

When can the limitation period for childbirth claims be extended?

*Asher-Relf by his next friend Douglas
Bean v Minister for Health & Ors [2009] WADC 202*

By Libby Brookes and Greg Walsh

Whether a court can, under the *Limitation Act* 2005 (WA) (the 2005 Act), permit an infant plaintiff to commence an action under a childbirth claim, where the applicable limitation period under the *Limitation Act* 1935 (WA) (the 1935 Act) has expired, was recently argued before Stevenson DCJ in the District Court of Western Australia.

THE FACTS

The plaintiff was born on 2 November 1996 at King Edward Memorial Hospital, a public hospital, with cerebral palsy allegedly caused by a lack of oxygen and bloodflow to his brain in the time immediately prior to his birth. He claimed that the defendants were negligent because, in the circumstances (in particular, his mother's condition and the result of a cardiocographic trace (CTG) of his heart rate), a caesarean section should have been performed sooner than it was. The plaintiff argued that his earlier birth would have minimised the risk of, or the degree of, the injury that he suffered.

The defendants argued that the expiry of the limitation period applicable to the plaintiff's action under the 1935 Act prevented the plaintiff from commencing his action. While conceding that the limitation period under the 1935 Act had expired, the plaintiff argued that the 2005 Act conferred a statutory power pursuant to new sections relating to childbirth claims, granting him leave to commence the proceedings. The defendant argued that the 2005 Act did not grant the court the power to extend the time limit, and even if it did, the facts did not justify such an extension.

EXTENDING THE LIMITATION PERIOD ALLOWING THE PLAINTIFF TO COMMENCE AN ACTION

Under s38(1) and s40 of the 1935 Act, a person under 18 when a cause of action accrues may commence an action at any time up until the six-year limitation period expires when they turn 24. Therefore, had the plaintiff been born in a private hospital, he could commence legal proceedings up until his 24th birthday on 2 November 2020. However, under s47A, any action against public authorities, the Crown, local government authorities and their employees must ordinarily be brought by the plaintiff within one year of the cause of action accruing although, with the consent of the defendant or leave of the court, the action may be brought within six years.

The court held that, although the plaintiff's cause of action

was not extinguished by the operation of the 1935 Act, he was prevented from proceeding with his action if the defendants chose to rely upon the expiration of the limitation period as a defence. The court further held that, under the 1935 Act, it had no power to extend the time to permit the plaintiff to commence an action against the defendant.

Although accepting that the time limit for commencing an action had expired under the 1935 Act, the plaintiff argued that the 2005 Act allowed the court to grant him leave to commence an action, despite the expiry of the limitation period. The plaintiff relied upon s41 of the 2005 Act, which allows a court to permit a plaintiff who was under 18 when the cause of action accrued to commence an action, even though the limitation period has expired. Section 4(1) of the 2005 Act would appear to prevent the plaintiff from relying on the 2005 Act, as it provides that the limitation periods in the 2005 Act apply only to causes of action that accrue on or after the Act's commencement day, which was 15 November 2005. The plaintiff's cause of action accrued on 2 November 1996, when he was born.

However, the plaintiff argued that s7 creates a special exception for personal injury actions relating to childbirth:

7. Special provisions for certain personal injury actions relating to childbirth ...
- (2) An action on a cause of action (childbirth) cannot be commenced if the cause of action accrued before commencement day and –
 - (a) six years have elapsed since commencement day; or
 - (b) the limitation period that would have applied but for this section has expired.
- (3) This section has effect subject to Part 3 but –
 - (a) sections 30 and 31 do not apply; and
 - (b) sections 32 and 41 do not apply if the person has reached 15 years of age at commencement day.
- (4) For the purposes of the provisions of Part 3 that apply under subsection (3), a cause of action (childbirth) is to be taken as having accrued on commencement day.'

The plaintiff claimed that the reference to the limitation period in s7(2)(b) is a general reference and includes the limitation period applicable to the plaintiff's action that expired under the 1935 Act. Further, the plaintiff argued that s7(3) clearly states that s7 is subject to Part 3 of the 2005 Act, which includes s41. Section 41 allows a court to extend the time in which an action can be commenced for a plaintiff under 21 when the limitation period has expired.

The plaintiff also argued that the Western Australian parliament enacted s7 to prevent an injustice to persons like the plaintiff, and cited the phrase 'special provisions' at the beginning of the heading to s7 and other extrinsic materials, such as the Second Reading Speech for the 2005 Act, to support his claim. On this basis, the plaintiff claimed that the 2005 Act was a remedial section and relied upon a summary of relevant authorities by McColl J in *Amaca Pty Ltd v Cremer* (2006) 66 NSWLR 400 (at 50-51) to assert that remedial legislation should be interpreted so as to provide the most complete remedy that is still consistent with the statutory language.

The defendants rejected the plaintiff's interpretation and argued that the effect of s7 was to limit childbirth claims (where the applicable limitation period had not expired at the time the 2005 Act commenced) to a further maximum six years. The 2005 Act was not intended by parliament to revive claims that had become statute-barred by the 1935 Act. In support of their interpretation, the defendants relied upon extrinsic materials, such as the Second Reading Speech, where the attorney-general stated that the 'situation will now be that if a person has suffered a personal injury in the course of being born ... and has not begun an action before the commencement day of the new act, *provided the limitation period has not already expired*, the action must be commenced within six years of the commencement day or before the date on which the person turns 24, whichever is the earlier' (emphasis added by defendants).

Although Stevenson DCJ stated that s7 was not 'unambiguously plain', his Honour ultimately rejected the plaintiff's arguments about the proper construction of the 2005 Act. His Honour concluded that s7 – in relation to claims against public authorities – was applicable only to claims within the relevant limitation period, and did not empower a court to allow an action to commence after the limitation period under the 1935 Act had expired.

His Honour stressed that it was a fundamental principle of statutory interpretation that legislation which impacts on a party's rights will not be interpreted as having a retrospective operation, unless the legislation is plain and unambiguous in its operation. His Honour concluded that the interpretation of s7 proposed by the plaintiff would clearly have an impact on the defendants' rights, as it would permit an action where the proceeding had already been rendered time-barred: *Maxwell v Murphy* (1957) 96 CLR 261. In reaching his conclusion, his Honour also relied upon extrinsic materials such as the Second Reading Speech and the Limitation Bill 2005. In particular, he relied upon the clause notes for clause 7 of the Limitation Bill 2005, which read: 'Clause 7 applies to actions in respect of personal injuries ... which accrued before the commencement day and where the limitation period had not expired before the commencement day'.

THE MERITS OF EXTENDING THE LIMITATION PERIOD

Despite concluding that he lacked the power under the 2005 Act, Stevenson DCJ would have permitted the plaintiff to commence his action had he decided that such a power

existed. Section 41(3) of the 2005 Act states that a court is not to grant an extension of time 'unless the court is satisfied that in the circumstances it was unreasonable for a guardian of the plaintiff not to commence the action within the limitation period for the action'. However, his Honour stated that, in addition to this requirement, the court was entitled to, and should, consider all relevant matters, including the conduct of the party seeking relief; the explanation for the failure to comply with the particular requirement; the degree and nature of the delay; the effect on other parties if an extension is granted, especially any negative impact on the positions of the parties; and the extent to which orders can be made to minimise the impact on the defendant should leave be granted.

Stevenson DCJ considered that for a number of reasons it was not unreasonable that the plaintiff's mother had not commenced an action within the limitation period. Some of the key reasons included that she was being treated for post-traumatic stress disorder; she had experienced difficult personal circumstances during the relevant period, including her marriage ending; she did not appreciate the full extent of the plaintiff's injuries until many years after his birth; and she became aware of the possibility of suing the defendants for failing to perform a caesarean section at an earlier time only when relevant evidence was obtained in early 2009.

In particular, there was a substantial delay by the defendant in producing the CTG records, which were received by the plaintiff only in January 2007. The plaintiff alleged that the CTG records were central to the claim that the defendants acted negligently in not performing the caesarean section earlier. His Honour referred to the failure of the defendants to accurately record the presence of pain during the delivery of the plaintiff, and the delay by the defendants to respond to a committee, which was investigating the appropriateness of the medical treatment. Another important consideration for his Honour was his finding that an extension of time would not have unacceptably diminished the risk of a fair trial or prejudiced the ability of the defendants to defend themselves against the plaintiff's action.

OUTCOME

If it had been possible under the 2005 Act to grant the plaintiff an extension of time, then Stevenson DCJ would have allowed the action. However, his Honour concluded that parliament had not provided the court with such a power. Notwithstanding this, his Honour indicated that a future action in estoppel might be open to the plaintiff, on the basis that the defendants should be estopped from relying on the limitation period due to their failure to provide relevant evidentiary materials in a timely fashion. ■

Libby Brookes is an Associate in the Medical Law Department of Maurice Blackburn Lawyers. **PHONE** (02) 8267 0941 **EMAIL** Ebrookes@mauriceblackburn.com.au. **Greg Walsh** is a lecturer in the School of Law at the University of Notre Dame Australia and a solicitor in the Medical Law Department at Maurice Blackburn Lawyers. **PHONE** (02) 8204 4304 **EMAIL** gwalsh1@nd.edu.au.