

## *AME Hospitals Pty Ltd v Dixon (by her next friend Dixon) [2015]* WASCA 63

### Key Points

- Extension of the limitation period application – respondent suffered severe injuries at birth.
- Proper construction of section 39 of the *Limitation Act 2005* (WA).

### Background

The respondent was born on 7 August 2001 at Attadale Private Hospital. She was floppy and not breathing. She was revived and shortly thereafter transferred to Princess Margaret Hospital (**PMH**) for observation and treatment.

Shortly after birth, the respondent was diagnosed with hypoxic ischaemic encephalopathy (**HIE**), a disease of the brain resulting from asphyxia (lack of oxygen). In November 2002, global developmental delay in the respondent's gross motor skills and speech was confirmed. In June 2003, the respondent was referred to the Cerebral Palsy Association with the referral letter stating that she has cerebral palsy with moderate quadriplegia and had hypoxic ischaemic encephalopathy at birth. At that stage, the respondent's father, Andrew Nigel Dixon, was not aware of the possible causes of the respondent's cerebral palsy.

In 2006, Mr Dixon and his wife sought legal advice from Ilberys Lawyers about the possibility of commencing legal action against Dr Simon Clarke (the doctor who managed the delivery of the respondent) and AME Hospitals Pty Ltd (**AME**). Ilberys Lawyers obtained an expert report dated 23 October 2006 from Professor CA Michael which was silent as to the cause of the respondent's HIE and cerebral palsy. Relevantly, Professor Michael made no criticism of the conduct of Dr Clarke or AME. Mr Dixon and his wife accepted Professor Michael's opinion and did not take the matter further.

Some years later, on the advice of Ilberys Lawyers, Mr Dixon and his wife obtained a further expert report from Professor Gustav Dekker dated 15 August 2012. Professor Dekker concluded that the respondent's neurological problems can be attributed to lack of appropriate care during the delivery process and to the conduct of Dr Clarke and AME.

On 24 July 2013, Mr Dixon filed an application for an extension of time under sections 39, 41 and 42 of the *Limitation Act 2005* (WA) (**Act**) as the respondent's next friend to commence proceedings against Dr Clarke and AME.

On 23 December 2013, the court granted leave under section 39(3)(a) and (b) to extend the limitation period. Dr Clarke and AME subsequently applied for leave to appeal the court's decision.

## The Law

The provisions relevant to present case were sections 7, 39 and 41 of the Act. The focus at first instance was confined to section 39.

Section 7 makes special provision for certain personal injury actions relating to childbirth. Specifically, when the cause of action (that is, childbirth) occurred prior to the commencement of the Act (that is, 15 November 2005), the limitation period is extended to 15 November 2011. In the present case, it was not in dispute that the relevant limitation period expired on 15 November 2011.

Pursuant to section 39:

- (1) A plaintiff may apply to a court for leave to commence an action for damages relating to a personal injury to a person even though the limitation period provided for under this Act has expired.
- (3) 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;
  - (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; or
  - (c) was aware of the physical cause of the death or injury and that the death or injury was attributable to the conduct of a person but after reasonable enquiry, had been unable to establish that person's identity.
- (4) On an application a court may extend the time in which the action can be commenced up to 3 years from when a person to whom the cause of action accrues became aware, or ought reasonably to have become aware --
  - (a) of the physical cause of the death or injury;
  - (b) that the death or injury was attributable to the conduct of a person (whether a defendant or not); and
  - (c) of the identity of the person mentioned in paragraph (b).

## Conclusion

The decision turned on the proper construction of section 39. The court considered the meaning of the terms: "injury", "the physical cause of the ... injury", "attributable", "aware" and "ought reasonably to have become aware" as they applied to the present facts and circumstances.

- The "injury" was cerebral palsy resulting from HIE at birth.
- The "physical cause" of the injury was the interrupted blood flow (asphyxia) to the respondent's brain. A physical cause refers to the event which, in fact, caused the injury. Importantly, factual causation must be distinguished from legal causation which is concerned more so with who caused the injury.

- The term "attributable" does not require there to be a causal connection, but a sufficient connection to justify legal action, between the conduct and the injury.
- The term "aware" must be understood in its natural and ordinary meaning, that being, cognisant or informed of. Actual awareness is required, not constructive awareness (the notion that a person can take reasonable steps to become aware of certain facts). That Mr Dixon was aware that the respondent had HIE and cerebral palsy is not enough to satisfy the actual awareness requirement. The proper conclusion is that Mr Dixon first became aware of the physical cause of the respondent's injury and that the injury was attributable to the conduct of Dr Clarke and AME on receipt of Professor Dekker's opinion in August 2012.
- The court reasoned that whether Mr Dixon "ought reasonably to have become aware" of the things identified in subsections 39(4)(a) to (c) must be assessed against what can be expected of Mr Dixon having regard to his characteristics, his attributes and the circumstances. The real question was whether, after receiving Professor Michael's report, Mr Dixon, acting reasonably, ought to have further investigated the causation issue. Having regard to Professor Michael's qualifications and expertise, the fact that he was briefed with all available information, and because his opinion was expressed without qualification or equivocation, it was held to be reasonable for Mr Dixon to cease investigations and not inquire further.

It is clear from the assessment of section 39 against the factual circumstances that Mr Dixon did not become aware of all the matters listed in subsections 39(4)(a) to (c) until he received Professor Dekker's report in August 2012. Therefore, the court properly extended the limitation period.

Leave to appeal was granted with the additional comment that the appeal must be dismissed.

## Lessons Learnt

This case is quite unhelpful to defendant medical practitioners (and their insurers) in cases where the injury was suffered at birth and there have been extensive delays in the commencement of legal proceedings. There was an 11 year delay between the date of the injury and the date that Mr Dixon became aware that the injury was attributable to Dr Clarke and AME's conduct.

For more information on this article, please contact:

Mark Birbeck  
Partner  
Email: mark.birbeck@hbalegal.com  
Direct Line: (08) 9265 6002

Shannon Mony  
Associate  
Email: shannon.mony@hbalegal.com  
Direct Line: (08) 9265 6016

*Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.*