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AN INFERENCE OF NEGLIGENCE IS NOT SUFFICIENT TO EXTEND A LIMITATION PERIOD

7 APRIL 2020 | HEALTH LAW

The Supreme Court of Queensland considered whether an expert report containing, at best, an inference of negligence constitutes a 'material fact of a decisive character' to enable a limitation period to be extended. While not ultimately deciding that issue, His Honour, Justice Ryan dismissed the application because there was no evidence of a prima facie cause of action in negligence.

IN ISSUE

- Can the report of the applicant's ophthalmologist amount to a 'material fact of a decisive character' despite the ambivalence of the opinions expressed in it?
- Was there evidence to establish a right of action?
- Should the limitation period be extended considering the delay of the applicant and her solicitors in progressing the claim?

THE BACKGROUND

The applicant was an 80-year-old woman with a 40-year history of glaucoma. The respondent became the applicant's treating ophthalmologist on 18 January 2012. The applicant alleged that his treatment of her in 2012 was negligent and caused her to become blind. The allegations relate to the continued use of steroid eye drops and the (alleged) late referral for surgery.

After being encouraged by her lawyers to obtain advice about the 2012 treatment, the applicant signed a cost agreement with medical negligence lawyers, Monaco, in September 2015.

On 2 October 2015, Monaco sent an initial notice pursuant to the *Personal Injuries Proceedings Act* 2002 (Qld) (PIPA) to the respondent and requested treatment records. On 15 March 2016 they asked an expert ophthalmologist, Dr Cohn, for an opinion. The file changed hands between solicitors and it was not until 15 September 2016 that Dr Cohn provided his report. In that report, Dr Cohn opined that the applicant's infection required treatment with steroid drops, and later required a referral for surgical treatment (which the respondent did).

The applicant's limitation period expired, at the latest, on 17 October 2015. To proceed, the applicant sought an extension of the limitation period until 15 September 2017, a year after receiving the report of Dr Cohn, pursuant to s31 of the *Limitation of Actions Act* 1974 (Qld).

The applicant submitted that Dr Cohn's report gave rise to her belief that a claim against the respondent had reasonable prospects of success. The respondent submitted the report was not capable of constituting a 'material fact of a decisive character' because the applicant had already provided an initial PIPA notice and due to the equivocal nature of Dr Cohn's opinion.

THE DECISION

His Honour agreed that Dr Cohn did not state that the respondent failed to exercise reasonable care in the treatment of the applicant or adequately canvas that this caused her blindness. However, he did not come to a concluded view on whether or not the opinion was sufficient to constitute a material fact.

The Court accepted that the applicant had no sense of reasonable timeframes in personal injury litigation and was not criticised for failing to follow up her solicitors to progress her claim despite months of inaction. The delay between 17 November 2015 (when the costs agreement was signed) and 23 September 2016 (when the applicant was told about Dr Cohn's report) was not so lengthy to be unreasonable for the applicant to wait passively for the report.

However, the Court held that even if Dr Cohn's report constituted a material fact, it did not evidence a cause of action in negligence. Accordingly, the application was dismissed.

IMPLICATIONS FOR YOU

The judgment leaves open the question of whether an expert report with equivocal statements about negligence can constitute a 'material fact of a decisive character'. However, applicants must still provide evidence of a right of action to extend their limitation period. In deciding whether there has been unreasonable delay, a Court will focus on what might reasonably be expected of the applicant in each particular case.

Smith v Reader [2020] QSC 48

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