SUPREME COURT OF QUEENSLAND

CITATION:	*Wright v Mackay City Council* [2002] QSC 263
PARTIES:	**RAYMOND JOHN WRIGHT** (Applicant) v **MACKAY CITY COUNCIL** (Respondent)
FILE NO:	S71/2001
DIVISION:	Trial Division
DELIVERED ON:	9 August 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	2 August 2002 in Mackay
JUDGE:	Dutney J
ORDERS:	**Application dismissed with costs**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OF TIME – whether a material fact of a decisive character was within the Applicant's means of knowledge – whether the Respondent would be unfairly prejudiced by delay *Limitation of Actions Act*1974, s30, s31 *Healy v Femdale Pty Ltd* Appeal 37 of 1992 – 9 June 1993 – unreported (BC9303277), followed *Brisbane South Regional Health Authority v Taylor* (1996) 185 CLR 541, followed
COUNSEL:	B Harrison for the Applicant W Campbell for the Respondent
SOLICITORS:	Mackays, Barry, Beaverson & Stenson for the Applicant HBM Lawyers for the Respondent

[1] Raymond Joseph Wright ("the applicant") seeks an extension of time within which to bring an action for personal injuries against his former employer, Mackay City Council ("the respondent").

[2] The injuries to which the application relates were suffered on 27 April 1987 ("the first injury"), over a period of time between 5 May 1987 and 23 January 1991 ("the second injury"), 23 January 1991 ("the third injury") and over a period of time between 8 February 1991 and 6 February 1992 ("the fourth injury").

[3] At the time of the first injury the applicant was working on a road gang as a mower driver. His mower hit a hidden hole in the ground and the applicant suffered an injury to his mid back. The incident was reported, the applicant saw a doctor and was off work until 5 May 1987. On his return to work, the applicant went back to driving the ride on mower but his back steadily worsened. By March 1988, the applicant was suffering neck ache, back ache and headaches. He consulted Lloyd Medical Centre about these problems.

[4] The applicant deteriorated and on 6 June 1988 he saw a Dr Dean who provided a letter to the effect that he was not fit to work on the ride on mower.

[5] The applicant was taken off the ride on mower and put onto a whipper snipping team. The whipper snippers were heavy and much of the work was overhead. The applicant's neck pain got worse. X-rays were taken in April 1989.

[6] A significant incident occurred on 24 January 1991. The applicant says that he was sent to Shoal Point following a cyclone. A log was blocking the road. While trying to lift it onto the tray of the truck with another worker the applicant heard a cracking sound and experienced severe pain in his neck and shoulders. A workers compensation claim for this injury was lodged on 25 January 1991.

[7] The applicant returned to work on 8 February 1991 and was placed back on whipper snipping work where he remained until early 1992. On 26 April 1992 the applicant saw a Dr Nixon about the neck pain. She referred him to a chiropractor. The applicant saw the chiropractor many times over the next 18 months but despite some temporary relief the chiropractic sessions were of no long term benefit.

[8] On 6 February 1992 the applicant was given time off work. He was eventually passed fit to return on light duties on 4 March 1992. There were no light duties available. A rehabilitation counsellor and an occupational therapist were assigned to the applicant's case and he eventually went back to work on 1 May 1992.

[9] The applicant continued to work until a further incident in January 2000. In between times the applicant continued to have neck and back problems for which neither physiotherapy nor chiropractic treatment gave any relief. The applicant did get relief, however, from Bowen Massage therapy provided by a natropath.

[10] The further incident in 2000 which ended the applicant's working life involved the applicant pulling the starter cord of a mower.

[11] The principles governing an application of this type are set out in ss30 and 31 of the *Limitation of Actions Act* 1974.

[12] To enliven the discretion to extend time the applicant must establish to my satisfaction 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 within one year of the commencement of the proceedings. In this case the material fact must come to the knowledge of the applicant after 23 May, 2000.

[13] The material fact relied on here is that the applicant might not be able to return to his job at the council. This was said to have been first revealed in a report

of Dr Boyce first read in August 2000 and confirmed in a report of Dr White in January 2001.

[14] To be decisive a material fact must be such that a reasonable person knowing the fact would regard that fact as showing that apart from the expiration of the limitation he had a reasonable prospect of success resulting in an award of damages sufficient to justify the bringing of an action and that he ought to bring the action in his own interests.

[15] The applicant sought the advice of Mr Stenson, an experienced personal injuries solicitor, on 7 April 2000. Mr Stenson sought the medical report from Dr Boyce because he did not have sufficient evidence to justify an application for an extension of time. In particular he did not have a material fact of a decisive character on which to found the application. His evidence as to the advice he would have given the applicant had he been consulted before the incident in 2000 was that an action was likely to be successful but the absence of economic loss at that point in time did not justify the risks or costs involved.

[16] Counsel for the applicant relied on the decision of the Court of Appeal in *Healy v Femdale Pty Ltd*[1] where the court said:

> *"The question then is whether it can be said that in the circumstances the plaintiff took all reasonable steps to ascertain the fact that her injury was serious enough to justify the bringing of an action. She did not ask her doctor questions of this kind. The question whether an injured person has taken all reasonable steps to ascertain the seriousness of the injury depends very much on the warning signs of the injury itself and the extent to which it or any other facts might be thought to call for prudent enquiry to protect one's health and legal rights. It is difficult to say that a person who finds herself able to get on with her life, and returns to employment without significant pain or disability fails the test merely because she fails to ask for opinions from her doctor about prospect of future disability or effect upon her working capacity. There is no requirement to take "appropriate advice" or to ask appropriate questions if in all the circumstances it would not be reasonable to expect the plaintiff to have done so."*

[1] Appeal 37 of 1992 – 9 June 1993 – unreported (BC9303277)

[17] To see whether the failure to take advice earlier was reasonable requires some consideration of the warning signs.

[18] The applicant returned to whipper snipping duties after the fourth injury in 1992, although the duties were somewhat lighter than before. After the injury and before the return to work in May 1992 the applicant expressed doubts about his ability to cope with the work. Nonetheless he seems to have coped for some years.

[19] As late as March 2000 Dr Tony Blue passed the applicant fit for returning to work. Dr Blue considered the applicant's back to be unremarkable for a person of his age.

[20] Despite the applicant's pessimism when he was off work in 1992 he seems to have overcome this and returned to work.

[21] I am satisfied in all the circumstances that the evidence of Mr Stenson as to the advice he would have given before 2000 is probably correct. I am also satisfied that since the applicant was coping with the work and obtaining relief from the naturopath it was reasonable not to seek further medical advice. As the respondent does not dispute the existence of the cause of action apart from the limitation problem the circumstances to enliven the exercise of my discretion are met.

[22] As to the exercise of the discretion the applicant has to satisfy me that the respondent will not suffer significant prejudice by the delay.[2]

[23] In relation to prejudice, lapse of time alone can be sufficient to deny the applicant the extension of time.[3] In this case the delay is 15 years from the date of the first injury, 11 years from the third injury and 10 years from the fourth injury. More importantly, perhaps, is the fact that the man to whom the

[2] *Brisbane South Regional Health Authority v Taylor* (1996) 185 CLR 541.
[3] *Taylor* at 556.

first injury was reported, a Mr Edmonds, has at best a vague recall of the event and the man who investigated it, a Mr Weatherall cannot be found. The significance of this is said to be that the applicant now alleges injury to his neck and right shoulder, whereas his contemporaneous claim relates to his back. In relation to the third injury the only witness, a Mr Reichow, has no recollection of the event. Again, there is some discrepancy between the original report of the incident, which involved branches, and the current allegation which concerns a log.

[24] The applicant relies on a bundle of statements relating to the nature and arduousness of the work in 1987 to show that the case can still be litigated. The applicant points out that records will show whether there was a cyclone in 1991 and the case has to be looked at in the light of the applicant's history of back and neck complaints. It is also pointed out that the report was corrected from branches to a log very quickly after the event.

[25] Despite the applicant's submissions, he bears the onus of showing that the respondent is not unfairly prejudiced. The combination of long delay and absent or unhelpful witnesses is in my view insurmountable. I am not satisfied that that onus has been met. It follows that I must dismiss the application with costs.