

Specialist Opinion Cure for Significant Delay in Extension Application *Masters v Daoud* [2020] QDC 38

Key Points

- Rinaudo DCJ of the District Court of Queensland was required to consider whether, in an application for an extension of time pursuant to s 31 of the *Limitations of Actions Act 1974* (Qld):
 - specialist opinion constituted a “material fact of a decisive character”; and
 - before that time, the applicant plaintiff had before her a body of evidence which would have prompted a reasonable person to have taken legal advice, that is, whether the opinion was “of a decisive character”.
- Finding in favour of the applicant plaintiff.

Background

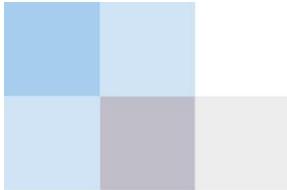
On 15 August 2013, Ms Sheryl Masters (**the applicant**) underwent a hook wire excision at the hands of Dr Mark Daoud (**the respondent**) following referral for a high grade ductal carcinoma *in situ* (**DCIS**).

On 23 August 2013, the applicant consulted the respondent, who advised her that she also had had a lobular carcinoma *in situ* (**LCIS**). He recommended urgent mastectomy of the right breast and confirmed that reconstruction of the right breast during the same procedure and preservation of the nipple were inadvisable. This procedure was carried out on 27 August 2013.

Subsequently, a friend to the applicant, who was also diagnosed with DCIS, was given similar advice by the respondent; however, her friend had also sought other specialist opinion, which was to the effect that breast reconstruction and nipple preservation were both possible. The difference in advice concerned the applicant, and she sought further opinion from two other surgeons in early 2014, neither of whom told her the respondent’s medical advice had been incorrect, but the applicant formed the view that they did not agree with the respondent’s advice. She underwent further mastectomy and bilateral reconstruction in August 2014.

On 27 March 2015, the applicant wrote a letter to the Medical Board of Queensland outlining her concerns around her treatment at the respondent’s hands, namely, that she had been advised she had multifocal disease which posed an urgent threat and that she had not been properly advised of her treatment options.

She forwarded the complaint to the OHO on 5 May 2015. Thereafter, the applicant sought regular updates from the OHO and, after her complaint was sent to AHPRA on 14 October 2015, from AHPRA. On 13 October 2017, AHPRA advised that it had engaged an independent specialist to provide an opinion on the respondent’s conduct. The report was provided on 27 February 2018 and then compiled and sent to



the Medical Board on 27 June 2018. The Medical Board met on 18 July 2018 and delivered its decision to the applicant on 30 August 2018, deciding to take no further action.

With its decision, however, AHPRA provided the opinion of Prof Ian Bennett, who opined that: (1) the respondent had wrongly categorised the LCIS as a new focus of DCIS, (2) surgical intervention was not urgent, (3) re-excision and radiation would have been more appropriate, (4) DCIS lends itself to immediate reconstruction and nipple preservation was negotiable, and (5) the respondent had provided a restricted perspective of the applicant's treating options.

On 14 September 2018, the applicant sought legal advice. Proceedings were filed on 30 July 2019.

Conclusion

Rinaudo DCJ was persuaded that a material fact of a decisive character was not within the applicant's means of knowledge until she received the report from Prof Bennett. In so concluding, his Honour observed that there was no evidence that the two specialists upon whom the applicant had consulted had given their *"considered opinion that the respondent may have conducted his treatment of her negligently"*. Therefore, *"it could not be said that her knowledge was such prior to the receipt of ... the advice of Professor Bennett ... that she knew the operation [the respondent] performed on her was performed negligently"*.

Further, in respect of the contention that the applicant should have sought legal advice at an earlier time, his Honour noted that the applicant was *"diligent in pursuing first the OHO and then subsequently AHPRA"* and that *"it was only after she received the response from AHPRA that [she would have a successful claim should she commence proceedings] became clear and she made enquiries about it"*. His Honour was also satisfied that the applicant was a witness of truth and, during the AHPRA investigations, *"she was motivated by [no] reason other than her concern to ensure that the respondent did not operate on other women"*.

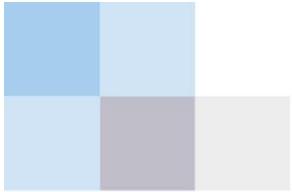
The respondent had contended that the applicant had marked the box on the AHPRA application form for "compensation", and that she had been made aware that compensation would not be available through the AHPRA process. During her conversations with AHPRA, the respondent alleged that representatives had then canvassed with the applicant that independent legal advice would need be sought about options available to her in respect of compensation, such that she ought to have sought legal advice. However, his Honour was not persuaded by this argument, noting *"whether [the applicant] was [aware] or not [of the possibility of suit] is immaterial, as she was clearly never told on what basis she could sue, that is that [the respondent] had been negligent in his treatment of her"*.

His Honour was satisfied that there was evidence to establish a right of action and, given the history of complaint, and well-documented events, no prejudice accrued to the respondent.

Lessons Learnt

This decision demonstrates that courts continue to look favourably upon plaintiff's applications for





extension of time based on specialist opinion in circumstances where plaintiffs have taken steps to help themselves and in which they have received no prior definitive advice in respect of a defendant's alleged negligence.

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