

IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 19 OF 1985

Between:

PERMAL f/n Vediappan

First Appellant

- and -

KRISHNA SAMI f/n Dorsami

Second Appellant

- and -

LORAINI TINAI SAWETA

Respondent

Mr. Ram Krishna for the Appellants
No appearance by the respondent or her counsel.

Date of Hearing: 10th May, 1988

Delivery of Judgment: *24 June* ~~May~~, 1988

JUDGMENT OF THE COURT

The respondent was duly served with notice of hearing of this appeal but did not appear. Mr. Ram Krishna, who appeared for both appellants, advised the court that the respondent's solicitors, Messrs Surendra Prasad & Co., who acted for her and commenced action in the court below, no longer carry on business as barristers and solicitors.

This appeal is an unusual one in that the order of the learned Judge, Mr. Justice Cullinan, that the plaintiff have leave for the purposes of section 16 of the Limitation Act, which will be referred to later, was admitted by the learned Juge to have been made by him in error when he later came to give his written reasons for granting the application.

It was not necessary for Mr. Ram Krishna in the circumstances to present any argument and he was so informed by this court. We have read and considered the learned Judge's reasons for the order he made and agree with his conclusions that he inadvertently erred.

While we could have shortened this judgment by accepting the learned Judge's admission that he had acted in error, we feel it necessary for record purposes to enlarge on this judgment. The learned Judge's written decision is a fully researched one amply supported by legal authority the benefit of which will not be available as a precedent if left on file as a decision on an interlocutory application.

The respondent was injured in a motor vehicle accident which occurred on the 16th of September, 1979 when she was a passenger in a bus travelling from Sigatoka to Lautoka. She received a number of personal injuries and in her statement of claim alleged having suffered permanent physical incapacity to the extent of 17½% which we take to mean 17½% based on the scale provided in the Workmen's Compensation Act.

The writ of summons in the action seeks damages against the two defendants, the appellants in this appeal, for injuries suffered by her in the accident. It was issued on the 25th of October 1983, more than four years after the accident occurred.

Section 4(1) of the Limitation Act, provides a limitation period of six years from the date on which a cause of action arose in bringing an action founded (inter alia) on Tort. The proviso to that section, however, reduces the 6 year period to 3 years in actions which include claims for damages in respect of personal injuries.

The statement of claim in this action contains no statements indicating any reasons why the action had not been instituted before the expiration of the three year limitation period. On the face of it the Claim is statute barred. The defendants in their Defence pleaded that the action was statute barred by reason of section 4 of the Limitation Act. It was open at that stage for the defendants' solicitors to take action to have the action dismissed on the grounds that the Claim was statute-barred. They took no such action.

The Defence must have alerted the respondent's solicitors, but it was not until sometime in August 1984 that Mr. Prasad applied to the court below for leave under section 17 of the Limitation Act for the purposes of raising section 16 of the Act which provides for extension of the time limit for actions in respect of personal injuries in situations referred to in that section. The application was made ex parte. The learned Judge granted leave and reserved his reasons which he later delivered in writing.

Section 16(1) of the Limitation Act 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.

It will be noted that in subsection 1(a) the court is empowered, either before or after commencement of the

action, to grant leave for the purposes of the section. What was not appreciated by the learned Judge at the time that he made the order granting leave was that the court was not empowered under section 17(3) to grant leave after commencement of the action in circumstances not covered by subsection 3 of section 17 which provides as follows:-

"17. - (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."

When the learned Judge came to consider the law involved he then appreciated that he had overlooked one of the legal requirements of sub-section 17(3) of the Act and he concluded his written reasons by stating:-

"I regret that I did not appreciate the impact of the latter requirement of section 17(3) and I can now only record my decision in the matter as per incuriam".

When he considered the evidence, before him the learned Judge was satisfied that the plaintiff had

actual knowledge more than 3 years before she commenced her action that the matters constituting her cause of action namely the alleged negligence of the second defendant which led to her receiving injuries occurred more than 3 years previously.

He said in his decision:-

"...it cannot be said that it was not until after commencement of this action that the plaintiff became aware (actually or constructively) that the action was barred under section 4 of the Act".

The evidence before him clearly supported that statement.

The reasons given by her for her delay in instituting her action were that the full nature and extent of her injuries were not known by her until the medical certificate was received by her solicitor. She also alleged that she was not aware of the names and addresses of the owner and driver of the vehicle involved in the accident.

If there was any merit in those excuses, as to which we offer no opinion, those excuses should have been raised in an application for leave under subsection (2) of Section 17 made before commencing the action.

The only difference between subsections (2) and (3) of section 17 of the Act is that subsection (3) requires a third ingredient to be met namely that the applicant had no knowledge, before instituting the action that the matters constituting her cause of action had occurred on a date which would afford a defence to the action namely a date more than 3 years before commencing the action.

The learned Judge stated:-

"It must be rare indeed that a plaintiff would commence an action without knowledge (actual or constructive) that the matters constituting that cause of action had occurred on a date which rendered the action statute-barred".

Cases where leave may be given after commencing action would also be rare. They could arise after the action is instituted where the plaintiff was not aware that material facts constituting his action had occurred more than three years before the action began.

In re Clark v. Forbes Stuart (Thames) St. Ltd (1964) 2 All E.R. 283 the plaintiff did not know the identity of the occupier of premises until after the limitation period had expired. That lack of knowledge was held to be a material fact and leave was granted under section 1 of the 1963-Limitation Act (Imperial). Sections 1 and 2 of that act are similar to sections 16 and 17 of the Fiji Limitation Act.

In that case the plaintiff applied for leave before commencing the action.

Pearson L.J. at page 284 stated:-

"...this is a case of an application made before the commencement of any relevant action, which is in any ordinary case the correct procedure. That is the time at which the application ought to be made and, if not made at that time, but after the commencement of the action, then something more has to be proved by the applicant under section 2(3)".

The "something more" to be proved under section 2(3) of the Imperial Act, which is in almost identical terms to section 17(3) of the Fiji Act, is that the matters constituting her cause of action were outside her knowledge when she commenced the action.

An example does not readily come to mind. In the instant case the appellant was well aware of the date and circumstances of the accident. They formed basis of her statement of claim. If she was not aware of the identity of the owner of the car until the limitation period had elapsed she should have sought leave before commencing the action.

The learned Judge was unable to find any case in England between 1963 and 1975, when the 1963 Act was replaced by the Limitation Act 1975, of leave being sought - or granted after commencement of the relevant action. He concluded that the reason was the rarity of a situation where a plaintiff did not know of facts having occurred which constituted her cause of action and which had occurred more than three years previously.

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 3 years before he issued the writ.

Mr. Ram Krishna requested that we dismiss the action and quoted in aid our powers under section 13 of the Court of Appeal Act.

We do not consider that we can do any more than allow the appeal and set aside the order. There was no application before the court below for an order striking out the action on the grounds that the Claim was statute-barred.

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The application under section 17 was in any event made ex parte and the respondent has had no opportunity to submit that the application to strike out should not be granted. She was not represented at this appeal and did not appear.

The appeal is allowed and the order made by the learned Judge in the action on the 6th day of July, 1984 is revoked. The appellants are to have the costs of this appeal.

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President, Fiji Court of Appeal

R. G. G. G.
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Justice of Appeal

M. G. G. G.
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~~Justice of Appeal~~