Meaning of fault in PI cases

Thea Spandideas v Dominic Vellar [2008] VSC 198

By Liat Blacher

Medical negligence and public liability claims in Victoria are subject to a general three-year limitation period (not including long-stop provisions). In circumstances where a negligent act occurred on or after 21 May 2003, this three-year period runs from what is known as the 'date of discoverability'.[1] This conceptually broad concept denotes the time from when the potential plaintiff knows or reasonably ought to have known that the injury was significant and that it was caused by the fault of another.[2]

The meaning of 'fault' in this context was clarified by the Victorian Supreme Court in June 2008,[3] and its analysis was subsequently upheld by the Court of Appeal in August 2008.[4] 'Fault' was found to mean blameworthiness or culpability in respect of alleged actions of negligence. Accordingly, more than a causal connection with the alleged negligent act and the injury is required for the three-year limitation period to start running.

The plaintiff originally issued proceedings against the defendant, a colorectal surgeon, on 31 May 2007, in respect of surgical procedures carried out in May 1996. The defendant argued that the plaintiff was statute-barred under the relevant provisions of the *Limitations of Actions Act (1958)* (Vic) (the Act). The plaintiff, on summons, sought a declaration that her claim was not statute-barred or, alternatively, an order extending the period of limitation to a period after the date on which the proceedings were issued.

The plaintiff gave birth to her first child on 8 February 1996. The baby was delivered by forceps with an episiotomy to assist the birth. Following the birth, she experienced difficulty with bowel motions and was referred to the defendant after discovery of an anal fissure. She was advised by the defendant that surgery was required. As part of her claim, the plaintiff alleged that the defendant carried out the operation without first ensuring that she hadn't sustained damage to the internal or external sphincter in the course of the birth.

At various times between 1996 and 2005, the plaintiff consulted various medical practitioners in relation to her ongoing medical difficulties (although she initially believed that her problems were related to the earlier forceps delivery).

She also consulted solicitors, who told her that she had no legal redress in relation to her bowel problems. It was not until she consulted new solicitors, who obtained a supportive opinion in negligence in 2006 related to the surgery performed by the defendant, that the plaintiff began to understand that her problems may in fact be attributable to the later surgery.

The proceedings were issued 11 years after the relevant surgical procedure. The court had to decide whether the plaintiff knew or ought to have known of the facts necessary for her cause of action to find either that the issue was statute-barred and/or to extend the time if the limitation period had expired.

The plaintiff accepted that she knew of her personal injury and the severity of the injury more than three years before she issued proceedings. The question was therefore whether she knew, or ought to have known, of the fault of the defendant.

The meaning of fault was the subject of considerable debate. The plaintiff argued that fault included knowledge that the defendant was culpably responsible, as opposed >>

arw
australian
rehabworks
OCCUPATIONAL THERAPISTS
CATASTROPHIC INJURY SPECIALISTS
- ADULT AND PAEDIATRIC BRAIN INJURY
- SPINAL CORD INJURY
- COMPLEX ORTHOPAEDIC INJURIES
- MEDICAL NEGLIGENCE
- MULTI-DISCIPLINARY CAPABILITY

WE PROVIDE COST OF CARE REPORTS
Can meet urgent requirement
Anna Castle-Burton
119 Willoughby Road, Crows Nest 2065
PHONE: 02 99665575

to the defendant's position – that it was sufficient for the purposes of the time period starting to run that the injury was caused by an act or omission of the defendant.

Significantly, other sections of the Act used the phrase 'act or omission',[5] whereas in the applicable section denoting date of discoverability, the word 'fault' was used. At trial, the judge concluded that this difference was significant, and found in favour of the plaintiff.

This position was in contrast to earlier Court of Appeal authority, which had found that the words 'act or omission' did not mean negligent act or omission for the purposes of time starting to run.[6]

The legislation being considered in the current case, however, was after the earlier Court of Appeal authority and Parliament had chosen to specifically use the word 'fault'. Further, the 12-year long-stop period for such claims meant that such claims did have a final end point.

The decision is a good one for plaintiffs. While its application may be somewhat limited in terms of the claims that it may affect, it nonetheless provides leeway for those injured plaintiffs who, without the common sense approach taken by Parliament and subsequently by the court, would be statute-barred and possibly without access to justice as a result of circumstances out of their control or imputed knowledge that they couldn't reasonably be expected to have. ■

Notes: **1** Section 27D(1)(a) of the *Limitation of Actions Act 1958* (Vic). **2** Section 27F(1)(b) of the *Limitation of Actions Act 1958* (Vic). **3** *Spandideas v Vellar* [2008] VSC 198. **4** *Vellar v Spandideas* [2008] VSCA 139. **5** For example, ss27D(1), 27D(2) and 27E(1). **6** *Mazzeo v Caleandro Guastalegname & Co* (2001) 3 VR 172.

Liat Blacher *is a solicitor with Holding Redlich in Melbourne, specialising in workers' compensation and medical negligence.*
PHONE *(03) 9321 9715* **EMAIL** *liat.blacher@holdingredlich.com.au.*

Delayed diagnosis, peer professional opinion and causation

O'Gorman v Sydney South West Area Health Service [2008] NSWSC 1127

By Dimitra Agiannitopoulos

On 29 October 2008, Justice Hoeben of the NSW Supreme Court found BreastScreen NSW Sydney South West negligent for failing to recall the plaintiff, Christine O'Gorman, for further testing following a mammogram performed in February 2006. The plaintiff was awarded just over $400,000 in damages for the delayed diagnosis of breast cancer and its metastatic spread to her lungs and brain.

At the time the expedited proceedings were heard, the 57-year-old plaintiff was terminally ill, with only months to live.

When handing down his judgment, Hoeben J said he expected the case would almost certainly be appealed. And it was. The appeal is fixed for hearing on 4 June 2009.

THE FACTS

The plaintiff started undergoing regular two-yearly screening mammograms at BreastScreen in 1994. Prior to each examination, the plaintiff signed a form consenting to the mammogram being compared with previous mammograms and acknowledging that there remained a 'small risk' that cancer might not be detected with a screening mammogram.

Following the last screening mammogram performed on 23 February 2006, the plaintiff received a letter, as she had on each previous occasion, advising that there was no visible evidence of breast cancer, but that there remained a chance that cancer may not be seen.

In January 2007, the plaintiff felt a hard lump in her left breast. She underwent a mammogram and ultrasound, which revealed cancer in the left breast. The plaintiff underwent chemotherapy to shrink the tumour and then, later, a mastectomy. No lymph nodes were removed, as a biopsy had shown them to be cancer-free.

In May 2008, metastatic spread of the cancer to the lungs was diagnosed. Shortly thereafter, testing revealed the presence of brain tumours.

BREASTSCREEN PROCEDURE

Evidence was led in the case distinguishing screening mammograms from diagnostic mammograms. Screening mammograms are performed to detect unsuspected lesions on asymptomatic women, who are recalled for further testing as required. On the other hand, the purpose of diagnostic mammograms is to diagnose breast abnormalities previously detected clinically. A full report is provided in those cases.

The usual practice with screening mammograms is to