

Barr v Farrell [2013] WASCA 211 (10 September 2013)

Key Points

- Recent Medical Negligence/Limitations Act Case – WA.
- This recent decision of the Court of Appeal deals with the Limitation Act 2005 (WA), and the circumstances in which an extension of time will be granted to issue proceedings after expiry of the limitation date.

Background

The appellant issued an application at the District Court under s41 and s44 of the Limitation Act for an extension of time to sue a medical practitioner and a hospital in relation to a right shoulder injury she allegedly sustained due to use of forceps during childbirth. The appellant's guardian had received incorrect legal advice about the expiry of the limitation period, and as a result, proceedings were not issued within time.

Under the former (repealed) Limitation Act 1935, doctors and hospitals were exposed to litigation related to childbirth for a period of up to 24 years. The current Act sought to address this by reducing the limitation period to 6 years, but allowing the Court to grant an extension of time in certain circumstances.

The Law

The District Court application

The primary judge refused the appellant's application for extension of time to issue proceedings.

His Honour found that the delay in commencing legal proceedings would not diminish the prospects of a fair trial and would not significantly prejudice the defendants. However, he was not satisfied it was unreasonable for the guardian not to commence the action within time, since he had acted reasonable in accordance with legal advice. He accordingly dismissed the application pursuant to s41(3).

The Appeal

On appeal, the appellant argued that the primary judge had misinterpreted s41(3) of the Act and in particular, had misinterpreted what constitutes unreasonable actions by a guardian.

By a majority (Newnes J dissenting) the Court of Appeal allowed the appeal and overturned the decision of the primary judge. Murphy JA found that the

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the guardian's decision not to commence proceedings within time was based on an unreasonable view of the limitation period. The protection of plaintiff in these circumstances was for the purpose for which s 41(3) was designed. Pullin J found that the primary judge had erred by taking into account the wrongful legal advice obtained by the guardian and that it was appropriate to grant an extension under s44.

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