

Danger for the defamed, and their lawyers

By BARON ALDER and GREG COUSTON

The authorities suggest an extension to commence a defamation action out of time will only be granted if the plaintiff is virtually blameless. This creates particular pressures for a plaintiff's lawyers, particularly when faced with a looming limitation period.

While their number has decreased since the tort law reform of the last decade, claims involving a failure to commence an action within time still comprise about 10 per cent of the notifications LawCover receives.

As many lawyers will be aware, the limitation period for defamation actions is one year from the date of publication.¹ There is an opportunity under s.56A(2) of the *Limitation Act*² for an extension of up to a further two years, but the courts are becoming increasingly unforgiving towards applicants seeking an extension.

The deliberately restrictive regime for the commencement of defamation actions "demands that parties and their advisers act timeously in respect of the narrow limitation window that is allowed".³ This places various pressures on practitioners with clients who have, or even suspect they might have, been defamed.

Demonstrate not reasonable

An applicant for an extension of time under s.56A(2) of the *Limitation Act* is required to demonstrate that it was not reasonable to have commenced an action within the one-year period, not merely that it was reasonable to have delayed commencing the action.⁴ The onus on such an applicant has been described as "a heavy one"⁵ and a "difficult hurdle to overcome unless there are some unusual circumstances."⁶ In many cases, whether unusual circumstances exist will depend on the conduct of the plaintiff's lawyers.

It is unlikely an extension will be granted if a plaintiff's lawyers, through their own delay, fail to commence an action within a year despite having been instructed in sufficient time to be able to do so. However, in the Western Australian case of *Wookey v Quigley (No.2)* (*Wookey*), a plaintiff in existing defamation proceedings was denied an extension

of time in respect of additional publications of which her lawyers became aware (through non-party discovery) only a matter of days before the limitation period for the additional publications expired.⁷ Illustrating the expectation on lawyers to act quickly when faced with an expiring limitation period, Justice Martin commented that the plaintiff's lawyers had two business days and an intervening weekend "as allowable time to act, before the 12-month limitation period expired" (at [43]).

Because of its particular circumstances, *Wookey* is not authority for the argument that a plaintiff must always move to commence proceedings within a number of days if faced with an expiring limitation period.⁸ However, the case does illustrate the requirement that a plaintiff's lawyers act without delay in view of a looming limitation period, particularly when the scope for an extension of time is limited.

And, even though the judge in *Wookey* expressly stated that he did not regard "the plaintiff or her advisers [as having] acted unreasonably", the case



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sets a very high standard against which practitioners' conduct may be assessed in future actions.

Circumstances justifying an extension will usually exist if the plaintiff is unaware of the defamatory publication within one year.⁹ However, it has also been held that in cases where a person does not know the content of a publication but suspects it may be defamatory, they must take "prompt steps to obtain access to the publication, with a view to assessing whether the communication is defamatory or not".¹⁰ A plaintiff's lawyers have been expressly identified as being subject to this obligation: "In the circumstances of the present case [*Cassar v Network Ten*], the plaintiff or his lawyer would be expected to take prompt action to ascertain if the defendant had published material about the incident and if the incident was defamatory" (emphasis added).

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ENDNOTES

1. Section 14B of the *Limitation Act 1969* (NSW). This was part of a national reform of defamation laws. The limitation period in all states and territories is one year from the date of publication.
2. Section 56A(2) provides that the court "must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action ... within 1 year... extend the limitation period ... to a period of up to 3 years".
3. *Wookey v Quigley (No. 2)* [2010] WASC 209 (emphasis added).
4. *Ritson v Gay & Lesbian Community Publishing Limited & Ors* [2012] NSWSC 483.
5. *Ibid.*
6. *Cassar v Network Ten Pty Limited* [2012] NSWSC 680; *Houda v State of New South Wales* [2012] NSWSC 1036.
7. See n.3. It is relevant that in this case the plaintiff had already commenced a defamation action and the publications in question were similar to those the subject of the existing proceeding.
8. See n.4.
9. *Rayney v The State of Western Australia (No. 3)* [2010] WASC 83.
10. *Cassar v Network Ten Pty Limited* [2012] NSWSC 680. Hislop J was citing Justice Martin's decision in *Wookey*.
11. See *Hearne v Street* [2008] HCA 36.
12. [1982] 1 NSWLR 585. See also *Houda v State of New South Wales*.
13. See s.347(2) of the *Legal Profession Act 2004* (NSW).
14. See *Houda v State of New South Wales*. □