SUPREME COURT OF QUEENSLAND

CITATION:	*Simonsen v State of Queensland & Anor* [2002] QSC 265
PARTIES:	**KEVIN SIMONSEN** (Applicant) v **STATE OF QUEENSLAND** (First Respondent) and **MACKAY SUGAR CO-OPERATIVE ASSOCIATION LIMITED** (Second Respondent)
FILE NO:	S28/2002
DIVISION:	Trial Division
DELIVERED ON:	9 August 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	3 June in Mackay
JUDGE:	Dutney J
ORDERS:	**Application dismissed with costs**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OF TIME – whether the existence of negligence from known facts can be a material fact of a decisive character – where Applicant suffered major depressive condition as a result of injury – whether that constitutes being under a disability for the purposes of s29 Limitations of Actions Act 1974 *Limitation of Actions Act*1974, s29(1), s31(2)(a), (b), s32 *Do Como v Ford Excavations Pty Ltd* (1984) 154 CLR 234, followed
COUNSEL:	P Land for the Applicant B Hoare for the First Respondent J McPherson (Solicitor) for the Second Respondent
SOLICITORS:	Morrin Lawyers for the Applicant Crown Solicitor for the First Respondent

McCullough Robertson for the Second Respondent

[1] Kevin Simonsen seeks an extension of time within which to bring an action against the State of Queensland and Mackay Sugar Co-operative Association Limited. From about May 1956 until about 1970 Mr Simonsen worked for the Works Department in Mackay. He began as an apprentice plumber, became a tradesman and ultimately, head plumber. Mr Simonsen spent most of his working hours outdoors and in particular working on roofs and guttering.

[2] After leaving the Department of Works Mr Simonsen worked for about 15 months as a roofing contractor in Blackwater. Mr Simonsen returned to the Works Department after a short stint in Gladstone as a plumber from 1972 until 1976.

[3] For about 15 months from 1976 Mr Simonsen operated a bread run. From then until 1998 Mr Simonsen worked for the Mackay Sugar Association in various capacities but mainly as a locomotive driver during the crushing season and a trades assistant during the off season.

[4] During the employment with the Works Department Mr Simonsen usually wore shorts, a short sleeved shirt, sandshoes and socks and a straw hat. No sunscreen was provided and no warnings were given about the danger of skin cancer. While working for Mackay Sugar Mr Simonsen wore shorts, a short sleeved short, safety boots and a felt hat. Even when engine driving Mr Simonsen's face was exposed to the sun shining into the cabin of the locomotive. From about 1988 15+ sunscreen was provided. It was available from a truck when he was doing track maintenance during the off season but only from the base when Mr Simonsen was engine driving. During the off season Mr Simonsen applied the cream before commencing work and at lunchtime. This was usual practice. Because there was nowhere in the engine to store the bottles of sunscreen Mr Simonsen usually only applied it at the commencement of the day's work during the crushing season.

[5] From late 1990 or thereabouts Mr Simonsen had various basal cell carcinomas, keratosis and squamous cell carcinomas removed. In 1995 a Dr

Robertson recommended that a claim should be made on WorkCover for the treatments. Such an application was made on 10 July 1995. The problem seems to have become progressively worse with Mr Simonsen undergoing extensive facial surgery between 1995 and 1998. In 1998 Mr Simonsen underwent surgery and radiation therapy for a carcinomas on his eyelid. As a result, Mr Simonsen lost the sight in his right eye and it has since been removed.

[6] Mr Simonsen deposes that in 2001 a WorkCover employee advised him to seek common law damages for his condition. Mr Simonsen says that up to that time he was not aware that his skin cancers may have been caused by negligence on the part of his employers.

[7] To enliven my discretion to grant an extension of time in which to commence an action Mr Simonsen must show:

(a) that a material fact of decisive character relating to the right of action was not within his means of knowledge until a date after the commencement of the year last preceding the expiration of the period of limitation[1];
(b) that there is evidence to establish the right of action[2];
(c) that this action is commenced within 12 months of the applicant ascertaining the fact[3].

[8] The first requirement does not present any difficulty to Mr Simonsen. The evidence suggests that 30 years is a reasonable gap between the first sun caused skin damage and the appearance of cancer. Skin cancers first appeared as early as 1990. The latest the limitation period could have expired in my view is 1993[4]. The "material fact" must therefore have come to the knowledge of the applicant after 1992. In 1992, Mr Simonsen's knowledge of

[1] *Limitation of Actions Act* 1974, section 31(2)(a)
[2] *Limitation of Actions Act* 1974, section 31(2)(b)
[3] *Limitation of Actions Act* 1974, section 31(2)

the extent of his problems was limited. The third requirement presents some difficult in timing. When I heard the application the action had not been commenced. I do not know if it has now been commenced. Assuming that this application is sufficient to stop the clock running, a matter about which I am extremely doubtful, the earliest date before which the fact could not be known is 28 February 2001. If an action and not just an application to extend time is required the earliest date is 3 June 2001 or one year before I heard the application, assuming an action was commenced on that day after I raised the matter with counsel.

[9] The material fact was identified by counsel[5] as being the fat that negligence caused the loss of Mr Simonsen's eye and that the negligence was by one or both of the defendants. When pressed counsel refined the submission to identify as the fact that the condition was caused by negligence of the employers.

[10] Mr Simonsen relies on the advice given to him by the WorkCover employee that he should look at a common law claim as being the time of discovery of the material fact.

[11] I can find no support in the authorities for treating such advice as a "material fact". The relevant fact seems to be that Mr Simonsen's condition is related to long exposure to the sun without adequate skin protection. This fact must have been known to Mr Simonsen from the moment the skin problems first appeared or at least very soon after. He had received no warning of the risk from his employer. Mr Simonsen also knew this. Even the extent of his injury was known to Mr Simonsen well before 28 February 2001. The eye itself had been removed in January 2001 but Mr Simonsen's awareness of the poor prognosis for his vision at least by early 2000 is said to be the cause of

[4] This is three years after the first appearance of skin cancers. Any negligence causing the outbreak of the condition must have occurred some, and perhaps many, years before then but it is unnecessary to decide that.
[5] Transcript pages 11-12

major depression from about that time[6]. What Mr Simonsen did not know was that these facts might be sufficient to give him a cause of action against one or both of his employers. This is not a fact but a conclusion of law. That the known facts constitute a cause of action is not itself a fact is established by the decision of the High Court in *De Como v Ford Excavations Pty Ltd*[7] where at 24-250 Deane J recognised that:

> *"[t]he ignorance of a material fact to which those sections refer is, in my view, ignorance of a factual matter in the ordinary sense and not ignorance either of the law itself or of the legal consequences of the material facts".*

[12] In the same case Dawson J held that the material facts relating to the right of action were *"those facts which must be provided in order to establish the negligent conduct upon which the cause of action is founded…."*[8]. Later, his Honour went on to say that *"[w]hat is relevant is what the applicant had to prove in order to establish negligent conduct"*[9]. Nothing said by the WorkCover employee as identified in Mr Simonsen's affidavit touches on this issue at all.

[13] I conclude therefore that there was no material fact of a decisive character identified during the course of the application which could meet the criteria laid down by section 31(2)(a) of the *Limitation of Actions Act* 1974.

[14] Mindful no doubt of the likelihood of my reaching the above conclusion counsel for Mr Simonsen relied in the alternative on s29(1) of *the Limitation of Actions Act* 1974. That section provides:

> *"(1) If on the date on which a right of action accrued whether before or after the commencement of this Act for which a period of limitation is prescribed by this Act the person to whom or for whose benefit it accrued was under a disability, the action may be brought at any time before the expiration of 6 years from the date on which the person*

[6] see for example the report of Dr Richards, psychiatrist, dated 6 November 2001 (Affidavit of Simonsen filed 28 February 2002, exhibit "AZ")
[7] (1984) 154 CLR 234
[8] ibid at 256
[9] ibid at 258

ceased to be under a disability….notwithstanding that the period of limitation has expired".

[15] Sub-section (2)(c) limits the extended time in the case of a claim for personal injuries to 3 years.

[16] Mr Simonsen deposes to becoming very depressed when his eye was removed. This is confirmed by a report from Dr Richards, a psychiatrist, dated 6 November 2001. Dr Richards diagnoses a major depressive disorder from early 2000 continuing to the present time. The report of Dr Richards supports counsel's submission that during this period Mr Simonsen would not have been able to properly instruct solicitors in relation to a claim. The cause of action which Mr Simonsen now wishes to pursue had already accrued before this time. Indeed the limitation period had already expired if the accrual is taken to be the time the damage to the skin first began to manifest itself in lesions requiring surgery. Even if a major depressive disorder is "a disability" for the purposes of the section it must precede the accrual of the right of action to invoke the benefit of the section. That is not Mr Simonsen's case. If the limitation period has expired before the disability is suffered I cannot see that the section provides any assistance in reinstating the right to sue. Only s31 can do that.

[17] In the circumstances I am not persuaded that the circumstances enlivening any discretion to extend time have been made out and I must dismiss the application with costs.