SUPREME COURT OF QUEENSLAND

CITATION:	***Whitcombe v. Khoo & Ors*** **[2002] QSC 043**
PARTIES:	**KAREN MAY WHITCOMBE** (Applicant) v **PAUL PONG TIAH KHOO** (Respondents) and **SAINT ANDREWS PRESBYTERIAN WELFARE ADMINISTRATIVE BOARD** (First Third Party) and **ENDOVASIVE PTY LTD** (Second Third Party) and **FEMCARE LTD** (Third Third Party) and **QUEENSLAND SURGICAL PTY LTD** (Fourth Third Party)
FILE NO:	S57/1998
DIVISION:	Trial Division
DELIVERED ON:	20 February 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	14 December 2001
JUDGE:	Dutney J
ORDERS:	**The period of limitation for instituting proceedings against the defendant arising out of a failed sterilisation procedure on 4 November 1994 be extended until 22 May 1998.** **The defendant's application for summary judgment is dismissed.** **The plaintiff is to pay the defendant's costs of the summary judgement application in any event, such costs to be assessed on the standard basis. Costs of the application for an extension of time reserved.**

CATCHWORDS:	LIMITATIONS OF ACTIONS – EXTENSION OF PERIOD – Applcn to extend period of limitations - Appct fell pregnant after failed sterilisation procedure – Wh material fact of a decisive nature was within the appct's means of knowledge before critical date – Wh steps taken by the appct to obtain necessary advice or information reasonable – Wh resp prejudiced by delay. *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 - FAA *Dick v University of Queensland* [2000] 2 Qd R 476 - CON. *Limitation Act* 1974 ss 30(1)(c) & 31(2)(a).
COUNSEL:	D A Reid (sol) for the Applicant D V McMeekin SC for the Respondent
SOLICITORS:	Murphy Schmidt for the Applicant Swanick Murray Roche for the Respondent

[1] **Dutney J:** Karen May Whitcombe seeks an extension of time within which to commence proceedings against Dr Paul Pong Tiah Khoo resulting from a failed sterilisation operation performed on her at St Andrews hospital on 4 November 1994. There is a converse application by Dr Khoo for summary judgement if the extension application fails.

[2] Mrs Whitcombe learnt that she was pregnant on 23 April 1995. The latest date of conception was 10 March 1995. Proceedings were commenced on 22 May 1998 by the filing of a writ. The period of limitation is submitted to have expired on 10 March 1998 and for the purposes of this application for an extension I am prepared to accept that date without further consideration.

[3] The first issue is whether a material fact of a decisive character was not within the applicant's means of knowledge until after 22 May 1997 (a date more than

two years after the alleged cause of action arose and not earlier than one year prior to the issue of the writ.[1]

[4] The material fact relied on here is the knowledge that the cause of the failure of the sterilisation was the failure by Dr Khoo to properly secure the clip and that there was no reasonable excuse for such failure. The fact was said to have first come within the applicant's means of knowledge when Dr Barrowclough reported to the applicant's solicitors on 15 April 2001.

[5] The respondent submits that the applicant failed to take reasonable steps to find out the fact that she now relies on prior to 22 May 1997. This is relevant because of s30(1)(c) of the *Limitation Act* which provides:

> "**(c) A fact is not within the means of knowledge of a person at a particular time if, but only if –**
> **(i) the person does not know the fact at that time; and**
> (ii) **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"**

[6] The child was born at the Mater hospital on 28 November 1995. The applicant did not consult solicitors about the possibility of a claim until 9 May 1996. The attendance upon solicitors was the result of a conversation Mrs Whitcombe had with the former wife of a barrister who was aware of her situation and suggested she seek legal advice. The applicant's position was exacerbated by the fact that the child was born with spina bifida which is the subject of a separate claim not affected by the limitation problem. The separate claim in relation to the spina bifida has, however had an affect on the steps taken which are relevant to the claim relating to the failed sterilisation.

[7] On 27 May 1996 the applicant's solicitors requested her Mater hospital records. Between that date and July 1996 the applicant approached her general practitioner, Dr Julie Burke seeking her records. The doctor responded by telling the applicant she could ruin Dr Khoo's career. This upset the applicant who then told Dr Burke not to worry about the records.

[1] *Limitation Act* 1974 s31(2)(a).

[8] In the same period Mrs Whitcombe approached the Mater hospital herself seeking her records but was told that she would have to obtain them from her treating general practitioner.

[9] On 8 August 1996 Dr Barrowclough, who had been engaged to provide an expert opinion, advised that he could not offer any advice without records of the operation or the treatment provided. He did advise that an opinion given by Dr Khoo to the applicant at the time of the pregnancy to the effect that the sterilisation failed because the clip moved about half a millimetre could not be correct.

[10] On 4 October 1996, the applicant's solicitors spoke with Dr Burke who advised them that her records were at another practice.

[11] On 25 November 1996 a further sterilisation procedure was carried out by a Dr Birk. Ther is no record of his having been asked at that time to indicate his operative findings in relation to the prior procedure or to provide his records.

[12] Nothing further of relevance to this application appears to have been done by the applicant's solicitors prior to the relevant date of 22 May 1997. After that date some further unsuccessful attempt was made to obtain the records of the Mater hospital, the writ was issued on 22 May 1998 making claims both in relation the failed sterilisation and the spina bifida and on 17 May 1999, prior to the delivery of the statement of claim, a notice of change of solicitors was filed. Writs of non party discovery were filed and records obtained. Dr Barroclough provided a further opinion on 24 April 2001 advising that the records did not allow him to comment on the procedure and a further opinion on 15 May 2001 indicating that in his view the clips had not been properly closed at the time of the original procedure. This latter opinion was based on a knowledge of the mechanics of Filchie clips and not on any specific record.

[13] The respondent submits that the material fact relied on was within the applicant's means of knowledge before the crucial date. In support of this

submission the respondent relies on the fact that ultimately, nothing more was known about the performance of the first operation at the time of the application than was known when the applicant first approached solicitors. If records were thought to be significant little attempt was made to obtain them until after the change of solicitors and those that had been sought were of marginal relevance since the critical records would have been those of St Andrews hospital which were not sought at all until after the relevant date. Particular reliance is placed on the judgement of Thomas JA in *Dick v University of Queensland* [2000] 2 Qd R 476 at para [36]:

> "**In cases where a potential claimant lacks a material fact, and reasonably needs the help of a solicitor or someone else to obtain it, some further time may reasonably elapse before it should be held that such facts are within the claimant's means of knowledge. Such time will include the time which would reasonably elapse if the claimant, taking all reasonable steps to do so, consults solicitors or other persons, and those solicitors or those other persons undertake the necessary inquiries to ascertain the necessary additional facts to show whether or not there is a worthwhile cause of action.**"

[14] Earlier, at [34] his honour had said:

> "**In making a finding of fact on this important question, the reasonableness of the steps taken by the claimant needs to be considered, and of course a claimant will not succeed if he or she has unreasonably delayed in obtaining the necessary advice or information.**"

[15] The respondent submits that in this case the applicant knew what information was required and simply did nothing to obtain it. She knew the solicitors had not located the records and knew no relevant opinion had been obtained. It was unreasonable in the circumstances for her to do nothing over a period of two years after she knew the procedure had failed.

[16] In my view it was reasonable for the applicant to do nothing about the failed operation until after the birth of the child. Indeed, it seems to me to be very likely that but for the fact that the child was born with spina bifida the applicant would have simply accepted the child as an unexpected blessing and taken no action. I also consider it reasonable for the applicant not to have

taken steps to progress the matter for some period after the birth while she adjusted to her situation. The failure to consult solicitors before 9 May 1996 is thus, in my view unremarkable.

[17] After solicitors were consulted the initial opinion of Dr Barrowclough was obtained with reasonable dispatch by August. The period preceding Dr Barrowclough's initial opinion was not demonstrably wasted or unduly long. By August it should have been clear that the only reliable way to obtain records was to issue proceedings and issue writs of third party discovery. How quickly things might have progressed is best illustrated by the time taken by the current solicitors for the applicant to discover the "fact" after they took over. From the service of writs of third party discovery until the obtaining of the important St Andrews hospital records took from 1 November 1999 until some time in March the following year, more than 4 months. To obtain the final opinion from Dr Barrowclough took until mid May. If time is also allowed for the issue of the writ and the drafting of the statement of claim, which would have been a necessary precursor to the third party discovery process, I find that even had the applicant's original solicitors acted with greater urgency they were unlikely, in the course of events as they transpired to have discovered the material "fact" before 22 May 1997. Since it is reasonable to rely on advisers such as solicitors until, at least, it appears that they are not acting diligently a longer period must elapse before the applicant will be damned by the lethargy of her advisers. In this context I have to consider what would have been reasonable for the applicant to have done after she ascertained that her solicitors were not acting with due diligence. I do not think, taking this last matter into account that there was any prospect of the applicant obtaining a considered opinion from Dr Barrowclough indicating negligence by 22 May 1997.

[18] In the circumstances I am satisfied that the material fact relied on was not within the applicant's means of knowledge until after 22 May 1997.

[19] There remains the proper exercise of my discretion as to whether to extend time. Relevant to this matter is that there is no affidavit from Dr Khoo

suggesting prejudice by reason of delay. I am asked simply to draw the inference from the lapse of time between the cause of action arising and the statement of claim being served, a period from March 1995 until June 1999 or more than four years. *Brisbane South Regional Health Authority v Taylor*[2] requires a comparison of the position of the defendant when the cause of action arose with that when the writ was issued. In this case it seems appropriate to consider the further period until the statement of claim was served because until then Dr Khoo would not have known that the failed sterilisation as well as the failure to diagnose spina bifida were both the subject of the claim.

[20] At the time the initial procedure was performed there would have been nothing remarkable about it from Dr Khoo's point of view. In the absence of any evidence from Dr Khoo I would not expect Dr Khoo to have any clear recollection of an apparently routine sterilisation procedure even after the four months between the procedure and the onset of the pregnancy. By the time Dr Khoo performed the Caesarean section to deliver Mrs Whitcombes baby he was aware that the child had been conceived after the procedure performed by him had failed and in circumstances where there had been discussions regarding termination preceding the birth. The circumstances were such that the doctor was able to comment after the delivery on a slight movement of the clips. It seems to me much more likely that Dr Khoo would remember the circumstances of a delivery after a failed procedure than a routine procedure.

[21] Without evidence from Dr Khoo I do not consider the delay in this case is of itself sufficient to have caused prejudice and accordingly I exercise my discretion in favour of the applicant.

[22] I order that the period of limitation for instituting proceedings against the defendant arising out of a failed sterilisation procedure on 4 November 1994 be extended until 22 May 1998.

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[2] (1996) 186 CLR 541

[23] Since the defendant's summary judgement application was predicated on the expiration of the limitation period the order I have just made renders it superfluous. This was conceded by senior counsel for the defendant. Despite this it was brought prior to the application to extend the limitation period and nearly three and a half years after the institution of the proceedings. It fails because its issue prompted the extension application which failed. I order that the plaintiff pay the defendant's costs of the summary judgement application in any event, such costs to be assessed on the standard basis. I reserve the costs of the application for an extension of time.