

IN THE COURT OF APPEAL, FIJI, AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0050 OF 1997S
(High Court Civil Action No.508 of 1992,S)

BETWEEN:

FIJI ELECTRICITY AUTHORITY
ATTORNEY-GENERAL OF FIJI

Appellants

AND:

MIRIAMA GANILAU

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Justice I.R.Thompson, Justice of Appeal

Hearing:

Wednesday, 12 May 1999, Suva

Counsel:

Mr. A. Patel for First Appellant
Mr. D. Singh for Second Appellant
Mr.T. Fa for the Respondent

Date of Judgment:

Friday, 14 May 1999

JUDGMENT OF THE COURT

This appeal is against the decision of Pathik J in the High Court given at Suva on 7 August 1997, extending the time under the Limitation Act [Cap 35] within which the respondent could bring her action against the appellants in respect of the death of her husband, who was electrocuted on 30 April 1989. He occupied a house in a prison compound and was killed when he touched a live stay wire in the grounds. The respondent as administrator of his estate issued these proceedings on 19 November 1992 under both the Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap 27] claiming damages and the Compensation to Relatives Act [Cap 29]. This was outside the time limit of 3 years from the date the cause of action arose (i.e. the date of death) imposed by s.4(1) of the Limitation Act in respect of the Law Reform Act claim, and 3 years from the date of death imposed by s.8 of the Compensation to Relatives Act.

In her statement of Claim the respondent alleged that the accident was caused by negligence for which both appellants were responsible, and said that the delay in bringing the action was due to the second appellant's failure to furnish a copy of a statutory report made on the accident until 1 October 1992. Liability was denied by each appellant in separate statements of defence and the Fiji Electricity Authority also pleaded that the claim was statute barred. The Attorney-General did not make such a plea.

Minutes of a pre-trial conference did not mention the Limitation defence as an issue, but before the hearing counsel-raised the matter as a preliminary point and it was argued before Pathik J. We were told that respondent's counsel made an oral application at that hearing for leave to "disapply" the limitation defence pursuant to s.17(3) of the Limitation Act. There was no affidavit or other evidence recorded, and we have no information about what was said to His Lordship in order to judge the validity of the appellants' criticism that the respondent did not adduce evidence satisfying the requirements of s17(3).

We need not traverse the convoluted provisions regarding extension of time in ss16-21 of the Limitation Act, beyond saying that His Lordship found the respondent did not know the material and decisive facts as required by s.16(3) and s.17(3) until the statutory report was received on 1 October 1992. He held that the question of who she could sue for negligence could not be decided in any degree of certainty before that date. With respect we are unable to share this conclusion.

As pointed out in Halford v. Brooker (1991) 1 WLR 428 at 443, "knowledge" in this context does not mean 'know for certain and beyond possibility of contradiction'. The circumstances of this unfortunate accident were straight-forward and obvious. Liability prima facie rested with whoever was responsible for erection and maintenance of the stay wire and with the occupier of the property, or both. A simple enquiry at any time could have ascertained that they were respectively the Electricity Authority and the Public Works Department. This appears to be a classic example of "res ipsa loquitur" and we are satisfied that the action could have been commenced well before expiry of the limitation period. There was no basis for extending the time, and the appeal by the Electricity Authority, which pleaded this defence, must succeed.

For the Attorney-General Mr. Singh submitted that the Court's practice was to permit such a defence to be raised without pleading, and he cited Surya Deo Sharma v. Jovesa Sabolalevu & Ors (High Court Suva, CA 539/94; 30 June 1995) where the Court ruled that a defendant who had not raised the point was not precluded from arguing it on the plaintiff's application for an extension of time under s.17 of the Limitation Act.

There is nothing in our High Court Rules 1988 about pleading a limitation defence, so that under O.1 r.7 the Court's jurisdiction must be exercised in conformity with the practice and procedure being adopted in the like circumstances by the English High Court, in respect of which O.18, r.8 directs that a party relying on it must plead specifically the expiry of the relevant period of limitation. This is so even if it appears from the statement of claim that the period has expired - see 28 Halsbury (4th Edn) para 647. It has always been understood that a defendant has an option whether to raise this defence and one does not expect to see it exercised in a case like this by a responsible public body and a public officer to defeat what appears to be a meritorious claim by the respondent. We understood Counsel for the Attorney-General to say that the defence was omitted by oversight from his pleadings. We refer him to para 656 of Halsbury (above) to the effect that if the defence was not pleaded through inadvertence, the Court may allow an amendment if it considers the plea is not in the circumstances improper, citing Aronson v Liverpool Corporation (1913) 29 TLR 325, where leave was refused.

In the present case His Lordship noted that the Attorney-General had not pleaded a limitation defence but allowed him to appear and make submissions on that preliminary issue before trial. With respect we do not think he should have been permitted to do so as no leave was given to amend the defence and it was not amended.

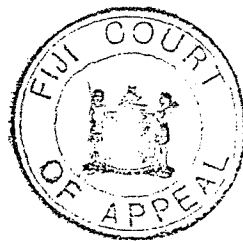
Mr. Singh's submission that the language of s.8 of the Compensation to Relatives Act was mandatory and imposed an absolute bar on the bringing of an action after three years from the date of death cannot be upheld. It reads:-

"8. Not more than one action shall lie for the same subject matter of complaint, and every such action shall be commenced within three years after the death of the person deceased."

If this submission were correct, one would not expect there to be any provision for extension of time in the case of an action commenced outside that period, since it would be a nullity. However, s.18(2) of the Limitation Act applies the provisions for extension in ss 16 and 17 to actions brought under the Compensation to Relatives Act, providing under s.16(1) that if leave is granted for the bringing of the action, the limitation provisions shall not afford any defence. Thus the limitation provision in s8 of the Compensation to Relatives Act is placed in the same category as the more general provisions in the Limitation Act itself as providing a ground of defence only, and not an essential requirement to the bringing of a valid action.

Result:

1. The appeal by the first appellant, the Fiji Electricity Authority, is allowed, with costs and disbursements of \$500 against the Respondent, and it is dismissed from the action.
2. The appeal by the second appellant, the Attorney-General, is dismissed on the basis that a limitation defence was not pleaded. The respondent will have costs and disbursements against him of \$500.



Moti Tikaram

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Sir Moti Tikaram
President

Maurice Casey

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Sir Maurice Casey
Justice of Appeal

I.R. Thompson

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Justice I. R. Thompson
Justice of Appeal

Solicitors:

Messrs. S.B. Patel & Company, Lautoka for the First Appellant
Office of the Attorney-General Chambers, Suva for the Second Appellant
Messrs. Tevita Fa & Associates, Suva for the Respondent