

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. 21 of 2013

BETWEEN: **MOHAMMED WAHID KHAN** of Salove, Wailevu

PLAINTIFF

AND: **MOHAMMED YASAD ALI** of Salove, Wailevu, Labasa

DEFENDANT

Appearances:- Mr. Sen of Maqbool & Co for the Plaintiff
 Mr. Ram of Gibson & Co for the Defendant

Introduction

Before the Court is an application by the Defendant by motion dated 24 January 2014 for the their section 4 of the Limitation Act defence be decided first as a preliminary issue and thereafter the matter to be struck out as statute barred. The parties were directed that this preliminary issue be determined first.

The Background

The Plaintiff claims that on or about the 7th day of October 2008 at Solove, Wailevu, Macuata whilst he was waiting for a bus the Defendant *improperly and unlawfully abused the plaintiff and he thereupon wrongly assaulted and beat the plaintiff by punching him on the right eye and violently kicking him until the plaintiff collapsed and fell on the ground. Despite being lying on the ground, the Defendant kept on kicking the plaintiff on the back and sides of the head*" That as a result of the alleged assault the Plaintiff suffered injuries and therefore claims from the Defendant damages. The assault was an intentional act. The Defendant in its defence states that the claim is statute barred in that the correct time for filing the action had expired on the 6 October 2011 and

that this writ of summons was issued on the 20 June 2013. And further that there a similar claim was issued on the 2nd May 2012 in the Magistrates Court which was later struck out after a defence was filed. By motion dated the 29 January 2014 the Defendant sought the following orders:-

1. That the section 4 of the Limitation Act defence be decided first as a preliminary issue;
2. That the matter be struck out as statute barred; and
3. That the defendant be awarded costs on an indemnity basis.

The Application

The application was supported by an affidavit of the Plaintiff which states briefly that, firstly the cause of action is statute barred in that Section 4 of the Limitation Act requires that the action be brought within three (3) years from the date on which the assault or tort was committed. The Defendant's position is that the action was filed almost five years after the incident occurred although he agreed that the issue of limitation be determined first. When the matter was called on the 31 January the parties were directed to prepare written submissions and was then adjourned to the 7 February for hearing. On the 7 February the Defendant requested further 7 days to file submission this was granted and the matter was then called on the 14th for submission to be filed and the matter further adjourned to the 20th February and the parties were informed that a ruling be made based on the submissions and that a notice be given on notice.

The Submissions

The Defendant submits firstly that the common law rule is that the period of limitation for an action in tort is three years from the date at which the cause of action accrued. That this issue was determined in Letang v Cooper [1965] 1 QB 232 a case concerning an intentional trespass to the person. The Defendant had run over the Plaintiff's leg intentionally. The Court found that the limitation period was three years for actions of negligence or trespass to the person. That this position changed after Stubbings -v- Webb (1993) AC 498 where it was held that action for personal injuries for an intentional trespass to the person fell within the six year period. It held there that section 4(1) (i) did

not apply to intentional assault and that acts on intentional trespass to the person were not acts of negligence, nuisance or breach of duty. The Defendant further submitted that the *Stubbings* decision has now been overruled by the House of Lords in *A v Hoare* [2008] UKHL 6 (30 January 2008) and the decision in *Letang -v- Cooper* was reaffirmed. The defendant in its final submission then referred to the Court of Appeal decision in *Maloney v Tam* [1997] FJCA 34; Abu0002u.97s (27 August 1997) where in construing which English decision to follow, held:

"We have come to the conclusion, therefore, that we must interpret proviso (i) section 4(1) using Letang and Stubbings (to the extent that the judgment does not depend on the use of extrinsic materials) as assistance but without being bound to follow either..."

The Plaintiff on the other hand relies totally on the same Fiji Court of Appeal decision in *Tam Suk-Chong Tammie -v- Neil Maloney & AG Civil Action No. HBC0228 of 1995* in which Justice Scott held that the House of Lords decision in *Stubbings -v- Webb* (1993) AC (1993) 1 ALL ER 322 superseded the decision in *Letang -v- Cooper* (1965) 1 QB 232; (1964) 2 ALL ER 929). In this instance the Court of Appeal held that the period of limitation for a deliberate assault on the person is six years.

Determination

Section 4(1) of the Limitation Act states:-

"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 on tort;

.....

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;"

It is the interpretation of the proviso in this section that was the issue for determination in Tam Suk Chong Tammie -v- Maloney & AG's in the Court of Appeal. The authority then appears to approve of both decisions with the proviso that the Court is not bound to the use of extrinsic material as assistance in determining the meaning of the section but is not bound to follow either. However the Court of Appeal accepts that our Limitation Act was modeled on English statute and incorporated many of the provisions of that statute so that the Courts and members of the legal profession and the public might take advantage of the guidance afforded by English decisions. It further stated that the English Court of Appeal and more so the House of Lords decisions are to be regarded as persuasive but they are to be followed only if the Courts in Fiji are satisfied that the reasoning on which it is based is sound and only matters which are permitted to be taken into account were considered.

Given what the Court of Appeal has stated above it falls on us to decide whether the reasoning used by the English Courts in deciding matters under this section is suitable to be accepted here. The defendant has correctly submitted that the *Stubbing and Webb* decision has been overruled by the House of Lords. But what was the reason used by the English Courts to overrule that decision and is the reasoning sufficient to satisfy us? Neither of the Counsels addressed the Court on this point. This is necessary because our Court of Appeal states that we could use both decisions but must be convinced by the reasons used in both.

It is clear that our Courts are very much guided by the decisions of the English Courts and it ought to be. What then is the reasoning used by the House of Lords in overruling *Stubbing* in A v Hoare which is helpful in deciding this matter. Firstly in Stubbings -v- Webb the House of Lords held that the three year limitation period from the date of knowledge for actions for negligence, nuisance and breach of duty where the damages claimed consists of personal injury did not apply to a cause of action based on rape or indecent assault because of the juxtaposition of breach of duty with negligence and nuisance. This is so because of the implication of the breach of duty referred to was a breach of duty of care not to cause personal injury rather than a breach of an

obligation not to infringe on a legal right of another person. The Courts were then looking at the difficulty in determining a breach of duty with negligence and nuisance. This was the same question put before our Court of Appeal in Tam Suk Chong Tammie -v- Maloney & AG's. The Court was to determine the meaning of "breach of duty". The difficulty in arriving at a common answer to this question created a lot of anomalies. Lord Hoffmann in A -v- Hoare (supra) stated that the most remarkable anomaly was S -v- W (Child Abuse : Damages) (1995) 1FLR 862 in which the plaintiff sued her mother and father for sexual abuse by the father ten years after the event. The cause of action against the father was intentional assault and the claim was therefore struck out. The cause of action against the mother was negligent failure to protect the plaintiff against the father, this cause of action fell within the discretionary extension of the Court and was allowed. In K R -v- Bryn Alyn Community (Holdings) Ltd (2003) QB 1441 at paragraph 100 Auld LJ highlighted the difficulty in framing causes of actions to accommodate the anomaly by saying that the need to frame a claim where the real cause of complaint was sexual abuse for which the employer was vicariously liable was causing "arid and highly wasteful litigation turning on distinction of no apparent principle or other merit. I therefore think that it would be right to depart from *Stubbings* and reaffirm the law laid down by the Court of Appeal in *Letang v Cooper*". This is now the current position in the English Courts.

It is the anomaly in adopting both decisions which has cause difficulty not only in this jurisdiction but in the English Courts, an anomaly which now appears to be resolved by the decision in A v Hoare.

The Defendant in its application also applies for costs on an indemnity basis. I am of the view that costs should not be awarded on the ground that due to the fact that Tam Suk Chong Tammie -v- Maloney & AG's allows two possibilities the plaintiff is entitled to issue the proceedings.

Conclusion

Given the above I am of the view that the decision of the House of Lords in *A Hoare* as submitted by the defendant should be adopted that as a result the decision in *Stubbings* no longer applies and that the *Letang and Cooper* decision is to be followed.

Order

I therefore make the following orders:-

1. That the cause of action is struck out as being statute barred;
2. That each party to pay their own costs.



A handwritten signature in black ink, appearing to be "H Robinson".

H Robinson

Master, High Court, LABASA

9 May 2014
