SUPREME COURT OF QUEENSLAND

CITATION:	*Donna-Marie Dixon v Australia Meat Holdings P/L* [2002] QCA 25
PARTIES:	**DONNA-MARIE DIXON** (plaintiff/respondent) **v** **AUSTRALIA MEAT HOLDINGS PTY LTD** ACN 011 062 338 (defendant/appellant)
FILE NO/S:	Appeal No 7879 of 2001 SC No 313 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	19 February 2002
DELIVERED AT:	Supreme Court at Brisbane
HEARING DATE:	12 February 2002
JUDGES:	de Jersey CJ, Williams JA and Ambrose J Judgment of the Court
ORDER:	**1. The appeal is dismissed;** **2. The appellant is to pay the respondent's costs of the appeal to be assessed.**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – appeal against an order extending the time limited for commencement of respondent's claim in negligence – whether the primary judge was entitled to conclude the relevant "material fact" was not within her means of knowledge at the relevant time – whether trial judge had correctly concluded the applicant established her right of action apart from the limitation defence – whether the primary judge's conclusion that the appellant would not suffer "significant prejudice" should time be extended was vulnerable to challenge on appeal. *Limitation of Actions Act* 1974 (Qld), s 31(2)(a), s 31(2)(b) *Muir v Franklins Ltd* [2001] QCA 173; Appeal No 9504 of 2000, 11 May, 2000, followed *Pizer v Ansett* [1998] QCA 298; Appeal No 6807 of 1998, 29

September 1998, considered
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431, applied

COUNSEL: M Grant-Taylor SC for the appellant
RJ Douglas SC, with A Mellick, for the respondent

SOLICITORS: Thompson Hannan for the appellant
Rees R & Sydney Jones for the respondent

[1] **THE COURT:** This appeal is brought against a learned judge's order, under s 31 of the *Limitations of Actions Act* 1974, extending the limitation period applicable to the respondent's cause of action. The respondent's claim is for damages for negligence and breach of duty in respect of injury she allegedly sustained in the course of her employment by the appellant.

[2] In finding favourably to the respondent, the judge took the view that she had successfully overcome three "hurdles". The first concerned her obligation to establish that the relevant "material fact" (s 31(2)(a)) was not within her means of knowledge until after 3 December 1998. The applicable material fact was the circumstance that her right shoulder injury was of such severity as to preclude her from maintaining employment.

[3] The learned judge found it significant that the respondent, although experiencing pain, worked without apparent interruption from June 1997 to March 1999. None of her treating doctors had advised her to give up work, until 1999. The appellant relied on the respondent's evidence that her physiotherapist said in passing in mid-1998 that "it was about time (the respondent) gave (her) job away". The judge proceeded on the basis that if that view was then expressed by the physiotherapist (which in fact the physiotherapist denied), any cause of action the respondent then had was in any case "of such a modest value as not to justify the anxiety, cost and risk involved" in its being pursued.

[4] In challenging this approach, counsel for the appellant pointed to the persistence of the respondent's shoulder problems over an extended period prior to the end of 1998 which, together with that "advice" from the physiotherapist, warranted the conclusion that the relevant material fact was within the respondent's means of knowledge before that time. But those circumstances taken together should not have excluded the approach taken by his Honour, and we note the observations by Thomas JA in *Pizer v Ansett* [1998] QCA 298 para 20. The appellant has demonstrated no basis such as would warrant appellate intervention into this factually based approach.

[5] What the judge termed the second hurdle was the respondent's need to show that there was evidence to establish her right of action apart from the limitation defence (s 31(2)(b)). There was conflict between the respondent and Dr Lloyd, an orthopaedic surgeon, as to whether that doctor had administered a certain injection as early as March 1994. The doctor's recollection, supported by his notes, was that the injection was then given, but the respondent denied that that occurred. The issue is potentially relevant to the issue whether her present condition is related to her employment by the appellant and to the seriousness of the respondent's condition as at that time, and over following months and years. The judge approached the issue on the basis that because three other orthopaedic surgeons, Drs Gillett, McMahon

and Blue, all expressed opinions linking the respondent's injury with conditions at work, the respondent had satisfied her obligation under s 31(2)(b).

[6] Counsel for the appellant submitted that the judge should have proceeded on the view that the injection was given, with the consequence that the basis for the conclusion of the other doctors was rendered at least extremely doubtful

[7] The judge's approach was, however, consistent with *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431, 434-5. Related factual concerns may be pursued at trial, for example, whether had those three doctors been aware of the earlier injection (if it occurred), their conclusion would have been different, and as to the reasonableness of the judge's view that the evidence did in any event support there having been an "arguably significant aggravation".

[8] The third "hurdle" was persuading the court to exercise its discretion favourably to the respondent. The learned judge did not consider that the appellant would be relevantly prejudiced by the granting of an extension. Some of Dr Lloyd's records had been lost, but the judge noted that the doctor, who gave oral evidence, was nevertheless able to speak of the respondent's symptoms and treatment on the basis of other records still retained. The judge also saw little significance in the loss of some of the appellant's records.

[9] The relevant consideration for his Honour was whether, should time be extended, the appellant could obtain a fair trial: "significant prejudice" would exclude that possibility. See *Muir v Franklins Ltd* [2001] QCA 173 para 56. His Honour's view that no such relevant prejudice had been established was the result of a factually based process of assessment or evaluation. No ground has been shown which could warrant this court's substituting a different view, even if it held one.

[10] The orders of the court are:

1. The appeal is dismissed;
2. The appellant is to pay the respondent's costs of the appeal to be assessed.