

IN THE HIGH COURT OF KIRIBATI )  
CIVIL JURISDICTION )  
HELD AT BETIO )  
REPUBLIC OF KIRIBATI )

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HIGH COURT CIVIL CASE 28 OF 2011

BETWEEN: TAMUERA TEKEANG

PLAINTIFF

AND: ATTORNEY GENERAL iro MINISRTY OF HEALTH & MEDICAL SERVICES

DEFENDANT

FOR PLAINTIFF: BATITEA TEKANITO

FOR DEFENDANT: GEORGE MACKENZIE

Date of Hearing: 9 October 2012

#### JUDGMENT

This is an application for the determination of a preliminary issue which is as follows;

*'Whether the case is statute barred pursuant to section 7 of the Government Liability Act'*

Section 7 of the Government Liability Act 2010 states the following:

***"Notwithstanding any provisions of the Limitation of Actions Act, any claim for torts against the Government must be instituted within one year from the date such claim arise"***

#### **AGREED FACT**

It was agreed by both parties that the claim arose on 18 March 2009 when the plaintiff's leg was amputated. The claim was filed with the Court on March 2011. The Government Liability Act was enacted in 2010.

## THE ARGUMENTS AND DISCUSSION

The argument submitted by the defendant was that the claim is statute barred pursuant to section 7 of the Government Liability Act. The claim was filed 2 years after it arose. The defendant argued on two points; that the Act governs court procedure therefore it has a retrospective effect, and that there is a clear intention that the Act is to be applied retrospectively.

On the other hand, the plaintiff submitted that the Government Liability Act has no retrospective effect. The Act was passed in 2010, after the claim arose therefore it has no effect on the plaintiff's claim, or any other claims arising before the enactment date. All claims before this Act were governed by the Limitation of Actions Act 2004.

During the hearing the plaintiff referred the Court to the case of *Tofa Nauer Ltd v Lutelu [1954] WSHC 1*. Their argument was that this *Tofa* case is a classic example of this case before us where the Court held that a new legislation, the Finance Ordinance 1953 has no retrospective effect. The case involved suing a Samoan trader for the balance alleged to be owed for goods sold and delivered and money advanced during the period of operation of the Samoa Trade Debts Ordinance 1925. This Ordinance was repealed by s5 of the Finance Ordinance 1953. The issue before that Court was whether s5 of the Finance Ordinance 1953 is retrospective in effect or not. The Court in that case made a decision that it is not retrospective in effect.

After carefully referring to this *Tofa* case, I found that the Court in that case reached their decision after finding that the right to bring an action for debt against Samoans, which was taken away by the Samoa Trade Debts Ordinance 1925, was a substantive right and not a mere matter of procedure, therefore s5 of the Finance Ordinance 1953 is not retrospective in effect. The plaintiff's rightful action against the defendant is governed under the Samoa Trade Debts Ordinance 1925 but since the plaintiff had failed to comply with the requirements of that Ordinance he had no right to sue the defendant, unless the repealing Ordinance (Finance Ordinance 1953) is held to be retrospective.

The defendant argued that the *Tofa* case is different with this instant case. Because the argument on retrospective was just made known to the defendant at the time of the trial, I made allowances for the defendant's Counsel to submit case authorities on this argument within 1 week of the trial date. I received two case authorities from them which are the *The Ydun [1899]* and *R v Chandra Dharma [1905] 2 KB 335*.

*The Ydun* case is a case where the limitation period for claims against public authorities of six years was cut down to six months. The action arose before the enactment of the new legislation, The Public Authorities Protection Act 1893 which cut the limitation period to six months. The plaintiff issued their writ on the 14 November 1898, well within the six years

period thinking that their claim was governed under the old Act. The Court held otherwise, that the new legislation applied retrospectively to their cause of action and therefore they were out of time. The Court held that because the new legislation deals with procedure only, the enactment applies to all actions, whether commenced before or after the passing of the legislation.

The *R v Chandra Dharma* [1905] 2 KB 335 applied the same principle as well. Section 27 of the Prevention of Cruelty to Children Act, 1904, extended the three months period to six months for the prosecution to commence after the commission of the offence. The offence was committed before the passing of the Prevention of Cruelty to Children Act. The prosecution commenced after three months but within six months. The Court held that s.27 of the Prevention of Cruelty to Children Act related to procedure only, and was therefore retrospective.

The Maxwell principle in regards to the interpretation of statutes was discussed in both *The Tofa* and *The Ydun cases* where it is clear that what must be taken to be an improvement in procedure '...are retrospective unless there be some good reason against it.'

In my opinion, section 7 of the Government Liability Act of 2010 is an alteration and improvement in procedure therefore is retrospective in effect. The plaintiff's case must fail as it is out of time.

Judgment for the defendant with cost.

Dated 19 February 2013.



TETIRO M SEMILO

COMMISSIONER OF THE HIGH COURT

