

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

No.

B E T W E E N:

THEA SPANDIDEAS

Plaintiff

- and -

DR VELLAR

Defendant

CASE SUMMARY [2008] VSCA 198

Justice Kaye on 6 June 2008 found that the Plaintiff who suffered injury in 1997 was not barred in bringing a proceeding issued on 31 May 2007 or in the alternative extended the period of time in which to bring such proceedings.

The Plaintiff bore a daughter on 8 February 1996 by way of forceps delivery. She shortly thereafter developed an anal fissure which led to the Plaintiff attending upon the Defendant in April 1997 for surgical treatment of that fissure by way of a lateral sphincterotomy. The Plaintiff thereafter suffered from faecal incontinence.

The Plaintiff had blamed her faecal incontinence upon the obstetrician who delivered her child in February 1996. The Plaintiff first obtained medical advice that the incontinence was from the negligence in the April procedure in August 2006.

The Court found that the meaning of fault in Section 27F(1)(b) of the Limitations of Actions Act 1958 under the definition of discoverability

“should be given its ordinary everyday meaning in Section 27F(1)(b) in order than an action be discoverable by a Plaintiff, the Plaintiff must know (or ought to know) (inter alia) that the death or personal injury which is the subject of the Plaintiff’s cause of action, was caused by an action which the Defendant ought not to have performed, or should have performed differently, or by an omission by the Defendant to perform an act which the Defendant ought to have performed”.

His Honour found that the Plaintiff’s claim was not discoverable until a date less than 3 years prior to the date of issue and therefore not statute barred. In the alternative his Honour granted an extension under Section 27K, 27L.

Leave was sought by the Defendant to appeal. Justices Dodds-Streeton and Pagone on 7 August 2008 refused leave [2008] VSCA 139. Her Honour said in an extensive judgement refusing leave:

“It is unnecessary to express a view on whether sufficient doubt attends the correctness of the declaration that the Respondent’s cause of action is statute barred, in circumstances where I am not satisfied that His Honour’s determination that the Respondent should be granted an extension of time is attended by the degree of doubt which would warrant its review on appeal. It follows from that conclusion ... that, in my view, substantial injustice to the Applicant is not made out.”

Pagone AJA agreed with Her Honour. The reasoning of Kaye J. has been followed by Kyrou J. in *Tucker v Barwon Health & Geelong Hospital* 2008 VSCA 229. The judgement has national significance in that it

considers the language used in the IPP report on the question of discoverability.