

SUPREME COURT OF QUEENSLAND

File No 2092 of 2002

BETWEEN:

MILLER

Applicant

AND:

BRISBANE CITY COUNCIL

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION: *Miller v Brisbane City Council* [2003] QSC 065

PARTIES: **STEPHEN DOUGLAS MILLER**
(Applicant)
v
BRISBANE CITY COUNCIL
(Respondent)

FILE NO/S: SC 2092 of 2002

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 17 March 2003

DELIVERED AT: Brisbane

HEARING DATE: 5 November 2002

JUDGE: Moynihan J

ORDER: **Application be dismissed**

CATCHWORDS: LIMITATION OF ACTIONS – Torts and personal actions – Whether the limitation period should be extended – Where material fact of decisive character was not within knowledge until after the date of expiration of the limitation period.

COUNSEL: Mr Boutlon for the Applicant
Mr O’Sullivan for the Respondent

SOLICITORS: Maurice Blackburn Cashman for the Applicant
Brisbane City Legal Practice for the Respondent

- [1] This is an application for the extension of the limitation period for a claim for damages for personal injury allegedly suffered by the respondent on 21 April 1998 in the course of his employment. The limitation period expired on 21 April 2001 but the action was not commenced until 12 March 2002. This application pursuant to s.31 of *Limitations of Actions Act* 1974 was brought on the same day.
- [2] The applicant's case is that a material fact of a decisive character relating to his right of action was not within his means of knowledge until a date after commencement of the year last preceding the expiration of the period of limitation; see s. 31(2)(a).
- [3] A material fact relating to a right of action is of a decisive character. A reasonable man knowing those facts and having taken appropriate advice on them would regard them as showing reasonable prospect of a successful action; s. 30(1)(b) of the Act.
- [4] The evidence in support of the applicant's liability case is scant. It appears that he was required, together with another man, to load three or four table tops into a vehicle. The applicant estimates the weight of the table tops to be 90kgs but really that is no more than a guess. It may be accepted that the lift required two people, there is nothing to suggest other than that the two people would be able to carry out the lift safely or, if it be the case, that the respondent ought to have known the applicant could not safely do so.
- [5] It is clear that the applicant had a degenerate lumbar spine notably at the L5/S1 level but also at other levels such as L2 and L3 by 1991 or earlier than the degenerative processes have continued since that date and they have been aggravated by a number of incidents which occurred prior to 21 April 1998. His condition was aggravated by a number of incidents, including that of 21 April 1998, which temporarily worsened the disability. When it settled the plaintiff returned to work.
- [6] The plaintiff was cross examined his affidavit before me. I do not regard him as a reliable witness. It is in my view manifest from various accounts that he has given to medical practitioners and his evidence that he tailors his accounts of his problems with his back to the particular circumstances. In particular in recent times he has sought to attribute his back problem to the 21 April 1998 incident. I do not think his accounts of what he was told by various medical practitioners can be relied on.
- [7] On 29 August 1995 the applicant twisted his lower back while trying to reach down to change a sign in the bus he was driving. This precipitated pain which however did not prevent the applicant from working but continued to trouble him.
- [8] In January 1997 the plaintiff was recorded as suffering from ongoing back pain for approximately 17 months.
- [9] On 21 January 1997 the applicant applied to the Workers Compensation Board for medical expenses to permit him to see a chiropractor these were refused but in the course of his application the applicant made it clear that he attributed his lower back problems at that time to the 28 August 1995 incident.
- [10] Following the 21 April 1998 incident the applicant applied for Workers Compensation benefits. His general practitioner referred him to an orthopaedic specialist (Dr Dickinson) who thought that the applicant's symptoms were due to an

aggravation of a pre-existing condition and would settle down particularly if the applicant undertook an exercise program, used analgesics and was encouraged to return to work.

- [11] The applicant returned to work on restricted duties on 2 June 1998 and to full duties on 1 July of that year. He continued in this employment, notwithstanding some difficulty with back pain, until 13 March 2001. On that date, apparently as a consequence of driving a bus with a defective seat and striking some pot holes, he suffered an onset of severe back pain and developed pins and needles in his left leg and right foot. He made an attempt to return to work on 21 March but was unable to complete the shift and has not worked since that date.
- [12] The plaintiff first saw a solicitor about the possibility of claiming damages on 10 May 2001, his Workers' Compensation benefits ceased on 25 September 2001 and his employment was terminated on that day. As I have said proceedings against the Council were instituted and this application was brought on 12 March 2002.
- [13] The plaintiff's affidavit evidence is scant in respect of the issues of knowledge or means of knowledge of a material fact of a decisive character is scant. His case appears to be that he was given a favourable prognosis following the 21 April 1998 incident. By 13 March 2001 he came to appreciate that his disability was greater than he had anticipated.
- [14] These events are consistent with the event on 21 April 1998 aggravating the applicants pre-existing condition which was well known to him by 1 July of that year the applicant was on full duties.
- [15] The incident of 13 March 2001 triggered the pre-existing condition and the plaintiff's case is he had not been able to work since. There is no basis for inferring a connection between 21 April and 13 March 2001 incidents or between the 1998 incident and any disability after that of 13 March 2001.
- [16] These considerations being those I have canvassed the application should be dismissed.