

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action: HBM 86 of 2013**

**BETWEEN** : **ISEI RATULAVETA RAUCA** as the personal representative of the Estate of **MALELI RAUCA** deceased, late of Reservoirs Road, Nauluvatu, Suva, Unemployed.

*Plaintiff*

**AND** : **ABILASH CHAND** of Savunawai, Nadi, Driver

*1<sup>st</sup> Defendant*

**AND** : **TOURIST TRANSPORT (FIJI) LIMITED** aka TTF a limited liability company having its registered office at Nadi International Airport, Nadi.

*2<sup>nd</sup> Defendant*

**Appearance** : **Ms. B N. Raikaci for the Plaintiff**  
**Mr. A.K. Narayan for the Defendants**

**Date of Judgment:** 14 October 2014

**JUDGMENT**

1. The *Ex-parte* Notice of Motion was filed by the Plaintiff on 17 July 2013 together with the Affidavit in Support sworn by the Plaintiff on 12 July 2013 and sought the following Orders:

*“1. That the Leave be granted for extension of time to file a Writ of Summons for damages by virtue of the Compensation to Relative Act for*

*the death of late Maleli Rauca in a motor vehicle accident subsequently died from injuries.”*

2. The said motion was mentioned *ex-parte* on 31 July 2013 and Ms Ravono V. appeared for the Plaintiff and not supported the application made. In the circumstance I made an order to call this matter *inter-partes* which was not objected by the Plaintiff's counsel.
3. Thereafter the Plaintiff filed the following documents:
  - (1) *Notice of Motion for substituted service on 12 August 2013.*
  - (2) *Affidavit in Support on 12 August 2013.*
4. The matter was mentioned on 22 August 2013 and Leave was granted for the substituted service.
5. When the matter was taken up 8 October 2013, Mr Raikaci appeared for the Plaintiff and Ms Waqabitu appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and directions were made with regard to filing of documents.
6. When the matter was mentioned on 10 December 2013, Ms Raikaci appeared for the Plaintiff no representation made by the Defendants and matter was fixed for hearing on 21 January 2014.
7. On 21 January 2014, when the matter was called, Mr A K Narayan appeared for the Defendants and requested time to file the Affidavit in opposition since several information had to be obtained.
8. The Affidavit in Opposition sworn by Arvendra Kumar, Claims Manager of Sun Insurance Company Limited and Mohammed Kazim, Yasin Private Investigator were filed on 22 April 2014 and the Affidavit in Reply was filed by the Plaintiff on 22 May 2014.

9. The matter was taken up for hearing on 1 August 2014 and the Defendants' counsel made submissions and the Plaintiff's counsel moved to file written submissions.
10. For the first time in the proceedings, the Plaintiff brought up the following issue:
  - (a) *As to whether the court has jurisdiction to exercise any discretion to grant to leave in the present application?*
  - (b) *In the event, the issue raised herein above is answered in negative, would the Defendants be entitled to costs?*
11. In the present application, Plaintiff is seeking leave to institute proceedings under the compensation to Relative Act (Cap 29) and pleaded that the cause of action arose from the date of the death of the deceased pursuant to Section 8 of the said Act:

**Section 8 states:**

*“8. – Not more than one action shall lie for the same subject matter of complaint, and every such action shall be commenced within 3 years after the Death of the person deceased”.*

12. It is also further provided in the Section 10 Action may in certain cases be brought by persons beneficially interested and it is also provided to bring in the action by and in the name of the executor or the administrator. In this case, probate was granted to the Plaintiff on 12 February 2012 by the High Court as the representative of the deceased Maleli Rauca, died on 14 October 2008.
13. The Plaintiff filed this Application for Leave to grant extension of time to file Writ of Summons on 17 July 2013 i.e. 4 years and 9 months after the death of the person deceased. *Prima facie* the Plaintiff cannot bring this action.
14. However, the application before me is to consider leave could be granted by using the discretion of this court to file the Writ of Summons. In this regard Section 16(1) and Section 17(2) of the Limitation Act are relevant.



*“16. – (1) The provisions of subsection (1) of Section 4 shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which –*

- (a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and*
- (b) the requirements of subsection (3) are fulfilled.*

*17. – (2) Where such an application is made before the commencement of any 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 such an action were brought forthwith and 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 fulfill the requirements of subsection (3) of section 16 in relation to that cause of action.”*

15. The section 16(1) (b) states the requirements under Section 16(3) be fulfilled, to exclude the defence of Limitation pursuant to Section 4 of the Act. Section 16(3) states:

*“16. - (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 in the facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until the 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 that period; and*
- (b) in either case, was a date not earlier than twelve months before the date on which the action was brought.*

16. Now I should consider as to whether the Plaintiff had established a cause of action a pursuant to Section 17(2) (a). On perusal of the Affidavit of the Plaintiff, the following facts were stated:
- 16.1 On 1 April 2007 the person deceased Maleli Rauca was passenger in a Taxi Registration No. LT4024.
- 16.2 The said Taxi No. LT4024 was involved in a collision with a Motor Vehicle No. EX338 belonging to the 2<sup>nd</sup> Defendant driven by the 1<sup>st</sup> Defendant.
- 16.3 The Defendant was found guilty and convicted of the offence of careless driving by the Magistrates Court the Certificate of Conviction was annexed to the Plaintiff's Affidavit marked as "**B**".
- 16.4 As a result of the accident, the deceased sustained severe multiple injuries to his body which were not recovered and could not use his legs until his death on 14 October 2008.
- 16.5 The medical report issued by the Lautoka Hospital dated 19 August 2010 was annexed to the Plaintiff's Affidavit marked as "**C**" and due to the long passage of time and the deceased was to make several visits to the hospital the original medical report was lost.
- 16.6 The Plaintiff had explained difficulties faced by the Plaintiff in the process of filing action and how the delay was caused in paragraphs 14 to 20 of the Plaintiff's Affidavit dated 12 July 2012.
- 16.7 The Plaintiff also stated that in 2007 they paid for a copy of the Police Report at the Police Headquarters in Suva and same was received in September 2011 after obtaining assistance from the Divisional Police Commissioner Western. Copies of

the Police Report 15/9/2011 and (date illegible) December 2011 are annexed to the Plaintiff's Affidavit marked "D" and "E" respectively. The reports divulge that the deceased person Maleli Rauca was injured due to the accident and due to the careless driving of the 1<sup>st</sup> Defendant as the driver of the Vehicle No. EY535 owned by the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant was facing the charge of dangerous driving.

16.8 I have considered the statements made in paragraph 23 to 41 of the Affidavit which led to delay in filing action.

17. It is also stated in the Section 17(2)(b) that the requirements of the Section 16(3) of the Limitation Act which states:

*"that the material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the actual or constructive knowledge of the Plaintiff until a date which:*

- (a) either was after the end of the three year period relating to the cause of action or was not earlier than twelve months before the end of that period; and**
- (b) in either case, was a date not earlier than twelve months before the date the action was brought".**

18. The present action was brought in pursuant to Section 18(5) of the Compensation to Relative Act, and firstly deals with the first limb of the Section 17(2)(a) as to whether the Plaintiff had established a cause of action.

18.1 The Plaintiff's Affidavit states that the 1<sup>st</sup> Defendant is the driver of the Vehicle No. EY388 owned by the 2<sup>nd</sup> Defendant which was admitted by the Defendants. However, the Plaintiff failed to establish in his Affidavit by way of evidence or otherwise who are the intended beneficiaries pursuant to Section 9 of the Compensation to Relative Act which states:

*"In every such action, the Plaintiff on record shall be required to deliver to the Defendant or his barrister and solicitor, together with the Statement of Claim full particulars of the person or persons for*



*whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.”*

The Plaintiff had not annexed intended Writ of Summons and/or Statement of Claim to the Affidavit and the decision on whether cause of action was accrued to the Plaintiff depends only on the Affidavit filed and failed to comply with the requirements under Section 9.

- 18.2 The Plaintiff's claim is based on causing death to the deceased person as a result of the careless driving of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant is vicariously liable. The Plaintiff had made available evidence to prove the 1<sup>st</sup> Defendant's careless driving. However, the Medical Report (Annexure "C") does not indicate the injuries sustained by the deceased person caused his death. Having examined by the doctors, Treatment Plan was stated in the Medical Report which I reproduce below:

**"Treatment Plan**

1. *Admitted to Orthopedic Ward.*
2. *Put on skin traction right leg in the ward with weight of 5 pounds.*
3. *Referred to Medical Consult – commence anti-fracture meds and antibiotics.*
4. *Pain relief tablets and/sedation Prn.*
5. *Patient was scheduled for open reduction (operation) Right leg – but signed out against advice.*

*The patient in the presence of his relatives signed No Operation hence was discharged on 14/04/07.”*

The Plaintiff's evidence present to this Court is inadequate to establish the death occurred due to the injuries sustained by the accident. Further it was a fact the deceased person was taken out from the hospital without allowing to perform the operation suggested in the said treatment plan.

There is no evidence produced before this court that the death was as a result of the injuries caused by the accident. As such I conclude the Plaintiff failed to adduce evidence with regard to the cause of action pursuant to compensation to relative Act.

- 18.3 The Defendant's Counsel cited the statement made in the case **Arnold v Baco Foods Pty Ltd** [1987] V.R. 407.

*"In order to succeed in an application for an extension of the period within which an action may be brought pursuant to S.23A of the limitation of Action Act 1958 the Application must show that evidence exists and can be adduced which would support a finding that the elements of cause of Action have been established."*

In this matter the Plaintiff had failed to established the elements of the cause of Action and I hold in favour of the Defendants.

19. Having considered the above now it is to determine whether the Plaintiff fulfilled requirements under section 16(3) as stated in paragraph 15 of this Judgment. The limitation period can be extended to material facts of a decisive character are not within the means of the knowledge of the Plaintiff.

- 9.1 This action was instituted on 17 July 2013. The Defendant's Counsel had referred to Annexure marked AK 3 to the Affidavit of Avendra Kumar. AK 3 is a letter dated December 2011 written by the wife of the deceased person to the Insurer (which was admitted by the Plaintiff paragraph 10 of the affidavit in reply dated 21 May 2014). This admission that all the material facts of a decisive character was within the knowledge of the defendants/survivors of the deceased before 19 months prior to filing of this action. It is outside the stipulated period of 12 months stated in the Section 16(3) (b) of the Limitation Act.



19.2 I agree with the Defendant's counsel that the Plaintiff had failed to set out the material facts of decisive character he was not aware until 1 April 2010. Considering all the material before me I conclude that the Plaintiff failed to fulfill the requirement pursuant to section 16(3) and quote Lord Denning M.R in Newton v Cammell Laird C. (Shipbuilders and Engineers ) Ltd [1969] 1WLR 415.

*“Under the Act of 1963 the time runs from the date when the injured or sick man knows, actually or constructively that he has a cause of action. He has then to bearing the action within acquiring that knowledge. He is taken to have knowledge of his cause of action when he knows the material facts relating to it; which are of a decisive nature once he knows those facts, actually or constructively, he has 12 months from that time.”*

Lord Denning further stated in the same case:

*“You have to ask yourself. At what date was it reasonable for him for the sick man himself – to have taken advice and found out that his illness was due to his employer's negligence. Or breach of duty. You do not ask: A what date would a reasonable person have taken advice. You ask: At what date was it reasonable for this man to take it? In other words, at what date ought be to have taken advice and found out that he had a worthwhile action?”*

In this matter the Plaintiff and/or deceased would certainly have known the material facts of decisive nature prior to the limitation period expired. It is a fact after the injuries the deceased person survived for 19 months. There is no material to establish as to whether Plaintiff sought advice and the averments in the affidavit in support are vague as dates or specific instances were as stated. The Plaintiff had stated in paragraph 34 of the affidavit in support that the probate was obtained on 25 February 2012 and was having the Medical Reports and the Police reports. This means the Plaintiff had obtained all material facts of decisive nature, however the Plaintiff delayed instituting the present case until 17 July 2013 and I conclude Plaintiff had not complied with the requirements under Section 16(3)(b)

of the Limitation Act. It is further determined that the court cannot use its discretion as submitted by the Counsel for the Defendants and I quote case of Surya Deo Sharma v Jovesa Sabolalevu and the Attorney General of Fiji 1999 FLR Volume 45 page 207.

*“First it is apparent that the three elements of Section 17(3), including requirements of S16(3), must be fulfilled before the Court can grant leave. That emerges from Section 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 arisen.”*

In this case the requirements are not fulfilled as such this Court cannot use its discretion to grant leave.

Considering all the circumstances in this case I am not granting costs and make the following orders:

- 1. Leave for extension of time to file Writ of Summons for damages dismissed.*
- 2. Parties to bare their cost.*

Delivered at Suva this 14<sup>th</sup> Day of October 2014.



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C. KOTIGALAGE  
JUDGE

