

AUSTRALIA / JUDGMENT

Vonhoff v Hillier [2024] NSWSC 1285

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Supreme Court

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Supreme Court

New South Wales

Medium Neutral Citation: Vonhoff v Hillier [2024] NSWSC 1285

Hearing dates: 21, 22 August 2024

Date of orders: 21 October 2024

Decision date: 21 October 2024

Jurisdiction: Common Law

Before: Cavanagh J

Decision: (1) The long-stop limitation period for the commencement of the proceedings is extended to 20 October 2020.

(2) Those paragraphs of the amended statement of claim that purport to plead a cause of action in respect of the 2010 surgery are struck out.

(3) The plaintiff is to serve an amended statement of claim on the defendant reflecting these orders within 14 days.

(4) The matter is listed for further case management before me on 9 December 2024 at 9:30am.

(5) Costs will be the defendant's costs in the cause.

(6) Should the parties seek any different order, that can be raised on 9 December 2024.

Catchwords: LIMITATION OF ACTIONS – where plaintiff sues the defendant for medical negligence alleged to have occurred in 2006 and 2010 – where proceedings not commenced until 2020 – application under s 62A of the Limitation Act 1969 for extension of the 12 year long-stop limitation period – whether the 3 year post discoverability period had expired at the time proceedings were commenced – whether just and reasonable to extend the long-stop limitation period

Legislation Cited: Limitation Act 1969 (NSW), ss 50A, 50C, 50D, 50F, 62A, 62B

Cases Cited: Baker-Morrison v New South Wales (2009) 74 NSWLR 454

Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167

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

Doughty v Hillier [2024] NSWSC 1220

Drayton Coal Pty Ltd v Drain [1995] NSWCA 131

Harris v Commercial Minerals Ltd (1996) 186 CLR 1

McLean v Sydney Water Corporation [2001] NSWCA 122

State of NSW v Gillette [2012] NSWCA 83

Category: Procedural rulings

Parties: Peter Walter Vonhoff (Plaintiff)

Dr Terence Hillier (Defendant)

Representation: Counsel:

I Roberts SC and JA Hillier (Plaintiff)

J Downing SC (Defendant)

Solicitors: Commins Hendriks (Plaintiff)
HWL Ebsworth (Defendant)
File Number(s): 2020/300906
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JUDGMENT

1. This is a medical negligence claim arising out of the treatment afforded to the plaintiff by the defendant as an orthopaedic surgeon in 2006 and 2010.
2. By way of a notice of motion filed 5 June 2024, the plaintiff seeks orders extending the limitation period in respect of the causes of action in accordance with ss 62A and 62B of the Limitation Act 1969 (NSW) ("the Act").
3. He also sought a declaration that he was a person under a disability and further that the limitation period should be suspended pursuant to s 50F of the Act. He no longer seeks those orders.
4. The plaintiff claims damages from the defendant arising out of alleged negligence in the advice and performance of operative treatment on two occasions, being on 2 March 2006 and then on 14 May 2010. The plaintiff alleges that on both occasions he was advised by the defendant to undergo surgery on his back. He complains both about the information and advice given to him by the defendant leading up to and after the operations as well as the fact of the operations.
5. The defendant has filed a defence denying the essential allegations raised by the plaintiff. In addition, the defendant says that the proceedings are statute barred having regard to s 50C of the Act. That is, the defendant asserts that the proceedings were commenced after the expiry of the relevant limitation period.
6. In response to the pleading of the limitation period, the plaintiff filed a reply asserting that:
 1. his claims are not statute barred;
 2. his claims were not commenced outside the three year limitation period having regard to s 50D(1); and
 3. his claims were not commenced outside the expiry of any long-stop limitation period contained in the Act.

1. The proceedings have been managed in the Professional Negligence List, firstly by the Registrar and then by me. As part of my management of this and other similar matters involving the defendant, I raised with the parties the limitation issue as it related to the expiry of the long-stop limitation period. The hearing, which took place on 21 and 22 August 2024, was the culmination of various other directions hearings and orders intended to facilitate the determination of the limitation issues.
2. Faulkner J heard and has delivered judgment in another matter involving the defendant and the long stop limitation period (*Doughty v Hillier* [2024] NSWSC 1220). The facts and circumstances in that matter are quite different. Indeed, different provisions of the Limitation Act applied at least in respect of some of the treatment afforded by the defendant.
3. These proceedings were not commenced until 20 October 2020, being 14 years after the first surgery. At the time of commencement, the plaintiff only pursued a claim in respect of the 2006 surgery. On any view, the long stop limitation period in respect of the first surgery had expired. The plaintiff seeks an extension of time in respect of the long stop period.
4. When the proceedings were commenced the plaintiff did not plead negligence in relation to the second surgery. Further, when an amended statement of claim was filed on 20 April 2021, the plaintiff did not plead negligence relating to the second surgery. It was only when a further amended statement of claim was filed on 3 October 2023 that the plaintiff added allegations in respect of the second surgery which took place on 14 May 2010. By that time the long stop period in respect of the 2010 surgery had also expired.
5. In support of his application, the plaintiff relies on affidavits of his solicitor, Tonya Longmore, dated 4 and 22 July and 12 August 2024. Exhibited to Ms Longmore's affidavits are a large number of documents on which the plaintiff relies for the purposes of the application, including extensive medical records and reports.
6. The defendant relies on affidavits of his solicitor, Melinda Jane Conry dated 26 July 2024 and 13 August 2024. Again, exhibited to these affidavits are the documents on which the defendant relies for the purposes of resisting the application, again including expert medical reports on the issues of liability and causation.
7. Other documents, such as the plaintiff's evidentiary statement, were also admitted into evidence. The defendant has not yet served his statement and did not seek to put what may be his evidence in the proceedings or any statement before the Court for the purposes of the application.
8. The plaintiff gave evidence on the application and was cross-examined. The parties provided helpful written and oral submissions.

Background

1. The plaintiff is currently 40. In November 2005, he sustained an injury to his back whilst working as a baggage handler at Wagga Wagga airport. He had not previously suffered from any form of back pain. He sought treatment from his general practitioner, underwent physiotherapy and had a CT scan. He was ultimately referred to the defendant for specialist treatment.
2. He says that by the time he first saw the defendant on 21 December 2005, he had returned to work, at least on light duties. The plaintiff says that the defendant explained to him that he had suffered a prolapsed disc, which was impacting on his left sided nerve. He said that during the first consultation the defendant suggested he would require surgery in the future in the form of a disc replacement, but he should undertake conservative treatment first.
3. The plaintiff also says that by the time of his second consultation on 1 February 2006, the defendant was recommending a disc replacement even though the plaintiff informed the defendant that his pain had improved slightly, and his walking was improved. The plaintiff asserts that the defendant explained to him during the second consultation that, after the surgery and a six-week recovery, he would be able to return to doing all the activities that a young man of his age would normally do.
4. As the plaintiff explained, he undertook his own Internet research to try and understand the defendant's recommendations. He relied on the defendant's assurances that he would recover quickly from the operation and that it would be better to have it done whilst he was young, as the longer he left it the worse it would get.
5. On 2 March 2006, the plaintiff was admitted to the Albury-Wodonga private hospital. The defendant performed an L5/S1 intervertebral disc excision with a Maverick disc arthroplasty. The plaintiff was 22 at the time. He recalled the defendant informing him after the surgery that the surgery was a success.
6. He underwent rehabilitation including physiotherapy and ultimately returned to light duties. However, he says that he did not achieve the recovery predicted by the defendant. When he tried to return to his pre-injury duties as a baggage handler, he felt significant sharp stabbing like pain in the back and pain down the leg. He continued to consult the defendant over the next few years. He underwent other treatments, such as injections, but his pain did not improve.
7. During a family holiday in Queensland in January 2010, he went to White Water World on the Gold Coast. He went down a waterslide on a donut tube. His buttocks hit the surface of the slide. He felt immediate pain in the L5/S1 region. Although the pain subsided about a month later, it returned. He was again referred to the defendant who suggested that the downward pressure had moved the disc replacement and that was causing him pain. He recommended further surgery.

8. The plaintiff was again admitted to the Albury-Wodonga private hospital on 13 May 2010. He underwent an L5/S1 posterior lateral spinal fusion and a L5/S1 legacy segmental fixation. Whilst he obtained some relief from the sharp stabbing pain in the S1 level, he says that his pain across the thoracic and lumbar spine and left leg and thigh were not relieved by this surgery. He has continued to suffer back pain ever since.
9. In January 2018, he was again on holidays in Queensland. He was on a tube being towed by a jet ski in the water. As a result of the way in which the jet ski was operated, he was thrown off the tube into the water headfirst. Sometime later, he developed neck pain. In December 2018, he sought treatment for his neck pain, including physiotherapy and treatment by a pain specialist. He has continued to suffer back and neck problems.
10. The plaintiff has worked in the airline industry, particularly for Virgin Airlines. He ceased working in the airline industry when COVID-19 hit. In February 2022, he commenced a graduate program at the Department of Defence. He continues to take pain medication. He says that his spinal problems and the use of medication effects his performance at work.
11. He says that whilst consulting Dr Bryant on 14 December 2018, he told Dr Bryant that he had had lumbar disc replacement but that failed, and he had to have a fusion to fix it. He says that Dr Bryant informed him that "disc replacements usually fail". He said he had never heard that before. He had not previously thought about that or related any ongoing pain to any problems with the initial surgery.
12. He says that he did not think of it further until his mother tagged him in a Facebook post put up by Commins Hendriks, his solicitors. On 15 August 2019, Commins Hendriks placed an ad suggesting that they wished to interview any person who had an adverse outcome from back surgery carried out in the Albury-Wodonga area between 2000 and 2019. It seems that the plaintiff's mother saw this ad and informed the plaintiff of it.
13. This resulted in the plaintiff contacting Commins Hendriks and the proceedings being commenced. There are now a number of actions being pursued by different plaintiffs against the defendant arising out of the treatment by the defendant of those persons many years ago.
14. The actions are at differing stages in this Court. One has already been the subject of a lengthy hearing. Others, such as this matter, have not yet been listed for hearing.

The limitation periods

1. This is a personal injury action. The acts or omissions the subject of the proceedings occurred after 6 December 2002 and as such Division 6 of Part 2 of the Act applies.
2. Sections 50A, C and D apply. Sections 50C and D are in the following terms:

50C Limitation period for personal injury actions

- (1) An action on a cause of action to which this Division applies is not maintainable if brought after the expiration of a limitation period of whichever of the following periods is the first to expire—
- (a) the 3 year post discoverability limitation period, which is the period of 3 years running from and including the date on which the cause of action is discoverable by the plaintiff,
 - (b) the 12 year long-stop limitation period, which is the period of 12 years running from the time of the act or omission alleged to have resulted in the injury or death with which the claim is concerned.

Note—

The 12 year long-stop limitation period can be extended by a court under Division 4 of Part 3 ...

50D Date cause of action is discoverable

- (1) For the purposes of this Division, a cause of action is discoverable by a person on the first date that the person knows or ought to know of each of the following facts—
- (a) the fact that the injury or death concerned has occurred,
 - (b) the fact that the injury or death was caused by the fault of the defendant,
 - (c) in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.
- (2) A person ought to know of a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact.
- (3) In determining what a person knows or ought to have known, a court may have regard to the conduct and statements, oral or in writing, of the person.
- (4) To remove doubt, a compensation to relatives action is not discoverable before the date of death of the deceased.
1. The plaintiff has abandoned reliance on s 50F.
 2. An action is not maintainable if brought after the first to expire of the 3-year post discoverability limitation period or the 12 year long-stop limitation period. The date on which the cause of action is discoverable is determined with reference to s 50D.
 3. The 12 year long-stop limitation period commences on the date of the act or omission of the defendant (in this case 2 March 2006 and 14 May 2010).

4. Division 4 of Part 3 of the Act also applies. A person may apply for an extension of the 12 year long-stop limitation period in accordance with s 62A. The Court may order an extension of the 12-year period if it is just and reasonable to do so but not to extend the period beyond the period of 3 years after the date on which the cause of action accrues having regard to Division 6 of Part 2.
5. Section 62B specifies the matters to be considered in determining an application for an extension of the 12 year long-stop limitation period.
6. The parties agree that I should firstly consider the date of discoverability because, if the 12 year long-stop limitation period has expired, it would not be permissible to extend the 12 year long-stop limitation period beyond 3 years after the date of discoverability.
7. Indeed, if I accept that the date of discoverability was more than 3 years before the date on which the statement of claim was filed, the plaintiff must be statute barred as there is no extension in the circumstances of this case permissible in respect of the 3-year post discoverability limitation period. Even if I might exercise my discretion and extend the long-stop limitation period it could not be extended to a date after the expiry of the 3-year post discoverability limitation period.
8. So, the first task is to determine the date of discoverability.

The date of discoverability

1. The plaintiff submits that the date of discoverability for the 2006 surgery was 1 June 2020, being the date on which he became aware of the contents of the report of Dr Hopcroft, an expert orthopaedic surgeon who was retained for the purpose of these proceedings. Only at that time did he know of all of the three facts set out in s 50D(1). The three facts are:
 1. the fact that the injury concerned occurred;
 2. the fact that the injury was caused by the fault of the defendant; and
 3. the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.
1. Dr Hopcroft prepared a report dated 22 April 2020 and the plaintiff became aware of the contents thereafter. Dr Hopcroft opined that the 2006 surgery was doomed to fail. The plaintiff commenced proceedings within 3 years of that date.
2. If I do not accept that primary submission, the plaintiff advances an alternative submission that, even if he ought to have known of the three facts at some time after seeing Dr Bryant in December 2018, he still commenced the proceedings within 2 years of that date.

3. In respect of the 2010 surgery, the plaintiff says that he first became aware of the three facts on 27 June 2020 after receipt of the report of Dr Drnda. Dr Drnda also considered that the first surgery was likely to fail and commented on deficiencies in the post-operative treatment. In his second report of 10 August 2023, Dr Drnda opined that the 2010 surgery was unnecessary.
4. At least in respect of the 2006 surgery, which was the subject of most of the evidence and submissions, the defendant says that the plaintiff ought to have known of the three facts by 2007-2008. This submission is largely based on the plaintiff's own evidence as to what he was told by the defendant prior to the operation in 2006 and what he ascertained and believed, having regard to his own enquiries and knowledge of what should have been the result of the operation.
5. The defendant accepts that the plaintiff did not know of the three facts at that time but says that the plaintiff ought to have known, as that term is understood in s 50D(1).
6. Whilst the plaintiff accepts that he knew that the injury had occurred at some point after the 2006 operation, he disputes that he knew of the second and third facts until 2020.
7. There is extensive medical evidence as to the state of the plaintiff's back condition over the years. The number of intervening events, including the surgery in 2010, makes it difficult to determine precisely when the plaintiff knew or ought to have known that his 2006 injury was sufficiently serious to justify the bringing of an action. The causal relationship between the surgeries in 2006 and 2010 and all the other events that have happened between those dates and up to the present time will be an issue at trial.
8. The plaintiff must have knowledge (or constructive knowledge) of the actual injury. Pointing to the existence of back pain after the event may not suffice. The plaintiff had back pain prior to the operation in 2006 and had back pain after the 2006 operation.
9. If that post operation back pain is "the injury", the question would still arise as to when that injury became sufficiently serious to justify pursuing an action. The fact that the plaintiff returned to some work and other recreational activities prior to the 2010 operation might raise a question as to precisely when the injury became sufficiently serious as to justify the bringing of an action.
10. The basis of the defendant's submission is really that the plaintiff knew that:
 1. he had not achieved the result from the 2006 or 2010 operations that the defendant suggested he would;
 2. he continued to suffer from back pain during the months and years after the 2006 operation which he knew was contrary to the suggestion of the defendant that he would recover within six weeks and be back at work and undertaking all the normal activities of a young man; and

3. he must have realised that the operation had failed because it had not achieved what the defendant said it would achieve.
1. In *State of NSW v Gillette* [2012] NSWCA 83 at [131] Campbell JA observed that the person would have to know or be in a position where they ought to know that they have sufficient prospects of recovering enough damages for it to be worthwhile litigating. That would require knowledge derived in some way, including from professional advice, that the injury in question was one to which the law would hold the defendant liable in damages and that the damages that could be recovered were large enough to be worth the time and trouble of suing. The plaintiff does not accept that he was aware of these matters at any time prior to consulting solicitors.
2. Whether he ought to have been aware must depend on whether that fact would have been ascertained if he had taken all reasonable steps before that particular time to ascertain the particular fact.
3. It is difficult to make any conclusion about the severity of his injuries at any particular time. It would be necessary to trace the plaintiff's symptoms through the particular periods to make any finding as to precisely when he ought to have known that his injury was sufficiently serious to justify the bringing of an action. The fact that he injured himself again in 2010 whilst using a donut on a water slide might raise a doubt as to the severity of his condition at that time. He says that he was told by the defendant at that time that the 2006 surgery had failed but he understood this to mean because of his accident on the water slide. His continued travel and work might raise a doubt as to the severity of his injuries at any particular time.
4. The fact, as he now alleges, that his second surgery did not relieve his back problem might also raise some doubt as to when he ought to have become aware that his injury was sufficiently serious to justify the bringing of an action.
5. However, it is unnecessary to undertake that precise tracing exercise for the purposes of this judgment because the date of discoverability is when all three facts are known or ought to have been known and I am not satisfied that the plaintiff knew or ought to have known that the injury (whether it be the 2006 injury or the 2010 injury) was caused by the fault of the defendant any time prior to 2018.
6. A person ought to have known a fact, assuming that the person has taken all reasonable steps before that time to ascertain the fact. It is no answer in an application such as this for a plaintiff to say that he did not take all reasonable steps and thus did not know. He ought to have known at a point when he could have found out if he had taken all reasonable steps available prior to that time.

7. Taking all reasonable steps includes obtaining medical and legal advice and information (*Baker-Morrison v New South Wales* (2009) 74 NSWLR 454 at [37] ("*Baker-Morrison*"). It is not necessary that the plaintiff be able to articulate a cause of action, but the plaintiff must know or ought to have known of the key factors necessary to establish a legal liability (*Baker-Morrison* at [39]).
8. The defendant submits that the plaintiff knew of the back condition and the results of the initial surgery by late 2006 or early 2007 and that he ought to have taken steps to seek medical and legal advice as to the appropriateness of the defendant's management of him and the need for the first surgery.
9. The defendant points to the plaintiff's evidence that the defendant had assured him that he would make a recovery and be back to his normal activities within six weeks. The plaintiff knew this did not happen. Further, the plaintiff was making some enquiries over the Internet as to the options and the operation recommended by the defendant.
10. The defendant also points to the evidence of the plaintiff about his consultation with Dr Bryant on 14 December 2018 when, according to the plaintiff, he first heard of any suggestion that the type of surgery performed in 2006 would usually fail. On the defendant's case, if the plaintiff had made reasonable inquiries in 2006 and 2007 he would have then found out that his ongoing back pain was caused by the fault of the defendant, that is in undertaking an operation which on the plaintiff's case was not appropriate.
11. The defendant submits that, in considering when the plaintiff ought to have known of the key factors necessary to establish a legal liability, it is important to have regard to the pleaded case and the particulars of negligence.
12. The defendant suggests that the particulars of negligence fall into three broad categories being:
 1. a failure to properly consider or assess prior to undertaking the 2006 surgery;
 2. a failure to take care in the decision to undertake the surgery and the performance of the surgery, that is performing surgery rather than treating the plaintiff conservatively; and
 3. a failure to warn or properly advise as to the risks associated with the surgery.
1. The defendant submits that the first category has no causal significance such that the real issue in these proceedings will be the alleged failure on the part of the defendant in not warning and advising the plaintiff about the appropriateness of the surgery at that time.
2. Put bluntly, the plaintiff's case is that the surgery was contraindicated, and the defendant should have known that it was always unlikely to achieve the result which the defendant assured the plaintiff it would.

3. The defendant then submits that, when regard is had to the plaintiff's statement and his evidence in cross-examination, I would be satisfied that, if he had made reasonable enquiries in 2006 or 2007, he would have ascertained that the surgery was contraindicated and would have become aware of each of the three facts set out in s 50D(1). Of course, the defendant does not accept the premise of the plaintiff's case but pursues this contention based on the plaintiff's allegations and evidence.
4. The plaintiff was cross-examined on these matters, albeit really limited to the 2006 surgery. The defendant suggests that I would not accept aspects of his evidence. I do have some reservations about some parts of his evidence. He seemed keen to avoid making any statements which might lead to any suggestion that he was aware of or had concerns about the surgeries in 2006 and 2010. He seemed reluctant to admit that he had concerns following the comments by Dr Bryant in 2018 or that he must have had some concerns in 2019 when he responded to the Commins Hendriks advertisement.
5. The defendant relies on *Bostik Australia Pty Ltd v Liddiard* [2009] NSWCA 167 ("Bostik") a case with some similarities and differences. In *Bostik*, the Court accepted that the plaintiff knew or ought to have known of each of the three facts at a time when he became aware that operative treatment did not provide the relief that had been anticipated by the treating doctor. Adopting the same approach, the defendant says that the plaintiff knew within months of the 2006 surgery that he was not better and would not be able to return to his pre-injury work and recreational activities (contrary to the assurances of the defendant). The defendant points to the evidence elicited during cross-examination as to the plaintiff's own understanding of the medical procedure he underwent and his own views as to recovery. The plaintiff said that he was interested in the safest form of surgery. The defendant says that he must have known that the procedure he underwent in 2006 was not successful.
6. However, the plaintiff says that he never paused to consider whether the cause of his ongoing problems (both following the 2006 and 2010 surgeries) might have been the performance of the operations. The defendant says that I would have difficulty accepting that statement in view of his attempts to find out more about the operations.
7. Again, the defendant submits that the plaintiff must be taken to have known that the operations did not fix his problems. I accept that but it does not necessarily follow that the surgeries must be taken to have failed or that the plaintiff ought to have known that they had failed.
8. It does seem to be drawing a rather long bow to suggest that a man in his mid-20s who has placed his faith in a doctor should have realised that the surgery performed by an expert, well-known orthopaedic surgeon had failed or was contraindicated such that he should have been making further enquiries of both a medical and legal nature for the purposes of establishing a legal liability on the part of the defendant.

9. Indeed, it seems a rather bold and counter-intuitive submission from the defendant to suggest that a person such as the plaintiff should have made enquiries about the potential legal liability of the defendant within 6 to 12 months of the 2006 surgery. The submission is no doubt made with the perspective of a defendant who is now being sued.
10. In the end, it was the statement of Dr Bryant in 2018 and the advertisement from Commins Hendriks which set the ball rolling in terms of these proceedings. The plaintiff's mother tagged him in a Facebook post which prompted him to contact Commins Hendriks.
11. I do not accept the defendant's approach to the issue. I am not satisfied that the date of discovery was 2006 or 2007 or any period within a few years of the 2010 surgery.
12. In my view, it was not reasonable to expect the plaintiff to obtain a second medical opinion as to his condition or an expert medical opinion or legal advice about the 2006 surgery (or the 2010 surgery) within 6 to 12 months of it occurring. I am not satisfied that he ought to have known that his ongoing back symptoms were caused by the fault of the defendant at that time.
13. I accept that the plaintiff did not know that his injuries were caused by the fault of the defendant (on his case) until 2020. I accept the plaintiff's evidence that there were a combination of events or circumstances including the comment by Dr Bryant in 2018, the advertisement placed by Commins Hendriks, the obtaining of legal advice and then the obtaining of the expert opinion from Dr Hopcroft in 2020 which led to the plaintiff becoming aware that his injury was caused by the fault of the defendant.
14. However, the question remains as to when he ought to have known that his injuries were caused by the fault of the defendant.
15. That necessarily involves a consideration of whether he ought to have sought legal and medical advice at some time before he did. That is, when would the relevant facts have been ascertained if he had taken all reasonable steps to ascertain the facts. It is apparent from the steps taken by his solicitors, once they were instructed, that they readily obtained expert medical opinion and provided advice on the fault aspect sufficient for proceedings to have been commenced. Bearing in mind the time since the criticised conduct of the defendant and the plaintiff's asserted back problems, it must be that if legal advice had been obtained earlier the same advice would have been given.
16. The limitation period is not fixed by the plaintiff's own choices as to when he seeks advice. Otherwise, the date of discoverability would always depend on when the plaintiff chooses to seek the appropriate advice. The operation of the limitation period depends not just on a subjective assessment of what the plaintiff knew but also requires an objective assessment of what he ought to have known if he had acted reasonably, of course having regard to the plaintiff's own circumstances.

17. In my view, it was the statement of Dr Bryant on 14 December 2018 (coupled with his own knowledge that the 2006 surgery had not worked as the defendant suggested that it would) which ought to have led to the plaintiff obtaining the legal and medical advice that he did in 2019/2020. That is, the plaintiff would have become aware of the three facts set out in s 50D within months if he had sought the necessary legal and medical advice following his consultation with Dr Bryant. Objectively assessed, the plaintiff, acting reasonably, should have and could have done so.
18. In the circumstances, I accept that the 3-year post discoverability period had not expired prior to the commencement of these proceedings on 20 October 2020. Whether he ought to have been aware of all three facts within a short period of hearing from Dr Bryant in December 2018 or only when he became aware of the opinion of Dr Hopcroft does not matter as he commenced these proceeding within 3 years of seeing Dr Bryant.
19. I make the same finding in respect of the 2010 surgery, although with different consequences.
20. I accept that the plaintiff did not know of all three facts until 2020 but in my view, acting reasonably, he ought to have known of all three facts in relation to the claim arising from the 2010 surgery within months of consulting Dr Bryant. That is because, if he had acted reasonably following his consultation with Dr Bryant, he would have sought legal and medical advice. Just as he would have become aware of the facts in relation to the 2006 surgery, he would have become aware of the facts in relation to the 2010 surgery as result of obtaining advice at that time.
21. Allowing a further 6 months to obtain the necessary advice/knowledge means that the date of discoverability in respect of each claim was 14 May 2019. Each cause of action was discoverable by that date.
22. Three years thereafter was 14 May 2022. Both claims became statute barred as at that date because:
 1. in respect of the 2006 surgery, both the three-year post discoverability limitation period and the long-stop limitation period had expired; and
 2. in respect of the 2010 surgery, both limitation periods had expired (coincidentally, the long-stop period expired the day before). Even if a different date (such as eight months) was used, it would not matter as the long-stop would still be the first to expire. If a shorter period to find out (such as three months) was used, the post discoverability period would be the first to expire but on any approach the outcome would be the same.
1. The plaintiff commenced proceedings in respect of the 2006 surgery within 3 years of the date of discoverability but after the expiry of the long-stop limitation period. As that limitation period expired prior to the three-year post discoverability limitation period, the proceedings are statute barred unless the plaintiff obtains an extension of the long-stop limitation period. The plaintiff needs an order extending the long-stop limitation period

until the date of commencement of these proceedings (which would be within the 3-year post discoverability period).

2. In respect of the 2010 surgery, the parties nominated the relevant date of the commencement of the claim as the date on which the motion seeking leave to amend was filed (being 26 September 2022) rather than the date on which the amended statement of claim was filed (3 October 2023). I am unsure why that is, but it does not matter for these purposes since the 3-year post discoverability period expired on 14 May 2022.

Extension of the long-stop limitation period

1. On application of the party seeking an extension of the long-stop limitation period, the Court is to hear such persons likely to be affected by the application as it sees fit and may, if it decides that is just and reasonable to do so, order the extension of the limitation period (s 62A). There is a preclusion on any extension beyond the 3-year post discoverability date.
2. Section 62B sets out the matters to be considered in determining the application for an extension. Specifically, s 62B requires the Court to have regard to the circumstances of the case and, to the extent that they are relevant to the circumstances of the case, the following matters:
 1. the length of and reasons for the delay;
 2. 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;
 3. the nature and extent of the plaintiff's injury or loss;
 4. any conduct of the defendant that induced the plaintiff to delay bringing the action;
 5. the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received; and
 6. the time when the cause of action was discoverable (within the meaning of Division 6 of Part 2) by the plaintiff.
1. The focus of the argument between the parties related to the issue of prejudice as referred to in s 62B(1)(b). However, as required by s 62B, I must have regard to all of the factors to the extent that they are relevant.
2. As is plain from ss 62A and B, the Court has power to extend the long-stop limitation period in certain circumstances. The exercise of the power is discretionary. That is, the Court may order an extension if it decides that it is just and reasonable to do so. The Court is not compelled to order an extension on satisfaction of certain conditions. Indeed, the only criteria for the exercise of the discretion is that it is just and reasonable to do so. Further, although various factors are listed in s 62B, whether any of those factors are relevant will

depend upon the particular circumstances of the case.

3. Having said that, and although the discretion is broad and general, the Court must have regard to at least those factors set out in s 62B(1) in considering whether to exercise the discretion in favour of the applicant.
4. There is no weighting system mandated by s 62B. The Court must first assess whether any or each of the factors are relevant in the particular circumstances of the case and assess how those factors might impact upon whether the extension is just and reasonable.
5. Further, the test is not one of exceptional circumstances. There is nothing in the legislation which suggests that an extension of the long-stop limitation period should only be granted rarely or in exceptional circumstances.
6. Yet, the Court must have regard to the fact that a limitation period exists for a reason. Limitation periods are necessary to ensure the proper and fair administration of justice which is generally not served through extensive delay in the pursuit of proceedings. The quality of the evidence is often diminished through extensive delay. Documents may no longer be available and witnesses' recollection of events may fade over time. Presumptive prejudice is often recognised even though a defendant may not be able to point to specific evidence that is not available after lengthy delay.
7. In *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 ("Brisbane South"), McHugh J observed at 551:

"The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates'. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose." (Citations omitted)

1. As there is a preclusion on extending the long-stop limitation period beyond the expiry of the 3 year post discoverability limitation period, there can be no extension beyond 14 May 2022. It follows that extending the long-stop period until 14 May 2022 will still mean that the proceedings in respect of the 2010 surgery are outside the limitation period and thus are statute barred. It is not necessary to consider the 2010 claim further. The claim in respect of the 2010 surgery must fail as being commenced outside the limitation period and not being amenable to any extension which could cure that defect.

Extending the period in respect of the 2006 claim

1. The period between the conduct said to give rise to the cause of action and the commencement of the proceedings is lengthy, although the period between the expiry of the long-stop limitation period and the commencement of the proceedings is not so lengthy.
2. The reason for the delay is straightforward. The plaintiff did not know that he might have a cause of action against the defendant until 2018-2020. He did not delay once he became aware of the potential claim although he ought to have become aware earlier.
3. He sought medical and legal advice once he became aware of the potential for a claim. He suffers from a back injury, but his injury could not be described as catastrophic.
4. There is no conduct of the defendant which induced him to delay bringing the action. I do not accept that statements made by the defendant after the surgeries assuring him of a successful outcome would be conduct falling within s 62B(1)(d).
5. As specified in s 62B(1)(f), a factor which may be relevant is the time when the cause of action was discoverable. As I have already identified, it was not discoverable until around the expiry of the long-stop limitation period.
6. Leaving aside s 62B(1)(b), none of the factors, to the extent they are relevant, are of such significance or importance or so adverse to the plaintiff's application that they would militate against any extension.
7. The focus of the argument was on the issue of prejudice as referred to in s 62B(1)(b).
8. The defendant submits that, even if the date of discoverability was not as the defendant maintains, I would accept that the plaintiff's knowledge of the factors which might have given rise to a cause of action was so extensive at a much earlier time that it would not be just and reasonable to extend time. The defendant points to earlier cases such as *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1, *Drayton Coal Pty Ltd v Drain* [1995] NSWCA 131 and *McLean v Sydney Water Corporation* [2001] NSWCA 122 as dealing with different legislation but the same point (being whether it is just and reasonable to extend time).

9. The defendant submits that the outcome of this case might depend on which evidence is accepted. The defendant no longer has his original handwritten notes. He is thus unable to say what might be in those notes. The notes might have provided essential information which could be used to refute the plaintiff's assertions. The hospital records are also not available.
10. Adopting McHugh J's observations in *Brisbane South*, the defendant submits that this gives rise to prejudice which would not make it just and reasonable to grant an extension.
11. The defendant makes this submission despite the existence of letters from the defendant after each consultation which provide a detailed account of each consultation.
12. In the end, the defendant submits that he has suffered relevant and substantial prejudice because he is unable to refer to his notes when responding to the plaintiff's assertions as to what advice might have been given and what might have been said at any particular consultation.
13. On the other hand, the plaintiff submits that, other than the notes and hospital records, all the information which would have been available to the defendant many years ago remains available to the defendant.
14. Indeed, I note the following.
 1. The defendant is still alive and able to give instructions, as is apparent from the letters and instructions to the defendant's experts.
 2. The original scans and imaging reports remain available. The experts on both sides have commented on these scans and reports.
 3. The defendant has not adduced evidence by way of his own statement so as to demonstrate what he now knows and remembers and what he might not know or remember. Evidence from a defendant that, because of the passage of time, he is unable to answer some of the allegations raised by the plaintiff might carry significant weight, but the defendant chose not to serve any statement setting out the evidence he might give prior to this application.
 4. Of course, he was not required to serve his evidence in the principal proceedings but he was afforded an opportunity to serve any evidence on which he might rely in response to the plaintiff's application.
 5. Both parties have obtained expert opinions on breach and causation. Neither party points to any expert being unable to offer an opinion because of the passage of time.
 6. The defendant did not raise any particular damages issues, such as an inability to investigate the plaintiff's claim for economic loss.

1. Much thus depends on the significance of the absence of the defendant's handwritten notes and the hospital records. Ordinarily the absence of such notes and records may be critical because it would be difficult to accept that any specialist could remember what happened at a consultation such a long while ago.
2. However, the circumstances of this case are not the norm. Both parties have access to letters from the defendant sent to various GPs and the workers compensation insurer during the period 2006 to 2010. Each letter provides details of the symptoms described by the plaintiff at the particular consultation, treatment, recommendations, diagnosis and prognosis. The letters are not short on detail.
3. Further, the reports of each operation are available, as are reports from the physiotherapist.
4. There may be presumptive prejudice as the defendant may be unable to say what his notes might have revealed but it is difficult to accept that they would reveal much more than the detailed correspondence from the defendant throughout the period of the plaintiff's treatment.
5. Absent evidence from the defendant that his handwritten notes are likely to be much more extensive than the letters he sent immediately following the consultations, I would not infer that there is likely to be important evidence contained in the notes not referred to elsewhere.
6. There is a form of presumptive prejudice but leaving aside what is not known about those documents which are no longer available, there appears to be no other prejudice to the defendant. He is in as good a position to defend the matter as he would have been many years ago (not that doing a comparison is the test).
7. Having regard to all of the factors set out in s 62B, I am satisfied that it is just and reasonable to extend the operation of the long-stop limitation period.
8. I am satisfied that it would be just and reasonable to extend the long-stop limitation period to the date on which the proceedings were commenced, being 20 October 2020.
9. I make the following orders.
 1. The long-stop limitation period for the commencement of the proceedings is extended to 20 October 2020.
 2. Those paragraphs of the amended statement of claim that purport to plead a cause of action in respect of the 2010 surgery are struck out.
 3. The plaintiff is to serve an amended statement of claim on the defendant reflecting these orders within 14 days.
 4. The matter is listed for further case management before me on 9 December 2024 at 9:30am.

5. Costs will be the defendant's costs in the cause. Should the parties seek any different order, that can be raised on 9 December 2024.

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Decision last updated: 21 October 2024

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