

## Wolverson v Todman; Wolverson v Lisle and Hooper and Ors [2015] QCA 74

### Key Points:

- Extension of the limitation period – two separate applications.
- Consideration of the terms “knowledge” and “means of knowledge” in determining whether applicant took all reasonable steps to become aware of material facts.

### Background

Julia Wolverson was under the care of Dr Donald Todman, neurologist, between 1991 and 2009. Dr Todman had initially diagnosed Ms Wolverson with multiple sclerosis (**MS**) and treated her accordingly. In diagnosing Ms Wolverson with and treating her for MS, Dr Todman relied on:

- MRI scans taken by Dr Paul O’Connell on 16 May 2002;
- MRI scans taken by Dr David Lisle on 21 June 2004;
- MRI scans taken by Dr Timothy Hooper on 30 May 2006; and
- MRI scans taken by Dr John McGuire on 17 September 2007 (**the four radiologists**).

Unfortunately, neither Dr Todman nor the four radiologists picked up that Ms Wolverson was not actually suffering from MS. On 7 April 2009, Dr C Kua, radiologist, reported to Dr Todman that Ms Wolverson was possibly suffering from a Chiari Type 1 malformation (a protrusion of the cerebellar tonsil). Ms Wolverson then sought Dr Robert Campbell’s opinion who arranged for her to have a further MRI which confirmed the presence of the malformation. It was uncontroversial that the malformation was present in each of the previous MRI scans and that each of the four radiologists and Dr Todman failed to identify it. Ms Wolverson underwent surgery on 26 June 2009 to treat the malformation and 5 months later she reported to Dr Campbell that, save for her vision impairment, she felt that a lot of her symptoms had resolved.

Ms Wolverson made several allegations against Dr Todman and the four radiologists including that they were negligent in failing to diagnose her with the malformation. Ms Wolverson commenced proceedings:

- On 21 May 2010 and consent orders were made on 27 May 2010 (**the consent orders**) giving Ms Wolverson leave to proceed with a personal injury action against Dr Todman (**the action against Dr Todman**). Leave was granted on two important conditions, those being, (a) that Ms Wolverson file any application for an extension of time within six months of receiving an independent specialist’s report, and (b) that Ms Wolverson make all reasonable and genuine attempts to procure the report within six months following the application; and
- On 31 July 2013 and orders were made on 30 July 2013 giving Ms Wolverson leave to proceed with a personal injury action against the four radiologists (**the action against the four radiologists**). Leave was granted on the condition that Ms Wolverson file an application for an extension of time by 31 January 2014.

In the action against Dr Todman, Ms Wolverson filed the application for extension of time on 21 January 2014.



In the action against the four radiologists, Ms Wolverson filed the application for extension of time by 31 January 2014.

On 17 April 2014, the primary judge refused to grant an extension of time in both actions. Ms Wolverson:

- Applied for leave to appeal in the action against Dr Todman (**the neurology application**);
- Filed a notice of appeal against the primary's judge's decision in the action against the radiologists (**the radiology appeal**).

On appeal, it was uncontroversial that each action was commenced out of time, and that an extension of time needed to be granted in order for the actions to progress.

The primary issue before the appellate court was whether, pursuant to sections 31(2)(a) and 30(1)(c) of the *Limitation of Actions Act 1974* (Qld) (**the Act**), Ms Wolverson had knowledge or means of knowledge of all material facts of a decisive character before 27 May 2009 (in the action against Dr Todman) and 31 July 2012 (in the action against the four radiologists).

## The Law

The key provisions in this case were sections 31(2)(a) and 30(1)(c) of the Act.

Section 31(2)(a) grants courts the power to extend the limitation period applicable to personal injury actions based on negligence. Specifically, in circumstances where:

- 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
- 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.

Section 31(2)(a) is subject to section 30(1)(c) which states that a fact is not within the means of knowledge of a person at a particular time if:

- The person does not know the fact at that time; and
- As far as the fact is able to be found out by the person, the person has taken all reasonable steps to find out the fact before that time.





## Conclusion

The appellate court partially allowed the appeal.

### *The action against Dr Todman*

Pursuant to section 31(2)(a) of the Act, it was agreed that the operative date was 27 May 2009, being one year before the action against Dr Todman was commenced. Therefore, Ms Wolverson had to prove that a material fact of a decisive character was not within her means of knowledge until 27 May 2009 (or later) and had to adduce evidence sufficient to establish her right of action.

The court was satisfied that, prior to 27 May 2009, Ms Wolverson was not aware of all material facts in question (and had taken all reasonable steps to find out all the material facts in question). The reasoning was that it was only in April 2009 that the malformation was detected, in June 2009 that the surgery was performed, and November 2009 that Ms Wolverson reported most of the symptoms had resolved.

Therefore, the neurology application was successful. Ms Wolverson was granted leave to appeal, the appeal was allowed with costs, and an order was made extending the limitation period.

### *The action against the four radiologists*

Pursuant to section 31(2)(a) of the Act, it was agreed that the operative date was 31 July 2012, being one year before the action against the four radiologists was commenced. Therefore, Ms Wolverson had to prove that a material fact of a decisive character was not within her means of knowledge until 31 July 2012 (or later) and had to adduce evidence sufficient to establish her right of action.

It was accepted that availability of an independent specialist's report which could prove a causal link (between the practitioner's conduct and Ms Wolverson's injury) was a material fact of a decisive character. Such a report was not available to Ms Wolverson before November 2013 and January 2014 (when two expert reports from Dr John Earwaker, radiologist, and Dr Ross Mellick, consultant neurologist, were respectively received (**the expert reports**)).

However, section 30(1)(c) of the Act qualifies "means of knowledge" to mean that although Ms Wolverson did not have the expert reports until November 2013 or January 2014, she had the means to obtain them beforehand by taking all reasonable steps to obtain them. The issue then became whether Ms Wolverson took "all reasonable steps" to obtain the expert reports prior to 31 July 2012.

As already outlined, Ms Wolverson knew in April 2009 that the malformation was detected. Ms Wolverson sought legal aid in 2010. She knew it was important to engage an independent radiologist to opine on whether the malformation could be identified on the previous MRI scans and, thereafter, she knew that funding for such a report had been approved. However, she and her solicitors together made a decision (for whatever reason) to defer obtaining the radiological report. The radiological report would have reviewed the four radiologists' professional work and determined whether Ms Wolverson had grounds to commence proceedings against them as well. Because Ms





Wolverson knew all of these facts, it was not reasonable for her to defer obtaining the report from 2010 to sometime in late 2013.

Therefore, the radiology appeal was unsuccessful on the basis that Ms Wolverson had not taken all reasonable steps to ascertain all material facts of a decisive character by 31 July 2012 and the limitation period was not extended.

## Lessons Learnt

This is a relevant decision in cases where the plaintiff has made an application to extend a limitation period but has delayed unreasonably in bringing that application. It is incumbent upon the plaintiff to make all reasonable inquiries to ascertain the correct potential defendant in a timely manner. The plaintiff is not entitled to claim that he or she did not know who the correct defendant was if he or she had an opportunity to take reasonable steps to find out. It must be noted that this is a Queensland case and the requirements for an extension of time application may differ in other jurisdictions.

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