

AUSTRALIA / JUDGMENT

Annetts v Bone and ANOR [2014] NSWDC 285

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District Court

New South Wales

Medium Neutral Citation: Annetts v Bone and ANOR [2014] NSWDC 285

Hearing dates: 16 July and 26 September 2014

Decision date: 04 December 2014

Jurisdiction: Civil

Before: Colefax SC DCJ

Decision: Leave granted to Plaintiff to commence and continue proceedings more than 3 years after the date of the motor vehicle accident, following the provision of a full and satisfactory explanation for the delay.

Catchwords: Motor vehicle accident - delays in submitting claim form and commencing proceedings – full and satisfactory explanation for delays

Legislation Cited: Motor Accidents Compensation Act 1999 (NSW), ss 40 (2), 66, 73 (1) and (5), and 109

Cases Cited: Ellis v Reko Pty Limited [2010] NSWCA 319; Figliuzzi v Yonan [2005] NSWCA 290; cf Brisbane South Regional Health Authority v Taylor [1996] HCA 25.

Category: Procedural and other rulings

Parties: Ronald George Annetts (Plaintiff/ Respondent/ Applicant)

Robert Leslie Bone (1st Defendant/Applicant/Respondent)

F.L.Green Distribution Pty Limited (2nd Defendant/Applicant/Respondent)

Representation: Counsel:

Mr Morgan (Plaintiff)

Mr Turnbull (Defendants)

File Number(s): 2013/340018 and 2014/52662

Judgment

1. On 13 September 2002 the plaintiff, Ronald George Annetts, was injured in a motor vehicle collision which involved three motor vehicles. One of those motor vehicles was driven by the plaintiff (in the course of his employment). Another vehicle was owned by the second defendant and driven by the first defendant. The final vehicle had two occupants, both of whom were killed in that collision.
2. The plaintiff did not sustain any physical injury as a result of the collision but it would appear he sustained some degree of psychological or psychiatric injury in the nature of depression and post-traumatic stress disorder.
3. The plaintiff did not submit a claim form within the six months following the collision as required by the Motor Accidents Compensation Act 1999 (NSW) ("the Act"); nor did he file a Statement of Claim within three years of the collision as was also required by the Act.
4. Rather, a claim form was submitted on 1 February 2013 and a Statement of Claim filed in this court on 11 November 2013 (matter No. 13/340018).
5. In these circumstances the court presently has before it two applications.
6. First, a Notice of Motion filed by the defendants on 8 January 2014 in the proceedings initiated by the Statement of Claim. By that Notice of Motion the defendants, amongst other things, seek an order dismissing the proceedings pursuant to section 73(5) of the Act (i.e. because of the delay in the making of the claim).
7. Secondly, a Summons filed by the plaintiff on 19 January 2014 (being proceedings No. 14/52662). At the time the Summons was filed, the plaintiff only sought an order pursuant to section 109 of the Act (i.e. an application for leave to commence proceedings more than three years after the date of the relevant accident).
8. Both the Notice of Motion and the Summons were listed for hearing on 16 July 2014.
9. On that occasion I granted leave to the plaintiff to amend the Summons to call in aide both sections 73 and 109 of the Act (the former section enables a plaintiff to make a late claim if he can provide a full and satisfactory explanation for that lateness). I also ordered that the two sets of proceedings be consolidated and that the Amended Summons and the Notice of Motion be heard together.
10. It is logical that the issues raised in the Amended Summons be determined first. The resolution of the issues raised by that initiating process will, in effect, also determine those raised in the Notice of Motion – except perhaps with respect to costs.
11. Accordingly, and within these parameters, I commenced the hearing of these two applications on 16 July 2014.

12. In the course of that hearing on that day, Mr Morgan of counsel (who appeared for the plaintiff) read two affidavits of the plaintiff made on 21 February and 2 June 2014 and an affidavit of the plaintiff's wife, also made on 2 June 2014. Neither the plaintiff nor his wife were required for cross-examination on that occasion.
13. I note that, in the preparation for the hearing, two affidavits made by the plaintiff's solicitor (Mr Scott Hall-Johnston) on 18 April and 15 July 2014 and one affidavit made by the defendants' solicitor (Mr Paul Wholohan) dated 7 January 2014 were filed and served. None of those affidavits were, however, read because of two concessions fairly made by Mr Turnbull of counsel (who appeared on behalf of the defendants). Those concessions were: first, that there was no complaint about the plaintiff's prosecution of his claim once solicitors had been formally retained on 11 December 2012; and, secondly, that the threshold fixed by section 109(2)(b) of the Act had been exceeded. As I would understand it, however, that latter concession was made concerning the status of the plaintiff on and from December 2012. There is no evidence to suggest that the threshold was exceeded at any significant time earlier to April 2012.
14. The only issue therefore to be determined was whether the plaintiff has provided a full and satisfactory explanation for the delays (from the date of the collision until he first contacted his solicitors) in submitting the claim form and commencing the proceedings.
15. During the course of submissions on behalf of the defendants (the submissions for the plaintiff having been heard first), Mr Morgan sought and obtained an adjournment to adduce further evidence, by way of affidavit, from the plaintiff.
16. The application for the adjournment came about as a result of a submission made by Mr Turnbull that nowhere in the two affidavits made by the plaintiff did he expressly say that he did not know that he had (modified) common law rights (under the Act) as well as rights to workers compensation. In this context, Mr Turnbull had submitted that it was not open to the court to infer any such lack of knowledge from the then extant affidavits (cf *Ellis v Reko Pty Limited* [2010] NSWCA 319).
17. Consequently the hearing was adjourned to 26 September 2014 in order to permit the plaintiff to adduce such further evidence.
18. In the result, however, no further affidavit was made. Rather, the plaintiff gave oral evidence on the resumed hearing date. (Regrettably, the transcript of that resumed hearing is still not available).

The Background Facts:

1. The background facts are largely uncontroversial and can be briefly stated as follows.
2. As at the date of the accident the plaintiff was 40 years of age.

3. He left school when he was 17 years old and from then on pursued employment initially in a timber mill as a labourer and then as a truck driver for a number of employers in various places in and about rural New South Wales. He appears to have been a hard-working man, but with limited formal education.
4. In 1993 the plaintiff's brother was killed in a motor vehicle accident. As a result of that death the plaintiff experienced depression for which he was treated for a short period of time. At around the same time he experienced bullying at his then place of employment which added to the depression caused by the death of his brother. In fact, the depression caused by the bullying resulted in a workers compensation claim. It would appear, however, that that depression resolved relatively quickly.
5. In the collision to which I have earlier referred, the plaintiff was driving his truck (a semi-trailer) in a southwest direction along the Olympic Highway near Wagga Wagga. He came to an intersection where a motor car travelling from the opposite direction was stationary and waiting to make a right-hand turn. The truck driven by the first defendant and owned by the second defendant came behind that motor car and collided with it, forcing the motor car into the path of the plaintiff's vehicle. That motor car and the plaintiff's vehicle then collided.
6. As consequence of the collision, two ladies in the motor car were killed at the scene.
7. Immediately after the collision the plaintiff got out of his truck to assist the occupants of the car. In his first affidavit the plaintiff described the scene as "particularly gruesome".
8. The accident occurred on a Friday and the plaintiff returned to work two days later and continued working for the following three weeks.
9. At the conclusion of that three week period, however, he suffered what is referred to in his first affidavit as "a breakdown" and he consulted the family general practitioner who prescribed further anti-depressant medication.
10. The plaintiff was then off work for about a month. At the end of that time he was able to return to work.
11. Nevertheless, he continued to think about the accident and this involved, in part, nightmares concerning what he had seen. He continued taking the anti-depressant medication but he did not have any formal counselling from a psychologist or any specialist medical practitioner. He did however continue working for various employers.
12. In November 2007 the plaintiff resigned from the employment which he had been engaged in for the previous four years. He did so because that employment required him to drive past the accident scene regularly and which caused him emotional distress.

13. The plaintiff, his wife and the younger members of their family then moved from New South Wales to Western Australia. He obtained work as a forklift driver, casual concrete truck driver, and as a yard person and loader operator.
14. In the course of submissions made on behalf of the defendants, some emphasis was made of the fact that the plaintiff moved to Western Australia. This, it was submitted, indicated the gravity of the scale of the depression. With respect, that is not necessarily so. The plaintiff moved or changed employment in order to avoid driving past the collision scene regularly. From the point of view of the depression, that could have been avoided by moving to another part of rural New South Wales. The plaintiff's move to Western Australia could just as easily have been motivated by availability of work. I am certainly not prepared to infer that the move to that distant location was directly causally linked to the depression.
15. Notwithstanding this substantial move, the plaintiff continued to suffer from depression and he received anti-depressant medication from the general practitioner whom he consulted in Western Australia.
16. In May 2011 the plaintiff and his family moved to Queensland. This move was not directly connected to the accident or its consequences, but rather was from a desire to see more of the two adult sons who had not moved to Western Australia.
17. Apart from the period of one month that the plaintiff was off work shortly after the accident, he did not have any other time off work until 17 April 2012.
18. On 17 April 2012 the plaintiff had what he again describes in his first affidavit as "a breakdown". However, it would appear that this incident was considerably more serious than the "breakdown" which he underwent shortly after the collision.
19. A significant amount of alcohol was consumed that night (and maybe in the period immediately beforehand) and this led to deep introspection and reflection by the plaintiff about the accident. The next day the plaintiff was admitted to the Emergency Department at the Logan Hospital and he was then quickly transferred as an in-patient to the psychiatric facility of that hospital where he remained for one week.
20. Following his discharge from the hospital, he was referred by his general practitioner to a psychologist and he has remained under the care of that psychologist since that time.
21. Additionally in late July 2012 he also was referred by his general practitioner to a psychiatrist whom he continues to regularly consult.
22. In early November 2012 the plaintiff was again admitted to a psychiatric facility – this time at the Pine Rivers Private Hospital. He remained in that hospital for approximately three weeks, being discharged on 28 November 2012.

23. The plaintiff has not worked since he was admitted to the Logan Hospital in April 2012. He had, however, received payments of workers compensation both for his medical expenses and his loss of income following that time. The weekly compensation payments for loss of wages were apparently very close to the wage that he actually received as a truck driver.
24. In December 2012 the relevant workers compensation insurer substantially reduced the amount of the weekly payments of compensation and, for the first time since the collision in September 2002, this caused the plaintiff significant financial difficulties.
25. It was at the time of the reduction in those weekly payments that the plaintiff, at the instigation of his wife, first sought and obtained legal advice – that was on 11 December 2012. He didn't seek such advice before then because:
 - (a) he thought he would "get over" the depression which he knew was caused by the accident (as he had "got over" depression in 1993 when his brother had been killed in a hit and run motor vehicle accident); and
 - (b) he was not out-of-pocket because his medical expenses were being paid by workers compensation.
1. In the course of his oral evidence in-chief, the plaintiff said that until he consulted solicitors and obtained that legal advice he did not know of the existence of a scheme for compensation or damages for motor vehicle accidents. The plaintiff did not say that he thought only physical injury was covered by the scheme which related to motor vehicle accidents. Further, he did not say that he thought, because he was receiving workers compensation, that he could not have the benefit of that scheme. To that extent he was implicitly aware at all times that a workers compensation claim was different from a motor vehicle accident insurance claim (and in that sense he was in a different position to the ultimately unsuccessful applicant in *Figliuzzi v Yonan* [2005] NSWCA 290 per Tobias and McColl JJA; Santow JA dissenting).
2. In the course of his cross-examination, however, he agreed that he knew (as and after 2002) that a green slip for the registration of a motor vehicle involved mandatory insurance; that if he caused injury to another person in a motor vehicle accident there was a relevant insurance scheme; and that he was generally aware that there was a scheme which enabled a person to sue if injured in a motor vehicle accident. The plaintiff denied however knowing that the legal action would be brought against the driver who had caused the injuries. Also, in cross-examination, the plaintiff accepted that he believed the motor vehicle accident was the cause of his depression – and that that depression was of such severity that it caused him in 2007 to resign his job and move to Western Australia.
3. As I have already noted, a personal injury claim form was submitted on 1 February 2013 and a Statement of Claim filed on 11 November 2013. In between these two dates, i.e. on 9 July 2013, the defendants admitted breach of duty of care by way of a Section 81 Notice.

The Relevant Legislative Provisions:

1. Section 73(1) of the Act permits a claim to be made after six months if "... the [plaintiff] provides a full and satisfactory explanation for the delay in making the claim". The plaintiff purported to provide a full and satisfactory explanation by way of a Statutory Declaration made on 26 March 2013. (The substance of that Statutory Declaration was reproduced in the plaintiff's first affidavit.)
2. Section 109 of the Act provides that a [plaintiff] is not entitled to commence proceedings in respect of a claim more than three years after the date of the relevant accident, except with the leave of the court. Such leave, however, cannot be granted unless the [plaintiff]: (a) provides a full and satisfactory explanation to the court for the delay; and (b) the total damages of all kinds likely to be awarded to the plaintiff if the claim succeeds are not less than 25% of the maximum amount that may be awarded for non-economic loss under section 134 of the Act. (It will be recalled that, in relation to this second aspect, the defendants made a relevant concession).
3. Section 66 of the Act defines "a full and satisfactory explanation". Specifically, sub-section (2) relevantly provides:

"... a reference to a full and satisfactory explanation by a claimant for non-compliance of a duty or for delay is a reference to a full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation. The explanation is not a satisfactory explanation unless a reasonable person in the position of the claimant would have failed to have complied with the duty or would have been justified in experiencing the same delay."

The Submissions:

1. Mr Morgan submitted that the evidence established a full and satisfactory explanation for the delay by reference to the following three factors, both individually and collectively.
2. First, he submitted that there was a delay in the onset of serious symptoms. Mr Morgan accepted that there were some symptoms of depression after the accident and that they involved, amongst other things, a move away from the Wagga area in 2007 (some 5 years after the accident). But it was not until 2012 that the degree of the depression got to the point of hospitalisation which included self-harm issues.
3. Secondly, he submitted that the applicant was ignorant of the workings of the Act, especially with respect to time limits.

4. Thirdly, (and this is connected with his second submission) he submitted it was not unreasonable of the applicant to be content to receive workers compensation in conjunction with his wages as an added form of compensation until that workers compensation was drastically reduced in 2012 – and as I have already noted, it was in that circumstance (in the context of the deteriorating psychological condition) that caused the applicant to seek legal advice in relation to the accident which had occurred approximately 10 years previously.
5. In relation to the first of those submissions, Mr Turnbull disputed that a significant deterioration in the applicant's condition first occurred in 2012. He submitted that there was a serious deterioration by the latest 2007 when the applicant moved from Wagga to Western Australia. Furthermore, Mr Turnbull pointed to the fact that as at 2007 the applicant was still on medication for that very depression.
6. In relation to Mr Morgan's second and third submissions, Mr Turnbull submitted that ignorance of the law does not itself excuse an applicant from complying with the statutory time period (I would pause to observe, however, that just as such ignorance is not an excuse, a person in the position of this plaintiff must also be taken to have known of the existence of thresholds and the adverse cost consequences of commencing litigation and losing – here I am not considering contingency fee arrangements with his own lawyers, but a costs order in favour of a defendant). Mr Turnbull also relies on the concessions made by the plaintiff in cross-examination on the adjourned hearing date – i.e. he was of the belief that the accident was the cause of his depression and he was aware in a general way of the existence of a relevant insurance scheme that might compensate him in relation to that depression separate from workers compensation.
7. In these circumstances Mr Turnbull submitted that although the explanation might be full, it is not satisfactory – and he specifically relied upon the decision in Figliuzzi.

Consideration:

1. As McColl JA makes clear in Figliuzzi (at [124]ff), the Act is one of many statutory schemes whereby the legislature has fixed definite time limits for the prosecution of civil claims because "the public interest requires that disputes be settled as quickly as possible" (cf Brisbane South Regional Health Authority v Taylor [1996] HCA 25; (1996) 186 CLR 541 at 553 per McHugh J). Unlike other limitation provisions, however, those fixed by the Act are not absolute.
2. The various authorities her Honour collects in that judgment clearly "... demonstrate a legislative concern with the prompt notification and timeous resolution of claims for damages arising out of motor vehicle accidents. ... what would constitute justifiable delay is to be considered in the light of these legislative purposes ..." (Figliuzzi per McColl JA at [127]).

3. And as the majority in Figliuzzi held, determining whether a claim has provided a satisfactory explanation, involves "a normative judgment". In this context, I again note that "... an explanation is not a satisfactory explanation unless a reasonable person in the position of the [plaintiff] would have failed to have complied with the duty or would have been justified in experiencing the same delay" (cf section 40(2) of the Act).
4. The following are therefore relevant factors in the present case informing that normative judgment:
 - (a) the limited formal education of the plaintiff;
 - (b) the knowledge or belief of the plaintiff that his depressive condition was caused by the 2002 collision;
 - (c) he took very little time off work because of that depressive condition between 2002 and April 2012;
 - (d) he had no out-of-pocket expenses associated with treatment of his depressive condition between 2002 and December 2012 because of the payments of workers compensation;
 - (e) he suffered no adverse economic consequences between April 2012 and December 2012 because of the amount of workers compensation he was receiving;
 - (f) he moved from the Wagga area in 2007 to avoid the scene of the collision but was continuing to work and was continuing to receive treatment for depression;
 - (g) he had a broad knowledge of a separate method of compensation for injuries sustained in the motor vehicle accident other than workers compensation;
 - (h) that separate method of compensation not only had time limits but also thresholds, thresholds which do not appear to have been exceeded until April 2012;
 - (i) the separate method of compensation provided that if proceedings were commenced and lost an adverse costs order would be made and could be enforced against him; and
 - (j) finally, there was a serious deterioration in his mental condition in April 2012 resulting in psychiatric hospitalisation.
1. In these circumstances, in my opinion a reasonable person in the position of the plaintiff would have failed to comply with the relevant statutory duties or would have been justified in experiencing the same delay.
2. Accordingly, I propose to grant the relief sought by the plaintiff in the Amended Summons and I shall dismiss the defendants' Notice of Motion.
3. The parties have not been heard as to costs.

4. There is of course a general rule that costs follow the event. However that general rule is subject to another well-established rule, namely that if a successful applicant is seeking an indulgence then it is that applicant which must bear the costs of obtaining that indulgence.
5. Subject to any further submissions I shall order that the costs of the Amended Summons and the defendants' Notice of Motion be the defendants' costs in the cause.

Orders:

1. I make the following orders:
 - (a) Order that pursuant to section 73 and 109 of Motor Accidents Compensation Act leave is granted to the plaintiff to commence and continue these proceedings.
 - (b) Order that the defendants' Notice of Motion filed 8 January 2014 be dismissed.
 - (c) Order that subject to any order to the contrary, the costs of the Amended Summons and the defendants' Notice of Motion are to be the defendants' costs in the cause.
 - (d) Grant liberty to apply to vary the above costs order provided any such application is notified to my Associate on or before 21 December 2014.
 - (e) Direct that any application to vary the order as to costs be heard in the period 19 to 30 January 2014.

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Decision last updated: 03 March 2015

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