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

CIVIL APPEAL NO. ABU0039 OF 2003S
(High Court Civil Action No. HBC 217 of 2002S)

BETWEEN:

RALOGA TAMUDU

Appellant

AND:

THE MEDICAL SUPERINTENDENT

First Respondent

THE ATTORNEY GENERAL OF FIJI

Second Respondent

Coram: Sheppard, JA
Tompkins, JA
Gallen, JA

Hearing: Tuesday, 16th March 2004, Suva

Counsel: Mr S. R. Valenitabua for the Appellant
Mr J. J. Udit and Ms N. Karan for the Respondent

Date of Judgment: Friday, 19th March 2004

JUDGMENT OF THE COURT

This is a most unfortunate case. It concerns the meaning and application of provisions of the Limitation Act (Cap. 35) which enable a person wishing to sue for negligence resulting in personal injury in the circumstances provided for in s.16 to obtain an extension of time to bring an action notwithstanding that the time provided for in s.4 of the Act has expired . Section 16 is unduly complex. The form of it has been criticised by many Judges of the High Court who have called for its reform. We add our own voices to

the criticisms that have been made. A simple solution would be to replace the existing section with a provision similar to that presently in force in the United Kingdom.

The facts of this matter are as follows. The appellant who was the applicant for an extension of time in the High Court wishes to sue the Medical Superintendent of the Colonial War Memorial Hospital and the Attorney General for damages for medical negligence. It is common ground that the limitation period which is 3 years has expired.

On 19 October 1977 the appellant gave birth to her first child. It was delivered by caesarian section. Years later she developed complications, so she alleges, because of the administration of excessive quantities of a drug known as stilbestrol. In the meantime she had two more children, the first being born on 10 March 1982 and the second on 10 April 1992. She began to suffer from a veinous ulcer on her left leg in December 1997. She was admitted to hospital on 2 March 1998 because of severe cellulitis . She was given sick leave until May 1998.

In her proposed statement of claim she alleges that she continues to be affected in her legs and feet by oedemas (swelling). She has difficulty walking and standing up for long periods as required in her profession as a nurse. She had further admissions to hospital in December 1999 and in February 2000. She was on continuous sick leave until her premature retirement at the age of 48 on 12 march 2001. She had had a further admission to hospital in March 2001.

In her affidavit the appellant said that one of the doctors at the hospital warned other staff that the amount of stilbestrol tablets being administered to her was excessive. She instantly reduced the dosage. The doctor, Dr. Schramn, told her that she would feel the side effects of the drug in 20 years time. Dr. Schramn told her she would be likely then to suffer from deep veinous thrombosis, ulcers and cellulitis. The prediction was remarkably accurate.

Subsection (1) and (3) of s.16 of the Act are as follows:

"(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 commencement of the action, granted leave for the purposes of this section; and
(b) the requirements of subsection (3) are fulfilled.

(3) The requirements of this section shall be fulfilled in relation to a cause of action if it is provided 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."

Sections 17 (3), 19 and 20 provide :

"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 related 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 fulfill the requirements of subsection (3) of section 16 in relation to that cause of action.

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 to 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."*

The provisions have been the subject of much judicial discussion both here and in England when they were in force there. We were referred to a number of authorities including the decision of the House of Lords in ***Central Asbestos Co. Ltd v. Dodd*** [1973] A.C. 518

The primary judge here relied on the decision of the Fiji Court of Appeal in ***Sharma v. Sabolevu and others*** (ABU0043 of 1995S) where it is said :

"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 moths before the end of that period, that is not earlier than 2 years after the cause of action accrued."

The learned judge said :

"It is quite clear from the affidavit evidence that the plaintiff knew the suffering she was going through or ought to have known the nature and extent of her 'injuries' so to say shortly after the birth of her first child in 1977. She even had her second and third child but she did not complain or take action. Her knowledge was well within the three-year period and was earlier than 12 months before the expiry of that period. In these circumstances it cannot be said that the plaintiff fulfilled the requirements of s.16(3) in respect of her 'injuries'."

We think that this may have been too severe a view of the requirements of the sections. In our opinion it would not be reasonable to conclude that the applicant should have consulted a Solicitor at any time within the 3 year period following the administration of the overdose of the drug. After all Dr. Schramn 's prediction may have proved incorrect. But the difficulty we have is that the appellant did not seek legal advice until 2001and the application for extension of time was not made until 8 May 2002. On 2 March 1998 after the problems she had encountered in 1997, it must have been clear to her that Dr. Schramn's predictions were coming true. That is when she ought reasonably to have sought legal advice. By then she had known of a possible problem for over 20 years.

It was conceded by the appellant that the cause of action had arisen after the drug was administered. It might have been possible for her to have argued that the cause of action had not arisen until 1997 or 1998 when she knew that she was likely to be affected. We express no view on this because such a proposition was not relied on. But even if it had been the action would still have been out of time because nothing was done about it until 4 years or so after she should have sought advice.

By that time more than 25 years had expired since the drug was administered. An application of this kind has to be dealt within a balanced way. There must be fairness to the applicant, but there must also be fairness to the respondent.

Defendants in these actions often face the fact that witnesses may have died or for other reasons have become unavailable. Human recollection is notoriously unreliable not because of dishonesty but simply because of the lapse of time. And in medical cases all important medical records may have been destroyed or lost. Justice must be done to would be plaintiffs but so must it be done to the persons they wish to sue.

In all the circumstances we consider that this application has been too long delayed. It was rightly dismissed even though for reasons with which we do not agree. The appeal is dismissed with costs which we fix at $750.00.

Sheppard JA

Tompkins, JA

Gallen, JA

Solicitors:

Valenitabua, S. R. Esq. Suva for the Appellant
Office of the Attorney General, Suva for the Respondent

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