

Time and prejudice

Fletcher v Besser & Anor [2004] NSWCA 132

By Mary Maloney

In *Fletcher v Besser* the NSW Court of Appeal unanimously upheld the decision at first instance and rejected the plaintiff's application for an extension of time pursuant to s60I of the *Limitation Act 1969* (NSW) on the grounds that the plaintiff applicant had failed to establish that it was just and reasonable to extend time by reason of prejudice to the defendants.

THE FACTS

In September 1982 the applicant was referred to the second respondent, Royal Prince Alfred Hospital (RPAH), suffering hydrocephalus. The first respondent, Dr Besser, operated on 28 September 1982, inserting a ventricular catheter to drain the cerebrospinal fluid and performing a ventriculogram. On 30 September 1982 he carried out a right frontal craniotomy and third ventriculostomy. The applicant developed a large right-hemisphere intra-cerebral haematoma during the surgery. On 12 October 1982 Dr Besser carried out a craniotomy to evacuate the haematoma. Following the surgery the applicant was left with left-sided hemiplegia and neuropsychological disabilities.

In 1992 the appellant issued proceedings in negligence against Dr Hamilton-Gibbs (her GP between 1975 and 1982) and Dr Durey (her GP in 1982), alleging that she had presented to both doctors with symptoms of hydrocephalus but had been afforded inadequate treatment. The appellant claimed she was under a disability until 1990 and thus was within the six-year limitation period.

REPORTS

In January 2000, in the course of the proceedings against her general practitioners, the appellant obtained a medico-legal report from neurosurgeon, Dr Grant. Dr Grant was of the opinion that the appellant's disabilities were predominantly the result of the cerebral haematoma and that the haematoma should have been removed at an earlier time.

A report was then obtained from a US neurosurgeon, Dr Fitzgerald, which was critical of both the timing of the surgery to remove the haematoma and the choice of surgical procedures.

The application for extension of time against Dr Besser and the hospital was conducted on the basis that if the applicant was successful against one of the two respondents, she was entitled to succeed against the other.

PREJUDICE

The respondents alleged actual prejudice. Dr Besser's evidence was that, in deciding the appropriate treatment for the applicant, he had relied heavily on the brain scans and films rather than on the reports. The reports were in

existence; however, the actual scans and films were not. The court accepted Dr Besser's evidence that without the films he was unable to recall the reason for his choice of treatment. Further, Dr Besser identified three senior colleagues with whom he was likely to have discussed the case. Two of these were deceased.

The applicant argued that the respondents had not suffered any additional prejudice by reason of the delay, as the films and scans would not have been available even if proceedings had been issued within time.

The court strongly rejected this submission on the grounds that a comparison between the prejudice faced by a defendant at the time of the application and the prejudice which a defendant would have faced if sued within time was 'a consideration of no real weight' and was 'a poor reason, in substance no reason, in favour of imposing prejudice on the respondents now by an exercise of discretion'.

EXTENSION OF TIME

The court went on to state that when considering extensions of time under s60G, there was no reason for affording greater weight to prejudice which occurred after the expiration of the limitation period. In determining whether it was just and reasonable to extend time, the whole circumstances should be considered as they exist when the question is addressed. The court noted that a similar view was taken in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 548-9 (Justices Toohey and Gummow); and at 554-5 (Justice McHugh), however, recognised that in that case the legislation was unlike s60G in form, and was closer to s60C without s60E(b).¹

The court found that not only did a presumption of prejudice arise from the lapse of time but that the respondents would suffer actual prejudice by reason of the absence of the films, both because Dr Besser had relied upon them when determining the course of treatment, and the absence of the films would disadvantage any independent experts engaged by Dr Besser. ■

Note: 1 Section 60E specifically provides that the court is to have regard to 'the extent to which, having regard to the delay, there is or may be prejudice to the defendant by reason that evidence that would have been available if the proceedings had been commenced within the limitation period is no longer available'.

Mary Maloney is a solicitor at Stacks Goudkamp, Sydney.
PHONE (02) 9223 6155. EMAIL mary@stacksgoudkamp.com.au