SUPREME COURT OF QUEENSLAND

CITATION:	*Young v BL & ST Nominees P/L* [2002] QSC 135
PARTIES:	**KERRY LYNNE YOUNG** (plaintiff) **v** **BL & ST NOMINEES PTY LTD** ACN 005 522 029 (defendant)
FILE NO/S:	S 233 of 1996 S327 of 2002
DIVISION:	Trial
PROCEEDING:	Application for Extension of Limitation Period
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	16 May 2002
DELIVERED AT:	Townsville
HEARING DATE:	2 May 2002
JUDGES:	Cullinane J
ORDER:	**Application dismissed with costs to be assessed.**
CATCHWORDS:	LIMITATION OF ACTIONS – GENERAL – PROCEDURE – COURTS AND JUDGES GENERALLY – whether order by Registrar to be set aside – whether Defendant entitled to seek orders – where application to commence action after expiration of limitation period – whether justice of the case requires extension of limitation period
COUNSEL:	T Moon for the plaintiff M O'Sullivan for the defendant
SOLICITORS:	Connolly Suthers for the plaintiff Boulton Cleary & Kern for the defendants

[1] There are two applications before the Court.

[2] The Applicant/Plaintiff (Plaintiff) seeks an order extending the limitation period within which to institute proceedings against the Defendant/Respondent (Defendant) her former employer, in respect of an incident which occurred in about July 1992 and in respect of her work activities generally during the period prior to 2

October 1993 so that it expires on 2 November 1995. This is the relevant date for the purposes of this application because the writ of summons issued on 2 October 1996.

[3] There is an application by the Defendant in which a number of orders are sought. As matters developed however it became clear that the order which the Defendant sought was the setting aside of an order by the Registrar in early 2001 in which the writ of summons was reviewed each year from 2 October 1997. The last yearly period for which it was renewed was the year commencing 2 October 2000. The precise date upon which this order was made does not appear but it occurred early in 2001.

[4] The power to renew a writ is contained in Rule 24 which provides so far as is relevant as follows:

> ***"[24] Duration and renewal of claim***
>
> ***24*** *(1) A claim remains in force for 1 year starting on the day it is filed.*
>
> *(2) If the claim has not been served on a defendant and the registrar is satisfied that reasonable efforts have been made to serve the defendant or that there is another good reason to renew the claim, the registrar may renew the claim for further periods, of not more than 1 year at a time, starting on the day after the claim would otherwise end.*
>
> *(3) The claim may be renewed whether or not it is in force.*
>
> *(4) However, the court's leave must be obtained before a claim may be renewed for a period any part of which falls on or after the 5th anniversary of the day on which the claim was originally filed."*

[5] The power of the Registrar to make the order was not challenged by the Defendant.

[6] The application was made under Rule 667(2)(a) which provides that the Court may set aside an order at any time if the order was made in the absence of a party.

[7] The Rule goes on to provide for a number of other particular circumstances in which the Court may set aside an order.

[8] The application to the Registrar was made ex parte.

[9] Alternatively reliance was placed on Rule 791 which provides as follows:

> *"**[791] Rehearing after decision of judicial registrar or registrar***
>
> *791 (1) A party to an application who is dissatisfied with a decision of a judicial registrar or registrar on the application may, with the leave of the court, have the application reheard by the court.*
>
> *(2) If the court grants leave, it may do so on condition, including, for example, a condition about -*

(a) the evidence to be adduced; or
(b) the submissions to be presented; or
(c) the nature of the rehearing.

(3) This rule does not apply to a review under rule 742"

[10] Leave would be required to appeal from the decision of a Registrar. However, it does not seem to me that the Applicant was a party to the application under consideration here and for that reason I do not think that Rule 791 has any application.

[11] Rule 667(2)(a) is the successor to Order 39 Rule 33 of the former Rules.

[12] This rule was considered by the Court of Appeal in *W R Carpenter Aust Ltd v Ogle and Anor* (1997) QCA 383 (28.10.97) whilst the new rule has received some consideration by MacKenzie J in *JP Sproule v L E Long* (2000) QSC 232.

[13] This rule, it seems, is concerned with those cases in which a party is entitled to be present and heard but is not in fact present. The circumstances in which the discretion might be exercised are not limited in any way by the terms of the rule. Orders have been set aside under similar rules where there is a good explanation for the failure to appear (see *Taylor v Taylor* (1979) 143 CLR 1) or where doubts arise as to whether service had been properly affected. See *Wilkinson v Wilkinson* (1963) P1. The discretion is undoubtedly a broad one.

[14] The court has an inherent power to set aside an order made ex parte. See *Woods v Sheriff of Queensland* (1895) 6 QLJ 163. Some basis must of course be demonstrated for the exercise of this power.

[15] The Defendant contended that the order ought to be set aside on the grounds that no reasonable efforts were made to serve the Defendant. The Plaintiff conceded that this was the case. However, as will be seen, the rule confers a power to set aside for other good reason. What is relied upon here is contained in a letter which is an Exhibit to an affidavit of the Plaintiff's solicitor, Andrew Benedict Douglas.

[16] A party who seeks to set aside an order made in the exercise of a discretionary power faces a substantial task. It is necessary to show that the discretion in some way miscarried or that no reasonable exercise of the discretion could have resulted in the order which was made. I am not persuaded that the Defendant has demonstrated any grounds which would justify the setting aside of the order made by the Registrar in the exercise of the discretion conferred upon him by Rule 24.

[17] In May 2001 the Defendant filed a notice of intention to defend after being served with the writ and after being served with the application for an extension of the limitation period. The Defendant conceded that it was not necessary in those circumstances, for the Plaintiff to obtain leave to proceed notwithstanding the failure to take a step within the period provided for by the Rules.

[18] Turning to the application under the *Limitation of Actions Act,* it was accepted by the Defendant that there was evidence which would satisfy the requirements of s.31(2)(b) of the Act in so far as the question of a breach of duty is concerned.

[19] The Plaintiff in her affidavit described the tasks which she was required to perform. These involved a good deal of lifting and handling. This activity was carried out virtually constantly and involved a variety of items of various weights and a variety of tasks.

[20] She says that in July 1992 she recalls picking up a box quickly and turning to give it to another employee who was standing on a ladder and she felt a sharp pain in her lower back. She says that she received physiotherapy treatment on three occasions but did not have any time off work. In her affidavit she swore that she could not recall any episodes of back pain (particularly lower back pain) or stiffness between that time and November 1995. She said that if she did have it, it was not such that she had to seek treatment for it. She however experienced the onset of significant pain in November 1995 and saw a physiotherapist and a chiropractor. By late November 1995 she was in quite severe pain and saw Dr Abeywardena on 1 December 1995 at the Health Link Family Medical Centre, Ross River Road, Cranbrook. She says that at that time her symptoms extended through both knees, her right thigh and right ankle. She had numbness in the shin, foot and toes of her right leg. She saw a neurosurgeon in early December 1995 who arranged for an MRI to be performed. A large central L4/5 disc prolapse was identified and she had immediate surgery. She obtained significant but not total pain relief. The pain in her legs subsided but she still had some lower back pain although it was reduced. She resigned from her employment with the Defendant formally in December 1996. Her evidence is that whilst she had earlier wished to return the Defendant was not prepared to employ her. This seemed to have caused her a good deal of anguish. The correspondence between her and the Defendant is before the court. I accept her account of why she resigned.

[21] She had obtained other employment as a receptionist. On 15 May 1996 she suffered severe pain in her lower back whilst at home walking around within her dwelling.

[22] She again saw Dr Abeywardena and the neurosurgeon (Dr Guazzo) she had previously seen. She was not able to continue her employment and ceased work but returned in February 1997 in a relieving administrative position. She then obtained employment at another toy store where she worked for some months. Following that she worked in the electrical sales department of a Townsville store and on 22 September 2000 whilst walking from her car to the store, she felt acute pain in her lower back. She saw a chiropractor and then again saw Dr Guazzo who performed further surgery in October 2000. Unfortunately the disc prolapsed again on 24 January 2001. Dr Guazzo told her that he did not think further surgery was warranted at that time, however on 13 March 2001 a laminectomy was performed. She has not, if I understand the effect of her evidence correctly, worked since that time

[23] Section 31 of the *Limitation of Actions Act* provides as follows.

> "***31.(1)*** *This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the Plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include*

damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.

(2) *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 Applicant in that court, the period of limitation is extended accordingly.

(3) *This section applies to an action whether or not the period of limitation for the action has expired--*

(a) before the commencement of this Act; or

(b) before an application is made under this section in respect of the right of action".

[24] Section 30 defines what is a material fact. In the present case the Plaintiff says that the material fact which was not within her means of knowledge prior to the relevant date was that the incident in 1992 was causally related to the disc prolapse identified in December 1995. Reliance was also placed upon what is said to be the causal link between the tasks which she was required to engage in on a daily basis in her employment and the prolapsed disc. As already mentioned an extension of the limitation period in respect of this would be relevant to activities prior to 2 October 1995.

[25] As Davies JA pointed out in *Wood v Glaxo Australia Pty Ltd* (1994) 2QR 431 at 444 the issue which arises under s.31(2)(a) is whether the material fact or facts relied upon were within the means of knowledge of the Applicant prior to the relevant date, that is 2 October 1995. The issue which arises under subsection (2)(b) is concerned with evidence existing at the time that the application is heard.

[26] According to the Plaintiff she first became aware in 1995 that in the incident of 1992 she had sustained damage to the disc which was causally related to the disc prolapse found in December 1995. She says that she was told this by Dr Guazzo.

[27] Dr Guazzo in an affidavit denied having told her this.

[28] The Applicant placed an affidavit of Dr Watson, a specialist in rehabilitation medicine before the court. Exhibited to this was a report by him, of 21 October 1996, in which he expressed the opinion that the 1992 incident was probably the initiating factor in her ultimate collapse and that without that she probably would

have gone for a very prolonged period if not the whole of her life without developing a chronic painful lumbar spinal condition.

[29] The Plaintiff says that she was told by Dr Abeywardena that her activities at work were causally related to the disc prolapse. Dr Abeywardena is a general practitioner who referred the Plaintiff to Dr Guazzo. Dr Abeywardena in a report of 16 January 1996 expresses an opinion to this effect.

[30] I accept the evidence of Dr Guazzo that he did not tell the Plaintiff that he was of the view that there was a causal relationship between the disc prolapse found in December 1995 and the 1992 incident. I am inclined to think that the Plaintiff may have misunderstood the effect of what she was told by Dr Guazzo. This however, does not seem to me to be fatal to the Plaintiff's prospects of success on this application in view of the report of Dr Watson and the report of Dr Abeywardena. The Plaintiff did not have any knowledge of the material fact or facts relied upon prior to the relevant date and if attention is confined to the reports of Dr Watson and of Dr Abeywardena she first learned of the relevant causal link since that time.

[31] In evidence Dr Guazzo accepted that there was a possible link between the 1992 incident and the disc prolapse and between the general tasks she was engaged to perform and the disc prolapse.

[32] Dr Watson in cross-examination had his attention drawn to the contents of the Plaintiff's affidavit which are summarised in the third and fourth sentences of paragraph 19 of these reasons. The Plaintiff in cross-examination had acknowledged their correctness. Dr Watson expressed the view that if those were the facts it was more probable than not that the 1992 incident was not causally linked to the prolapse which occurred in 1995.

[33] The Respondent contended that this being the state of the evidence the application must fail.

[34] Although it was not specifically articulated in this way it seems that the Defendant in making this submission is arguing that the Plaintiff is unable to satisfy the requirements of either section 31(2)(a) or (b).

[35] In a case such as this where the Plaintiff has to rely upon medical opinion for the existence of the material fact of a decisive nature relied upon and the timing of that advice to demonstrate that that fact was not within her knowledge or means of knowledge prior to the relevant date it must follow that the Plaintiff, to succeed under s.32(2)(b), must on the application be able to point to some evidence of the existence of such material fact.

[36] The appropriate test to apply under s.31(2)(b) is whether the Plaintiff can point to the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his/her case. See *Wood v Glaxo Australia Pty Ltd* (supra) at 435 per Macrossan CJ.

[37] Neither subsection requires the court to form any impression of the Plaintiff's prospects of successfully establishing the existence of the material fact of a decisive

nature at trial. Similarly it is not the court's function to resolve conflicting opinions on this subject on such an application.

[38] Accepting that Dr Guazzo does not think that there is a probable link between the 1992 incident or the Plaintiff's activities generally and the subsequently discovered prolapse, and also accepting that Dr Watson has abandoned his previous opinion that there was such a link and now thinks that such a link is unlikely there still remains the evidence of Dr Abeywardena.

[39] This evidence it seems to me, ought to be regarded as sufficient for the Plaintiff's purposes for s.31(2)(a) and section 31(2)(b).

[40] No doubt at trial considerable difficulties could be anticipated in attempting to establish the relevant causal link if the only evidence before the court is that of Dr Guazzo and Dr Watson on the one hand and Dr Abeywardena on the other. However this is not the issue here.

[41] The Plaintiff has in my view brought herself within both provisions of s.31.

[42] This is not however the end of the matter.

[43] As McHugh J said in *Brisbane South Regional Health Authority v Tyler* (1996) 186 CLR 541 at page 553:

> *"The purpose of a provision such as s.31 is 'to eliminate the injustice a prospective Plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced.' But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the Applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an Applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension".*

[44] In the present case the relevant events are an incident which occurred in 1992 and which was not the subject of a claim for workers' compensation and those daily tasks in the period ceasing on 2 October 1993. I do not overlook the fact that these activities continued thereafter until the Plaintiff ceased work. The 1992 incident was an instance of the daily activities which gave rise, in that case, to painful symptoms.

[45] The Defendant did not seek to advance a positive case of prejudice. Nonetheless the specific incident occurred almost 10 years ago and the other activities in respect of which the extension is sought are only marginally more recent.

[46] The Plaintiff first consulted a solicitor on 26 September 1996. She was informed that the three years had elapsed since the 1992 incident and that she was therefore out of time. She was advised that she should commence proceedings and she did so.

[47] In her affidavit she deposes to the fact that in February 1997 she decided not to proceed with the matter at that time as she felt she could not cope with it emotionally. She had had a miscarriage in September 1996.

[48] The proceedings were left in abeyance until the beginning of 2001 when the Plaintiff changed her mind and decided to proceed.

[49] Thus, for something over four years the action remained in abeyance as a result of a choice made by the Plaintiff. She of course worked during part of this time and in late 2000 suffered the onset of acute pain which, it was revealed, was caused by a further prolapse of the disc which had earlier prolapsed. Nonetheless it must have been apparent to her during all of this time that she had suffered a significant back disability, constituted by the prolapsed disc. She received treatment from a chiropractor during 1998 and 1999.

[50] The Plaintiff advances as her explanation for not proceeding with the matter that she was having difficulties coming to terms with the way she had been treated by the Defendant and she had had a miscarriage in the month prior to the issue of the writ.

[51] There is no psychiatric or psychological evidence about the Plaintiff's condition during this time. As already mentioned she was in employment for a substantial part of this period.

[52] Where there has been the passage of such a long time between relevant events and when a trial might be able to take place it is inevitable that the capacity of the parties to adequately present their respective cases and respond to their opponent's case is adversely affected.

[53] About one half of the time which has passed since the relevant events is accounted for by the period since the issue of the writ.

[54] I think in these circumstances it is not possible to conclude that the Plaintiff has demonstrated that the justice of the case requires the extension which she seeks.

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