

Plaintiff wins extension of time application in passive smoking case

Sharp (nee Elliott) v G J Guinerv & R Guinerv t/as The Port Kembla Hotel & Anor

Roland Everingham, Cashman & Partners, Sydney

New South Wales Limitation Act. Extension of time application following decision of High Court in Brisbane South Regional Health Authority v Taylor (1996) 70 ALJR 866. Plaintiff employed in smoky environment from 1973 to 1995. Plaintiff developed metastatic squamous carcinoma in her mouth, throat and neck.

The plaintiff was employed from 1973 to 1995 in licensed premises as a bar attendant. It was alleged that her employment exposed her to tobacco smoke, nicotine, tobacco tars and other noxious and carcinogenic agents which originate from tobacco. Further, that exposure to these substances caused her to develop cancers in her mouth, throat and neck.

A plaintiff seeking an extension of the limitation period in NSW must satisfy Section 60I of the Act which provides:

“60I (i) A Court may not make an order for an extension under Section 60G or 60H unless it is satisfied that –

a) the plaintiff:

i) did not know that personal injury had been suffered; or

ii) was unaware of the nature or extent of personal injury suffered; or

iii) was unaware of the connection between the personal injury and the defendant's act or omission, at the expiration of the relevant limitation period or at a time before that expiration when proceedings might reasonably have been instituted; and

b) the application is made within three years after the plaintiff became aware (or ought to have become aware) of all three matters listed in paragraph (a) (i) – (iii).”

Section 60G(2) confers a discretionary power upon the Court to make an order extending the limitation period where it decides that it is just and reasonable to do so.

The plaintiff was 57 years of age

at the time of the application and was (and had been) a non smoker. She gave evidence that she had been required to work in an environment which had been “heavily smoky”.

The cancers were discovered during 1995. She underwent surgery. Following the surgery the plaintiff made good progress and was in a state of remission. Nonetheless, she continues to suffer from various problems and has a reduced life expectancy.

Master Malpass determined that the plaintiff satisfied the requirements of Section 60I.

The application then turned on the discretionary matters which touched on the issues of causation, foreseeability and prejudice.

It was common ground that carcinoma in the larynx by environmental tobacco smoke is very unusual. In a report dated 17 December 1996, Professor Young gave this opinion:

“To my knowledge, there is as yet no evidence linking environmental tobacco smoke exposure and carcinoma in the larynx. However, the strong association between active smoking and carcinoma of the larynx and the evidence of an association between ETS exposure and carcinoma of the lung would suggest that this lady's passive smoke exposure did materially contribute to her developing this tumour, which is very unusual in non smokers”.

Mr Peter Semmler QC appearing on behalf of the plaintiff relied heavily on this opinion as demonstrating at the very least a prima facie case on causation. The Master accepted his submission that the causation issue had been established to the standard required on this kind of application.

In assessing the issues of prejudice, Master Malpass observed that the defendants will have to prepare a case where the relevant knowledge in the 1970's and 1980's will be a

real issue. The Master accepted that there may be problems in relation to this task. However, the Master also noted the seriousness of the plaintiff's condition.

The Master stated that the Court was required to perform a balancing exercise with regard to the relevant circumstances of the case. He observed that in the circumstances of the application the task was not without difficulty. Nonetheless, the Master came to the view that the plaintiff had discharged the relevant onus and, accordingly, ordered an extension of the limitation period.

Less than a week after this widely publicised application was made, the NSW Government backed away from its previous refusal to ban smoking in pubs and clubs.

It is anticipated that success by the plaintiff in the trial on the merits of this claim, which is now possible because the limitation issue no longer exists, will give rise to many more passive smoking claims by employees of pubs and clubs throughout Australia.

Roland Everingham is a partner with Cashman & Partners in Sydney, and is National Secretary of APLA.

APLA Membership

Membership as at 31 May 1997

NSW	272
Queensland	179
Victoria	116
SA	53
WA	25
NT	10
ACT	13
Tasmania	8
International	29
TOTAL	<u>705</u>