

AUSTRALIA / JUDGMENT

Long v Gaincrew Pty Ltd [1999] NSWSC 561

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Supreme Court

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New South Wales

Supreme Court

CITATION : Long v Gaincrew Pty Ltd [1999] NSWSC 561

CURRENT JURISDICTION : Civil

FILE NUMBER(S) : 20333/94

HEARING DATE(S) : 12 May 1999

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30 July 1999

PARTIES : John Long & Anor v Gaincrew Pty Ltd & Ors

JUDGMENT OF : Carruthers AJ at 1-37

LOWER COURT JURISDICTION : Supreme Court

LOWER COURT FILE
NUMBER(S) :

LOWER COURT JUDICIAL OFFICER : Master Harrison

COUNSEL : K. Andrews for the appellant.

I.G. Roberts for the respondents.

SOLICITORS : Vandervords for the appellant.

Minter Ellison for the respondents.

CATCHWORDS : Limitation of Actions - appeal from Master's refusal to extend limitation period upon basis no initiating process filed within extended limitation period.

ACTS CITED : Queensland Limitation of Actions Act 1974

Clutha Developments Pty Ltd v Barry (1989) 18 NSWLR 86 at 102

Karolis v Prince of Wales Hospital & Anor (1986) Aust. Torts Reports 80-053, at 67, 974

Coulton v Holcombe (1986) 162 CLR 1 at 8

CASES CITED : University of Wollongong v Metwally [No. 2] (1985) 59 ALJR 481 at 483

Bolwell Fibreglass Pty Ltd v Foley [1984] V.R. 97 at 104

Baker v Australian Asbestos Insulations Pty Ltd [1984] 3 NSWLR 595 at 601

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541

DECISION : The appeal is dismissed with costs.

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- 1 -

THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

CORAM : CARRUTHERS AJ
FRIDAY, 30 JULY, 1999
20333/94 - John LONG & ANOR v GAINCREW PTY LTD & ORS

JUDGMENT

1 HIS HONOUR : John Long appeals from the judgment of Master Harrison dated 15 December 1998, insofar as she dismissed a Notice of Motion, dated 22 September 1998, brought pursuant to the provisions of s 30 and s 31 of the Queensland Limitations of Actions Act, 1974, for an order extending the time in which the appellant may bring proceedings against Dr Fallowfield and the State of Queensland (described by the Master as the proposed fourth defendant and the proposed fifth defendant respectively) for damages for alleged negligent medical treatment.

2 It is necessary to consider some background to the application to Master Harrison. The plaintiff, a resident of New South Wales, is the managing director of Premier Pools Pty Limited, a company engaged in the erection of swimming pools. Between 28 June 1993 and 2 July 1993 the plaintiff undertook a diving course conducted by the first defendant, Gaincrew Pty Limited (Gaincrew) at Port Douglas in the State of Queensland.

3 On 3 July 1993 the plaintiff displayed symptoms of decompression illness. His consequential medical treatment included treatment at the Mossman Hospital and the Townsville Hospital (for which hospital the State of Queensland incurs liability pursuant to the Health Legislation Amendment Act (No. 2) 1996 of the State of Queensland). Dr Fallowfield was at the time the Director of Hyperbaric Medicine at the latter hospital.

4 On 12 October 1993 the plaintiff retained Sydney solicitors to commence legal proceedings in this Court on his behalf with respect to serious physical sequelae which he contends he suffered as a result of the alleged negligence of Gaincrew and those who afforded him medical treatment. At the time the plaintiff's solicitors received instructions, they did not believe that they had sufficient evidence to establish a breach of duty on the part of Dr Fallowfield and/or the Townsville Hospital.

5 On 30 May 1994 the plaintiff's solicitors filed a Statement of Claim in which Gaincrew was named as the first defendant, Marina Medical Pty Limited as the second defendant, Dr J. Christie as the third defendant (proceedings against him have now been discontinued) and Mossman Hospital as the fourth defendant.

6 An amended statement of claim was filed on 24 July 1997 but the amendment is not of relevance for present purposes.

7 On 15 and 16 July 1997, the plaintiff was examined by Professor Des Gorman who is, I understand, a specialist in decompression illness practising in Auckland, New Zealand. Professor Gorman reported to the plaintiff's solicitors on 29 July 1997 to the effect that there was, in his view, negligence on the part of Dr Fallowfield and the Townsville Hospital in their treatment of the plaintiff. I might say, parenthetically, that the report also expressed the view that there had been negligence on the part of Gaincrew and the Mossman Hospital.

8 On 29 August 1997 the plaintiff conferred with his solicitors and counsel and was advised that in light of Professor Gorman's report it was appropriate to proceed against both Dr Fallowfield and the Townsville Hospital. However by 29 August 1997 the three year limitation period under Queensland law had expired. It is common ground that the Queensland Limitation of Actions Act, 1974 applies to these proceedings and that Act relevantly prescribed a limitation period of three years.

9 On 23 July 1998 the plaintiff's solicitors filed a Notice of Motion seeking an extension of the limitation period to enable the plaintiff to proceed against Dr Fallowfield and the Townsville Hospital. Directions were subsequently given in relation to the filing of affidavits.

10 On 26 August 1998 the Notice of Motion came before Master Malpass. The plaintiff sought an adjournment of the Notice of Motion in order to place further evidence before the Court. The Master refused the adjournment and dismissed the Notice of Motion with costs payable forthwith.

11 On 22 September 1998 the Notice of Motion the subject of the present appeal was filed. The Master's judgment states that on the same date a proposed further amended statement of claim was filed which named Gaincrew as the first defendant, Marina Medical Pty Limited as the second defendant, Mossman Hospital as the third defendant, Dr Fallowfield as the fourth defendant and the State of Queensland as the fifth defendant. However, in fact such proposed further amended statement of claim was not filed. Evidence in support of the Notice of Motion included an affidavit by Simon Chadwick sworn 22 September 1998. Mr Chadwick is the solicitor who has the carriage of this matter in the office of the plaintiff's solicitors. Paragraph 17 of the affidavit states:

"Annexed hereto and marked with the letter "B" is a Further Amended Ordinary Statement of Claim it is proposed to file in this manner (sic) should the Court grant leave to extend the limitation period."

12 This is a reference to the further amended statement of claim which the Master erroneously believed was filed on 22 September 1998. However, nothing really turns on that insofar as her judgment is concerned.

13 The Notice of Motion came before Master Harrison on 30 November 1998 when Mr K. Andrews of counsel appeared for the plaintiff and Mr I. G. Roberts of counsel appeared for the defendants. Both counsel also appeared before me on this appeal.

14 Section 31 of the Limitation of Actions Act 1974 (the Act) applies (inter alia) to actions for damages for negligence where the damages claimed by the plaintiff for the negligence consist of or include damages in respect of personal injury sustained by the plaintiff.

15 Sub-section (2) of s 31 defines the powers of the court to extend the limitation period with respect to such actions and is in the following terms:

" Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court -

- (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
- (b) that there is evidence to establish the right of action, apart from a defence founded on the expiration of a period of limitation:

the court may order that the period of limitation for the action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly."

16 Section 30 of the Act defines (although not exhaustively) what facts constitute a material fact of a decisive character relating to the right of action. It is not necessary, however, for present purposes to consider those criteria.

17 In her judgment the Master held that the plaintiff did not know he had a cause of action against Dr Fallowfield and the State of Queensland until 29 August 1997 when he was so advised by his legal advisers on the basis of Professor Gorman's report. The Master held that this knowledge constituted " a material fact of a decisive character relating to the right of action " which was not within the means of knowledge of the plaintiff until 29 August 1997, which was a date after the commencement of the year last preceding the expiration of the period of limitation for the action.

18 Having made that finding of fact (which was not challenged on appeal) it was open to the Master under subs (2) of s 31 to order that the period of limitation for the action be extended to 30 August 1998. However, the Master held that as the Notice of Motion was not filed until 22 September 1998, the claim for an extension of the limitation period must necessarily fail at the threshold. Thus, it did not become necessary for the Master to determine whether it was just and reasonable to extend time.

19 The manner in which the Master expressed this finding requires some comment. It is now well established that if initiating process is filed within the extended limitation period, the notice of motion seeking leave to extend the limitation period may be filed after the expiration of that period. So much is clear from the judgment of the Court of Appeal in *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 102, per Gleeson CJ. See also *Karolis v Prince of Wales Hospital & Anor* (1986) Aust. Torts Reports 80-053, at 67, 974.

20 Thus, it would have been more appropriate for the Master to have expressed her finding upon the basis that a further amended statement of claim naming Dr Fallowfield (as the fourth defendant) and the State of Queensland (as the fifth defendant) was not filed within the extended limitation period.

21 The plaintiff's case, on appeal, took on a different complexion to that presented to the Master. Appellant's counsel focused on the appeal upon paragraph 25 of Mr Chadwick's affidavit of 22 September 1998 which paragraph was not drawn to the attention of the Master. Paragraph 25 is in the following terms:

"On the 28th day of August 1998 a Statement of Claim was issued in this honourable Court against Dr Fallowfield and the State of Queensland who incur liability for Townsville Hospital pursuant to the Health Legislation Amending (sic) Act No. 2 1996, (Queensland)."

Paragraph 25 needs some explanation.

22 I was informed by counsel for the appellant that after the Notice of Motion seeking the extension of time was dismissed on 26 August 1998 by Master Malpass, the appellant's advisers were placed in a position where they had to make a critical decision to protect their client's interests bearing in mind that proceedings had to be filed joining Dr Fallowfield and the Townsville Hospital by 30 August 1998. There was not time, it was thought, to file a fresh notice of motion, obtain the appropriate order and then file a further amended statement of claim before 30 August 1998. The Supreme Court Rules prevented the plaintiff filing a further amended statement of claim without leave, because the pleadings had been closed.

23 What was described by counsel for the appellant as a "forensic decision" was made to file a fresh statement of claim on 28 August 1998 joining Dr Fallowfield and the State of Queensland as sole defendants. However, as it was necessary under the Rules for that statement of claim to be treated as an original matter it was allocated File No. 20322 of 1998. I particularly note that paragraph 25 of Mr Chadwick's affidavit does not refer to the fact that the statement of claim filed on 28 August 1998 was given File No. 20322 of 1998.

24 As I have indicated when the Notice of Motion was argued before Master Harrison, her attention was not drawn to the 28 August 1998 statement of claim. Mr Roberts, counsel for the defendants was only made aware of its existence on the morning of the hearing because, at that stage, it had not been served on either of the defendants.

25 Now, although the 28 August 1998 statement of claim had not been referred to in argument before the Master nor, understandably, in her judgment, it became the linchpin of the appellant's argument on appeal. I might add that File No. 20322 of 1998 was not before her.

26 The thrust of the appellant's argument was that the only order which the Master was asked to make was to extend the period in which the appellant could bring proceedings against Dr Fallowfield and the State of Queensland to 30 August 1998. If the Master had made such an order, it was submitted that the 28 August 1998 statement of claim (albeit that it was filed in different proceedings) would satisfy that order. Alternatively, if necessary the appellant could have gone

back to the court and sought consolidation of the proceedings in File No. 20333 of 1994 with the proceedings in File No. 20322 of 1998, pursuant to Part 31, Division 2 of the Rules.

27 Counsel for the appellant conceded that this approach had not been raised before the Master. However, he submitted that there was evidence before her of a statement of claim having been filed on 28 August 1998 and that was enough for the purposes of this appeal. It was not to the point, he submitted, that it was not drawn to her attention or that the File was not before her.

28 In any event, counsel submitted, the Master should merely have satisfied herself that there were justifiable grounds for extending the limitation period to 30 August 1998 and left it to the appellant to satisfy that order in whatever way he could.

29 The appellant faces formidable difficulties on this appeal. Firstly, the decision by the Master was, upon the basis that the appellant's case was presented to her, in my respectful view, perfectly correct. That case was presented solely on the basis that the appellant wished to obtain the necessary extension of time so that the further amended statement of claim annexed to Mr Chadwick's affidavit could be filed in the proceedings before her, viz. File No. 20333 of 1994.

30 However, upon the material presented to the Master, it would have been futile for her to have made an order extending the limitation period to 30 August 1998 because the order could not be satisfied.

31 Secondly, as the High Court (Gibbs CJ, Wilson, Brennan and Dawson JJ) re-affirmed in *Coulton v Holcombe* (1986) 162 CLR 1 at 8, a party is bound by the conduct of his or her case. Their Honours repeated what the Court had said in *University of Wollongong v Metwally* [No. 2] (1985) 59 A.L.J.R. 481 at 483:

"Except in the most exceptional circumstances, it would be contrary to all principles to allow a party, after a case has been decided against him, to raise a new argument which, whether deliberately or by advertence, he failed to put during the hearing when he had an opportunity to do so."

Such exceptional circumstances do not exist here.

32 Nevertheless I might say that even if the Master had been apprised of File No. 20322 of 1998, it would, in my view, have been inappropriate for her to have extended the limitation period (leaving aside discretionary considerations) in anticipation that the appellant might obtain a consolidation order in relation to the two sets of proceedings. Such a course would have been highly unusual. As Brooking J pointed out in *Bolwell Fibreglass Pty Ltd v Foley* [1984] V.R. 97 at 104:

"The effect of a consolidation order is difficult to determine and in my opinion such an order should rarely be made."

Those remarks had the concurrence (at 100) of Young CJ and

Kaye J.

33 It should be recalled that a consolidation order is a process by which two or more matters are, by order of the court, combined and treated as one action. Such an order is to be clearly distinguished from an order that two or more matters be heard together, which refers to a situation where proceedings are heard concurrently.

34 This Court should not be expected in any event, to resort to the rare course of consolidation merely to avoid the consequences of the appellant's solicitors failing to approach the Court with the appropriate evidence and within time to seek an order for extension of the limitation period in Matter No. 20333 of 1994: See *Baker v Australian Asbestos Insulations Pty Ltd* [1984] 3 NSWLR 595 at 601.

35 Obviously, the appropriate course for the appellant now is to file a notice of motion in File No. 20322 of 1998 seeking an extension of the limitation period against Dr Fallowfield and the State of Queensland. The appellant will not be faced with fatal defect so far as the present notice of motion is concerned. However, he will, no doubt, be faced with other arguments arising from the discretionary considerations considered by the High Court in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

36 If the appellant overcomes the discretionary considerations and obtains an extension of the limitation period then an application could be made for an order that both matters be heard together, or if sufficient grounds can be established, a consolidation order.

37 The appeal is dismissed with costs.

Last Modified: 07/30/1999

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