

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 39 of 2011

BETWEEN : **KAMACHI** fathers name Raj Ratnam as the **Sole Executrix of the ESTATE OF PERMAL SWAMI a.k.a PARMAL SAMI a.k.a PERMAL SAMI NAICKER** of Barara, Sigatoka in the Republic of Fiji Islands, Domestic duties.

Plaintiff

AND : **SUVA PRIVATE HOSPITAL** of Amy Street, Toorak, Suva in the Republic of Fiji Islands.

First Defendant

AND : **DR. PAN YI** of Suva Private Hospital, 120 Amy street, Toorak, Suva in the Republic of Fiji Islands, General Surgeon.

Second Defendant

R U L I N G

INTRODUCTION

[1]. This case is, yet, the most challenging application under the Limitation Act that I have had to consider. Permal Sami (“**Sami**”) died on 17 January 2010. On 18 March 2011, Sami’s surviving spouse, Kamachi, filed a claim against the Suva Private Hospital and a Dr. Pan alleging a case of medical negligence. The alleged act of medical negligence occurred on 17 July 2006. On that date, Dr. Pan had performed a surgical procedure on Sami to remove a gall bladder. Immediately after that operation, Sami suffered complications¹. He would continue to suffer those complications until his death on 17 January 2010. And he died exactly three and a half years after the surgical procedure. But there is more to this! Sami, apparently, had made up his mind to sue the defendants whilst he was still alive. In fact, he formed the view shortly after the 17-July-2006 operation, that the defendants were negligent. And he was assisted to this view by the expert opinion of some government medical

¹ After the 17-July-2006 operation, Sami continued to feel complications. He returned to the Suva Private Hospital for some further check-up. Sometime between August and September of that same year, he was referred to the Lautoka Hospital by the Suva Private Hospital. At Lautoka, after some diagnostic and corrective open-surgical procedure, government doctors” took out 4 ½ liters of bile fluid and found 2 staples”, allegedly left by the 2nd defendant. Sami began to pursue the Suva Private Hospital. He believed that the Suva Private Hospital was negligent in its execution of the procedure to remove the gall bladder.

doctors (see footnote 1). Four months after the 17-July-2006 operation, Sami formally instructed his then lawyers, Pillai Naidu & Associates, to file a claim².

THE EVIDENCE

[2]. Kamachi swore an affidavit on 08 July 2011 and which is filed herein. She confirms that Sami had instructed Pillai Naidu in November 2006. She blames Pillai Naidu for their laxity in handling Sami's instructions. She also deposes at paragraph 17 of being advised that the limitation period "has just expired by one and a half years" due to the fault of Pillai Naidu³. A letter dated 30 November 2006 written by Sami to Pillai Naidu exhibited in Kamachi's affidavit suggests that at the time he wrote the letter, Sami had a clear theory about how his case would have to be argued.

² By November 2006, Sami, had instructed Pillai Naidu & Associates, to institute civil proceedings. At paragraph 10 of her affidavit, sworn on 08 July 2011, Kamachi deposes that:

10.initially my late husband Permal Sami a.k.a Parmal Sami a.k.a Permal Sami Naicker instructed Messrs. Pillai Naidu & Associates on the sometimes in November, 2006 and he was not advised by the former Solicitors that claim in negligence for personal injury must be brought within 3 years from the date of the cause of action arouse. (my emphasis)

³ Kamachi's affidavit is reproduced below from paragraph 11.

11.on the 30th day of November, 2006 the Plaintiff faxed a history of events what transpired to this cause of action and medical condition of the Plaintiff after the operation that my late husband had at Lautoka Hospital.
12.upon numerous enquiries with the office of Messrs. Pillai Naidu & Associates my late husband, Mr. D. S. Naidu of Messrs Pillai Naidu & Associates has advised that the documents has been filed at the Lautoka High Court and was waiting for a hearing date to be assigned to the matter.
13. the matter was personally handled by my late husband and he paid legal fees to Messrs Pillai Naidu & Associates upon the request of Mr. D.S. Naidu and no receipts were given to my late husband for the monies paid by him.
14.my late husband entrusted the former Solicitors Messrs. Pillai Naidu & Associates as the principle practitioner Mr. D.S. Naidu was the President of a religious organization T.I.S.I and my husband was the Vice President and branch President of Nadroga T.I.S.I.
15.after certain time my husband fell ill and could not liaise with his former Solicitors directly but through telephone calls and even then he was always informed that they were waiting for a hearing date to be assigned.
16.it was only after the death of husband on 17th day of January, 2010 that I uplifted the files from Messrs. Pillai Naidu & Associates and hand them over to Messrs. Samusamvodre Sharma Law to pursue the matter in the Lautoka High Court....
17.I verily believe and have been informed by my Solicitors that the limitation period has just expired by one and a half years and this was due to the negligence on the part of the former Solicitors and the delay was not caused by the Plaintiff and/or her late husband.
18.I verily believe and have been informed by my late husband that he was in a lot of pain after being operated at the Suva Private Hospital and at the Lautoka Hospital.
19.it was revealed in the medical report from the Lautoka Hospital dated 25th day of June, 2006 that there was 2 staples isolated and collected and they were unable to identify the site of bile leakage due for massive tissue Necrosis. **Annexed hereto and marked with the letter "F" is a copy of medical report dated the 25th day of October, 2006.**
20.my husband had lost a lot of weight and could not have a normal life like he used to have before after being operated at the Suva Private Hospital and he paid close to \$8,000.00 (Eight Thousand Dollars) for the operation at the Suva Private Hospital.
21.my husband was in constant pain and could not eat anything and was drinking water only and he could not walk long distances, unable to do heavy and/or light work, he felt light headed and he could not work on his farm and had to hire 8 casual workers to work on his farm and he lost thousands of dollars as he could not supply vegetables to the market.
22.I verily believe and have been informed by my Solicitors that I have a great chance of success in this matter for special damages, general damages and pain and suffering that my late husband had went through due to the medical negligence on the part of the First and Second Defendant.
23.due to the matters foresaid and my husband having constant abdominal pain and being sick and/or ill my entire family went through a lot of mental stress, trauma and sleepless nights.
24.the Writ of Summons was duly served on the First Defendant on the 4th day of April, 2011 and affidavit of service was filed in Court and since there was no Acknowledgement for Service filed by the First Defendant default judgment was entered and application for assessment of damages was listed for first call on the 22nd day of June, 2011.
25.on the 21st day of June, 2011 Messrs. Munro Leys Solicitors for the First Defendant wrote to our office advising in the issue of limitation act which was overlooked by my Solicitors office before filing the Writ of Summons in this Honourable Court.
26. That on the 22nd day of June, 2011 Counsel for the First Defendant Mr. Vinit Singh of Messrs. Munro Leys advised his Mastership that he was consenting to orders made and further advised the Court he would have consented for leave to be granted extending the period provided under the Limitation Act the Counsel correctly pointed out that the Plaintiff has to satisfy some requirements provided under the Limitation Act before leave is granted.
27. That the delay of filing this action was mainly caused on laxity of the previous Solicitors of the Plaintiff namely Messrs. Pillai Naidu & Associates and I verily believe and informed by Solicitors that my Solicitors upon the grant of Probate will file the Writ of Summons in Court. (my emphasis)
28.I verily believe and informed by my Solicitors that delay caused by my late husband and his Solicitors Messrs continues to one and a half years and therefore this delay is a reasonable delay in meeting the time limitation of 3 years mandatory requirement under the Limitation Act however the reasons outlined herein are meritorious for this Honourable Court to consider our application.
29.I will be greatly prejudiced if leave is not granted to litigate this matter on behalf of my late husband and the matter is not determined by this Honourable Court.

ISSUES

- [3]. If, supposing, Sami had lived, and had, himself, commenced proceedings on the date that he died, he would have been out of time by six months. In this case, of course, Sami's surviving spouse and the sole executrix of his estate, namely Kamachi, did file a claim on 18 March 2011. That claim was filed some fourteen months after Sami's death. Kamachi claims common law damages as well as damages under the Law Reform (Miscellaneous Provisions) (Death & Interest) Act (Cap 27) and the Compensation to Relatives Act (Cap 29).
- [4]. What are the causes of action in this case? And when did time start running in respect for each?
- [5]. Does the limitation period run three years from the date of the surgical operation or is it three years from the date of death?
- [6]. Considering that Sami died after the expiry of the limitation period of the cause of action that he was pursuing whilst he was still alive, is there a claim of his to survive for the benefit of his estate and his dependents under the Law Reform (Miscellaneous Provisions) (Death & Interest) Act (Cap 27) and/or under the Compensation to Relatives Act (Cap 29)?
- [7]. If the answer is "no", is it then open to Sami's personal representative to seek an extension from this court and, if so, on what grounds?

COMMENTS

- [8]. For a common law claim for personal injuries, three years is the limitation period. Time is calculated from the date when the cause of action accrued as provided under section 4 of the Limitation Act. And the cause of action would accrue normally from the date of the alleged injury, or from the date of "*knowledge*" of the material facts relating to the cause of action.
- [9]. For a claim under the Compensation to Relatives Act (**Cap 29**), which Kamachi brings in this case in her name as sole executrix for the benefit of Sami's dependents (namely her as surviving spouse and their children), the limitation period is also three years from the date of death.

[10]. This is provided for in **section 8** of that Act (Cap 29).

Only one action shall lie

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

[11]. For any claim under the Law Reform (Miscellaneous Provisions) (Death & Interest) Act (**Cap 27**) which is brought for the benefit of the estate, the limitation period is also three years from the date of death. Although Cap 27 itself does not contain any provision to that effect, this position can be taken as granted in as far as the Fiji Court of Appeal's judgment goes in the case of **Fiji Electricity Authority v Ganilau** [1999] FJCA 34; Abu0050u.97s (14 May 1999).

This appeal is against the decision of Pathik J in the High Court given at Suva on 7 August 1997, extending the time under the **Limitation Act** [Cap 35] within which the respondent could bring her action against the appellants in respect of the death of her husband, who was electrocuted on 30 April 1989. He occupied a house in a prison compound and was killed when he touched a live stay wire in the grounds. The respondent as administrator of his estate issued these proceedings on 19 November 1992 under both the **Law Reform (Miscellaneous Provisions) (Death and Interest) Act** [Cap 27] claiming damages and the **Compensation to Relatives Act** [Cap 29]. This was outside the time limit of 3 years from the date the cause of action arose (i.e. the date of death) imposed by s.4(1) of the **Limitation Act** in respect of the **Law Reform Act** claim, and 3 years from the date of death imposed by s.8 of the **Compensation to Relatives Act** .

[12]. To reiterate, Sami died on 17 January 2010. Kamachi filed her claim some 14 months later on 18 March 2011. The alleged act of medical negligence took place some three and half years before Sami's death. And Sami had intended all along for some three and a half years before his death – to file a claim against the defendants.

[13]. Kamachi sues in her capacity as surviving spouse and as sole executrix for remedies under Cap 27 and Cap 29. One might say, based on these alone, that the three-year limitation period would have to accrue from 17 January 2010 (the date of death).

[14]. Such, would be a misguided position to take. It would have to involve an out-of-context reading of section 8 of the Compensation to Relatives Act (supra), as well as a misunderstanding of the Fiji Court of Appeal's obiter comments in **FEA v Ganilau** (supra).

SO – WHEN DOES TIME ACCRUE IN THIS CASE?

[15]. I start with the following passage from Clerk & Lindsell on Torts, 15th edition at paragraph 9-54 (page [352]) which, in my view, correctly sets the tone for this discussion:

The Law Reform (Miscellaneous Provisions) Act 1934 provides that an action survives for the benefit of a deceased person's estate. Where the action is, as it usually is, a claim for personal injuries, special rules concerning limitation apply, which may be summarized as follows:

- (i) If the plaintiff died after the expiry of the limitation period in cases of personal injury, then there is no claim of his to survive for the benefit of his estate. However, it is open to his personal representatives to ask the court to override the limitation period under section 33 of the Limitation Act 1980. In such a case, the criteria which a court is supposed to take into account when overriding the limitation period in favour of a living plaintiff are modified to take account of the fact that he is now dead. Section 33(5) says, in effect, "where the criteria say "plaintiff," read "deceased". And by section 33(4) the court shall have regard to the length of, and the reasons for the delay by the deceased in taking action against the defendant
- (ii) If the plaintiff died before the limitation period expired, a new limitation period begins to run under the Limitation Act 1980, s 11(5). This new period is three years from either the date of the death, or from the date of the personal representative's knowledge, whichever is the later.....

[16]. Using the above to get my bearings, I start by re-stating the obvious that in Fiji, an action survives for the benefit of the deceased's estate under section 2 of our own Law Reform (Miscellaneous Provisions) (Death & Interest) Act.

2.-(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act **all causes of action subsisting against or vested in him** shall survive against or, as the case may be, for the benefit of, his estate.....

[17]. I think the key words from section 2 of our Law Reform Act (supra) are: "**all causes of action subsisting**". Hence, if a deceased person who suffered personal injuries, died before the expiration of the limitation period of the cause of action that would have accrued to him had he survived, obviously, at the time of death, that deceased had a cause of action vested in him which had not been caught by section 4 of our Limitation Act. And, yes, it is that subsisting cause of action which, by operation of section 2 above, which then survives for the benefit of the estate. And in that case, a new limitation period begins to run from the date of death. Hence, the three-year rule under section 8 of the Compensation to Relatives Act (see paragraph [10] above) and under

the Law Reform (Miscellaneous Provisions)(Death & Interest) Act as stated in **FEA v Ganilau** (see paragraph [11] above), will apply. For example, where death occurs immediately upon the event of an accident, the three-year limitation period is still running, and will run from the date of death for someone suing under Cap 27 and/or Cap 29.

- [18]. But if death happens after the expiration of the limitation period (in other words, death occurs after three years from the date of injury), there would be no cause of action vested at that time in the deceased as time has run out. And it follows that, because time has run out, there is no cause of action vesting in the deceased to survive for the benefit of his estate or his dependents.
- [19]. The above needs to be underscored because, once time has run out, no cause of action can vest in the deceased's estate unless the Court has granted leave pursuant to sections 16 and 17 of the Limitation Act.
- [20]. The same analysis above will apply to a claim brought under the Compensation to Relatives Act by virtue of section 18(6) of the Limitation Act (see below paragraph [23]).

WHEN WILL A COURT GRANT LEAVE?

- [21]. As all practitioners who practice civil law will know, any application to extend time for a personal injury claim must be made pursuant to sections 16 and 17 of the Limitation Act.
- [22]. But in the case of any action brought under Cap 27 and/or 29, sections 16 and 17 must be read together with section 18 of the Limitations Act of Fiji, which latter section provides for the special rules applicable. And these rules are designed to avoid the potential mischief that might arise, for example as in this case, where Sami died three and a half years after the alleged medical negligence but failed to file a claim within three years even though he had full knowledge of all the material facts relating to his cause of action.
- [23]. Section 18 provides as follows.

18.-(1) In relation to **any action to which section 16 applies** being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of section 2 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, subsections (1), (3) and (5) of section 16, and section 17, shall have effect subject to the provisions of subsections (4) and (5).

(2) Subsections (1), (3) and (5) of section 16, and section 17, shall have effect subject to the provisions of subsections (4) to (6), in relation to an action brought by virtue of the Compensation to Relatives Act for damages in respect of a person's death, as they have effect in relation to an action to which section 16 applies.

(3) In subsections (4), (5) and (6), and in sections 16 and 17 as modified by those provisions, "**the deceased**" means the person referred to in subsection (1) or (2), as the case may be.

(4) Subsection (1) of section 16 shall not have effect in relation to any action falling within subsection (1) or (2) unless the action is brought before the end of the period of twelve months from the date on which the deceased died.

(5) For the purpose of the application of subsection (3) of section 16 to an action falling within subsection (1) or (2)-

(a) any reference in the said subsection (3) to the plaintiff shall be construed as a reference to the deceased; and

(b) the requirements of that subsection shall be taken to be fulfilled in relation to a cause of action if either the matters specified in that subsection (as modified by paragraph (a)) are proved or it is proved that the material facts relating to that cause of action were or included facts of a decisive character which at all times until his death were outside the knowledge (actual or constructive) of the deceased and any reference to the requirements of the said subsection (3) shall, in relation to an action falling within subsection (1) or (2), be construed as a reference to the requirements of the said. Subsection (3) as modified by this subsection.

(6) In the application of sections 16 to 22 to an action brought by virtue of the Compensation to Relatives Act-

(a) any reference to a cause of action to which an action relates shall be construed as a reference to a cause of action in respect of which it is claimed that the deceased could, but for his death, have maintained an action and recovered damages; and

(b) any reference to establishing a cause of action shall be construed as a reference to establishing that the deceased could, but for his death, have maintained an action and recovered damages in respect thereof.

HOW SECTION 18 APPLIES IN THIS CASE?

[24]. At the outset, if the limitation period under section 8 of Cap 29 (see para 10 above) is three years from the date of death, then why would section 18(4) of the Limitations Act require that any application for extension for a Cap 27 or Cap 29 claim be brought "**before the expiration of twelve months from the date of death**"? In other words, where is the need to apply for an extension of time?

[25]. Sami in this case, died exactly three and a half years after the surgical operation that is alleged to be the genesis of his slow demise. As stated above, he did not have a claim vesting in him at the time he died because he was out of time. In other words, there is/was no claim vesting in Sami at the time of

his death to survive for the benefit of his estate under Cap 27 or for his beneficiaries under Cap 29.

[26]. However, his personal representatives may apply under section 18 of the Limitation Act to extend the period. In **FEA v Ganilau** (supra), the Fiji Court of Appeal made some passing obiter comments relevant in this regard.

Mr. Singh's submission that the language of s.8 of the **Compensation to Relatives Act** was mandatory and imposed an absolute bar on the bringing of an action after three years from the date of death cannot be upheld. It reads:-

"8. Not more than one action shall lie for the same subject matter of complaint, and every such action shall be commenced within three years after the death of the person deceased."

If this submission were correct, one would not expect there to be any provision for extension of time in the case of an action commenced outside that period, since it would be a nullity. However, s.18(2) of the Limitation Act applies the provisions for extension in ss 16 and 17 to actions brought under the Compensation to Relatives Act, providing under s.16(1) that if leave is granted for the bringing of the action, the limitation provisions shall not afford any defence. Thus the limitation provision in s8 of the Compensation to Relatives Act is placed in the same category as the more general provisions in the Limitation Act itself as providing a ground of defence only, and not an essential requirement to the bringing of a valid action.

[27]. To reiterate, and as stated in section 18 subsections (1), (2) and (3) above, an application to extend time will have to be based on the usual criteria under sections 16 and 17 of the Limitation Act.

[28]. Notably, however, under section 18(4), no extension will be considered **“unless the action had been filed before the expiration of twelve months from the date of death”**. It would appear logical then that, before this court embarks on an inquiry under sections 16 and 17 of the Limitation Act, the first question that needs to be determined is whether or not the plaintiff has fulfilled the requirements of section 18(4). In this case, Kamachi filed the claim some 14 months after Sami died, so she does not meet the section 18(4) threshold.

[29]. But, supposing she had met the requirements of section 18(4), the next question would be, whether or not she has met the requirements of sections 16 and 17 of the Limitation Act, which, must be read together with section 18(1),(2),(3),(5) and (6). Sections 16(1) provides that the three-year limitation defence provided under section 4 of the Act will not be available where (a) the

court has granted leave and (b) where the requirements of section 16(3) are fulfilled.

[30]. The requirements of section 16(3) are:

(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.

[31]. By operation of section 18(5) (a) and (b), and for the purposes of an application to extend time in a case such as the one now before me, any reference to “**plaintiff**” in section 16(3) should be construed as a reference to the “**deceased**”. Hence, in order to succeed in this case, Kamachi must establish 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 Sami until his death (see section 18(5)(b)). Sadly, this requirement is also not satisfied in this case. I say this considering the following:

- (i) the cause of action alleges medical negligence for an operation performed on Sami at the Suva Private Hospital in July 2006.
- (ii) in August/September of that same year, Sami was again operated upon by some Government Doctors who took out some 4 ½ liters of bile fluid as well as removed some staples allegedly left behind by the doctor from the Suva Private Hospital (see footnotes).
- (iii) by November 2006, Sami had instructed Pillai Naidu & Associates.
- (iv) it is clear from Kamachi’s affidavit that Sami had instructed Pillai Naidu & Associates to institute a civil claim against the defendant. At paragraph 27 of her affidavit, Kamachi deposes as follows:

That the delay of filing this action was mainly caused on laxity of the previous Solicitors of the Plaintiff namely Messrs. Pillai Naidu & Associates and I verily believe and informed by Solicitors that my Solicitors upon the grant of Probate will file the Writ of Summons in Court. (my emphasis)

- (v) all that Kamachi states in her affidavit is that her late husband thought all the time that his former solicitors had in fact filed a claim but had in fact not done so. There is no evidence before me that the reason why the late husband or Kamachi filed the case out of time was because “facts” of a “material” and “decisive” nature as defined in sections 19 and 20 were outside their knowledge until after the three-year limitation period had run out.

CONCLUSION

[32]. In light of all the above, I regret to say that, based on **Sharma v Sabolalevu** [1999] FJCA 56; [1999] 45 FLR 204 (27 August 1999), there is insufficient material before me to invoke this court’s discretionary jurisdiction. Accordingly, I cannot even begin to consider the question: should I or should I not grant leave? I say this mindful of the following authoritative words of the Fiji Court of Appeal in **Sharma v Sabolalevu** when considering sections 16 and 17 of the Limitation Act.

If these requirements are not fulfilled, the court lacks jurisdiction to grant leave. No question of discretion arises.

If the requirements are fulfilled the court “may” grant leave, that is the court then has a discretion. In exercising that discretion the court will have regard to such matters as the cause or reason for the delay, and whether, and if so to what extent, the defendant may have been prejudiced in his defence by the delay. Further the court can then consider whether, having regard to all the circumstances, it is just to grant leave.

Secondly, we emphasise the importance of these provisions limiting the right to bring actions for personal injuries. They can have a significant effect on any person who has suffered injuries as the result of the actions of another.

[33]. For the record, there is nothing in our Limitation Act that states that the knowledge of the personal representative is relevant in the circumstances of this case. The application is dismissed. The plaintiff’s writ and statement of claim, accordingly, must also be struck out. Costs to the defendants which I summarily assess at \$800 (eight hundred dollars only).

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Anare Tuilevuka
JUDGE
14 February 2014.