SUPREME COURT OF QUEENSLAND

CITATION:	*Church v A.E Smith & Son P/L* [2002] QSC 015
PARTIES:	**KEITH ANDREW CHURCH** (Plaintiff/Applicant) **V** **A.E. SMITH & SON PROPRIETARY LIMITED** ACN 004 274 793 (Defendant/Respondent)
FILE NO/S:	S 410/00
DIVISION:	Trial
PROCEEDING:	Application to Extend Time
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	1 February 2002
DELIVERED AT:	Townsville
HEARING DATE:	10 December 2001
JUDGES:	CULLINANE J.
ORDER:	**Application to be dismissed with costs to be assessed**
CATCHWORDS:	LIMITATION OF ACTIONS-PERSONAL INJURIES-EXTENSION OF TIME-KNOWLEDGE OF MATERIAL FACTS-Plaintiff suffering prolapsed disc at L4/5 in accident in March 1993-Prolapse not revealed until MRI in early 2000-Plaintiff informed that he should avoid work involving lifting, bending-whether medical advice given shortly after the injury should have led a reasonable person to institute proceedings.
COUNSEL:	D Turnbull, for the applicant M O'Sullivan for the respondent
SOLICITORS:	Giudes & Elliott for the applicant Boulton, Cleary and Kern for the respondent

[1] The Plaintiff seeks an order extending the time for the institution of proceedings by him against the Defendant so that it expires on 8th July 2000, the day after proceedings were instituted.

[2] The relevant date for the purposes of considering whether he knew or had the means of knowledge of the relevant material facts is therefore 7th July 1999.

[3] The material facts relied upon are:

(a) that the Plaintiff had suffered a prolapsed disc at L4/5, and

(b) that in consequence he would be precluded from carrying out work involving lifting and bending.

[4] The Plaintiff was born on the 20th day of December 1971. He completed a course at TAFE in electrical studies. He worked for the Defendant as an apprentice electrical fitter and it appears that he worked after qualification as an electrician.

[5] It is clear that he suffered an injury to his lumbar spine on the 18th March 1993 when he and a co-employee were lifting and manoeuvring a motor and base plate into position. The weight was some 150 kgs.

[6] I accept that the Plaintiff has satisfied the requirements of s.31(2)(b) of the *Limitation of Actions Act.* There were no submissions directed to me on this subject by the Defendant to the contrary effect. For the purposes of these proceedings it is sufficient to observe that an acceptance of the Plaintiff's evidence that he was required or permitted to lift or handle a weight of such a kind would justify a finding against the Defendant.

[7] Similarly the Respondent did not contend that there was no evidence providing a causal link between the accident and the prolapsed disc which was found on a MRI in 2000.

[8] The issue is whether prior to 7th July 1999 the Plaintiff had knowledge or the means of knowledge of facts which would have led a reasonable person to have taken appropriate advice about his position and armed with such advice to have instituted proceedings.

[9] FACTS

[10] The Plaintiff experienced pain in the lower back whilst he was carrying out the task just described and felt some further pain at the time when he and his co-employee were completing the reconnection of the motor to a pump. He continued to suffer what he describes as a constant ache in his lower back until the following Saturday, 20th March, when as he was alighting from his vehicle and turning his body to do so he experienced the onset of acute pain in the lower back and found that he could not stand up straight.

[11] Through arrangements made by his mother he was able to see Dr Monro a specialist in rehabilitative medicine. Dr Monro was known to the Plaintiff's mother and saw the Plaintiff on that day (20th March) and treated him with ultra sound and massage.

[12] Some X-rays were taken which showed no obvious abnormality. Dr Monro saw the Plaintiff on the 22nd, 23rd, 24th and 26th March. In evidence before me he said that he assumed at the time that the Plaintiff suffered from some nerve ridge irritation from a disc lesion. The Plaintiff had some symptoms of sciatica.

[13] On 24th March Dr Monro told the Plaintiff to stay off work for another week but in fact the Plaintiff returned to work on the following day. It seems from Dr Monro's evidence that the Plaintiff was to perform some work in Cairns and he gave the Plaintiff the name of a doctor to whom he could go in the event that he suffered any further problems.

[14] The Plaintiff says that he continued to suffer from what he describes as a dull ache which was constant. He worked without having any time off.

[15] On the 18th July 1994 he suffered the onset of a more severe pain whilst lifting a 24 kg drum. He consulted Dr Monro and saw him on some five occasions at that time. On 18th July. Dr Monro gave him an injection of pethidine because of the pain and prescribed analgesics. I will return to the evidence of Dr Monro as to what was said between he and the Plaintiff during this time.

[16] At some time the Plaintiff commenced to work for Contract Building Services Pty Ltd in Cairns. This is a family business. He was performing heavy lifting and bending work of a kind similar to that which he previously performed. Much of this work involved laying epoxy floors.

[17] He continued to suffer from constant low grade pain which he says he understood from what he had been told was muscular. A good deal of driving over long distances was involved in his work.

[18] As he explained it in evidence he had commenced to assume the tasks of tradesman in the business and then in 1998 became supervisor. This enabled him to avoid some of the heavier work but according to his affidavit he continued to nonetheless carry out work of this kind as well as performing supervisory duties. In evidence he said that heavy lifting and manual lifting is done by labourers.

[19] The Plaintiff had other incidents in which he suffered the onset of acute pain and for which he received chiropractic treatment. On 3rd November 1997 the Plaintiff was involved in a motor vehicle accident when a vehicle overturned. He did not suffer any direct injury to the lower back but his pain in the lower back was aggravated by it and he developed some thigh pain following it.

[20] In May 1999 he attended a physiotherapist following an injury to his right shoulder whilst playing touch football. He informed the physiotherapist of his back problems and he received some treatment for that also.

[21] Between the incident the subject of this application and early 1999 the Plaintiff not only continued working but also engaged in sporting activities such as touch football. After the injury to his shoulder he was told by Dr Guazzo, a neurosurgeon that he should not play touch football again.

[22] His lower back symptoms deteriorated in the latter part of 1999. He saw Dr Monro in August 1999 following another motor vehicle in which his vehicle was struck from behind. This exacerbated his lower back problems.

[23] In early 2000 he saw Dr Walker, a chiropractor in Townsville complaining of low back pain and also a pain in the mid back and the neck. Of these his complaint in the lower back was the worst. As a result of this consultation an MRI was carried out on his lumbar spine which revealed the large disc herniation at L4/5 and smaller bulges at other levels.

[24] This was when the Plaintiff learned for the first time that he had a disc prolapse. He was referred to Dr Guazzo, a neurologist of Townsville. He also saw Dr Monro in early 2000 following the MRI.

[25] The Plaintiff says that it is only with the result of the MRI that he realises that he has more than a muscular problem with his lower back and that there are significant restrictions upon his capacity to work. Dr Monro says that he should severely limit his lifting.

[26] It should also be mentioned that the Plaintiff had had some injury to his lower back in 1989 or early in 1990 whilst at work. He said he did not take any time away from work and quickly recovered from it.

[27] It is the Plaintiff's case that following the 1993 incident his symptoms settled to a stage that enabled him to return to work and he has continued working until the present. He says that whilst he suffered a constant low dull back pain this has not prevented him from carrying out his tasks or from engaging in quite physical sporting activities. He says that there have been a number of specific incidents or episodes which have resulted in increased pain for periods during which he received treatment which resulted in his symptoms returning to the level of the dull ache in the lower back enabling him to return to work.

[28] He has had something like 30 or 40 chiropractic consultations and also some physiotherapy consultations. He says that these were associated with the relatively small number of incidents to which I have referred with a number of consultations following each such incident or episode of increased symptoms.

[29] The various chiropractors who have treated the Plaintiff provided reports. Two of the chiropractors swore affidavits and three gave evidence. I will return to what they said shortly.

[30] The Plaintiff says that he was also led to believe that his problems were muscular. He says he was told this by Dr Beattie in 1995. Dr Beattie's report suggested he was of the view the Plaintiff suffered degenerative disc disease. The matter was not directly raised with Dr Beattie in cross-examination.

[31] Dr Monro gave evidence of a conversation that he had with the Plaintiff following the 1994 attendance which followed the lifting of the 24 kg item causing the onset of acute symptoms in the lower back. Dr Monro did not purport to speak from a specific memory but said that he was certain that he would have spoken to the

Plaintiff about his lower back and the problems he was having with it. He gave these questions and answers (page 52 – lines 10 to 50 – p 57 lines 45 –55.

P.52 "...But, Doctor, you were there and you were with him and he saw you on these occasions in '94. Would you have told him that he had to be careful about lifting heavy objects, for example?-- There again, I can't remember this discussion but, this having been a second incident -----

Yes?-- -----I'm sure that we would have talked somewhat about what was causing the problem for him.

And – and what would have you have explained to him about that?-- I'm sure I would have said that he would have to take things easy.

In respect to-----?-- Lifting-----

-----working?-- Lifting and – bending and lifting. All right. And can you – I'm sorry, a moment ago I think you said that you also had a practice of telling people certain things in these situations. Is that right?— We talk a great deal about what's going on.

Yes. Can you inform us a little bit more about what you would have said to him about what was going on?-- I would have tried to give some explanation to him and – that I would have said to him that it's in his – in his interest to maybe monitor things and to be aware of not lifting as much.

Yes?—I think I probably would have talked it – you know – around that sort of – that topic.

Yes. Would you have informed him that he had a – a permanent disability to his back?— Well, in the sense that – when he first presented to me in March 1993 he was complaining a lot of leg pain as well. But, when he presented in July of 1994 it was mainly in regards to back pain. There was some referral a little further to the right side but there wasn't a leg pain component that he had in 1993.

Yes. Well, Doctor, I'm really asking about your conversation with him. Would you have told him that he had a permanent back condition that required him to not lift as much at work?— I don't know whether I'd use the word "permanent" but I would have said to him – I think I've already said to you that he – he had a significant problem and that he should limit his work practices."

P.57... "All right. But there would be – would there or would there not be people that you would have advised over the years that have presented on particular occasions with symptoms of sciatica and yet with your approval they've been cleared to go back to lifting and heavy labouring duties?-- I'm – I'm sure that I would have expressed an opinion to them that they should limit to some extent what they were doing. I mean, I wouldn't say go back to heavy labouring work with a crook back".

[32] The Plaintiff does not have a good recollection of what Dr Monro said to him. whereas Dr Monro said that when he saw him in 1993 he was of the belief that the Plaintiff had a disc lesion and believes that he told the Plaintiff that, the Plaintiff says that he does not recall any such discussion. There was according to the Plaintiff some discussion about nerve involvement in the pain which the Plaintiff said in evidence extended into his hip rather than into his legs.

[33] He says all of the chiropractors gave him general advice that he had a problem which he had to take care with. Again his recollection of what they said is not good.

[34] Dr Payne and Dr Beattie, chiropractors who treated the Plaintiff at different times swore affidavits in which they deposed to their general practices. Neither had any specific recollection. Each say they would have told the Plaintiff of the need to limit his employment to jobs involving little or no **strain** or jarring on the spine. The Plaintiff denies this and I think it fair to say that neither came up to this evidence when cross-examined. Dr May did not suggest that he told the Plaintiff to limit his work.

[35] Dr Monro has sworn an affidavit the effect of which is that he did not tell the Plaintiff to severely curtail lifting when he saw him in 1993 because he was not aware at that time of the disc lesion in the lower back. I had initially some concerns about whether this evidence was inconsistent with the evidence Dr Monro gave in cross-examination and which has been set out earlier but it seems to me that it is not, there being questions of degree involved.

[36] The issue on an application of this kind is whether the Plaintiff prior to the relevant date had knowledge of or the means of knowledge of material facts which would have led a reasonable person in his position to have sought advice and armed with such advice, take action.

[37] I should mention that the Plaintiff in 1997 did speak on the telephone to a solicitor. At this time he was concerned with the expenses that he was incurring in chiropractic fees and was interested to know whether there was some source from which he could obtain assistance with payments. He made it clear that he had not considered suing, as it was not a matter that he regarded as relevant whilst he was in work and able to perform his tasks without requiring time off. I should add he is still in the same employment but his attitude has changed because he now realises he has a disability of some severity which will probably curtail his activities in the future and may lead to surgery. His advice at the time was that he was out of time to make any claim for such fees.

[38] It will not be of any assistance to the Plaintiff on an application of this kind if being in possession of or having the means of knowledge of material facts which would have led a reasonable person to take steps to ascertain his position, a more serious condition emerges later which might give rise to a right to a substantially larger award of damages than that recoverable on the earlier action which ought to have been instituted. See *Mills v Comalco Aluminium Ltd* (1992) ACL Rep: 255 Qld 1.

[39] There have been a number of cases in which Plaintiffs have succeeded in obtaining extensions where having suffered an injury to the back they returned to work

without suffering any significant on-going problems so far as work is concerned. In those cases, it was held that it was not unreasonable for those persons to proceed without seeking any advice from their medical practitioners as to their position and their prognosis. *Healy v Ferndale* (C.A. Qld No 37 of 1992 9/6/93 unreported) is an example.

[40] I think the Plaintiff's position is different to the position of the Plaintiffs in those cases. Here he undoubtedly was aware he had suffered a substantial injury to his lower back. Dr Monro, most likely informed him that he would have to take things easy and that he would have to modify his lifting. It seems also likely that Dr Monro told him that he had had some damage to a disc. The Plaintiff therefore knew he had a back problem which would limit the type of work he could do.

[41] I am not prepared to find that the chiropractors (or any of them) told him to limit his work activity. However I accept he was told he had an ongoing problem with his back which required him to be careful. The evidence of the Plaintiff that he was told he had a muscular problem seems to be at odds with the views expressed by Dr Beattie. I have already found that Dr Monro most likely told him he had damage to a disc. In these circumstances I am not prepared to find that he was told that he had a muscular problem or that he proceeded in the belief this was the case..

[42] I adopt with respect what Thomas J (as he then was) said about the considerations relevant to an application of this kind:

> *"In appeals of the present kind, when the material fact concerns the nature and extent of personal injury, questions of degree are necessarily involved. At one end of the spectrum, a case of latent symptoms of apparently trivial injury, followed by eventual discovery, a serious condition will plainly justify an extension, and an appeal court could readily detect error in a refusal to grant it. At the other end of the spectrum, cases of patently serious orthopaedic injury productive of observable economic loss followed by belated realisation that the consequences are likely to be worse than had been contemplated, will not justify an extension, an appeal court could likewise readily correct an erroneous decision. Somewhere between these extremes there is a range of cases where different minds might reasonably form different assessments of the level of the Plaintiff's knowledge and as to whether the reasonable person contemplated by s.30(b), endowed with such knowledge and having taken appropriate advice, would have brought proceedings..."*

[43] Whilst in many respects the Plaintiff's persistence in his work notwithstanding the constant dull pain and the episodically more acute pain is in many ways commendable as has been his determination to get on with his life, I think that it is impossible to avoid the conclusion that a reasonable person in his position, given his youth and the restrictions which Dr Monro told him he would be affected by, ought to have sought advice about his position and that had he done so action would have been instituted.

[44] Perhaps put more correctly the Plaintiff has not satisfied me that a reasonable person in his position with his state of knowledge would not have taken advice and as a result instituted proceedings.

[45] The result must be that the application is dismissed.

[46] The application is dismissed with costs to be assessed.