

SHAREEN WAHIDUN NISHA

v.

TUCKER GROUP (FIJI) LIMITED

[HIGH COURT, 1999 (Scott J) 10 March]

Civil Jurisdiction

*Limitation- action in negligence- difference between physical and legal disability-
Limitation Act (Cap. 35) Section 11, 16 & 17.*

The Applicant suffered injury to her hand but allowed the limitation period to elapse before commencing proceedings. The High Court explained the circumstances in which the limitation period could be extended and, dismissing the application HELD: (i) that the applicant's injuries did not mean that she was "under a disability" and (ii) that the state of understanding of her injuries which she reached during the limitation period was such that her failure to commence proceedings could not be excused.

Cases cited:

Goodchild v. Greatness Timber Co. Ltd [1968] 2 All ER 255
Kirby v. Leather [1965] 2 QB 367

Interlocutory application in the High Court.

Ms. P. Narayan for the Plaintiff
No appearance by the Defendant

Scott J:

This is an application for leave to commence an action for damages for negligence causing personal injuries notwithstanding that more than 3 years have elapsed since the accident.

The only affidavit of facts is that of the Plaintiff filed on 30 October 1998. The Plaintiff formerly worked in a factory run by the Defendant. On 12 January 1994 her right hand was crushed in a pastry roller. Although her fingers were lacerated there was no bony injury and after treatment at the CWM Hospital she was sent home.

In May 1994 she returned to work but owing to the pain in her hand she was unable fully to perform her former duties. Thereafter the condition of her hand appears to have deteriorated and by October 1995 she had been diagnosed as suffering from reflex sympathetic dystrophy a condition characterised "by a devastating amount of pain, swelling, discoloration and stiffness (caused by) vasomotor dysfunction of the sympathetic nervous system". (see Exhibit C to the supporting affidavit).

A Following diagnosis the condition was treated quite intensively with various drugs and physiotherapy. The Plaintiff continued working but apparently her much-reduced performance was unacceptable to her employers and on 19 April 1996 she was told not to come back to work until she had fully recovered.

B According to the Plaintiff her health then deteriorated still further. She now complains that her hand is quite useless and that she is severely depressed. When she finally consulted solicitors with a view to initiating proceedings against her former employers she was told that the limitation period had expired on 12 January 1997.

C Under proviso (i) to Section 4 (1) (a) of the Limitation Act (Cap 35-the Act) claims for damages for negligence causing personal injuries must be brought within 3 years of the accident complained of. There are however two circumstances in which this 3 year period may be extended. The first is where the Plaintiff is "under a disability" (Section 11 of the Act) and the second is where the Plaintiff states that she was unaware (actually or constructively) of material facts relating to the cause of action until a date which:

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- "(a) either was after the end of the three year period relating to the 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."

(Section 16 (3) of the Act).

E Under Section 17 (1) of the Act any application for leave to commence proceedings within the extended period provided by Section 16 must be made *ex parte* but there is no specific procedure for invoking the provisions of Section 11.

F The relevant provisions of the Act are identical to the provisions of the English Limitation Act 1939 as amended by Section 2(1) of the Law Reform (Limitation of Actions, etc) Act 1954 and the Limitation Act 1963. A commentary on the procedure to be followed when applying under Section 2 of the 1963 Act (which corresponds to our Section 17 (1)) is to be found at Order 110 of the Rules of the Supreme Court of England and Wales 1967 Edn. Once again, there is no set procedure for invoking the disability provisions, Section 22 of the 1939 Act, which correspond with our own Section 11. Unfortunately our own High Court Rules do not deal with an application under the Act and therefore the relevant English procedure is applicable (see RHC O 1 r 7).

G It is not entirely clear on which provision the Plaintiff is relying. The application was filed on 30 October 1998 *ex parte*, presumably in accordance with section 17. The Chief Registrar ordered that the application be served on the Defendants but the Defendants have failed to appear. At the hearing of the application on 2

March 1999 the main thrust of Ms. Narayan's submission was that the Plaintiff, as a result of her accident became disabled to such an extent as to fall within the provisions of Section 11. She did not, except peripherally, suggest that the facts fell within the provisions of Section 16 (3).

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Paragraph 36 of the Plaintiff's affidavit is as follows:

"I seek this honourable Court's leave to institute legal proceedings against the Defendant out of time for the following reasons:

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- (i) I was injured due to the Defendant's negligence and breach of statutory duty.
- (ii) That I was unaware of the limitation period that applied in cases of personal injuries.
- (iii) That the Defendant has acted in a manner that can only be categorised as deception since it had placed me on a rehabilitation period and then terminating my employment after the lapse of 2 years since my injuries.
- (iv) That I have suffered severe injuries with a very remote chance of recovering to full capacity.
- (v) That I am unaware of the particulars on injuries I sustained."

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Rather than getting enmeshed in technical procedural difficulties my view is that the best way to deal with the application is to consider both grounds which may afford a reason for extending the limitation period. The first is disability (Section 11).

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Pointing to Subsection 11 (3) Ms. Narayan suggested that although certain classes of persons were deemed to be under a disability this did not mean that disability was restricted to those classes. She suggested that on the evidence the Plaintiff had been so disabled by her accident and in particular was now suffering from such a disabling condition namely reflex sympathetic dystrophy that she should be regarded as falling within the section and therefore the limitation period should not apply.

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In my view this submission faces two major difficulties. The first is that the way the Section operates is by allowing a person under a disability to bring proceedings:

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"at any time before the expiration of (3) years from the date from the date when the person *ceased* to be under a disability ..." (emphasis added),

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Since it is the Plaintiff's case that she is *presently* under a disability I do not think that the Section applies to her.

The second difficulty stems from the word "disability". In law disability does not mean the same as "disabled". Thus, a person who has suffered severe physical injuries may be disabled but will not usually thereby be under a disability. A

A legal disability is the same thing as a legal incapacity, the effect of which is to prevent certain classes of persons from entering into legal relations or performing certain legal functions. Examples include undischarged bankrupts sitting in Parliament (Constitution Section 71 (d)) or persons convicted of serious crimes sitting as assessors (Criminal Procedure Code – Section 267).

B Of course, in some cases a person who has suffered a severe accident may become both disabled and legally incapable. As was explained by the English Court of Appeal in Kirby v Leather [1965] 2 QB 367 where a person by reason of mental illness caused by an accident becomes incapable of managing his affairs as a reasonable man would do then he falls within the Section. Although it is here being suggested that the Plaintiff is suffering from a psychological condition as a result of her accident it is clear to me and indeed obvious from her affidavit that she is well able to manage her affairs. I do not find that her accident left her mental processes so impaired that she can be held to be under a disability by reasons of unsoundness of mind.

C While I do not wholly exclude the possibility that some form of disability other than infancy or unsoundness of mind might come with the provisions of Section 11 (3) I am satisfied that mere physical disability or even physical disability coupled with limited psychological complications does not. After all, the general purpose of Sections 4(1) (a) (i) and 11 (2) is to reduce the period within which a claim can be made following an accident involving personal injuries, not to extend it.

D I am satisfied that the Plaintiff has never been under a disability for the purposes of these proceedings and that accordingly Section 11 cannot apply to her.

E The next question is whether Section 16 (3) can help. Once again the English Court of Appeal offers guidance. In Goodchild v Greatness Timber Co Ltd [1968] 2 All ER 255 Lord Denning at page 257 explained the way in which the Section should be applied:

F “Take all the facts known to the Plaintiff or which he ought reasonably to have ascertained within the first 3 years about the accident and his injuries. Assume that he was a reasonable man and took such advice as he ought reasonably to have taken within those 3 years. If such reasonable man in his place would have thought he had a reasonable prospect of winning an action and that the damages recoverable would be sufficiently high to justify the bringing of an action – in short, if he had a “worthwhile action” – then he ought to have brought the action within the first 3 years. If he failed to bring an action within those 3 years, he is barred by the statute. His time will not be extended under the Limitation Act 1963 simply because he finds out more about the accident or because his injuries turn out to be worse than he thought. His time will only be extended if a reasonable man in his place would not have realised, within the first

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2 or 3 years that he had a “worthwhile action”. Then, if it should turn out after the first 2 or 3 years that he finds out facts which make it worthwhile to bring an action, he must start it within 12 months after he finds out those facts. Then, and then only, will the time limit be extended so that he is not barred.”

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In the present case it is part of the Plaintiff’s own case that she was well into an intensive course of physiotherapy and had been diagnosed as suffering from reflex sympathetic dystrophy as early as October 1995, well within the limitation period. Although she states in paragraph 36 (v) of her affidavit that she was “unaware of the particulars of injuries I sustained” I find as a fact that she was aware of the essential nature and quality of her injury and its subsequent complications long before the limitation period expired. In these circumstances therefore I hold that Section 16 cannot avail.

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I have sympathy for the Plaintiff. This is not the first time that I have had to refuse leave to an applicant whose main reason for not commencing proceedings within the limitation period was either ignorance of the law or lack of funds. But the High Court cannot bend the law merely on the ground of sympathy. In some countries the law has been reformed to mitigate its harshness. Perhaps there is a case for such a reform here in Fiji.

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The application fails and is dismissed.

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(Application dismissed.)

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