

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Action No. HBC 354 of 2014

BETWEEN : **RAJENDRA PRASAD**
PLAINTIFF

AND : **CHATTUR LAL**
1ST DEFENDANT

AND : **COMMISSIONER OF POLICE**
2ND DEFENDANT

AND : **ATTORNEY-GENERAL OF FIJI**
3RD DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Plaintiff in Person
Mr K. Singh for the 1st Defendant
Ms R. Mani and Ms S. Chand for 2nd and 3rd Defendants

DATE OF HEARING : 16 April 2015

DATE OF JUDGMENT : 14 April 2016

JUDGMENT

Introduction

1. On 12 December 2014, Plaintiff filed Originating Summons dated the same day seeking following Orders:-
 - “1. *That the Plaintiff be granted extension of time to file Statement of Claim against the above named Defendants for compensation and damages arising from negligence.*
 2. *That an Interim Injunction be granted that the 1st Defendant be Restrained from leaving Republic of Fiji until the hearing and determination of the within matter since the 1st Defendant is a flight risk.*
 3. *Any other interim Order as this Honourable Court may deem just.*
 4. *That the costs of this action be costs in cause.”*
2. On 23 January 2015, being the returnable date of the Originating Summons, Plaintiff was represented by his son Sanjay and one Arun Prasad Sharma. They informed the Court that Plaintiff was away overseas and was returning the following day (24 January 2015).
3. On 23 January 2015, this Court directed the parties to file Affidavits and enquired with Plaintiff’s representative that since the Application before the Court raises legal issue, whether Plaintiff will need to consult a lawyer. Plaintiff’s son informed Court that Plaintiff will do so. The Originating Summons was adjourned to 6 March 2015 at 9.30 am, for mention.
4. On 6 March 2015, parties were directed to file a Submission and this matter was adjourned to 16 April 2015 at 9.30, for hearing.
5. Following Affidavits were filed on behalf of the parties:-

For Plaintiff

- (i) Affidavit in Support of Plaintiff sworn on 19 January 2015 (“**Plaintiff’s 1st Affidavit**”);

- (ii) Plaintiff's Affidavit in Reply to 1st Defendant's Affidavit in Response sworn on 21 February 2015 ("**Plaintiff's 2nd Affidavit**");
- (iii) Plaintiff's Affidavit in Reply to 2nd and 3rd Defendant's Affidavit in Response sworn on 4 March 2015 ("**Plaintiff's 3rd Affidavit**").

For 1st Defendant

1st Defendant's Affidavit in Response sworn on 9 February 2015 ("**1st Defendant's Affidavit**")

For 2nd and 3rd Defendants

Affidavit of Sakeo Raikaci in Response sworn on 23 February 2015 ("**Raikaci's Affidavit**").

- 6. Parties filed Submissions and made oral submissions on 16 April 2015. Plaintiff was assisted by his friend Arun Prasad Sharma.

Background Facts

- 7. On or about 29 May 2007, front right wheel of bus registration No. CW803 ("**the bus**") came off whilst the bus was being driven by 1st Defendant's driver.
- 8. The 1st Defendant at the material time was owner of the bus.
- 9. Plaintiff states that at the material time he was walking along on the footpath at NG Road Nausori when the tyre with rim hit him from behind ("**the alleged accident**").
- 10. Plaintiff claims that he received injuries as a result of the alleged accident.
- 11. Plaintiff did not file any claim within the time prescribed in s4 of the Limitation Act Cap 35 and has now filed Application for extension of time to file the claim.

Application for Extension of Time to File Claim Against 1st Defendant

- 12. The Plaintiff submits that the time for filing of the claim be extended under Order 3 Rules 1, 2, 3 and 4(1)(2) of the High Court Rules which provides as follows:-

“Or.3r.1 Without prejudice to any law affecting the interpretation of subsidiary legislation, the word "month", where it occurs in any judgment, order, direction or other document forming part of any proceedings in the High Court, means a calendar month unless the context otherwise requires.”

“Or.3r.2-(1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.

(2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(3) Where the act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that date.

(4) Where the act is required to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include a Saturday, Sunday or public holiday that day shall be excluded.”

“Or.3r.3- Where the time prescribed by these rules, or, by any judgment, order or direction, for doing any act at an office of the High Court expires on a Saturday or Sunday or other day on which that office is closed, and by reason thereof that act cannot be done on that day, the act shall be in time if done on the next day on which that office is open.”

“Or.4(1)- The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2)- The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.”

13. Order 3 Rule 4(1)(2) gives the Court discretion to extend time prescribed by the rules of the High Court or by any judgment, order or direction of this Court.
14. The limitation period for filing of the claim is fixed under the Limitation Act Cap 35 and not by the High Court Rules, judgment order or direction of this Court.
15. Therefore, Order 3 Rules 1, 2, 3 and 4 of the High Court Rules has no application in respect to time limits prescribed under Limitation Act Cap 35 or any other Statute.
16. Even though Plaintiff has wrongly stated that the Application for extension of time is made under Order 3 Rule 4 of High Court Rules I will deal with the Application as if it is made pursuant to relevant provision of Limitation Act due to the fact that Plaintiff is a lay person and is acting in person.
17. The relevant provisions of the Limitation Act Cap 35 are sections 4(1)(a), 16, 17(1)(2), 19, 20 and 21 (hereinafter referred to as “LA”).
18. Section 4(1)(a) of LA provides as follows:-

“4-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

- (a) actions founded on simple contract or tort;**
- (b)**
- (c)**
- (d)**

Provided that:-

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in

respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and”

19. At paragraphs 2, 3 and 4 of Plaintiff’s 1st Affidavit, Plaintiff states as follows:-

“2. That on the 29th day of May 2007 the Plaintiff was walking along the footpath at NG Road, Nausori.

3. That the driver of the bus registration number CW803 which is owned and operated by the 1st Defendant on 29 May 2007 drove the bus so negligently and or the bus was so defective that the right wheel complete with the hub intact with the rim and the tyre came off the bus and hit the Plaintiff from behind.

4. That the impact of the tyre with rim and hub intact weighing approximately 100 kg hitting the Plaintiff was unanticipated strike from behind in which the Plaintiff fall head on, on the footpath and sustained serious injuries.”

20. The alleged accident took place on 29 May 2007, and as a result Plaintiff suffered injuries on the same day (the date of the accident).

21. Hence, Plaintiff had to file his claim by 29 May 2010.

22. Plaintiff filed the Application before this Court on 12 December 2014, and without doubt the delay is inordinate.

23. Section 16(1)(2)(3)(4) provides as follows:-

“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.*

(2) *This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.*

(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 that period; and

(b) in either case, was a date not earlier than twelve months before the date on which the action was brought.

(4) *For the purposes of subsection (3), reference to the three-year period relating to a cause of action means a reference to the period of three years from the date on which that cause of action accrued:*

Provided that-

(a) in relation to any cause of action in respect of which, by virtue of section 11, an action could have been brought after the end of the period of three years from the date on which that cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period up to the end of which an action could, by virtue of that section, have been brought in respect thereof;

(b) in relation to a cause of action in respect of which, by virtue of section 15, the period of limitation did not begin to run until a date after the cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period of three years from the date on which, by virtue of that section, the period of limitation began to run.”

24. Fiji Court of Appeal in **Sharma v. Sabolalevu** (1999) 45 FLR 2014 in respect to section 16(1)(3) stated as follows:-

“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.”

25. Plaintiff’s reason for not filing claim within prescribed time is that Police Department provided Plaintiff with different vehicle registration number.

26. There is clear evidence that Plaintiff knew about the accident, his injuries and bus registration number on or about 29 May 2007.

27. In addition to what Plaintiff stated at paragraph 2, 3 and 4 of Plaintiff's 1st Affidavit and quoted at paragraph 19 of this Judgment, the Plaintiff at paragraph 7 of Plaintiff's 1st Affidavit stated as follows:-

"7. That the complete survey of the accident site was taken by the traffic police officers; the driver of the said bus was taken in custody and the said bus CW803 was impounded with the complete hub with rim and tyre detached. The Plaintiff's family members took pictures of the towing of the bus; bus in Police custody and damages along the road.

Attached herein with the marks "B-1, 2 and 3" are the photographs of the bus being impounded and the damages caused to the road."

28. Section 17(1)(2) of LA provides as follows:-

"17-(1) Any application for the leave of the court for the purposes of section 16 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.

(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."

29. For this Court to grant Plaintiff an extension of time to file the Claim the Plaintiff will need to meet the requirement in Section 16(3) of LA.

30. Section 19, 20 and 21 of LA provides as follows:-

“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 extent of the 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.**

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.

21.-(1) Subject to the provisions of subsection (2), for the purposes of sections 16 to 18 a fact shall, at any time, be taken to have been outside the knowledge, actual or constructive, of a person if, but only if-

- (a) he did not then know that fact;**
- (b) in so far as that fact was capable of being ascertained by him, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and**
- (c) in so far as there existed, and were known to him, circumstances from which with appropriate advice within the meaning of section 22 that fact might have been ascertained or inferred, he had taken all such action, if any, as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice as aforesaid with respect to those circumstances.**

(2) In the application of subsection (1) to a person at a time when he was under a disability and was in the custody of a parent, any reference to that person in paragraph (a), (b), or (c) of that subsection shall be construed as a reference to that parent.”

31. From the evidence of Plaintiff and as appears from Plaintiff's 1st Affidavit, it is certain that on 29 May 2007:-
- (i) Plaintiff knew that personal injuries resulted after the front right tyre of bus registration No. CW083 hit him;
 - (ii) Plaintiff knew nature of injury;
 - (iii) Plaintiff's injuries were attributed to the tyre hitting him;
 - (iv) any reasonable person would have known that time would run out and any action taken would have reasonable prospect of success (s20);
32. There is no evidence to suggest that Plaintiff did not know the material facts or that it was not ascertainable (s21).
33. On the basis of what I said at preceding paragraphs I do not think Plaintiff is entitled to the indulgence to file his claim out of the three year limitation period.

Whether Plaintiff can file claim against 2nd or 3rd Defendants

34. Plaintiff's claim against the 2nd and 3rd Defendant is based on a mistaken police report.
35. Plaintiff made allegations on misrepresentation and fraud.
36. Plaintiff was provided Police report on 15 November 2007, with vehicle registration number LT673 instead of CW803.
37. The Police letter did not mislead the Plaintiff in any way for the reason that Plaintiff knew the correct number.
38. It is also interesting to note that after 15 November 2007 letter, Plaintiff did not do anything until April 2011 (well after three year period) when he went to consult the 3rd Defendant.

39. Plaintiffs allegation at paragraph 16 of Plaintiff's 1st Affidavit that most lawyers is unfounded as this Court has judicial notice of the fact that lawyers have filed legal action against the Defendants in this Court.
40. In fact what the Plaintiff should have done was that, he should have gone to the lawyers to institute legal proceedings against the 1st Defendant and the driver of the bus within three years of the date of accident.
41. It is apparent that the allegation against the 2nd Defendant and 3rd Defendants, was an afterthought as the Plaintiff's claim against 1st Defendant had become statute barred.
42. As stated herein before, the Plaintiff is entirely responsible for the delay in filing his claim.
43. The purported action against 2nd and 3rd Defendant is clearly an abuse of court process and the application to institute proceeding against the 2nd and 3rd Defendants should be dismissed in exercise of this Court's inherent jurisdiction.
44. Since prayer 1 of the Originating Summons has failed, there is no need to consider prayer 2 as it was hinging on prayer 1.
45. I note the following:
 - (i) The Application by Plaintiff was to commence proceedings should have been made ex-parte;
 - (ii) Plaintiff however, served the Originating Summons and Affidavit on the Defendants which resulted in Defendants appearing in Court and making Submissions.
46. Before making final Order, I must categorically and in very clear terms state that even though Defendants filed Affidavits and Submissions I have not considered their Affidavits and Submissions and this Judgment is entirely based on evidence produced in Plaintiff's 1st Affidavit and Submissions filed by the Plaintiff.

Cost


47. In view of nature of proceedings and the fact that the Application should have been dealt ex-parte I do not think it is appropriate to make an Order for costs.

Order

48. I make following Orders:-

- (i) Plaintiff's Application to extend time to file claim and for Injunction by Originating Summons dated and filed on 12 December 2014, is dismissed and struck out;
- (ii) No order as to costs.




.....
K. Kumar
JUDGE

At Suva

14 April 2016

Plaintiff in Person

KS Law for 1st Defendant

Office of the Attorney-General of Fiji for 2nd and 3rd Defendants