

## *The Importance of Good Communication*

### *Eastbury v Genea Limited (Formerly Known As Sydney Ivf Limited) [2015] NSWSC 1834*

#### Key Points

- There is no prejudice in extending a limitation period to join a defendant to the proceedings when that person or entity is already a cross-defendant and the evidence against them has already been established.
- In establishing an entitlement to an interim payment order under section 82 of the *Civil Procedure Act 2005* (NSW), the party seeking the order must prove that it is more probable than not that they would recover substantial damages at trial.

#### Background

Leighee Eastbury (**Mrs Eastbury**) and Philip Eastbury (**Mr Eastbury**) are the parents of Hayden and Jacob Eastbury. In the early years following their birth, Hayden and Jacob were diagnosed with Fragile X Syndrome following a test which revealed that they both had a full mutation sized expansion of "Fragile X". As a result of the Fragile X Syndrome, both children suffer from significant speech and language delays, behavioural and language difficulties, and neuro-developmental and physical features of the syndrome. Mrs Eastbury had a family history of Fragile X Syndrome and was referred for genetic testing prior to falling pregnant. The tests were carried out by Genea Limited (**Genea**), except that Genea used the cytogenetic method of diagnosing Fragile X, rather than the molecular test. In essence, Genea's tests were incapable of determining whether Mrs Eastbury was a Fragile X carrier, they could only determine whether she had the disease. Mrs Eastbury's general practitioner, Dr Ranjana Curtotti (**Dr Curtotti**) informed her subsequently that the result of the testing was negative. Mr and Mrs Eastbury commenced legal proceedings against Genea and Genea joined Dr Curtotti as a cross-defendant seeking indemnity and contribution from her. Mr and Mrs Eastbury then sought orders that:

- Dr Curtotti be joined as a second defendant to the proceedings;
- pursuant to section 60G(2) of the *Limitation Act 1969* (NSW) (equivalent to the *Limitation Act 2005* in Western Australia), the limitation period be extended to enable Mr and Mrs Eastbury to join Dr Curtotti to the legal proceedings; and
- pursuant to section 82 of the *Civil Procedure Act 2005* (NSW), Genea pay Mr and Mrs Eastbury damages sought to be recovered in the proceedings (**interim order**).



## Law

Pursuant to section 18A of the *Limitation Act 1969* (NSW), the limitation period for causes of action founded on personal injury is three years.

Pursuant to section 60G of the *Limitation Act 1969* (NSW):

- (1) This section applies to a cause of action that accrues on or after 1 September 1990, founded on negligence, nuisance or breach of duty, for damages for personal injury, but does not apply to a cause of action arising under the *Compensation to Relatives Act 1897*.
- (2) If an application for an order under this section is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines.

Section 60I(1) sets out some considerations for the court in making a decision under section 60G.


Western Australia does not have a section 60G or section 60I equivalent. Rules relating to the extension of limitation periods differ according to the type of cause of action and the age of the plaintiff. These rules can be found in Part 3 of the *Limitation Act 2005*.

Section 82 of the *Civil Procedure Act 2005* (NSW) states that in any proceedings for the recovery of damages, the court may order a defendant to make one or more payments to the plaintiff of part of the damages sought to be recovered in the proceedings. The court cannot make such an order unless it is satisfied that if the proceedings went to trial, the plaintiff would obtain judgment for substantial damages against the defendant.

## Conclusion

### **Joining Dr Curtotti to the proceedings and extension of time**

It was not disputed that the matters listed in section 60I(1) of the *Limitation Act 1969* (NSW) have been satisfied. However, Dr Curtotti argued that it was not just and reasonable to extend the limitation period pursuant to section 60G(2). Mr and Mrs Eastbury submitted that there was no prejudice to Dr Curtotti being joined as a second defendant as Genea had already joined her as a cross-defendant and Mr and Mrs Eastbury intended to rely on Genea's evidence against Dr Curtotti (they did not intend to adduce new evidence). Dr Curtotti then attacked the adequacy of the medical evidence against her and argued that being joined as a second defendant is obviously different to being a cross-defendant. The court held that Mr and Mrs Eastbury had an arguable case against Dr Curtotti backed by expert evidence. Further, as Dr Curtotti was already joined to the proceedings, it was unlikely that she would suffer prejudice.





## Interim order

Mr and Mrs Eastbury sought an interim payment order from Genea in the sum of \$100,000.00 on the basis that they would probably recover substantial damages at trial. Mr and Mrs Eastbury's expert evidence supported the notion that Genea should have carried out molecular testing to diagnose Fragile X and not the cytogenetic method. If Genea was unable to do the molecular test, they should have referred Mrs Eastbury to another laboratory. Genea did not adduce any expert evidence to the contrary, however, it argued that it performed the test it was asked to perform accurately. The reason for Genea's misunderstanding of the purpose of the test was due to the typed Pathology Referral stating "uncle has x-factor Mental Retardation" and omitting Dr Curtotti's handwritten note "genetic testing for carrier status of X-factor". The court found that the former sentence should nevertheless have alerted Genea to the purpose of the test, that is, to determine whether Mrs Eastbury was a carrier. By this reasoning, the court further found that Mr and Mrs Eastbury would probably succeed at trial in recovering substantial damages against Genea.


## Orders

In relation to the above three issues, the court ordered that:

- (1) Dr Curtotti be joined as a second defendant to the proceedings;
- (2) The limitation period to join Dr Curtotti to the legal proceedings be extended to 17 December 2015; and
- (3) Genea make an interim payment to Mr and Mrs Eastbury in the sum of \$100,000.00.

## Lessons Learnt

This case highlights that there is no prejudice in extending a limitation period to join a defendant to legal proceedings when that person or entity is already a cross-defendant and the evidence against them has already been established. Furthermore, the case touches on the burden of proof required to be met in establishing entitlement to an interim payment order under section 82 of the *Civil Procedure Act 2005* (NSW). Mr and Mrs Eastbury were required to, and did, prove that it was more probable than not that they would recover substantial damages against Genea at trial.





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