

Espinos v Chong [2013] WADC 174 (8 November 2013)

Background

Mr Espinos had a left knee rupture of the anterior cruciate ligament resulting in that knee regularly dislocating when put under pressure. He underwent a patellofemoral reconstruction of the left knee in December 2006 which did not improve his symptoms. On 15 February 2010, Mr Chong, orthopaedic surgeon, performed a total knee replacement on Mr Espinos' left knee at Bunbury Regional Hospital. On 25 February 2010, Mr Espinos felt a popping sensation in his left calf. On 26 February 2010, Mr Espinos was transferred by the Royal Flying Doctor Service from Bunbury Regional Hospital to Royal Perth Hospital. The next day, Mr Espinos underwent surgery to repair the popliteal artery in his left knee which had been severed during the knee replacement operation.

Mr Espinos subsequently commenced legal proceedings against Mr Chong. However, the originating summons dated 6 March 2013 was not filed until 15 March 2013. As the proceedings were issued out of time, Mr Espinos' sought an extension of time to commence an action against Mr Chong.

The District Court dismissed Mr Espinos' application on the basis that:

1. Mr Espinos' cause of action arose no later than 5 March 2010; and
2. Mr Espinos was at all times aware that Mr Chong caused his injury.

The Law

- Pursuant to section 14(1) of the *Limitation Act 2005* (WA) (**the Act**):

"An action for damages relating to a personal injury to a person cannot be commenced if 3 years have elapsed since the cause of action accrued."

- Pursuant to section 55(1) of the Act:

"A cause of action for damages relating to a personal injury to a person accrues when the only or earlier of such of the following events as are applicable occurs —

- (a) The person becomes aware that he or she has sustained a not insignificant personal injury;*
- (b) The first symptom, clinical sign or other manifestation of personal injury consistent with the person having sustained a not insignificant personal injury."*

- Pursuant to section 3 of the Act, a "personal injury" is defined as:

"A disease, impairment of a person's physical condition and mental disability."

- The Act does not define the word "aware".

- Pursuant to section 39(3) of the Act:

“On an application a court may extend the time in which the action can be commenced if the court is satisfied that, when the limitation period expired, a person to whom the cause of action accrues —

- (a) Was not aware of the physical cause of the death or injury; or*
- (b) Was aware of the physical cause of the death or injury but was not aware that the death or injury was attributable to the conduct of a person.”*

The Issues

The issues were as follows:

- Was Mr Espinos’ injury a “not insignificant personal injury”?
- When did Mr Espinos become aware of his not insignificant personal injury?
- When did Mr Espinos’ not insignificant injury manifest itself?
- When the limitation period expired, was Mr Espinos aware that the injury was attributable to the conduct of Mr Chong?

Application

Was Mr Espinos’ injury a “not insignificant personal injury”?

The parties agreed that Mr Espinos’ severed artery constituted a not insignificant personal injury.

When did Mr Espinos become aware of his not insignificant personal injury?

Mr Espinos’ position was that Mr Chong advised him there was a reasonable prospect that after physiotherapy, he would get full movement of the knee and no further dislocation. Mr Chong further advised that the complication which occurred as a result of the surgery on 15 February 2010 would not have any lasting impact on the use of Mr Espinos’ left leg. Despite undertaking physiotherapy for three to four months, Mr Espinos had no significant improvement. In fact, his symptoms became worse. Nevertheless, he relied on Mr Chong’s advice that his knee would improve and the pain would eventually disappear. It was only in July 2010 that Mr Espinos began to think he may have a permanent problem. Mr Espinos argued that it was then that he first became aware that he had sustained a “not insignificant injury”.

Goetze DCJ did not accept this argument stating that it is quite usual for loss and damage to not be fully sustained for some time after a person is injured. An injured person need not have suffered all potential loss and damage to be aware that he or she has suffered a not insignificant injury.

Goetze DCJ held that Mr Espinos could not have been expected to know that the “popping sensation” was a severed artery or of the fact that it was severed in the knee replacement surgery. However, he can reasonably be expected to have been aware that it was no ordinary or insignificant occurrence to transfer him by flying doctor from Bunbury Regional Hospital to Royal Perth Hospital. He underwent further surgery at Royal Perth Hospital to repair the severed artery. After that surgery, Mr Espinos was informed of the severance of the artery. All this meant that a not insignificant personal injury had manifested itself. Clearly Mr Espinos was aware of his injury and it

was not insignificant. It was held that, in the circumstances, the cause of the action accrued by 5 March 2010 (at the very latest) when Mr Espinos was discharged from Royal Perth Hospital and returned to Bunbury Regional Hospital.

When did Mr Espinos' not insignificant injury manifest itself?

Goetze DCJ held that the first symptom, clinical sign or other manifestation of the severed artery was around 25–27 February 2010 when the popping sensation occurred, when Mr Espinos was transferred to Perth, and when Mr Espinos was operated on.

When the limitation period expired, was Mr Espinos aware that the injury was attributable to the conduct of Mr Chong?

Goetze DCJ held that Mr Espinos was aware of the injury and the physical cause of his injury, being the severed popliteal artery, by no later than 5 March 2010. He was also aware at all times that Mr Chong caused that injury.

Conclusion

Goetze DCJ concluded that, on the facts, there was no power to grant an extension of time. The originating summons was therefore dismissed.

Our Observations

This decision illustrates that one of the key issues is awareness, or means of awareness, of the existence of a not insignificant personal injury. In reaching a decision, Goetze DCJ looked at the surrounding factual circumstances to determine whether or not Mr Espinos was aware that he had sustained a not insignificant injury.

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