

Save v Kingdom of Tonga

Supreme Court, Nuku'alofa

10 Ward CJ

Civil Case No.626/93

10 December, 1993

Fatal Accidents Act - limitation period

Limitation - application of English law - discretion to enlarge time

20 Following a death at Hospital the administrator of the deceased estate took action against the hospital authorities, based on negligence. The writ was filed some 6 weeks after the one year period referred to in the Fatal Accidents Act, s.6.

On a motion to strike out the writ.

Held (refusing that application and allowing extension of time):-

1. The Supreme Court Act, s.16, does not make special provision for personal injuries cases.

2. The Civil Law Act, s.3, therefore allows the use by the Court of the various provisions of the (English) Law Reform (Miscellaneous Provisions) Act 1936 and the Limitation Acts (1976, 1980)

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contrary to section 16(1) of the Civil Law Act

Cases Considered : Donovan v Gwenloys [1990] 1 All ER 1018
Halford v Brookes [1991] 3 All ER 559

Statutes Considered : Civil Law Act ss.3, 4, 5.
Fatal Accidents Act, s.6
Law Reform (Miscellaneous Provisions) Act 1936 (Eng)
Limitation Act (Eng.) 1976, 1980
Supreme Court Act, s.16

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Counsel : Mr Hala for Plaintiff
Mr Taumoepeau for Defendant

* CA allowed an appeal against this decision.

Judgment

On 30 July 1992 the mother of the plaintiff was taken to Vaiola Hospital for medical treatment. By the end of that day she was dead and the plaintiff as administrator sues the hospital authorities for negligence on behalf of five dependents of the deceased.

The writ was filed on 16th August 1993 and, by the notice of motion filed on 13th September 1993, the defendant now applies to strike it out for failure to file within the time limited by section 6 of the Fatal Accidents Act (Cap 34):

"6. Not more than one action shall be brought for and in respect of the same subject matter of complaint and every action under this Act shall be commenced within 12 calendar months after the death of the deceased person in respect of whom the claim is brought".

The plaintiff seeks to have that that time extended on the basis of the Court's residual power, equity and the English Limitation Acts.

The Solicitor General points out that the terms of section 6 are clear and leave the Court no discretion. The defendants are entitled to rely on that protection and the Act has no provision allowing the Court to look behind section 6.

However, I am not satisfied that provides a complete answer in this case. By section 3 of the Civil Law Act (Cap 25):

"3. Subject to the provisions of this Act, the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England".

The provisions to which that is subject include sections 4 and 5.

"4. The common law of England, the rules of equity and the statutes of general application referred to in section 3 shall be applied by the Court -

- (a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom; and
- (b) only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualification as local circumstances render necessary".

Section 5 provides the mode of application.

Limitation of actions is covered only by section 16 of the Supreme Court Act (Cap 10). Subsection 1 reads:

"16(1) It shall not be lawful to sue any person for debt or damages after the expiration of 5 years from the date on which such liability was incurred nor to sue for property which has been in the undisputed possession of any person for more than 5 years. But if any part of such liability or claim has been paid within such time or the claim or liability has been admitted in writing within such time the 5 years shall commence to run from the time of such payment or admission and if there be any deed or document between the parties covering a period of time the 5 years shall commence to run from the expiration of such period of time".

I accept section 16 is subject to section 6 of the Fatal Accidents Act. The question here is whether section 16 is a sufficient provision to supplant the entire English Limitation Acts in terms of section 4(a) of the Civil Law Act.

The Common Law rule was that a personal action dies with the person and under the rule in *Baker v Bolton*, no damages could be recovered arising out of the death of another.

The harshness of the Common Law has been mitigated by the Law Reform (Miscellaneous Provisions) Act 1936, which provides that, on the death of any person, all

causes of action vested in him or existing against him survive for the benefit of or against his estate, and by the Fatal Accidents Acts, which allow an action by the dependents of the deceased.

Under English legislation, the limit in claims for personal injuries and death is three years. It was this difference from our Act that led to the mistake by counsel for the plaintiff that lies at the heart of this action. The terms of section 16 of the Supreme Court Act do not make any special provision for personal injuries cases. I consider that these provisions of that one section are not sufficiently comprehensive to supplant the whole of the English Act.

The importance is that, since the 1976 Limitation Act, the Courts have been given a discretion to "disapply" the limitation period in certain cases of personal injuries claims and actions under the Fatal Accidents Act. I consider these provisions do apply in Tonga and that the Court may exercise a discretion to enlarge the time.

Were this not so, the untenable position would be that the provisions of the Law Reform (Miscellaneous Provisions) Act 1936, which is an act of general application here, would apply and allow actions for the benefit of those entitled under the estate during a period of three years whilst actions on behalf of the dependents would be limited to one year under our Fatal Accidents Act with no chance of extension.

In this case, of course, the dependents are also beneficiaries under the estate and so, had I ruled differently, the action could have been brought afresh under the 1936 Act.

In exercising my discretion under the Limitation Acts the matters to be considered are stated in section 23 of the 1980 Act. I do not set them out here; the section can be read, for example, in Donovan v Gwenloys [1990] 1 All ER 1018 and Halford v Brookes & anor [1991] 3 All ER 559.

In the case before me, I consider the length of the delay was minimal and was not caused by the mistake of the plaintiff. I cannot accept such a delay will in any way affect the cogency of the evidence that may be called by either party. Bearing in mind the inexplicable delay in the issue of the Letters of Administration, I do consider the plaintiff acted reasonably promptly.

I should add that various authorities in England suggest that, where a party has a cause of action against his lawyer for the failure to comply with the time limit, that may be a factor to be considered. I feel, in the Tongan context, it would only be in an exceptional case that it would be likely to be a matter of any weight.

In all the circumstances I allow the application. The time limit is not to be applied. The plaintiff has 14 days to file an amended statement of claim and there will be 28 days thereafter to file the defence.