

# Limitation issues in childhood sexual abuse cases resulting in psychiatric injury

## *Lisa Jacks v the State of New South Wales* [2013] NSWDC 168

By Ramina Kambar

**P**laintiffs who are victims of child sexual abuse face the challenge of overcoming limitation issues and bearing the costs of limitation applications before they can commence civil proceedings.

These are often very difficult cases.

The factors to be taken into account in extending a limitation period to allow a plaintiff to bring a claim were recently explored in the matter of *Jacks v The State of New South Wales* [2013] NSWDC 168, argued before Mullen DCJ. Interestingly, the costs in this case were not all borne by the plaintiff, due to protracted cross-examination by the defendant of the plaintiff.

### THE FACTS

The plaintiff, Ms Lisa Jacks, filed a Statement of Claim alleging negligence against the State of New South Wales (the defendant), being the entity liable for the acts and omissions of the Department of Family and Community Services (DOCS). The plaintiff's case was brought under ss148A, 148B and 148C of the *Child Welfare Act* 1939 (NSW). The plaintiff alleged that despite being notified to DOCS and registered as a child at risk, the defendant failed to conduct a thorough investigation and exercise its statutory

power to remove and therefore protect her from her domestic situation in circumstances of reported parental neglect, abuse and sexual abuse over a 15-year period.

The defendant argued that the claim was statute-barred. The defendant further argued that the plaintiff was a liar, that her complaints of neglect and abuse were inherently improbable and that the plaintiff had, in times of stress, fabricated the truth and made misrepresentations about her character, academic qualifications and family situation. The defendant's cross-examination of the plaintiff was protracted in an effort to discredit her as a witness.

### COURT'S POWER TO EXTEND A LIMITATION PERIOD

Under s60G of the Act, if an application is made to a court by a person claiming to have a cause of action accruing on or after 1 September 1990 and founded in negligence and for damages for personal injury, the court may decide that it is just and reasonable to order that the limitation period for the cause of action be extended.

The matters to be considered by the court are as set out in s60L(1)(a) and (b). A court can extend a limitation

period where it is satisfied that the plaintiff: (i) did not know that personal injury had been suffered; OR (ii) was unaware of the nature or extent of personal injury suffered; OR (iii) was unaware of the connection between the personal injury and the defendant's act or omission at the expiration of the relevant limitation period or at a time before that expiration when proceedings might reasonably have been instituted; AND the application is made within three years after the plaintiff became aware (or ought to have become aware) of all three matters listed in para (1)(a)(i)-(iii).

Murrell DCJ considered the relevant issues in the decision as to whether or not to extend the limitation period as being whether the plaintiff was a credible witness, and whether she was unaware of the nature and extent of her personal injury or the connection between that injury and the alleged acts and omissions of the defendant. In doing so, Her Honour gave consideration to when the plaintiff should have become aware of this connection and whether it was just and reasonable to extend the limitation period having regard to the extent of the delay, whether there was a viable cause of action and whether there was any prejudice to the defendant.

**Section 60L(1)(a)(i) and (ii)**

The plaintiff gave evidence that she was unaware of the nature and extent of her psychiatric problems until she was diagnosed as having a recognised psychiatric injury. Although the plaintiff had undergone counselling, Murrell DCJ concluded that she did not fully comprehend the nature and extent of her injuries and satisfied the requirements of 60L(1)(a)(i) and (ii).

**Section 60L(1)(a)(iii)**

The plaintiff's realisation and growing awareness was triggered by the loss of custody of her own child in August 2008. The plaintiff gave evidence that she had suppressed memories of her childhood until this point of time. This prompted her to request her DOCS file in December 2008. She argued that she did not make the connection between the alleged breaches and the nature and extent of her injury at any certain point in time but that this was a gradual process of realisation. The defendant submitted that at that time of requesting her DOCS file, the plaintiff had made the connection between her injury and the alleged acts/omissions.

Murrell DCJ considered that although the plaintiff had requested her DOCS file, she was ignorant as to DOCS' alleged culpability. Expert

evidence served by the plaintiff supported her claim that she could only have become aware of the connection between her childhood abuse and the alleged failings of DOCS to protect her once she came to a conscious realisation that her childhood abuse had caused major psychiatric problems for her.

**OTHER CONSIDERATIONS:  
REASONABLE PROSPECTS  
OF SUCCEEDING IN THE  
SUBSTANTIVE CLAIM**

Under s60G(2), a court can extend a limitation period only if it is just and reasonable to do so. In determining whether it is just and reasonable, the court will have regard to whether a plaintiff has demonstrated a viable cause of action and has a reasonable prospects of succeeding at trial on the evidence available.

Her Honour noted that, undoubtedly, a delay of 30 years was substantial. There were, however, no adverse inferences drawn against the plaintiff's failure to call witnesses relevant to her substantive case in order to demonstrate that she had a viable cause of action. Her Honour concluded that there was a viable cause of action based on the DOCS records alone and that there was ample basis for the plaintiff to argue that

DOCS failed properly to investigate her domestic situation and take available action, as alleged.

**OUTCOME**

In relation to when the plaintiff should have become aware (and taken reasonable steps to find out), Murrell DCJ concluded that it was not the case that the plaintiff ought to become aware of her condition prior to 2010. Notwithstanding the defendant's attempt to discredit the plaintiff as a witness, Her Honour found the plaintiff to be a credible witness and noted that throughout the protracted cross-examination, the plaintiff emerged relatively unscathed. Further, the documentation in the DOCS file substantiated the plaintiff's complaints.

In relation to costs, Murrell DCJ concluded that the defendant cross-examined the plaintiff repetitively and for the most time to little effect, consequently ordering that the plaintiff not have to bear the defendant's costs for 1½ days of the limitation hearing.

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