DISTRICT COURT OF QUEENSLAND

CITATION:	*Rodgers v Chinsee* [2024] QDC 55
PARTIES:	**CASSANN RODGERS** (applicant) **v** **IAN CHINSEE** (respondent)
FILE NO:	BD 3276/23
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	22 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2024
JUDGE:	Rosengren DCJ
ORDERS:	**1. That the period of limitation be extended until 30 November 2023** **2. I shall hear the parties as to the form of the orders and as to costs**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIOD – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – where the applicant commenced proceedings for medical negligence claiming damages for personal injuries associated with breast augmentation surgery – where the limitation period for any claim against the respondent has expired – whether a material fact of a decisive character was not within the means of knowledge of the applicant – whether there is a prima facie right of action against the respondent apart from the limitation issue *Limitation of Actions Act* 1974 (Qld) s 30, s 31 *Personal Injuries Proceedings Act* 2002 (Qld) s 9A, s 43 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 *Dick v University of Queensland* [2000] 2 Qd R 476 *Glenn Alexander Pikrt v Hagemeyer Brands Australia Pty Ltd*

[2006] QCA 112
Greenhalgh v Bacas Training Ltd [2007] QCA 327
Healy v Femdale [1993] QCA 210
HWC v The Corporation of the Synod of the Diocese of Brisbane [2009] QCA 168
Magarey v Sunshine Coast Hospital and Health Service (Nambour Hospital) [2021] QSC 240
Moriaty v Sunbeam Corporation Ltd [1988] 2 Qd R 325
State of Queensland v Stephenson (2006) 226 CLR 197
Watters v Queensland Rail [2001] 1 Qd R 448

COUNSEL: D Steiner for the applicant
D Schneidewin and B Stringer for the respondent

SOLICITORS: Cranston McEachern Lawyers for the applicant
Kalantzis Lawyers for the respondent

Introduction

[1] The respondent is a cosmetic doctor and the applicant was his patient. On 29 November 2023, the applicant filed a claim against him for personal injuries and consequential loss and damage arising out of four surgical procedures he performed on her in relation to bilateral breast augmentation between 1 September 2017 and 14 August 2018. The limitation period applying to the claim expired at the latest, on 14 August 2021. To proceed with the claim, the applicant seeks an order under s 31 of the *Limitation of Actions Act* 1974 (Qld) ('the Act') extending the limitation period until 30 November 2023. The order is opposed by the respondent.

Relevant facts

[2] On 1 September 2017, the applicant underwent a bilateral breast augmentation procedure and a right breast crescent lift ('the first surgery'). Prior to this, she signed a consent form, evidencing that she had been informed of numerous risks associated with such surgery.

[3] In the post-operative period, the applicant experienced ongoing pain in her left breast. When reviewed by the respondent on 11 January 2018, she had some fluid leaking from her left breast and the respondent thought the implant had flipped. The applicant underwent revision surgery with respect to her left breast on 23 January 2018, which included re-inserting the same implant which had been used in the first surgery ('the second surgery'). On account of ongoing complications, including a failure of the surgical wound to heal, the implants were removed on 20 February 2018 ('the third surgery').

[4] The applicant underwent a second breast augmentation procedure involving implant revision on 14 August 2018 ('the fourth surgery'). On this occasion, the respondent used different implants which had not yet been registered by the Therapeutic Goods Administration ('the non-TGA implants'). The applicant deposes that the respondent advised her that while the non-TGA implants had not yet been registered, that they would be. Further, he told her that he would not be charging her for them as he she would be a "*trial case*". The applicant's post-operative recovery following the fourth

surgery was uneventful, although she deposes that she is dissatisfied with the cosmetic results.

[5] It is asserted by the applicant that on 30 November 2022 she had a conversation with Justine Coupland, a nurse who had previously worked for the respondent. It is not known how they came to be in contact with each other. As to the conversation, the applicant stated the following:

> *"… I spoke to Ms Coupland, and she informed me that the B-Lite implants had still not been approved by the TGA. I was shocked by this information. This has impacted my mental health greatly and I am deeply concerned that the non-TGA approved implants that are in my body will cause me ongoing concern and physical ill effects. This was the first occasion that I was informed that Dr Chinsee had inserted implants that may never be TGA approved. If I had been informed that they may never be approved I would not have agreed to undergo the surgery."*

[6] On 25 February 2023, the applicant complained to the Office of the Health Ombudsman ('OHO') about the respondent's treatment of her. She explained that she had been to the gym two weeks after the first surgery and thought that the level of activity had *"damaged something"* because after this, she had experienced pain and excess fluid leakage from her left breast. Further, the applicant stated:

> *"I am concerned because these implants still are not approved and my results are terrible. I am concerned with the health risks of having non-TGA approved implants in. … I am concerned that this cosmetic surgeon is using non-approved implants in his surgeries and I am not sure how he is even able to source these? Is it legal??"*

[7] It was on 13 April 2023, that the applicant first contacted her instructing solicitors to seek advice as to a possible medical negligence claim against the respondent. About three weeks later, OHO informed the applicant that it was referring her complaint to the Australian Health Practitioner Agency ('AHPRA') for further investigation (which is ongoing). The reasons for this included that:

(i) While the applicant made the decision to proceed with the non-TGA implants knowing they had yet to be registered, there were concerns as to why the respondent had selected them over TGA registered implants.

(ii) There were concerns regarding the information provided by the respondent to the applicant about other options that may have been available to the applicant.

(iii) AHPRA has the expertise to determine whether the respondent provided the applicant with appropriate treatment.

[8] The applicant's solicitors served an initial Notice of Claim on the respondent pursuant to s 9A of the *Personal Injuries Proceedings Act* ('PIPA') on 6 July 2023. The complaint was limited to the fact that the respondent had inserted the non-TGA implants in the applicant's breasts in the fourth surgery. On the same day, the applicant's solicitors requested Dr Campbell-Lloyd, plastic surgeon to give an expert liability opinion. This was provided in a report dated 3 October 2023. It is critical of several aspects of the respondent's treatment and management of the applicant.

[9] On 29 November 2023, the applicant commenced proceedings against the respondent claiming damages for personal injuries and consequential loss. It is claimed that the respondent was negligent, breached his contract with the applicant and failed to comply with his obligations under the *Fair Trading Act* 1989 (Qld), causing her to suffer injuries in the form of scarring, depression, anxiety and shock. 21 particulars of negligence are pleaded. These relate to the post-operative care following the first surgery, the decision to reuse the implant in the second surgery, the post-operative care following the second surgery, using the non TGA implants in the fourth surgery and not referring the applicant to an appropriately qualified and trained medical specialist. The applicant claims to have suffered scarring, shock, depression and anxiety.

[10] Subject to the applicant bringing this application, the respondent consented to the applicant being granted leave to commence the proceeding pursuant to s 43 of PIPA, even though the usual pre-litigation steps had not been completed. The consent order required the applicant to apply for an extension of the limitation period pursuant to s 31(2) of the Act.

[11] A Part I Notice of Claim was completed by the applicant on 22 January 2024. She described the nature, type and severity of her symptoms to have arisen from the respondent's treatment as follows:

> "*I experience intermittent physical pain and complications post-surgery, necessitating further invasive procedure. This ordeal has also induced significant anxiety, particularly about seeking help from another surgeon due to the fear and mistrust engendered by the initial experience."*

Requirements for extension

[12] The practical effect of the relevant extension provisions in the Act is that an applicant has one year to commence proceedings from the time when their knowledge of material facts coincides with the circumstance that a reasonable person with the applicant's knowledge would regard the facts as justifying and mandating that an action be brought in their own interests.[1]

[13] Relevant to this claim, the Court has the discretion to extend the limitation period pursuant to s 31(2) of the Act, provided the applicant has established that:

(i) there is a material fact of a decisive character relating to the right of action which was not within her means of knowledge until on or after 30 November 2022; and
(ii) there is a right of action against the respondent (apart from the limitation issue); and
(iii) there can be a fair trial.

[14] A material fact may be one which goes to prove an element of a right of action.[2] In determining whether a fact of which the applicant was unaware is material, there is a distinction between knowledge that a person has caused an injury and knowledge that the person has caused it negligently.[3]

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[1] *State of Queensland v Stephenson* (2006) 226 CLR 197 at [29]-[30] per Gummow, Hayne and Crennan JJ.
[2] *Watters v Queensland Rail* [2001] 1 Qd R 448 at 452 and 456-457; *Glenn Alexander Pikrt v Hagemeyer Brands Australia Pty Ltd* [2006] QCA 112.
[3] *Dick v University of Queensland* [2000] 2 Qd R 476.

[15] The decisive character of a material fact may develop over time.[4] For a newly learned fact to be decisive, the applicant must show that without it she would not, even with the benefit of competent medical, legal or other advice, have previously appreciated that she had a claim worth pursuing and should in her own interests commence proceedings.[5] Whether an action for damages is worthwhile includes a consideration of the expense and risks of litigation.[6]

[16] In considering whether a material fact of a decisive character was not within the means of knowledge of an applicant prior to the expiration of a limitation period, the applicant must not have then known the fact, and so far as the fact was able to be found out, the applicant must have taken all reasonable steps to find that fact out.[7] It is necessary to focus attention on the relevant fact and consider whether the applicant should reasonably have taken steps at an earlier time to find out that fact.

[17] The question of whether it can be said that an applicant has taken all reasonable steps to find out a fact depends very much on the information available which is suggestive of a right of action against the respondent, and the extent to which it or any other facts might be thought to call for prudent enquiry to protect one's health and legal rights. There is no requirement to take "appropriate advice" or to ask appropriate questions if, in all the circumstances, it would not be reasonable to expect a person in the circumstances of the applicant to have done so.[8] An injured person ought not to be penalised for getting on with their life, and in that context, failing to seek out expert medical opinion about the prospect of a claim.[9]

[18] Further, pursuant to s 31(2)(b) of the Act, the applicant must establish that there is a right of action against the respondent. It is not a rigorous test, meaning that it is sufficient for an applicant to demonstrate something like a prima facie case, even on hearsay evidence. The requirement will be met if an applicant can point to evidence which may reasonably be expected to be available at trial that would, if unopposed by other evidence, be sufficient to prove their claim.

[19] Finally, the applicant bears the legal onus of showing that the discretion to extend the limitation period should be exercised in her favour where, in all circumstances, justice is best served by doing so. In particular, the applicant needs to satisfy the Court that the respondent is not prejudiced such that there cannot be a fair trial.[10]

Discussion

[20] To succeed in this application, the applicant must establish that the material facts of a decisive character on which she relies were not within her means of knowledge before 30 November 2022. Those material facts were identified by her counsel in oral submissions as being the following:

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[4] *State of Queensland v Stephenson* (2006) 226 CLR 197 at [29].
[5] *Moriaty v Sunbeam Corporation Ltd* [1988] 2 Qd R 325 at 334 per Macrossan CJ.
[6] *Greenhalgh v Bacas Training Ltd* [2007] QCA 327 at [22].
[7] *Magarey v Sunshine Coast Hospital and Health Service (Nambour Hospital)* [2021] QSC 240 at [19].
[8] *Healy v Femdale* [1993] QCA 210.
[9] *HWC v The Corporation of the Synod of the Diocese of Brisbane* [2009] QCA 168.
[10] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544.

(i) The information provided by Ms Coupland in their conversation on 30 November 2022, to the effect that the non-TGA implants inserted in her breasts by the respondent during the fourth surgery still had not been approved; and

(ii) The contents of Dr Campbell-Lloyd's report to the effect that the respondent had been negligent in his treatment and management of the applicant in that:

(a) he failed to diagnose post-surgical seromas in two post-operative consultations following the first surgery and a further consultation following the second surgery; and/or

(b) during the second surgery, he should not have reused the implant he had used during the first surgery.

[21] In my view, the information referred to in sub-paragraph (i) above is not a material fact of a decisive character. Prior to the fourth surgery the applicant knew that the implants which the respondent was proposing to use were not registered with the TGA. The respondent apparently told her that it was his understanding that they would be registered in the future, although there is no suggestion on the material that he gave her a timeframe for when he thought this might be.

[22] While it is accepted that material facts may develop over time, it could not be said that the applicant learning on 30 November 2022 that the non-TGA implants had still not been registered, proved anything related to the nature or extent of her alleged injury, or was otherwise information relevant to an element of her claim. In no other way could this information be regarded as having added anything by way of a material fact to the applicant's state of knowledge at the time her claim became statute barred. It therefore does not bear the necessary quality of decisiveness.

[23] Turning to the second material fact asserted by the applicant, being the inferences of the respondent's negligence which the applicant says may be drawn from Dr Campbell-Lloyd's report, as referred to in paragraph 20(ii) above. In my view, these are material facts of a decisive character because of their relevance to the prospects of success of a claim. It was when she received the report that a material fact of a decisive nature, speaking to liability came into her knowledge to the level required to justify the bringing of a claim.

[24] In arriving at this conclusion, I am cognisant that for some years prior to the receipt of Dr Campbell-Lloyd's report, the applicant was aware that she had experienced post-operative complications following the first and second surgeries. However, this needs to be considered in its proper context. The complications were in accordance with those which the respondent had apparently told the applicant were the risks associated with breast augmentation surgery. They included wound infections, re-opening of the surgical incision and a 30 percent chance that further surgical procedures would be required. It was not until the applicant received Dr Campbell-Lloyd's report that she became aware that the complications could be explained by the negligence of the respondent.

[25] Further, it seems that it was not until the applicant received Dr Campbell-Lloyd's report that she learnt that in the second surgery the respondent reused the implants he had used in the first surgery, and that this was negligent.

[26] In short, absent any opinion evidence such as that contained in the report of Dr Campbell-Lloyd, it could hardly be said that the applicant had a promising case. The applicant did not have knowledge of the fact of the occurrence of negligence or breach of duty by the respondent upon which a right of action may have been founded.

[27] The question remains whether the applicant should reasonably have taken steps at an earlier time to seek an expert opinion going to the appropriateness of the respondent's treatment and management of her.

[28] In my view there was nothing about the information available to the applicant prior to the expiration of the limitation period that might have been thought to require her to seek an expert liability opinion or to otherwise take steps to protect her health and/or legal rights. There was no reason to suspect that the complications she had experienced were the consequence of the respondent's negligence. As explained above, there is no suggestion from the material that the applicant was even told that during the second surgery the respondent would be reusing the implant he had used in the first surgery. Even if she had been so informed, it could not be said that this fact was of such an elementary kind that it ought plainly to have been within the knowledge of the applicant that the respondent should not have made this clinical decision. Further, the applicant seemed to have continued moving forward with her life, including having been certified by the respondent fit to return to her work as a casual sales assistant at Bed Bath N' Table within two weeks of the fourth surgery. In short, a reasonable person in the position of the applicant having taken appropriate advice, would not have regarded the facts known to the applicant as showing that a claim would have had a reasonable prospect of success and of resulting in an award of damages sufficient to justify the instituting of proceedings.

[29] As to whether there is evidence of a right of action, I consider the material on which the applicant relies in support of causation as well as consequential loss and damage could be regarded as very slim. It seems to be that the applicant is alleging that the failure to diagnose the post-surgical seromas in the post-operative periods following the first and second surgeries meant that she required further surgeries causing additional scarring and a psychological injury. Further, that the reuse of the implant in the second surgery contributed to the need for the further surgeries and therefore also caused additional scarring and a psychological injury. The evidence regarding both issues is currently limited to Dr Campbell-Lloyd having expressed the opinions that the respondent failed to recognise and appropriately manage the seromas and that his decision to reuse the implant in the second surgery was an error of surgical judgment.

[30] Having said this, given the expense that would be required for the applicant to produce the necessary expert evidence on this application, together with the caution that should be exercised in shutting out the applicant from establishing her claim at a future trial, I am ultimately satisfied that she has met the low threshold requirement imposed by s31(2)(b) of the Act. It seems that it can reasonably be expected that such evidence will be available at the trial and will, if unopposed by other evidence, be sufficient to prove her claim.

[31] To allow the application would be to deprive the respondent of a complete defence to the applicant's claim. While this is never an insignificant factor, a refusal of the application would close the applicant out of her claim against the respondent, in circumstances where there is something like prima facie evidence of a right of action against the respondent.

[32] Further, it is not suggested that there is any relevant prejudice to the respondent. In saying this, I am mindful that the delay of more than two years means that the respondent will probably suffer general prejudice relating to the passage of time. This

will equally apply to the applicant. It may well be that the passage of time will clarify some quantum related issues. Therefore, while the risk of prejudice may be real, it is not so significant that a fair trial could not be held.

Conclusion

[33] The applicant has satisfied the requirements of ss 30 and 31 of the Act and the limitation period should be extended until 30 November 2023.

[34] I direct that any submissions in respect of the form of the orders and costs (not to be longer than four pages), or alternatively a proposed draft order if the parties are agreed, be filed by 4 pm on 24 April 2024.