SUPREME COURT OF QUEENSLAND

CITATION:	*Whittaker v Farnsway Mining Construction Pty Ltd* [2002] QSC 022
PARTIES:	**DEWAYNE WILLIAM WHITTAKER** (plaintiff) **v** **FARNSWAY MINING CONSTRUCTION PTY LTD ACN 010 562 713** (defendant)
FILE NO/S:	9987 of 2000
DIVISION:	Trial Division
PROCEEDING:	Civil
ORIGINATING COURT:	Brisbane
DELIVERED ON:	13 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2002
JUDGE:	White J
ORDER:	**The period of limitation for bringing proceedings be extended to 16 November 2000. There be no order as to costs.**
CATCHWORDS:	*Limitation of Actions Act* 1974, s 30, s 31 *WorkCover Queensland Act* 1996 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419 *Opacic v Patane* [1997] 1 Qd R 84
COUNSEL:	Mr W Sofronoff QC and Mr P Smith for the applicant Mr M Grant-Taylor for the respondent
SOLICITORS:	Paul Everingham & Co. for the applicant O'Mara's Lawyers for the respondent

[1] The applicant has applied for an order that the limitation period for bringing a claim against his former employer in respect of an injury sustained by him on 27 October 1997 be extended pursuant to s 31 of the *Limitations of Actions Act* 1974.

[2] The limitation period in respect of the subject injury expired on 27 October 2000. On 13 November 2000 Helman J granted the applicant leave to bring a proceeding for damages despite non-compliance with s 280 of the *WorkCover Queensland Act* 1996. The claim and statement of claim were filed on 16 November 2000. The various steps under the *WorkCover Act* have occurred including the holding of a s 293 conference on 21 December 2001 which did not settle the claim.

The provisions of the Limitation of Actions Act 1974

[3] The *Limitation of Actions Act* 1974 ("the Act") precludes an action for damages for personal injury due to negligence after the expiration of three years from the date on which the cause of action arose, s 11. Some relaxation of this statutory prohibition against commencing an action after that time is provided for in Part 3 of the Act.

[4] Section 31(1) applies to actions for damages for negligence in respect of personal injury. Subsection (2) provides:

> "Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court-
>
> (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
>
> (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;
>
> the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the application in that court, the period of limitation is extended accordingly."

[5] Section 30 defines a number of the concepts employed in s 31(2). It provides that:

> "(a) the material facts relating to a right of action include the following-
>
> (i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
>
> (ii) the identity of the person against whom the right of action lies;
>
> (iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;
>
> (iv) the nature and extent of the personal injury so caused;

(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing-

(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and

(ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;

(c) **"appropriate advice"**, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts, as the case may require;

(d) 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 at that time know the fact; and

(ii) so far as the fact is capable of being ascertained by the person, the person has before that time taken all reasonable steps to ascertain the fact."

[6] No issue is raised in relation to evidence to establish a right of action, and there is no suggestion of any prejudice to the defendant as a result of the delay.

[7] The approach to deciding whether the necessary extension should be granted is set out succinctly in the judgment of Dawson J in *Do Carmo v Ford Excavations Pty Limited* (1984) 154 CLR 234 at 256 where his Honour considered analogous New South Wales provisions. This passage was quoted with relevant Queensland interpolations by Thomas JA with whom Pincus JA agreed in *Dick v University of Queensland* [2000] 2 Qd R 476 at [26].

> '"The form of the legislation requires, I think a step-by-step approach. The first step is to inquire whether the facts of which the appellant was unaware were material facts: s. 57(1)(b) [Qld s 30(1)(a)]. If they were, the next step is to ascertain whether they were of a decisive character: s. 57(1)(c) [Qld s. 30(1)(b)]. If so, then it must be ascertained whether those facts were within the means of knowledge of the appellant before the specified date: s. 58(2) [Qld] s. 30(1)(c)]."'

[8] With those provisions in mind the relevant factual matters may be examined.

The incident on 11 January 1997

[9] The applicant was born on 22 September 1967. He is now aged 34 years. He was employed as a miner/truck driver by an associated company of the present defendant in the Northern Territory. On 11 January 1997 he was working at the McArthur River Mine. As he descended a ladder from a truck he lost his footing, fell to the ground and suffered an injury to his left foot. His swollen ankle was treated at the mine with ice and he was taken to Mount Isa Hospital where ligament damage was diagnosed. X-rays taken at the hospital showed "no definite evidence of a fracture", exhibit KMB-4 to the affidavit of Keith Barratt filed by leave 8 February 2002.

[10] The applicant was sent to Brisbane for further management by his general practitioner at Caboolture, Dr T Jameson, who referred him to an orthopaedic specialist, Dr L Sampson. Dr Sampson described the injury as "a moderately significant left ankle sprain" in his letter to Dr Jameson. The applicant was treated with physiotherapy and on 12 February 1997 he was cleared for work and returned to the McArthur River Mine. The application made a claim on the Northern Territory Insurance Office ("the TIO"). I was informed from the Bar table that there is no right to common law damages for work-related injuries in the Northern Territory.

[11] Although the applicant maintained his employment he continued to experience weakness in his left ankle. He was transferred to work for the respondent at the Pajingo Mine near Charters Towers in mid 1997.

The incident on 27 October 1997

[12] The appellant was walking from an office down a set of stairs towards a workshop on 27 October 1997 at the mine site. At the foot of the stairs the respondent had begun construction of a drainage pit which was covered by a grate similar to a cattle grid as a temporary cover for the pit. It did not fully cover the hole. The applicant put his foot on the grate and as he did so his left foot rolled over the edge towards the uncovered area and he injured that foot again. He immediately experienced significant pain.

[13] The applicant attended a general practitioner in Charters Towers who advised that he should return to light duties. He saw his general practitioner, Dr Jameson, at Caboolture. He gradually returned to work on normal duties. From then until his employment ceased at the end of 1998 he worked for two weeks and took one week off work.

[14] The applicant experienced continuing pain, particularly laterally under the left heel and on 21 April 1998 Dr Jameson referred him for a CT scan which revealed a fracture involving the medial aspect of the posterior talus. This was the first that the applicant knew of the fracture and, it would appear, the medical profession who had been treating him. In his report to the TIO of 19 June 1998 Dr Jameson wrote:

> "It is difficult to say when this fracture happened. (1) When he hurt his ankle prior to the 15/1/97 or when he tripped prior to the 5/11/97. I don't have a detailed history as the exact location of this injury and under what circumstance it happened."

[15] This, the respondent contends, ought to have alerted a reasonable person in the position of the applicant to have sought appropriate advice about whether there was a good cause of action in respect of the 27 October 1997 incident. Mr Grant-Taylor asked the applicant in cross-examination:

> "You knew on 27 October, can I suggest to you, that you had sustained an injury to your left ankle that was at least as bad as the one that you'd sustained in January '97?-- Yeah.
>
> …
>
> WITNESS: Well, it hurt as much as the first one so I suppose it was as bad."

[16] That passage does not go so far as Mr Grant-Taylor would have it. My impression of the applicant was of an honest man not much given to abstract thought and theorising about his injury. The experience of pain on the second occasion is consistent with a view that it was an aggravation of an existing injury given that the left ankle had not healed completely after the incident on 11 January. Of greater significance was the fact that in the many medical reports obtained by the TIO throughout 1998, 1999 and 2000 reference is made to the incident of 11 January as the origin of the applicant's disability which confirmed the applicant's own belief.

[17] An orthopaedic specialist excised the bone in October 1998 but it did not resolve the applicant's problems. Indeed he was retrenched by the end of the year.

[18] In May 1999 the applicant consulted with his present solicitors about a family law matter and dealt with a Mr C Kong employed by the firm. In the course of the consultation he sought advice about the Northern Territory injury. The applicant was still receiving compensation from the TIO.

[19] The applicant underwent a fusion procedure on his left subtalar joint in May 1999 arranged by the TIO. The reports identify the injury as being caused by the incident on 11 January 1997.

[20] Mr Kong arranged for the applicant to consult with Dr J Pentis, an orthopaedic specialist, on 19 October 1999. Dr Pentis suggested that since the applicant was in "mid-recovery stage" he should be re-examined in six to nine months and mentioned only the incident of 11 January 1997. On 7 June 2000 the applicant again saw Dr Pentis. This report commenced:

> "I recently reviewed this gentleman on 7/6/2000 with respect to providing an updated medical report in relation to injury sustained in an accident on 11/1/1997."

Dr Pentis estimated an incapacity of 25% of the efficient use of the left leg.

[21] After the receipt of that report Mr Kong ceased working for the applicant's solicitors. On 29 October 2000 the applicant attended on Mr Everingham who took a detailed statement and advised that the applicant might have a claim relating to the incident on 27 October 1997. Instructions were given to bring an application to commence proceedings which culminated in the order of Helman J.

[22] Mr Everingham advised the applicant to consult Dr Pentis to ascertain the extent to which the incident of 27 October 1997 had contributed to his present condition and on 22 November 2000 he did so. The applicant had difficulty finding the money to

pay for Dr Pentis' report and was only able to do so in February 2001. The report dated 29 November 2000 was obtained on 20 February 2001. It is that report which for the first time attributes the disability from which the applicant suffers to each incident and, significantly, the greater proportion to the 27 October 1997 incident. Dr Pentis wrote

> "He has currently been left with a residual incapacity and this is approximating a 33 1/3 % loss of the efficient function of the limb on the affected side.
>
> As the initial injury was a strain this would account for somewhere in the vicinity of a 7 % – 10 % at most loss of the efficient function of the limb in his work activities, and the rest would be due to the accident in late 1997, i.e. 20 % – 25 % loss of the efficient function of the limb on the affected side."

This is the material fact of a decisive nature of which the applicant maintains he was unaware until 21 February 2001 which raised the real possibility of a successful common law claim.

[23] Although Mr Grant-Taylor drew attention to Dr Jameson's observation in his report of 19 April 1998 expressing uncertainty as to which incident was responsible for the fracture, as Mr Sofronoff submitted, there were numerous specialist reports which attributed the disability to the incident of 11 January. The following are a sample from the many reports which were apparently collected by Mr Kong whilst he had charge of the applicant's file.

- Dr K Zischke, general practitioner, report of 15 June 1998:

  > "(1) Mr Whittaker presented to this surgery on 27.4.98 with a history of sustaining a severe "sprained" left ankle on 11.1.97 but was subsequently found to be a fracture of his left Talus with non-union of the fragment. This has resulted in continuous pain to his left foot.
  >
  > …
  >
  > (5) There is little doubt his symptoms are as a result on his injury sustained in January 1997."

- Dr D King, orthopaedic surgeon, report of 14 July 1997 who was carrying out a lengthy review for the TIO in respect of the 11 January injury:

  > "Mr Whittaker, who was a 30 year old truck driver/miner by occupation, has sustained an unusual injury to his left foot and ankle in the nature of an osteochondral fracture with separation of a small bone fragment adjacent to the joint surface on the inferior aspect of the talus adjacent to the medial or inner margin.
  >
  > This is, I consider, attributable to the initial episode in the course of his employment on 11 January 1997 as this was a relatively severe injury in the course of which he fell to the

ground. The later incident in November 1997 consisted of a minor twist to his ankle.

Not surprisingly, the diagnosis was not reached until April of this year when CT scan and specific X-rays centred on the subtala joints were carried out."

- Ms Donna Barton, an occupational therapist carrying out a Worksite Assessment Report which was dated 30 September 1998 after detailing the circumstances of the injury of 11 January added:

"However, he reported he continued to experience pain and this was exacerbated when in November 1997 he again rolled his left ankle after tripping over a small hole adjacent to a grate when leaving the site office."

[24] The extent of the disability attributed to the incident of 27 October is a material fact of a decisive nature, s 30(a)(iv). The applicant had consulted with doctors whom he might have expected to have addressed this issue particularly as most if not all of the medical practitioners were reporting to the TIO. He sought legal advice. That Mr Kong might have appropriately explored this issue within the limitation period does not mean that the applicant had the means within his knowledge to do so, *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419. Further, the only specialist doctor who was retained to advise him personally on medico-legal issues, Dr Pentis, did not advert to this matter in his first two reports.

[25] It was only on 21 February 2001 that the applicant understood that the injury sustained on 27 October 1997 was serious enough on its own to justify bringing an action. I conclude that the conduct of the applicant was reasonable in all the circumstances and that he has discharged the onus which s 31 of the Act imposes upon him.

[26] The fact that proceedings were commenced after the expiration of the limitation period but before the applicant acquired the means of knowledge of the material fact does not disentitle him to the relief in s 31, *Opacic v Patane* [1997] 1 Qd R 84.

[27] The order is that the period of limitation for bring proceedings be extended to 16 November 2000.

[28] This is an interlocutory proceeding and accordingly by virtue of s 324(4) of the *WorkCover Queensland Act* 1996 there is no order as to costs.