

IN THE HIGH COURT OF FIJI

At Suva

Appellate Jurisdiction

CIVIL APPEAL NO. 0006 OF 2007

Between ;

THE ATTORNEY GENERAL

First Appellant

**THE PERMANENT SECRETARY
FOR HEALTH**

Second Appellant

- and -

DEO RAJ

Respondent

**Counsel : Ms. K. Naidu for the Appellants
Mr. I. Samad for the Respondent**

Date of Hearing : 14th January 2008

Date of Judgment : 21st January 2008

JUDGMENT

- [1] Deo Raj, the respondent (plaintiff), says that on the 30th of June 2004 he underwent a surgical operation to a "Keloid on his neck". He states that since that operation he has had pain and trouble with his neck and there is an unsightly scar. He filed proceedings in the Magistrates Court on 23rd of July 2007 alleging medical negligence.

[2] The appellants, the Attorney General representing the Permanent Secretary at the Ministry of Health, denied negligence but also in their defence asserted that Mr. Raj's claim had been filed outside the three year limitation period and therefore should be struck out.

[3] In a Ruling given on 4th October 2007 the Magistrate charged with hearing the case ruled that the claim did not fail by operation of the Limitation Act (Cap.35) and therefore it should proceed. The Attorney General appealed this decision. I have before me a copy record of the Magistrates Court at Nausori which also includes affidavits of Ajay Singh dated 31st August and 27th of September 2007 and the affidavit in reply of Deo Raj dated 18th September 2007. I have received written and oral argument from counsel.

[4] The relevant part 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 ;

(b)-(d) ...

Provided that -

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of the contract or of provision made by or under any act or independently of any act 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 was substituted a reference to three years ;

(ii) ...

(2)-(7) ...”

- [5] Part D of the Act is entitled “Special Provisions Applicable to Certain Actions in Respect of Personal Injuries”. This provides for the extension of the three year term limit upon application in certain circumstances. No application has been made in this case.
- [6] On the face of the papers before me it is clear that this action was filed just over three weeks after a period of three years from the date of the operation.
- [7] Counsel for Mr. Raj argues that nevertheless the action is sustainable as the respondent was not aware he might have any action until receipt of Dr. Oten’s letter of 27th September 2006. That states,

“TO WHOM IT MAY CONCERN
RE : DEO RAJ F/N D. PRASAD

The above is a 46 year old Indian male presented with a Keloid on his left neck for more than three years.

He had been treated with Kenocot injections (15 xs) without any changes in the Keloid bulk. Surgical excision is absolutely contra-indicated as it will only aggravate the Keloid.

For your information.

Dr. B. Oten
Surgical Registrar
for Consultant Plastic Surgeon, CWM Hospital."

[8] Counsel for Mr. Raj states that upto that time he understood the problem would get better and there would be no scar, Mr. Raj was only aware there was a cause of action upon receipt of that letter.

[9] It is important to note what Mr. Raj says in his Statement of Claim. He says,

"7. On 30/6/04 when plaintiff presented himself to first defendant doctor - the doctor without explaining anything as to cause or what treatment he was going to administer and without first obtaining his consent performed operation.

8. That the first defendant doctor did not inform the plaintiff about the success rates in this kind of operation nor did he explain or advise plaintiff concerning the likely result of surgery in terms of scars.

9-10...

11. That the operation was never a success and I am suffering from pain till today.

12. Everyday I find it difficult to shave my face due to the scars and creating more pain.

13. The operation wound healed in such a way as to leave a prominent and ugly scar which constituted a significant disfigurement.

14. Taking tablets daily also caused my kidney to be infected.

15. ...

16. I have seen several private doctors who gave anaesthetic injections but the pain still remains.”

[10] Counsel for the respondent cites the dictum of Lord Denning in *Good Child v. Greatness Timber Company Limited* [1968] 2 ALL E.R. 255 where he states at 279,

“I can best explain it by stating the way it should be applied (referring to the operation of the Limitation Act period). Take all the facts known to the plaintiff, or which he ought reasonably to have ascertained within the first three years about the accident and his injuries. Assume that he was a reasonable man and took such advice as he ought to have taken within three years. If such a reasonable man in his place, so advised, would have thought he had a reasonable prospect in winning an action and that the damages recoverable will be sufficiently high to justify the bringing of an action - in short, if he had a “worthwhile action” - than he ought to have brought an action within the first three years.”

[11] On any showing Mr. Raj was aware on or about the 27th September 2006 that there was strong evidence to support a claim for negligence. Yet he waited another ten months before filing his claim. He had all the knowledge and ample time to file his claim within the three years yet failed to do so. That letter did not mean the three year period started from the date thereof.

[12] In any event, on the face of his pleading and affidavit it was clear that within months of the date of the operation there was something wrong.

- That would have alerted any reasonable man to ascertain what the problem was and seek advice as to whether an action was sustainable. This did not take place either. Even in his statement of claim, see paragraph 16, Mr. Raj says "I have seen several private doctors ...". It is not clear when he saw those private doctors but again this illustrates the fact that Mr. Raj could and any reasonable man would have sought medical advice to ascertain if there was a cause of action.
- [13] In these circumstances, I can see no basis upon which Deo Raj's action for negligence can be maintained. The date of accrual of this action was the date of the operation.
- [14] There were, in the Magistrates Court, some discussions on procedural matters. I do not propose to rule on those, it does nothing more than prolong these proceedings.
- [15] I therefore allow this appeal. The claim of Deo Raj cannot be sustained and I order that it be struck out.
- [16] Nevertheless, there is a degree of sympathy for Mr. Raj. In my judgment, this allows me to make no order for costs on this appeal nor in the Magistrates Court.

A handwritten signature in black ink, consisting of the initials 'R.J.' followed by a stylized, cursive signature that appears to be 'Coventry'.

(R.J. Coventry)

JUDGE