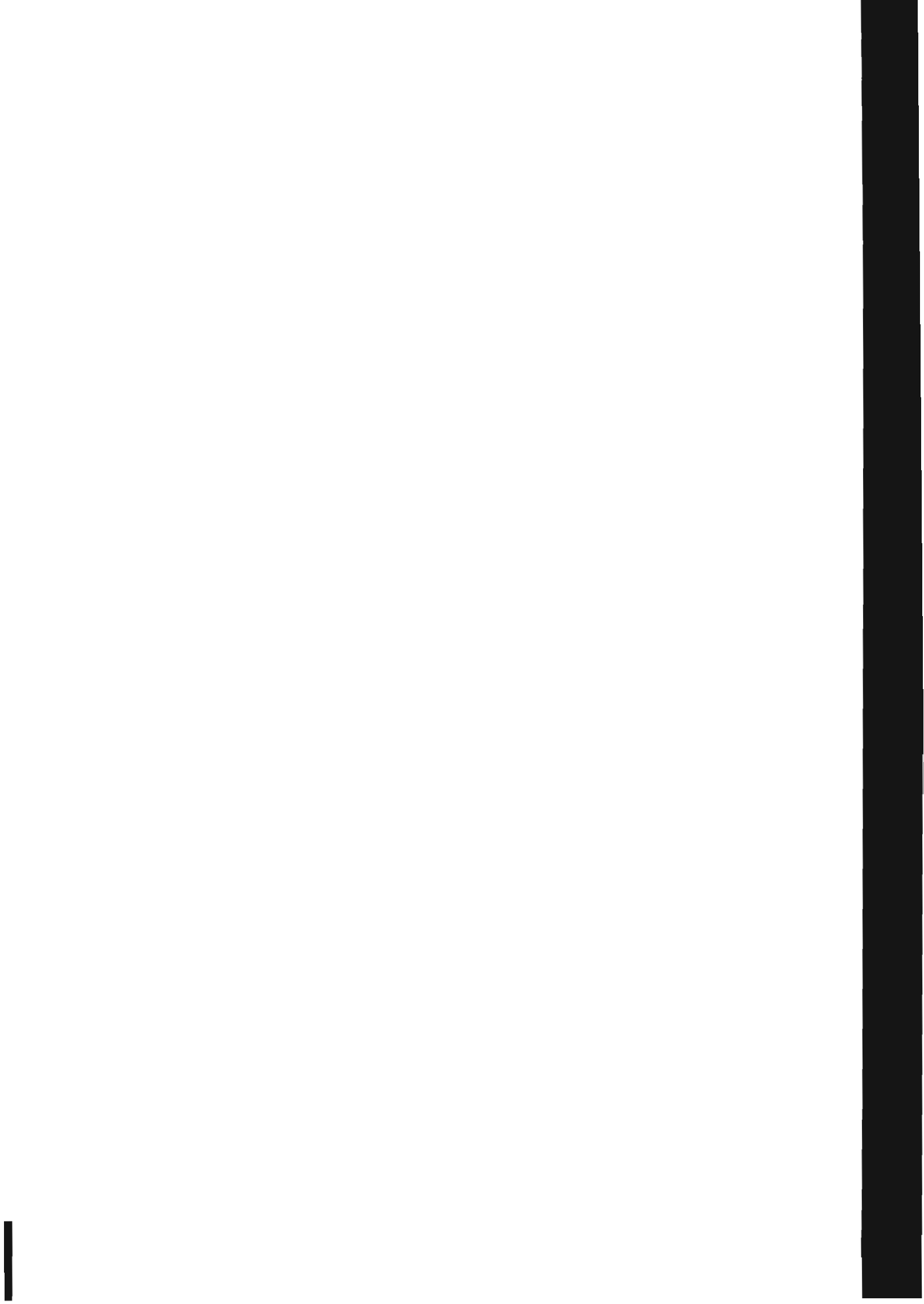
was cured without amendment by the mere lapse of time and which causes no prejudice to the defendant, there is no reason for the court to insist that the irregularity nullifies and invalidates the whole proceedings. The modern approach is to treat an irregularity as a nullifying factor only if it causes substantial injustice: see *Marsh v. Marsh* [1945] A.C. 271 at page 284. The premature issue of the writ in the present case did not cause any injustice at all. A bizarre and unjust result would follow if a writ issued on 2nd November 1974 and served on 4th November 1974 were held to be a nullity whereas a writ issued and served on 4th November 1974 would plainly have been effective.

On behalf of the respondent reliance was placed on authority for the proposition that proceedings are a nullity unless the plaintiff is entitled to sue at the date of the writ. In *Ingall v. Moran* [1944] 1 K.B. 160 the plaintiff sued as administrator and claimed damages under the Law Reform (Miscellaneous Provisions) Act 1934. The plaintiff was not an administrator at the date of the writ and did not obtain letters of administration until the limitation period had expired. It was held that the proceedings were a nullity. But in that case the plaintiff did not become entitled to sue until it was too late.

In *Hilton v. Sutton Steam Laundry* [1946] K.B. 65 the plaintiff claimed as administratrix under the provisions of the Fatal Accidents Act 1846 which correspond to section 8 of the Ordinance. The plaintiff was not an administratrix at the date of the writ and sought to amend so as to sue as a dependant widow. The Court of Appeal refused to allow the amendment and following *Ingall v. Moran* (above) held that the plaintiff was not entitled to continue her action as administratrix. In *Finnegan v. Cementation Co. Ltd.* [1953] 1 Q.B. 688 the plaintiff claimed in the writ as administratrix, though in the statement of claim she pleaded that she was both the widow and the administratrix. The Court of Appeal following their earlier decisions held that the plaintiff was not entitled to continue the action or to amend. The plaintiff was not the administratrix and never became entitled to sue in that capacity. None of the other authorities cited by counsel for the respondent carries the matter any further.

In the cited cases the plaintiff did not have any right to sue in the capacity claimed. In the present case the appellants were entitled to sue in the capacities in which they claimed provided, as happened, no executor or administrator intervened to bring an action within six months of the death of the deceased. In *Ingall v. Moran* (above) Luxmoore L.J., at page 169, could not help "feeling some regret". In *Hilton v. Sutton Steam Laundry* (above) Lord Greene, at page 73, was not "averse to discovering any proper distinction which would enable this unfortunate slip to be corrected". In *Finnegan v. Cementation Co. Ltd.* (above) Singleton L.J., at page 699, lamented "that these technicalities are a blot on the administration of the law, and everyone except the successful party dislikes them". Accepting, without approving, the decisions of the Court of Appeal which have been cited, their Lordships see no reason to encourage any extension of their ambit. In the present case the appellants were entitled to sue in the capacities named in the writ, they were entitled at the date of the writ to sue unless the executor or administrator intervened within six months of the death, no such intervention took place and the appellants without needing or seeking any amendment are entitled to proceed with the action which they launched.

Their Lordships allow the appeal and direct that the order of Alcalde Warner J. should be set aside and that the action should proceed to trial on its merits. The respondent must pay the costs of the appellants relating to the preliminary point in the courts below and before the Board.



In the Privy Council

ALEXANDRINE AUSTIN
AND OTHERS

v.

GENE HART

DELIVERED BY
LORD TEMPLEMAN