

# SUPREME COURT OF QUEENSLAND

CITATION: *Smith v Advanced Electrics P/L* [2002] QSC 211

PARTIES: **TREVOR ANDREW SMITH**  
(applicant)

v

**ADVANCED ELECTRICS PTY LTD** ACN 010 928 177  
(respondent)

FILE NO/S: No 4427 of 2002

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 26 July 2002

DELIVERED AT: Brisbane

HEARING DATE: 22 July 2002

JUDGE: Ambrose J

ORDER: **Application dismissed**

CATCHWORDS: LIMITATION OF ACTIONS – application for declaration that applicant was under a disability within the meaning of s 29 of *Limitation of Actions Act* 1974 – where applicant injured at work – where subsequent to physical injury plaintiff developed psychiatric injury – whether s 29(1) applies – whether disability existed on the date on which a right of action accrued

*Limitation of Actions Act* 1974 (Qld), s 5(2), s 11, s 29, s 29(1), s 29(2)(c), s 31

*WorkCover Queensland Act* 1996 (Qld), s 280

*King v Coupland* [1981] Qd R 121, applied

*Kirby v Leather* [1965] 2 QB 367, considered

COUNSEL: R Trotter for the applicant  
B L P Hoare for the respondent

SOLICITORS: Shane Ellis for the applicant  
Minter Ellison for the respondent

[1] This is an application for a declaration that at times material to the application of s 29(2)(c) of the *Limitation of Actions Act* 1974 (“the Act”) the applicant was “under a disability” within the meaning of s 29(1) and s 5(2) of that Act.

- [2] The applicant was injured on 25 September 1997 when he received a severe electrical shock when employed by the defendant to perform work on a switchboard on a customer's premises which had been installed/worked upon by another electrician or other electricians employed by the defendant.
- [3] There is evidence that indicates that the earlier work performed by another employee or other employees of the defendant on the switchboard was done negligently and it was as a consequence of that negligent work that the applicant suffered the shock which he did on 25 September 1997. Whether the duty owed by his employer to the applicant was based solely upon the master/servant relationship that undoubtedly existed at the time of his injury was not argued.
- [4] The applicant received severe burns for which he received treatment in hospital for about a fortnight.
- [5] He also suffered severe psychological damage which the medical evidence indicates resulted directly from the electric shock and electric burns he received on 25 September 1997.
- [6] The bad burning, for which the applicant received treatment in hospital for 14 days, seems to have masked the emotional trauma inflicted on the applicant until he returned to his home upon discharge from hospital. Upon his return home his wife was unable to cope with the change in her husband's appearance and also with the effect the electric shock and burns had on him psychologically, and she left him.
- [7] On 3 October 1997, 8 days after his injury, an inspector employed by the Workplace Health and Safety division of the relevant department took a statement from the applicant of events leading to his electrocution. The applicant was then still in hospital and I infer that the inspector was able to obtain that quite detailed statement from the applicant and to have him identify apparatus involved with his injury, of which photographs had been taken, without the hindrance of any psychological avoidance of recollecting those events of the kind that developed subsequent to his release from hospital.
- [8] On 15 October 1997 Dr Waymouth examined the applicant. He concluded that post traumatic stress disorder was a possible diagnosis of his symptomatology and he referred him to Dr Ziukelis.
- [9] The applicant observed that the first time he "noticed the post traumatic symptoms" was when he got home from hospital and found that he was not able to bring himself to touch any electrical appliance at home. He was unable even to bring himself to switch on electrical switches. He said that he had been referred to Dr Ziukelis late in October 1997 but was unable to see him for some time.
- [10] Eventually on 9 November 1997 Dr Ziukelis certified that the applicant was then suffering from a post traumatic stress disorder resulting from his injury at work.
- [11] In fact the applicant had sought an earlier appointment with Dr Ziukelis but apparently had to wait for about a month to see him.
- [12] The applicant attended Dr Pegg from time to time for treatment of his burns. On 25 November 1997 Dr Pegg considered that the applicant's wounds to his arms and

- hands seemed to be healing well. He referred to the psychological condition of the applicant and noted that he was then seeing a psychologist regarding this condition.
- [13] On 16 December 1997 Dr Law examined the applicant with reference to his scarring and burn marks but became more concerned with his post traumatic stress disorder “which he seemed to develop from this incident”. Dr Law observed that at that stage the applicant had seen Dr Ziukelis once and was to see him weekly to help with his post traumatic stress disorder.
- [14] Dr Ziukelis certified the inability of the applicant to work as a consequence of the post traumatic stress disorder from which he then suffered on 27 November 1998, 24 March 1998 and 28 October 1998.
- [15] On 2 March 1998 Dr Katz a consultant psychiatrist examined the applicant and concluded that at that time he was suffering from post traumatic stress disorder “which arose acutely in relationship to a traumatising electrocution that occurred, according to Trevor’s report, at his workplace and which apparently sensitised Trevor to the point where he is continuing to have active flashbacks and nightmares about the incident and Trevor has also developed a phobic reaction to foci related to the accident which in this case includes electrical appliances or electrical equipment”. I deduce from the expression “arose acutely” that Dr Katz’s opinion was that the post traumatic stress disorder developed “soon after” or “swiftly subsequent to” the electrocution but not necessarily at the moment of or on the day of its occurrence.
- [16] On 12 May 1998 the Medical Assessment Tribunal determined that the acute post traumatic stress disorder, which totally incapacitated the applicant from working at that time was temporary and determined that the applicants incapacity would be reviewed in six months time – ie; in November 1998.
- [17] It is clear from the material that WorkCover Queensland accepted during 1998 that the applicant was then suffering from post traumatic stress disorder which required active psychiatric therapy.
- [18] On 27 November 1998 the Medical Assessment Tribunal concluded that the applicant had suffered a permanent impairment being a post traumatic stress disorder (chronic and stable) which impaired his employment capacity by 25%.
- [19] Dr Chittenden a specialist in psychological medicine examined the applicant in May and June 1999. She observed that the applicant had been discharged from hospital with particularly severe burning and scarring of his arms and hands. His vision and hearing however had returned slowly whilst in hospital. She observed that the applicant had been severely psychologically destabilised when he reached home and developed a severe phobia about all things electrical. Initially he could not touch any electrical apparatus in his home or even switch on a light. After receiving treatment (presumably from Dr Ziukelis) his condition settled down sufficiently to enable him to turn on light switches and to handle some electrical appliances but he had not up until the date of her examination been able to progress further with electrical appliances. According to Dr Chittenden –

“Immediately after Mr Smith’s accident he was extremely severely affected with this disorder (post traumatic stress disorder). It is gradually fading now, partially through treatment and

encouragement, but also over time. However, in my opinion, Mr Smith has a long way to go before he gets anywhere near normality and is able to engage in normal life and normal work again”.

[20] She continued –

“He is a person who always fostered a good physical self image and now he finds himself physically damaged. He has partially recovered from this aspect, but the psychological aspects that he has with regard to emotional shock, and more specifically Post Traumatic Stress Disorder, has totally redirected his life in a very negative way.

...His disability has been entirely due to the psychological effects of his accident that is Post Traumatic Stress Disorder, which has been totally due to his accident he sustained on 25 September 1997”.

[21] In a later report dated 6 December 2000 Dr Chittenden observes –

“On assessment, Mr Smith was able to verbalise the reasons for his inability to pursue his claim with his solicitor. I understand that every time he had a communication by letter or a telephone call with regard to his personal injury claim, he had a clearly described panic attack. He would sometimes not open letters or answer telephone calls from his Solicitor. He would put the paper work out of his sight or anywhere where he did not have a reminder of his accident. This was within a background of quite disorganised behaviour, including self harmful and risk taking behaviour for a while ... These actions were performed to avoid focussing his mind on his accident.

... Mr Smith has had a continuing history of self defeating, self harming, and avoidant behaviour accompanied by a severe rise in his level of anxiety and panic attacks when he had to face thoughts or memories of his accident (such as Solicitor’s letters etc).

... Mr Smith’s difficulty in pursuing his claim appears entirely due to his continuing Post Traumatic Stress Disorder.

... Mr Smith may still need encouragement to pursue his case. His psychiatric condition is quite genuine and his horror and anxiety about his accident and his psychiatric condition have impeded his pursuance of his claim. Treatment should continue at the same time as pursuing his claim, so that he gets support in the necessary practical steps in the legal arena, and so that his present disturbance does not become even more severe.”

[22] On 11 January 2000 the applicant was assessed by Gordon Siebel an occupational therapist. By that time he was working full time washing boats. He was still however fearful of electrocution. He had previously done part time security guard work but his personality had so changed that he felt unable to “manage social situations”. In Mr Siebel’s view, as at 31 March 2000, the applicant would still

need “at least 12 sessions from a Clinical Psychologist to assist him better manage his Post Traumatic Stress and to advise him regarding vocational redirection”.

- [23] The applicant eventually gave WorkCover Queensland a notice of claim for damages which appears to have been signed on 13 October 2000 although in the claim form itself it is asserted –

“Date notice given: 16/4/99”

- [24] It is unclear to me from the content of this form precisely what if any notice was given to WorkCover on 16 April 1999. There would be no impediment to the applicant’s action had it been given then. However I assume that the notice of claim form provided for his signature by his solicitor was not given to WorkCover prior to the applicant signing it which the same form indicates occurred on 13 October 2000 – nearly 3 weeks after the expiration of the 3 year limitation period for issuing proceedings in respect of his cause of action which arose on 25 September 1997.

- [25] Dr Chittenden last interviewed the applicant on 5 February 2002. On 14 February 2002 she gave a further report to update the earlier report of 3 August 1999 and a communication dated 6 December 2000 to which I have already referred. She observed that the applicant then continued to have “severe symptomatology of Post Traumatic Stress Disorder”. I will not analyse in detail the content of this report. She refers to the extreme anxiety caused to the applicant with feelings of fear and apprehension which “flashbacks” cause him. She said that his anxiety “is often set off by some type of cue which is associated with the electrical accident that he had in 1997”.

- [26] More importantly Dr Chittenden observes –

“As a result of Mr Smith’s extreme reaction to the intrusive symptoms, including flashbacks, of his accident in 1997, he has become extremely avoidant with regard to any memories or reminders of the traumatic event, which he now knows will lead to an extreme degree of distress for him. This is extremely uncomfortable and leads him to go a darkened room where he feels safe and goes to bed.”

She continued –

“Although previously always a very motivated person, his Post Traumatic Stress Disorder symptomatology has made it very hard for him to make decisions and for him to pursue a definite course in life, in that he finds very few things enjoyable or easy...”

She continued –

“Mr Smith has had extreme difficulty with his litigation I understand that he was able to make initial contact with his Solicitor for purposes of pursuing litigation as a result of his accident in 1997, but he has not been able to cope with any correspondence sent to him, in that the letters contain or ask for information with regard to his

accident and he cannot cope with this. He pushes the paperwork aside with somewhat disastrous consequences as far as litigation is concerned due to his extreme avoidance of being able to face up to legal action as a result of his accident.

It would seem that Mr Smith wants to pursue legal action, but is quite incapable of emotionally doing so. I have been able to talk with Mr Smith extensively about this, and although he realises that he may have a good basis for litigation, he realises that psychologically he is not going to be able to cope with the process of litigation. His inability to cope with litigation in this respect, in my opinion, could be accurately described as “unsoundness of mind”.

...In my opinion, although Mr Smith may have improved in one or two areas, a large number of his symptoms have either remained the same, or over time as I have talked with him about his symptomatology, have obviously become worse in that his normal lifestyle has almost “*wound down*” as a result of his psychiatric symptomatology.

Particularly with regard to his inability to cope with his paperwork because of his profound sense of anxiety and terror and his avoidance action of dropping them in a drawer or somewhere similar, he is unlikely to be able to pursue litigation, as he is in my opinion quite incapable of giving instructions to his Solicitor and also his Solicitor is virtually unable to communicate with Mr Smith.

For this reason, I would strongly suggest that this man has a legal guardian or legal friend appointed who may assist him to actually perform his paperwork, to give instructions to his Solicitor in a competent and timely fashion. At the present time I feel Mr Smith is extremely restricted in his ability to conduct any kind of legal action due to the extreme restriction that his psychiatric disability places upon him.”

- [27] Upon the whole of the evidence I am satisfied that as a consequence of his electrocution on 25 September 1997 the applicant did develop very severe post traumatic stress disorder which eventually amounted to a disability of unsoundness of mind within the meaning of s 29(1) and 5(2) of the Act. In this respect I adopt the approach adopted by Macrossan J in *King v Coupland* [1981] Qd R 121 when he applied *Kirby v Leather* [1965] 2 QB 367.
- [28] I conclude that he was already suffering from unsoundness of mind within the meaning of s 5(2) of the Act when the applicant was referred for psychiatric treatment by Dr Waymouth on 15 October 1997 – nearly 3 weeks after his cause of action arose with respect to his injury on 25 September 1997. It is clear on the material that he received treatment for this post traumatic stress disorder over a period of months from Dr Ziukelis.
- [29] I accept the evidence of Dr Chittenden that when she examined the applicant in mid 1999 and later in February 2002 he was then of “unsound mind”, because due to his post traumatic stress disorder he was mentally incapable of sufficiently bringing his

mind to bear on the incident that led to this injury to properly instruct his solicitors to enable them to proceed with reasonable despatch to institute proceedings on his behalf – which of course at all material times required compliance with the notice requirements of s 280 of the *WorkCover Queensland Act 1996*. I am satisfied on the material that probably as early as 15 October 1997 when he was examined by Dr Waymouth the applicant was suffering from the condition described by Dr Chittenden some years later.

- [30] Upon the whole of the evidence I infer that the applicant's problem of aversion, with respect to recollecting the incident leading to his injury on 25 September 1997, commenced to manifest itself between the time he returned home from hospital, on about 8 October 1997, and the time he was referred to Dr Ziukelis for psychiatric treatment on 15 October 1997.
- [31] The problem however that must be overcome by the applicant is that s 29(1) of the Act requires that a disability (as defined) which has the effect of postponing the running of the limitation period until a person ceases to be under that disability, must exist "on the date on which a right of action accrued".
- [32] In my view it is clear on the applicant's case, that his cause of action to recover damages for both the physical injuries he sustained in the electrocution and the post traumatic stress disorder which he sustained as a consequence accrued on 25 September 1997.
- [33] Upon the evidence it is not suggested that when he gave his statement of facts relevant to the cause of action he seeks to pursue to the Workplace Health and Safety inspector on 3 October 1997 – 8 days after his electrocution – the applicant then suffered from the "unsoundness of mind" from which he did most probably suffer 12 days later.
- [34] In my view the evidence discloses that the psychiatric injury which the applicant developed subsequent to his electrocution on 25 September 1997 as he became conscious of that injury and thought about it, and the terrible effect that it had on him, perhaps while in hospital or perhaps even within a week or so of leaving hospital. However no symptoms of psychiatric injury of the sort discussed by Dr Chittenden were observed "on the date on which a right of action accrued" to the applicant which was 25 September 1997. It was only the applicant's psychiatric reaction to the physical trauma suffered on 25 September 1997 and not that trauma itself which could constitute a "disability" within s 29(1) and s 5(2) of the Act.
- [35] I am unpersuaded that in observing that the applicant's post traumatic stress disorder affected him "immediately after" his electrocution, Dr Chittenden intended to convey that it affected him on the day of his injury rather than within a week or so. Such a contention would be inconsistent with the account of the accident he gave upon admission to hospital on 25 September 1997 and the much more detailed statement he gave to the Workplace Health and Safety inspector while still in hospital on 3 October 1997. To the extent that Dr Chittenden does express the opinion that the applicant's disability of unsoundness of mind did exist on 25 September 1997 I am not persuaded to accept it.
- [36] It is with regret therefore that I feel compelled by the terms of s 29(1) of the Act to conclude that the applicant did not suffer from unsoundness of mind within s 5(2) of

the Act on the date his cause of action accrued in respect of the electrocution he suffered on 25 September 1997.

- [37] Had the applicant suffered from or displayed the recollection aversion symptoms of the post traumatic stress disorder, from which undoubtedly he did suffer and display within weeks of his electrocution, at the time he was admitted to hospital on the 25 September 1997 he would have come within the protection of s 29(1) of the Act. On the facts of this case it is impossible to infer that the applicant's disability commenced at the time of trauma as it was possible to infer in *King v Coupland* and *Kirby v Leather* where disability was caused by organic brain damage immediately occasioned by the act constituting the cause of action.
- [38] Unfortunately for the plaintiff, upon the material I must conclude that the post traumatic stress disorder which has very significantly impeded his taking the steps that most reasonable persons not under such disability would have taken promptly to pursue his cause of action did not exist on 25 September 1997 the date on which his right of action accrued.
- [39] I am informed that there is pending in the District Court an application under s 31 of the Act to extend the period of limitation of 3 years prescribed by s 11 of the Act. The prospect of success of this application however was not addressed in argument before me which was confined to the applicant's rights under s 29 of the Act.
- [40] Upon an application for a declaration under s 29(1) there is no call for the exercise of discretion as there is upon an application made under s 31 of the Act for extension of a limitation period. If a disability as defined in s 5(2) exists on the date of accrual of a cause of action then by force of s 29(1) the limitation period prescribed by s 11 does not commence to run until cessation of that disability. If such a disability does not exist on the date of accrual of the cause of action then s 29(1) has no operation on the running of that limitation period from the date of such accrual.
- [41] It is with regret therefore that I dismiss the application.
- [42] I order that the applicant pay the respondent's costs of and incidental to the application to be assessed on a standard basis.