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Extension of limitation period denied, in favour of Doctor
Smith v Reader [2020] QSC 48

Key Points

- The Supreme Court of Queensland considered an application for an extension of the limitation period on the basis of an expert report constituting a "material fact of a decisive character" pursuant to s 31 of the *Limitation of Actions Act 1974* (Qld), and whether there was then sufficient evidence to establish a right of action.

- The Supreme Court found in favour of the respondent doctor.

Background

On five occasions from 7 August 2012 to 17 October 2012, Ms Beverley Smith (**the applicant**) attended upon her treating ophthalmologist, Dr Stuart Reader (**the respondent**), with a viral eye infection, which he treated with steroid eye drops Prednefrin Forte.

At the time, the applicant was aged 72 and was suffering from advanced chronic glaucoma.

The Prednefrin Forte was associated with an increase in intraocular pressure. The respondent duly measured and recorded the applicant's intraocular pressure on each of her visits.

By 27 September 2012, the respondent noted that the applicant had suffered damage to her optic nerve as a result of the increased intraocular pressure. He added Diamox to the applicant's medication regime and instructed that she cease Prednefrin Forte.

The applicant sought a second opinion from Associate Professor Lee. Associate Professor Lee told the applicant that there was nothing the respondent could have done differently. He administered treatment, including laser surgery, and was able to bring the applicant's intraocular pressure under control. However, her sight did not improve. By 25 June 2013, she was blind in both eyes. Due to Associate Professor Lee's support for the respondent's treatment, the applicant did not consider commencing an action against the respondent at the time.

In September 2015, the applicant consulted solicitors to investigate a claim for damages for medical negligence arising from her treatment in 2012. On 2 October 2015, a request for the respondent's medical records was made pursuant to s 9A of the *Personal Injuries Proceedings Act 2002*.

It was not until 15 September 2016 that the report of an expert ophthalmologist, Dr Geoffrey Cohn, was received by the applicant's solicitors.

The applicant filed her Claim and Statement of Claim on 24 October 2016, a little over a year following the ordinary three-year period of limitation.

The applicant argued that a material fact of a decisive character – Dr Cohn's report – was not within her

means of knowledge until 15 September 2016.

The respondent argued that: (1) the delay in commencing proceedings was inexplicable and unreasonable; (2) Dr Cohn's report was not "decisive"; and (3) Dr Cohn's report did not establish that the respondent's conduct had been negligent.

Conclusion

Ryan J noted that, save for Dr Cohn's report, it could not be said that the applicant ought to have been aware that she had a *worthwhile* cause of action on the strength of her lay opinion. Further, despite the delay on her solicitor's part, the delay on the part of the applicant personally was not so unreasonable that she ought to have taken further steps to ascertain the material fact, such as, for example, seeking alternative legal counsel.

Her Honour did observe that there was no authority to which she was referred which dealt with whether an *equivocal* fact could be decisive. Nevertheless, her Honour was prepared to proceed without reaching a concluded view on the matter.

The report may have been capable of constituting a "material fact of a decisive character" which was not within the applicant's means of knowledge until 15 September 2016. However, her Honour was not satisfied that Dr Cohn's report, together with the applicant's other evidence, established a right of action in negligence.

Read as generously as possible for the applicant, Dr Cohn's report appeared to conclude that: Prednefrin Forte was mandatory (even with the associated risk for increased intraocular pressure in the presence of glaucoma); continuing Prednefrin Forte until 27 September 2012 was reasonable; it was appropriate to then try Diamox; the only available option to treat the applicant's intraocular pressure was surgical; and, had earlier referral been made to surgery, a better level of central vision *might* have been obtained.

Her Honour was not satisfied that Dr Cohn's report addressed causation adequately – that is, the difference made by other treatment to her blindness – and found therefore that the applicant's evidence did not provide a *prima facie* cause of action in negligence.

Lessons Learnt

The Supreme Court has shown a receptiveness to finding that medical expert reports are capable of constituting a "material fact of a decisive character" in cases of medical negligence to extend limitation periods beyond the ordinary three years (see, for example, the recent case of *Walker v Tucker* [2019] QSC 141).

That being said, the evidence which the applicant brings to bear ought be carefully examined to establish whether the prerequisites to an extension under s 31 of the *Limitation of Actions Act 1974* are made out, including whether the plaintiff applicant's experts are equivocal or silent in their opinions about the principal elements of an action in medical negligence.

Contact:

Jacob Stekhoven
Solicitor
Direct: +61 (0) 7 3307 5509
Jacob.Stekhoven@hbalegal.com

Kim Waygood
Special Counsel
Direct: +61 (0) 7 3307 5504
Kim.Waygood@hbalegal.com

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