SUPREME COURT OF QUEENSLAND

CITATION:	*Weeks v Pioneer Building Products (Qld) Pty Ltd* [2003] QSC 024
PARTIES:	**BRUCE JAMES WEEKS** (applicant) **and** **PIONEER BUILDING PRODUCTS (QLD) PTY LTD** (respondent)
FILE NO:	S2024 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2003
JUDGE:	Mackenzie J
ORDERS:	**1. that the limitation period herein be extended pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) to 5 March 2001;** **2. that the costs of and incidental to the application be costs in the cause.**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR - EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF A DECISIVE NATURE – where applicant suffered work related and non-work related injuries to his back – where injuries suffered over a long period of time – where the applicant's claim for compensation was not made against his employer until after the expiration of the limitation period – whether s31 of the Limitation of Actions Act allowed an extension of the limitation period within which to bring proceedings for a personal injuries claim – whether a material fact of a decisive nature relating to the right of action was not within the means of the applicant's knowledge until after 5 March 2003 *Limitation of Actions Act* 1974 (Qld), s31 *Beaver v State of Queensland* [2000] QSC 40, distinguished

Katene v George Weston Foods Ltd (unreported, Helman J 26 March 1998, SC Qld, 8158/97), applied

COUNSEL: RJ Douglas and J.S. Miles for the plaintiff applicant
W Campbell for the defendant respondent

SOLICITORS: Parkers Simmonds for the Applicant
HBM Lawyers for the respondent

[1] **MACKENZIE J:** This is an application for an order that the limitation period for bringing proceedings in connection with personal injuries be extended, pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld), to 5 March 2001. The applicant suffered a series of incidents, some of which were work related and some not, after which he suffered back pain on each occasion. The first of these, which was work related, occurred on 1 November 1994. The claim and statement of claim were not filed until 5 March 2001.

[2] The applicant had been employed at a block-making plant operated by the defendant, first as a labourer and then, after a year or so, as a machine operator. The title of that job changed to "operations technician". There was a physical component to the work, but not all of it was heavy physical work. The applicant estimated that half was light duties and the rest physical. His employment was terminated not as a result of his inability to cope with the work but over concerns that his analgesic use may present a safety risk.

[3] There is a concession by the respondent that there is evidence to establish the right of action in respect of the incident of 1 November 1994 and that it has not suffered any relevant prejudice in consequence of the delay. Therefore the substantial issue to be resolved is whether a material fact of a decisive character relating to the right of action was not within his means of knowledge until after 5 March 2000.

[4] The essential facts are the following. The plaintiff commenced employment with the defendant in 1993. On 1 November 1994 he lifted a heavy metal plate weighing between 15 and 25 kilograms. He felt severe pain in the middle and lower back. He was absent from work for 1 week. He had suffered no previous back pain. On 7 November 1994 he returned to work on light duties for about 2 weeks and then recommenced his normal duties. He had some difficulties with his normal duties from time to time and had good days and bad days. However, he continued with his work.

[5] On 14 December 1995, while at home, he lifted his baby from the floor and felt severe pain in the middle to lower back in the same area as he had felt it after the plate lifting incident in 1994. After about a week away from work he returned on light duties for about a week and then returned to normal duties. He took simple analgesics from time to time and continued to work.

[6] On 24 September 1998, he was at work when a ladder upon which he was standing became unstable and began to fall. He grabbed a fence as he was falling. This brought on severe pain in the same region of his back as in 1994 and 1995. He took

a few days off work. After that he took pain relief medication when absolutely necessary but continued his normal duties without too much difficulty apart from an occasional day of sick leave due to pain.

[7] On 27 March 1999, he was engaged in machine maintenance which involved bending for extended periods of time. He again experienced severe pain in his back. This time the pain was more constant and did not ease off as it had following the previous incidents. He took a few days sick leave and was referred by the defendant to Dr David Eaton, a specialist in rehabilitation medicine. The plaintiff did not apply for statutory WorkCover benefits as he expected his pain to return to the same level as it had previously been. Dr Eaton was of opinion that he was suffering from chronic low back pain without obvious structural pathology. He recommended that it be managed by judicious use of simple measures such as heat and simple analgesia. He also recommended that he undertake a conditioning program to maintain a high level of physical fitness and take care with his posture when sitting. He organised to review him again in 3 weeks to follow his progress and identify how he was progressing with his conditioning program. However, the review did not occur because of other commitments.

[8] The applicant had performed normal duties during the week preceding the next episode. On 31 July 1999, which was a Saturday, he woke with severe pain and could not get out of bed. He lay on the lounge most of the day. The following day he woke and felt numbness in his left buttock, back, left thigh and genitals. He went to the toilet and felt his back give way with a "popping" sensation. He lost sensation in his genitals, left groin, left leg and left foot, and was driven to Tweed Heads Hospital by his wife.

[9] On 2 August 1999 a CT scan was done at Tweed Heads Hospital but there was no bed available and he was not admitted. The next day he was still in severe pain and was taken by ambulance to the Tweed Hospital, but once again no bed was available. The following day he was admitted to Gold Coast Hospital. The following day he underwent discectomy at L5/S1.

[10] Dr Eaton saw him again on 28 August 1999. His assessment and recommendations on this occasion were to the effect that the applicant had a 5 year history of chronic lower back pain which he related to an injury at work associated with manual handling. He said it was possible that the applicant had sustained some form of disc derangement at that time, which was not a prolapse. He said that the applicant's work activity was modified around 1998, largely eliminating the requirement for manual handling and heavy work.

[11] He referred to the incident on 1 August 1999 and concluded as follows:

> "In my opinion Mr Weeks' current work activities would not produce a disc prolapse in a healthy disc. It is, however, possible that the work injury in 1994 significantly damaged the disc to that extent that it finally failed in August 1999. The probability of this being the case could possibly be determined based on the significance of the injury in 1994.

> Post operatively Mr *(sic)* has made excellent progress and I anticipate a graduated return to normal work activities over a 4 to 6 week period commencing 13 September 1999."

The applicant returned to work on light duties on 13 September 1999 and returned to full-time work on 10 October 1999.

[12] In the meantime, on 16 September 1999 he had consulted his solicitor for the first time and the solicitor commenced to make appropriate inquiries of WorkCover, hospitals and doctors with a view to investigating the applicant's case.

[13] On 2 February 2000 he briefed counsel to advise generally on the matter. Amongst the inquiries made was a request for a report from the operating neurosurgeon who subsequently advised on 22 May 2000 that he had ceased practice and would not be able to provide a report.

[14] On 29 September 2000, Dr David White, orthopaedic surgeon, examined the applicant. He said that the likely sequence of events in the applicant's pathology was that the initiating event on 1 November 1994 had weakened the annulus of the L5/S1 disc. Further aggravations, of which the most significant would appear to have been that on 24 September 1998, weakened the annulus to the point where the relatively minor trauma of straining while urinating led to a massive frank prolapse and associated cauda equina syndrome. He expressed the view that because of the elapsed time since surgery, he would for all practical purposes regard his condition as stable and stationary and assessed him as displaying 30% whole person permanent impairment. Further, he said that he would regard the applicant as unlikely to materially improve in the long term and to be permanently unfit for work involving heavy physical labour, prolonged standing, prolonged sitting, lifting or repetitive bending. He said he was suitable for light semi-sedentary duties which allowed some freedom to sit, stand or move around as dictated by any discomfort that he may be feeling from time to time and was likely to remain so until normal retirement age.

[15] When asked subsequently to apportion the relative contribution of the various incidents, he reported on 2 March 2001 that the applicant's history would strongly suggest that the initiating incident of 1 November 1994, in weakening the annulus of the disc, set the stage to the point where relatively minor trauma would effectively result in major pathology. On that basis he expressed the conclusion that the incident of 1 November 1994 contributed 50% of his present impairment, that of 24 September 1998 40%, and the remainder was attributable to the interim minor aggravations.

[16] The applicant had also been examined by Dr Boys on behalf of the defendant. He gave an opinion that the applicant suffers persistent mechanical low back pain, restriction of spinal movement and sensory alteration of the left lower limb as a consequence of massive discal derangement at the L5/S1 level necessitating decompressive spinal surgery. The history available to Dr Boys suggested that

acute L5/S1 disc protrusion occurred in the incident on 1 August 1999. The structural derangement occurred in the context of pre-existing degenerative changes within the lumbar sacral disc.

[17] He also was aware of the other incidents and said that they had apparently induced soft tissue strain in the lower lumbar spine. There was no evidence available which would suggest the cumulative effects of the incidents had given rise to any frank discal protrusion throughout that period. While he said it was impossible to state specifically what physical injury was sustained on each occasion it was reasonable to postulate that work or domestic strains to the lower back were ultimately contributory to the spontaneous discal derangement on 1 August 1999. He said that the applicant manifested 20% impairment of bodily functions of which 15% was due to the derangement occurring on 1 August 1999 and the subsequent surgery. Without the incident of 1 August 1999 he would have manifested 5% impairment of bodily function referable to the lumber spine.

[18] It is now necessary to consider the steps taken by the plaintiff and those acting for him at relevant times. The applicant consulted a solicitor for the first time on 16 September 1999. According to the solicitor, the applicant requested that he act for him on a speculative basis in respect of a possible claim against his employer with respect to injuries he had sustained in the course of his employment which had led to him recently undergoing an operation to his back. The applicant said that he had gone to the solicitor because he was concerned about his future employment. He said that he asked the solicitor to look into any claim that he might have against his employer because of the various injuries that he had suffered over the years. He said that he knew that he had suffered a number of injuries in his employment and thought that some may be responsible for his operation.

[19] After that, he said he kept in contact with his solicitor from time to time. The solicitor made prompt and appropriate requests for relevant information from WorkCover, the treating hospitals and Dr Eaton. He next saw the applicant on 25 January 2000. There had been some delay because the plaintiff said he was working on shift work and was not sure when he could get in to see him. On that occasion the solicitor advised the applicant that, in light of the series of incidents which he had suffered over the years, both of a work nature and of a domestic nature, counsel should be briefed to provide advice as to what course should be adopted in respect of any possible claim. The solicitor believed that the facts relating to negligence and causation were quite complex.

[20] On 2 February 2000 he briefed counsel to advise generally on the matter. That advice was received on 10 April 2000. Counsel advised, amongst other things, that a report should be obtained from the doctor who performed the operation, Dr Cull, which proved fruitless. It was decided to get a report from Dr White who was known to the solicitor as an orthopaedic surgeon experienced in medico-legal matters. Dr White was contacted on 7 August 2000 but the first available appointment for the applicant was 29 September 2000. Dr White's report followed about 3 weeks later.

[21] Upon receiving it the solicitor formed the view that the plaintiff may have a cause of action worth pursuing in respect of the 1994 injury. However, he remained conscious of the fact that the plaintiff was still fully employed and had not suffered much economic loss and was not then suffering any such loss. He had been paid by WorkCover for his time off work and his medical expenses. It is convenient to record here that the applicant was cross-examined on his affidavit. He appeared to be quite a stoic and straight-forward person.

[22] The solicitor again briefed counsel and it was suggested that a further report be obtained from Dr White to determine the role played by the 1994 injury in the plaintiff's symptomology. Dr White gave a further report dated 2 March 2001 which was received on 21 March 2001. In the meantime the proceeding in respect of the 1994 injury was issued on 5 March 2001 and served on 15 October 2001. In the interim period the solicitor had a series of dealings with WorkCover for the purpose of obtaining damages certificates and assessment in respect of the 1998 and 1999 injuries.

[23] The focus now shifts to the principles involved. The plaintiff must establish that a material fact of a decisive character first came to his knowledge after 5 March 2000 to enliven the discretion under s 31 of the *Limitation of Actions Act*.

[24] Having regard to the concessions made by the respondent the issue is whether 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 which is agreed to be 5 March 2000. Section 30(1)(a)(iv) provides that one of the material facts relating to the right of action is the nature and extent of the personal injury caused by the negligence or breach of duty. Section 30(1)(b) provides that material facts are of a decisive character only if a reasonable person:

- knowing the facts
- having taken appropriate advice on the facts

would regard them as showing:

(i) that the action would have a reasonable prospect of success and a reasonable possibility of resulting in an award of damages sufficient to justify bringing the action; and

(ii) that the applicant ought to bring the action in his own interests taking his circumstances into account.

The Section 30(1)(c) provides that a fact is not within the means of knowledge of a person at a particular time only if he did not know it at that time and that he has taken all reasonable steps to find out before the time in question.

[25] The applicant proposed a series of possible material facts of a decisive character which were within the applicant's means of knowledge only after the relevant date. It was submitted that there were three alternative material facts, each of which was decisive, in order for the plaintiff to make out a cause of action which was worthwhile pursuing. The first was the plaintiff's unfitness for "heavy physical labour, prolonged standing, prolonged sitting, lifting or repetitive bending" in the

future by reason of the symptoms and impairment of function he was suffering. This was contained in Dr White's first report in October 2000. The second was the causal link between the 1994 accident and the current symptomology and the inability to work to a significant degree having regard to all of the intervening incidents. This appeared in Dr White's report in March 2001. The third was that he was unable to carry out his duties, which became known when he was terminated in February 2002.

[26] The respondent's case is that the plaintiff's evidence in cross-examination at the hearing and inferences to be drawn from it show that the nature and extent of his back injury were within his means of knowledge at a time prior to 5 March 2000. It was submitted that the evidence of his symptoms were such that he either knew or did not take reasonable steps to find out the nature and extent of his injury prior to that date. It was submitted that the case was indistinguishable on its facts from *Beaver v State of Queensland* [2000] QSC 40 (Atkinson J; and on appeal [2000] QCA 21) and *Katene v George Weston Foods Ltd* (unreported, Helman J 26 March 1998, Sc Qld, 8158/97). However, those cases were in my view less favourable to an exercise of the discretion than the present one.

[27] The present case has the unusual feature that the plaintiff not only returned to work (which was a feature in common with *Beaver* and *Katene*) but even after the last work related incident occurred, about 4 months before the incident leading to the operation, the plaintiff expected his pain to return to its previous level and Dr Eaton was speaking in the optimistic terms referred to in para [7] above. It was only after the collapse of the disc at the beginning of August 1999 that Dr Eaton began to canvass the possibility that the 1994 injury may be implicated in what had now happened. However, he was still expressing the view that the applicant had made excellent progress and he anticipated a graduated return to normal work activities over a period of 4 to 6 weeks. Within a week of that report the applicant had seen a solicitor who immediately took steps to investigate the possibility of a claim, which ultimately led to appropriate advice being given and the claim instituted by filing the claim and statement of claim on 5 March 2001. In *Katene,* Helman J said the following:

> "In a proper case a newly-discovered fact that a claimant's injury is more serious than previously thought can be described as a material fact of a decisive character within the meaning of those words in s 31(2)(b) if it adds substantially to the quantum of damages likely to be recovered if without the newly-discovered fact the amount otherwise would be too small to bother about; and in determining what a reasonable person might do in such circumstances it is valid to consider whether substantial parts of any sum to be recovered in a judgment would be refundable by a successful plaintiff: *Taggart v The Workers' Compensation Board of Queensland* [1983] 2 QdR 19 at pp 23-24 per Andrews SPJ, with whom Macrossan J agreed. Generally however, a material fact which merely increases a claimant's damages is unlikely to be decisive: *Peabody Resources Limited v Norton* (Appeal no. 200 of 1994, unreported, 16 June 1995); and see also *Ipswich City Council v Smith* (Appeal no. 5443 of 1997, unreported, 29 August 1997)."

[28] It is true that after the operation the applicant became concerned about the state of his back. However, had the medical evidence under consideration then consisted of Dr Eaton's report, it is by no means clear that a person giving proper advice to the applicant would have advised him at that time that he ought to take action. It was by no means clear at that point that he would suffer substantial economic loss. In my view it was the intervention of the subsequent medical opinion which painted a more serious prognosis in addition to implicating the injury in 1994 as a significant cause of the applicant's problems. In my view that was the first material fact of a decisive character for the purposes of the application and as it became known to the applicant within 12 months of the date upon which the claim was filed, it allows him to satisfy the threshold requirement for leave. Having regard to the concessions made as to other requirements which must be satisfied before a favourable exercise of discretion may be made, I am satisfied that the applicant should succeed.

[29] The orders are the following:

1. that the limitation period herein be extended pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) to 5 March 2001;
2. that the costs of and incidental to the application be costs in the cause.