

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 175 of 2013

BETWEEN : **SUSHIL CHAND** as a personal representative of the deceased **SHIVNEEL CHAND** of Tavarau, Ba, Farmer and I am suing on my behalf and as Trustee for my wife, Sneh Lata and two sons Ronish Chand and Prashant Chand who are beneficiaries under the Compensation to Relative Act.

Plaintiff

AND : **HANDYHARD MARKETING (FIJI) LTD** a company duly registered under the Companies and having its registered office on 2 Nasoki Street, Lautoka.

First Defendant

AND : **AVINESH NAIDU** of Korovuto, Nadi, Driver

Second Defendant

Counsel : Messrs Qoro Legal for the Plaintiff
A.K Lawyers c/a Young & Associates for the Defendant

R U L I N G

INTRODUCTION

1. Shivneel Chand (“**Shivneel**”) was eight years of age when he died on 19 April 2008 as a result of injuries he sustained when he was ran over by a car driven by the 2nd defendant but owned by the first defendant. Shivneel is survived by his parents, Sushil Chand (“**Sushil**”) and Sneh Lata and also his two brothers, Ronish Chand and Prasan Chand.
2. No Letters of Administration has yet been granted over Shivneel’s estate. Sushil wishes to institute civil proceedings for damages against the defendants. However, he was already out of time by 19 April 2011.
3. Sushil filed this Notice of Motion before me now on 19 September 2013 seeking the following Orders:
 1. that an order that the plaintiff be granted leave to institute this proceedings out of time against the defendants.
 2. any other order that this Honourable Court deem just.
 3. costs to be paid by the defendants.

4. He files the application purportedly as personal representative of Shivneel's estate and also on his own behalf and as trustee for his wife and two children who are beneficiaries under the Compensation to Relatives Act (Cap 29).
5. I say "purportedly" because Sushil does not yet hold Letters of Administration over Shivneel's estate.
6. An affidavit of Sushil sworn on 19 September 2013 is filed herein support of the application.
7. The defendants oppose the application by an affidavit of Arvendra Kumar, Assistant Claims Manager for Sun Insurance Company Limited, and of one Anirud Kumar, Private Investigator. Both these affidavits were sworn on 02 October 2015.

AFFIDAVIT OF SUSHIL

8. In his affidavit supporting the application seeking leave to file a writ and statement of claim out of time, Sushil deposes that he is the father of Shivneel. On 16 April 2008, Sushil was in Washington in the US when he was told that Shivneel had met an accident and was admitted at the Lautoka Hospital in serious condition. At the time, Sushil had been in the US for some two weeks or so where he had gone to bury his mother and perform the funeral and post-funeral rites in accordance with the Hindu customs.
9. After being told of the accident, Sushil had to cut short his stay in the US. On 18 April 2008, he was on his way back to Fiji. Shivneel however would succumb to the injuries. He passed away on 19 April 2008, a day after Sushil arrived in Fiji.
10. Sushil explains his failure to file a writ of summons and statement of claim on several factors. First, he says that he is not well educated and had no knowledge that he could sue the driver and/or the owner of the car. He says that it was his landlord who urged him to see a lawyer.

I heard that the driver by the name of Naidu was charged but I did not know his full name. Also I did not know what criminal offence he was charged with. At that time, I did not know that I can sue the Driver and the Owner of the Vehicle for the death of my son Shivneel Chand. Because of my lack of knowledge and education, I did not do anything about it.

Sometimes on or about March 2010, I met with my new landlord, Saha Deo. In our conversation, Mr Deo asked me how many children I have. I said three but the youngest

died. He asked me how he died. I said he died from injuries suffered in an accident on or about 16th April 2008. Mr Deo then asked me what I have done about it. I said nothing. **He then asked me whether I have sought legal advice from a lawyer. I said no because I did not know what to do and what rights do I have.**

Mr Deo then arranged for me to seek legal advice from Qoro Legal. I met Mr Qoro and I told him that I need his legal advice regarding the death of my son Shivneel Chand in that the accident. I said to him that my son was killed in a car accident on the Kings Road at Tuvu, Ba. Mr Qoro then asked me whether I have a copy of the Accident Report. I said no. I was then advised to get the copy of the accident report from Ba Police Station.

11. Second, Sushil appears to assert that he was delayed by the fact that he did not know the identity of the driver of the car that hit Shivneel.

On or about 28 April 2011, the Ba Police Station Traffic Branch issued the Accident Report. I then brought it to Qoro Legal who then advised me that according to the report.

- a. The Driver's name was Avinesh Naidu s/o Latchman Naidu of Korovuto, Nadi.
- b. The Vehicle Registration No. is FB 410.
- c. The Driver, Avinesh Naidu was charged with Occasioning Death by Dangerous Driving for bumping my son Shivneel Chand 7 years old of Tuvu, Ba. He later died at the Lautoka Hospital.

Except that I know the driver by the name of Naidu and that my son died from the accident, I did not know the rest of the information above **until 28th April 2011. By then the three years limitation period had lapsed.** (Annexed herewith and marked 'SC4' is a true copy of the Ba Police Station Traffic Branch Accident Report dated 28th April 2011).

12. Third, he seems to assert that he was only able to get his hands on the relevant medical report at a time when the limitation period had already lapsed.

I was advised by Qoro Legal that we need to get a copy of the medical report from the hospital to determine the extent of injuries suffered by the Shivneel. I then signed an authority on 29th April 2011 authorizing the Hospital to release the medical report of Shivneel to Qoro Legal. (Annexed herewith and marked 'SC5' is a true copy of the letter dated 29th April 2011).

The medical report was made available to Qoro Legal on 19th October 2011 almost 6 months when we wrote to the Hospital for it. (Annexed herewith and marked 'SC6' is a true copy of the letter dated 19th October 2011).

13. Fourth, he says that he was delayed considerably by the failure of the LTA to supply him with details of the registration, ownership and third party insurer of the car that ran over Shivneel.

On or about 19th September 2012 a vehicle search was conducted with LTA to ascertain who owns the Vehicle No. FB 410 and whether it was insured for third party insurance.

The search revealed that

- a. the owner of the vehicle No. FB410 is Suem Prakash Mani of Naviago, Lautoka.
- b. Vehicle No. FB410 is insured with New India Assurance between 5th July 2012 and 5th July 2013.

(Annexed herewith and marked 'SC7' is a true copy of LTA Vehicle Registration Certificate for FB410).

However, I am still trying to get vehicle search for April 2008 to ascertain who was the vehicle owner during the accident and whether it was insured by India Insurance at that time. I did not know the information mentioned in paragraph 14 only after the search was made on 19th September 2012.

14. Fifth, he appears also to blame the delay in the prosecution of the related traffic charge on his inability to file a writ of summons and statement of claim within the stipulated three year period.

18. Thus far, the case of Avinesh Naidu for the offence of Occasioning Death by Dangerous Driving has not been finalised or determined in the Ba Magistrate Court. Without which, I have been advised by Qoro Legal that it cannot with certainty advise me as to whether or not such injuries were caused by the negligent, breach of duty or omission of the Driver. I do not have the copy of the police disclosures which Qoro Legal could rely on to advise me of my legal position.

19. Based on the above information, Qoro Legal then filed an application in this Honourable in HBC 97 of 2013. Suem Prakash Mani was the 1st Defendant being the owner of vehicle No. FB 410 as at 19th September 2012. (Annexed herewith and marked SC8 is a true copy of HBC 97 of 2013).

20. Also on 19th September, Qoro Legal also requested LTA to provide them as to who owned the vehicle on or about 16th April 2008 when the accident occurred.

21. On 23rd July 2013, LTA then replied to Qoro Legal's letter dated 19th September 2012 and confirmed that Handyhard Marketing (Fiji) Ltd was the owner of the said vehicle on or about 16th April 2008 when the accident occurred. Based on this new information, I had to withdraw my application on HBC 97 of 2013 and file this new one seek leave to institute this proceeding against the Defendants out of time. (Annexed herewith and marked 'SC9' is a true copy of the said LTA letter dated 23rd July 2013).

22. I have annexed herewith and marked 'SC10' is a true copy of the Draft Statement of Claim.

23. I therefore ask for order in Terms of the Ex-Parte Motion filed herein.

DISCUSSION

15. This Court does have a discretion as to whether or not to grant leave to file or continue proceedings out of time.

16. In Fiji, section 4(1)(i) of the Limitation Act sets the limitation period for personal injury claims at 3 years. If time has run out, the claimant may still seek the leave of the court under section 16(1)(a) of the Limitation Act.

16.-(1) the provisions of subsection (1) of section 4 shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which-

(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(b) the requirements of subsection (3) are fulfilled.

(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract 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 the plaintiff or any other person.

(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.

17. Since this application seeking leave in this case is being made before the plaintiff has filed substantive proceedings to extend time, section 17(2) of the Limitation Act will apply.

18. Section 17(2) provides:

Application for leave of court

17.-(1) Any application for the leave of the court for the purposes of section 16 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of any relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient-

(a) to establish that cause of action, apart from any defence under subsection (1) of section 4; and

(b) to fulfil the requirements of subsection (3) of section 16 in relation to that cause of action.

19. Section 17(2) requires the plaintiff to establish the following:

(i) he must adduce evidence which will be sufficient to establish a cause of action.

(ii) he must fulfil the requirements of section 16(3).

20. To fulfil the requirements of section 16(3), the plaintiff must prove 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.

21. The Fiji Court of Appeal in **Sharma v Sabolalevu** [1999] FJCA 56; [1999] 45 FLR 204 (27 August 1999), though dealing with section 17(3), said the following words which apply equally to section 17(2) in my view:

First, it is apparent that the three elements of s 17(3), including the requirements of s 16(3), must be fulfilled before the court can grant leave. That emerges from s 17(3) providing that the court may grant leave “**if but only if**” the requirements of the subsection are fulfilled. **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. **The provisions of s 16 and s 17 are in our view, unnecessarily complex and difficult to understand. Indeed they can fairly be described as convoluted. This is an undesirable feature of legislation that can affect the lives of ordinary citizens. It is our recommendation that the authorities give active consideration to the re-enactment of these provisions in a form that is simple, clear and easy to understand. A useful model is the provisions in the Limitation Act 1980 (UK), which fulfil these requirements, and which replaced the provisions of the 1963 UK Act, which were in terms substantially the same as those in the Fiji Act.**

22. In the above case, the Fiji Court of Appeal rejected an argument that even if the plaintiff had not succeeded in adducing evidence, it was still open to the court to exercise a discretion on a balance of prejudice approach. In other words, notwithstanding any prejudice the defendant might suffer, the authorities are clear that if the requirements of section 16(3) and section 17(3) are not fulfilled, the Court does not have any discretion to exercise.
23. In England, the prejudice that might be suffered by a potential claimant is relevant in the exercise of the court’s discretion. This is because section 33(3) (a) of the UK Act provides that, in considering an application, the court shall have regard to all the circumstances of the case and in particular to the matters

referred to in the subsection (see Court of Appeal in England in **Coad v. Cornwell and Isles of Scilly Health Authority** [1997] 8 Med LR 154).

24. In Fiji unfortunately, the Limitation Act does not allow such a consideration to be taken into account.
25. The policy reasons behind having a Limitation Act was reiterated by the English Court of Appeal in **Ministry of Defence (Respondent) v AB and others (Appellants)** [2012] UKSC 9 as follows:

6. The statutes of **limitation** which stretch back to 1540, have been in place for two main reasons. One is to protect defendants from being vexed by stale claims. They are Acts of peace: see *A'Court v Cross* (1825) 3 Bing 329, 332 (Best CJ). The other is to require claims to be put before the court at a time when the evidence necessary for their fair adjudication is likely to remain available, or, in the words of the preamble to the 1540 Act, at a time before it becomes "above the Remembrance of any living Man...to...know the perfect Certainty of such Things". Conventionally, therefore, they have required the assertion, by claim, of a cause of action within a specified **period** following its accrual.

ANALYSIS

26. I am prepared to accept as establishing a cause of action in terms of section 16(3) the allegation that Shivneel died from injuries he sustained as a result of being run over by a motor vehicle (registration number FB410) driven by the second defendant and owned by the first defendant, and that the second defendant has a pending criminal charge of Occasioning Death By Dangerous Driving is sufficient in my view to establish a cause of action.
27. I say that because the defendants do not seriously dispute that for the purpose of this application.
28. However, having said that, I do not think that the plaintiff has satisfied the requirements of section 16(3).
29. Although the plaintiff has raised many reasons for his inability to file a claim within the limitation period, these reasons all rest on the primary argument that he is not well educated and did not know his rights until his landlord advised him to see a solicitor. Notably, at the time when his landlord advised him to see a solicitor in March 2010, he was still within the three-year limitation period.
30. I note that Sushil does not say when he first saw his solicitor. What I note though is that at the time when he was running around trying to get all the

documentation as directed to by his lawyer, he was already out of time. What he did between the time his landlord urged him to consult a solicitor and the time when he was running around for the documentation is unaccounted for.

31. In that light, everything else that Sushil says about being poorly educated and knowing of his rights rings rather hollow.
32. I cannot agree with the argument that his cause of action could only clearly materialise after the Magistrates Court has concluded the related criminal case.
33. Under section 17 of the Civil Evidence Act 2002, a conviction will be prima facie proof of that the person committed an offence. However, the absence of a conviction does not necessarily disprove negligence in a related civil action. In other words, the outcome of a criminal proceeding was not entirely conclusive on any related civil claim. This means that it is not a valid excuse to delay the filing of a claim on account of the pendency of a related criminal proceeding.
34. I regret I must decline the application.
35. I must say that I am truly sorry for what the plaintiff has to go through in the manner that he lost his youngest son whilst he was away in the US attending to the death of his mother. In this case, I do not see any real prejudice to the defendants if the application was to be allowed.
36. However, I am bound by this law which many bemoan can be harsh in its application, particularly in such cases as this one and many others I have come across.
37. In England, legislative changes have been made to widen the discretionary powers of the Court to override the limitation period where it would be equitable to do so and this includes cases where, for example, a plaintiff knew the facts but did not know his legal rights. Unfortunately, we in Fiji are still stuck with a rather piece of archaic legislation in this regard and have not been abreast with development in England or in other jurisdictions in this area of the law.
38. I regret I must refuse the application for leave to file a claim out of time. Parties to bear their own costs.
39. Perhaps the Fiji Law Society should make submissions for reform on this area of the law to the Honourable Chairperson of the Parliamentary Standing Committee on Justice, Law and Human Rights, Mr. Ashneel Sudhakar.

POST SCRIPT

40. There was a preliminary objection raised by counsel for the defendant based on **Ingall v Moran** [1944] 1 AER 97. That case is authority that a person who claims on behalf of an intestate's estate must first obtain a grant of letters of administration before he can file a claim. Otherwise, his writ and claim will be null and void, and that nullity will not be curable by amendment. This is so because an administrator derives his title to sue from the grant of letters of administration¹.
41. Although Sushil has not obtained letters of administration over Shivneel's estate, and although he somewhat asserts in the intituling that he is "a personal representative of the deceased Shivneel Chand", I am of the view that the principle in **Ingall v Moran** is irrelevant in this application now before me because all I am dealing with now is an application seeking leave to file a claim out of time.
42. In any event, I would dismiss the application on the ground that the plaintiff has not satisfied me that the material facts in this case were outside his knowledge at all material times.



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Anare Tuilevuka
JUDGE
06 May 2016

¹ In contrast, an executor derives his title to sue from the Last Will and Testament of the testator, rather than from the grant of probate. Accordingly, courts have long recognised that the executor's entitlement to sue crystallizes upon the testator's death. This means that an executor can sue even before probate is granted because all rights of action of the testator vests in the executor upon the testator's death - although, the executor may need to prove his title-by probate, at the hearing, before a decree can even be considered.