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

CIVIL APPEAL NO. ABU0043 OF 1995S
(High Court Civil Action No.539 of 1994/S)

BETWEEN:

SURYA DEO SHARMA

Appellant

AND:

JOVESA SABOLALEVU
THE ATTORNEY-GENERAL OF FIJI

Respondents

Coram:

The Hon. Sir Moti Tikaram, President
The Hon. Justice Gordon Ward, Justice of Appeal
The Hon. Sir David Tompkins, Justice of Appeal

Hearing:

Tuesday, 18 August 1999, Suva

Counsel:

Mr. R.Chand for the Appellant
Mr. D.Singh for the Respondents

Date of Judgment: Friday, 27 August 1999

JUDGMENT OF THE COURT

The appellant, the plaintiff in the High Court, applied for leave to commence an action for damages for personal injuries out of time. By a judgment delivered on 30 June 1995 Pathik J declined that application. The appellant has appealed.

The sequence of events

On 6 April 1990 the appellant suffered severe personal injuries as a result of a collision between a vehicle driven by him and a vehicle driven by the first respondent, owned by the Ministry of Forests represented by the second respondent. He was admitted to hospital that day, discharged on 9 May 1990, readmitted on 28 July 1990 and discharged on 2 August 1991.

On 19 October 1990 he was charged with dangerous driving. Following a defended hearing on 21 July 1994, he was acquitted.

On 11 November 1994 the appellant through his solicitors filed a writ of summons claiming \$2,457.50 special damages, general damages, and consequential relief. Three days later on 14 November 1994 the appellant through his solicitors applied for an order granting leave to the appellant to file and institute his claim for damages against the respondents, pursuant to s 17 of the Limitation Act cap 35 ("The Act"). On 27 February 1995 leave was granted with the consent of counsel representing the respondents. Later, on the application of the respondents, the order granting leave was revoked. The application for leave, then opposed by the respondents, was heard by Pathik J. on 7 June 1995. Judgment refusing the application was delivered on 30 June 1995.

The judgment

In his decision the Judge sets out the facts, relevant statutory provisions, the authorities on the issue, and dealt with counsel's submissions. He concluded:

"In the outcome, on the facts I find that the plaintiff was dilatory in commencing his claim within the limitation period particularly when he was well aware of the nature and extent of his personal injury at the time of the accident or shortly afterwards and at the latest after his discharge from hospital in August 1991. In the circumstances of this case for the reasons given all of Mr. Chand's arguments are devoid of merits and they have no legal basis."

Accordingly the appellant's application was dismissed.

The relevant statutory provisions

An action for damages for personal injury shall not be brought after the expiration of three years from the date on which the cause of action accrued: s 4(1) of the Act. It is accepted in this case that the cause of action accrued when the accident occurred and the injuries were suffered on 6 April 1990. The time for commencing the action ended on 6 April

1993. The action commenced on 11 November 1994 was therefore 19 months out of time.

Section 16 (1) provides that s 4 (1) shall not afford a defence in so far as the action relates to any cause of action in respect of which the court has, whether before or after the commencement of the action, granted leave, and the requirements of subs (3) are fulfilled.

That subsection provides:

“(3) The requirements of this subsection shall be fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which -
(a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of the period; and
(b) in either case, was a date not earlier than twelve months before the date on which the action was brought.”

Section 17 relates to the application for leave. Relevant to an application made after the commencement of an action is subs (3):

(3) Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient -
(a) to establish that cause of action, apart from any defence under subsection (1) of section (4); and
(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action,
and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 4.”

It is apparent from these provisions that the crucial issue is the actual and constructive knowledge of the plaintiff under s.16(3). The appellant must show that the material facts relating to the cause of action including those of a decisive character were outside his actual or constructive knowledge until either after the 3 year period or not earlier than 12 months before the end of that period, that is not earlier than 2 years after the cause of action accrued.

In respect of 17(3) a court can grant leave only if the uncontradicted evidence establishes the cause of action relied on, and the requirements of s 16(3) are fulfilled. The final ingredient of s 17 (3) is not easy to understand. It means that the appellant must show that, when he commenced the action on 11 November 1994, it was outside his actual or constructive knowledge that the matters constituting the cause of action had occurred more than three years before the action was commenced. All of the three elements of s 17(3) must be established.

Section 19 defines the meaning of "material facts relating to a cause of action".

It provides:

"19. In sections 16 and 18 any reference to material facts relating to a cause of action means a reference to any one or more of the following :-

- (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;*
- (b) the nature or the extent of personal injuries resulting from that negligence, nuisance or breach of duty;*
- (c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable."*

Section 20 defines the meaning of "facts of a decisive character" referred to in s.16(3). The section provides:

"20. For the purposes of sections 16 and 18, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those

facts and having obtained appropriate advice within the meaning of section 22 with respect to them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence under subsection (1) of section 4, an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action."

On these statutory provisions we have two comments.

First, it is apparent that the three elements of s 17(3), including the requirements of s 16(3), must be fulfilled before the court can grant leave. That emerges from s 17(3) providing that the court may grant leave "if but only if" the requirements of the subsection are fulfilled. If these requirements are not fulfilled, the court lacks jurisdiction to grant leave. No question of discretion arises.

If the requirements are fulfilled the court "may" grant leave, that is the court then has a discretion. In exercising that discretion the court will have regard to such matters as the cause or reason for the delay, and whether, and if so to what extent, the defendant may have been prejudiced in his defence by the delay. Further the court can then consider whether, having regard to all the circumstances, it is just to grant leave.

Secondly we emphasise the importance of these provisions limiting the right to bring actions for personal injuries. They can have a significant effect on any person who has suffered injuries as the result of the actions of another. The provisions of s 16 and s 17 are in our view, unnecessarily complex and difficult to understand. Indeed they can fairly be described as convoluted. This is an undesirable feature of legislation that can affect the lives of ordinary citizens. It is our recommendation that the authorities give active consideration to the re-enactment of these provisions in a form that is simple, clear and easy to understand. A useful model is the provisions in the Limitation Act 1980 (UK), which fulfil these requirements, and which replaced the provisions of the 1963 UK Act, which were in terms substantially the same as those in the Fiji Act.

The pleading submission

Mr. Chand submitted that the application for leave should have been granted because the respondents did not in their statement of defence specifically plead the Act as required by O 18 r 7(a) of the High Court Rules 1988. That rule requires a party pleading subsequent to a statement of claim to plead specifically any relevant statute of limitation. The respondents had filed a statement of defence dated 30 March 1995. It did not plead the Act as a defence.

We do not accept Mr. Chand's submission that this omission should mean that the application for leave should have been granted. The action that the appellant had commenced, and the application for leave to continue those proceedings despite their having been commenced after the expiry of the limitation time, are separate proceedings. If the time for commencing the proceedings had expired when the action was commenced, leave is required. That requirement cannot be affected by the pleadings in the action already commenced.

The knowledge of the appellant

Mr. Chand submitted that the appellant only had knowledge of the material facts relating to the cause of action when his solicitors received the medical report of 21 February 1992 or from the date when the appellant was acquitted of the charge of dangerous driving on 21 July 1994. Time should begin to run from either of these dates. The first part of the submission requires consideration of s 19, the second of s 20

The medical issue requires, in terms of s 19(b), consideration of the respondent's knowledge of the nature or extent of the personal injuries resulting from the first respondent's claimed negligence. The appellant in his affidavit said that he received severe injuries in particular to his right leg which had compound multiple fractures. It required internal fixation as did the right knee cap. These were affixed on 12 April 1990 following which he suffered post operative wound infection. He deposes to suffering constant and

continuous headache and pain on to his right leg from his hip downwards and also pain caused by the fixation. He was re-admitted to hospital on 28 July 1991 for further post operative measures and was discharged on 2 August 1991. Symptoms have continued to the present time.

In our view, on that evidence, the conclusion is inescapable that the appellant knew or ought to have known the nature and extent of his personal injuries shortly after the accident and certainly during the course of his hospital treatment until his final discharge in August 1991. Further on 21 February 1992 a surgeon at the hospital provided to the appellant's solicitors a letter describing the injuries and calculating his permanent disability at 20%. So by that date if not earlier the appellant knew the nature and extent of his injuries. This knowledge was well within the 3 year period which expired on 6 April 1993 and was earlier than 12 months before that date. It follows therefore that, in respect of his injuries, the appellant has failed to fulfill the requirements of s 16(3).

We do not accept Mr. Chand's submission that the appellant did not have knowledge of facts of a decisive character relating to the accident itself until the appellant was acquitted of the charge of dangerous driving on 21 July 1994. In terms of s 20, the appellant knew facts relating to the accident which a reasonable person, knowing those facts and having obtained appropriate legal advice, would have regarded as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action. The appellant was charged with the offence of dangerous driving on 19 October 1990. It is reasonable to assume that if the circumstances relating to the accident had not been adequately investigated before then, they would have been within a reasonable time after the laying of the charge.

It follows from these conclusions that the appellant has failed to fulfill the requirements of s.16(3) because he had knowledge actual or constructive of facts of a decisive character well before the end of the 3 year period and earlier than 12 months before the end of that period.

The appellant faces a further difficulty. The third ingredient of s 17(3) requires the appellant to establish that he had no actual or constructive knowledge, before commencing the action, that the matters constituting his cause of action had occurred more than three years before commencing the action. He cannot do so. Obviously, when he commenced his action on 11 November 1994, he knew that the cause of action had accrued more than three years before. That is obvious from the statement of claim. As was observed by this court in *Permal v Sami and Saweta* Civ App 19/85 judgment 24 June 1998, cases where leave may be given after commencing an action would be rare. The court said at page 7 of the unreported judgment:

“Generally speaking it can be stated that in virtually all cases leave should be sought before issuing a writ. If leave is sought after commencement of the action a court has no jurisdiction to entertain the application unless the applicant can satisfy the court that he did not know, and could not with reasonable diligence discover, that the material facts on which he based his claim had occurred more than three years before he issued the writ.”

Discretion

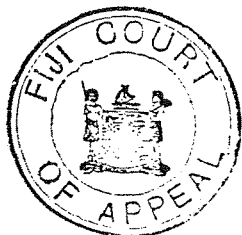
Mr. Chand submitted that even if the appellant had not fulfilled the requirements of s 16(3) and s 17(3), the Judge ought to have exercised his discretion by granting the application, on the grounds that the prejudice to the appellant from not granting the application is greater than the prejudice to the respondents from granting it.

This submission cannot succeed. As we have pointed out, the court's discretion arises only after the appellant has cleared the hurdles of s 16(3) and the three ingredients of s 17(3). If, as in this case, he stumbles and falls at either hurdle, no question of discretion can arise. In this respect, we point out that the Act contains no provision equivalent to s.33(3) (a) of the UK Act which provides that, in considering an application, the court shall have regard to all the circumstances of the case and in particular to the matters referred to in the subsection, a provision recently considered by the Court of Appeal in England in *Coad v Cornwell and Isles of Scilly Health Authority* [1997] 8 Med LR 154.

The Result

The judge was correct in reaching the conclusion that the appellant's claim is statute barred and the application for an order extending the time should not be granted.

The appeal is dismissed. The respondent is awarded \$1,000 costs inclusive of disbursements.



Moti Tikaram

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Sir Moti Tikaram
President

Gordon Ward

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Justice Gordon Ward
Justice of Appeal

David Tompkins

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Sir David Tompkins
Justice of Appeal

Solicitors:

Messrs. Ram Chand & Company, Nausori for the Appellant
Office of the Attorney-General Chambers, Suva for the Respondents