

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

C.P. 101/97

BETWEEN: STEVE YOUNG of Faatoia,
Businessman, suing for and on
behalf of his son STEVEN
TAUTALATASI YOUNG, a
minor:

Plaintiff

A N D: THE ATTORNEY-GENERAL
sued for and on behalf of the
Department of Health:

Defendant

Counsel: PA Fepuleai for plaintiff
G Latu for defendant

Hearing: 18 September 1997

Judgment: 23 March 1998

JUDGMENT OF SAPOLU, CJ

In the present proceedings the plaintiff, on behalf of his son who is a minor, has brought an action for damages against the Health Department alleging professional negligence against a doctor who was employed on the Department's medical staff. The professional negligence in question is alleged to have taken place in February 1995 when the doctor in question failed to provide proper medical care and treatment to the plaintiff's son thereby resulting in damages.

Even though the cause of action in negligence appears to have occurred in February 1995 when the plaintiff's son first sustained damages, the plaintiff's action was not commenced until 15 May 1997. Counsel appearing for the Attorney-General who is being sued on behalf of the Health Department has therefore moved that the action should be struck out for non-compliance with the requirements of section 21 of the Limitation Act 1975 as to notice and the time in which the present action should have been commenced. Section 21(1) as far as relevant, provides :

"No action shall be brought against any person (including the Government) for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless :

"(a) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action; and

"(b) The action is commenced before the expiration of one year from the date on which the cause of action accrued".

Section 21(2) then provides :

"Notwithstanding the foregoing of this section, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time before the expiration of 6 years from the date on which the cause of action accrued, whether or not notice has been given to the intended defendant under subsection (1), and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose where it considers that the failure to give the notice or the delay in bringing the action, as the case may be, was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the failure or delay".

It would appear from these provisions that no action can be brought against any person, including the Government, in terms of section 21(1) unless there is notice in terms of section 21(1)(a) given by the prospective plaintiff to the prospective defendant, and that the prospective plaintiff's action is commenced within one year. Section 21(2), however, empowers the Court, upon application by an intended plaintiff, to grant leave to him to bring an action as contemplated by section 21(1) notwithstanding non-compliance with the requirements of section 21(1).

In the present case, the plaintiff has not complied with the requirements of section 21(1). As submitted by counsel for the defendant, no notice was ever given by the plaintiff as required by section 21(1)(a) and the plaintiff's action was not commenced within one year from the date the cause of action accrued as required by section 21(1)(b). The action seems to have been commenced some 2 years and 2 months after it accrued. It was therefore submitted for the defendant that there has been a total failure to comply with the requirements of section 21(1) by the plaintiff. It follows that the present action is not maintainable under section 21(1) unless leave is obtained from the Court under section 21(2).

In the circumstances of this case, the plaintiff is confronted with certain difficulties in relation to section 21(2). The first is that there has really been no application by the plaintiff for leave to be granted to him under section 21(2) to bring his present action notwithstanding his non-compliance with the requirements of section 21. Because of this, there has been no real attempt by the plaintiff to rely on

section 21(2) by showing that the failure to comply with the requirements of section 21(1) as to notice and the time for commencing this action was occasioned by mistake or by any other reasonable cause, or that the intended defendant was not materially prejudiced in his defence or otherwise by the failure to give notice or the delay in commencing the action. Mistake in this context does not include a mistake as to the legal position for ignorance of the law is no defence. Furthermore, proceedings did not reach the stage where the Court has to consider the exercise of its ultimate discretion under section 21(2) as to whether it is just to grant leave or not. The reason for this is that it has to be first established to the satisfaction of the Court that the non-compliance in this case with section 21 was occasioned by mistake or other reasonable cause, or that the defendant was not materially prejudiced in his defence by the non-compliance.

The other difficulty for the plaintiff in relation to section 21(2) was raised by counsel for the defendant who submitted on the authority of *Milford Builders Ltd v Western Samoa Shipping Corporation [1980-1993] WSLR 235* that the Court has no jurisdiction under section 21(2) to grant leave retrospectively to a plaintiff to enable him to continue with an action which he has already commenced without any notice being given in terms of section 21(1). In *Milford Builders* case, as in the present case, the plaintiff did not give any notice at all or commence its proceedings within one year. In that case, Bathgate J after a detailed discussion of section 21 said at pp254-255 :

“In the present case I have found that there was no notice at all given under “s.21(1)(a). The question of the sufficiency of the notice does not arise. The “provisions of 25(1) of the Act Interpretation Act 1974 apply. The true intent,

“meaning and spirit of s.21 of the Limitation Act is to protect persons in the
“position of the second and third defendants, acting in pursuance of any public
“duty or authority from stale claims and to ensure they have notice of the claim
“against them as soon as practicable after the accrual of the cause of action
“giving rise to that claim. For the plaintiff to commence its action without any
“prior notice, and then to be able to get leave to continue with the action would
“in my opinion be contrary to the true intent, meaning and spirit of s.21.
“Except as provided in *Auckland Harbour Board v Kaihe* [1962] NZLR 68
“the section does not authorise the Court to grant leave retrospectively in
“respect of the action already commenced. In my view I have no jurisdiction
“to grant the application now sought by the plaintiff for leave under s.21(2) to
“enable the plaintiff to continue with its action”.

Therefore, even if there was an application made to the Court during the hearing of
these proceedings for leave under section 21(2), it is clear from *Milford Builders* case
that the Court would have no jurisdiction under section 21(2) to grant leave to a
plaintiff to continue with an action that has already been commenced where no notice
at all has been given under section 21(1)(a).

But even if the Court had jurisdiction under section 21(2) to grant leave to the
plaintiff to continue with the action he has already started, the Court would not, in the
present circumstances, have granted such leave. The legal onus is on the plaintiff to
satisfy the Court that his failure to give notice or commence his action within one year
was occasioned by mistake or other reasonable cause or that the defendant was not
materially prejudiced in his defence by the failure to give notice or the delay. The
plaintiff has not satisfied the Court as to those requirements. Neither has the plaintiff
satisfied the Court that it would be just in the exercise of its discretion to grant leave
to the plaintiff. In short the plaintiff has not discharged the onus on him.

On the particular question of prejudice to the defendant, not only has the plaintiff been unable to discharge the legal onus of satisfying the Court that his non-compliance with section 21(1) has not materially prejudiced the defendant in his defence, but the affidavit evidence for the defendant also shows that the particular doctor to whom the accusation of professional negligence is directed was an expatriate doctor and he had already left the country sometime prior to 3 July 1997.

In all these circumstances, I have come to the view that the defendant's motion to strike out should be granted. Accordingly, the statement of claim is struck out.

Counsel to file memoranda as to costs within 7 days if they wish to do so.

Tom Sapala
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CHIEF JUSTICE

Solicitors:

Fepuleai Law Office, Apia for plaintiff
Attorney-General's Office, Apia for defendant