SUPREME COURT OF QUEENSLAND

CITATION:	*Rollason v Byrnes Byproducts* [2003] QSC 116
PARTIES:	**SHERRALENE FRANCES ROLLASON** (Plaintiff/Applicant) **v** **VICTOR PATRICK BYRNES Trading as BYRNES BYPRODUCTS** (Defendant/Respondent)
FILE NO/S:	523 of 2002
DIVISION:	Trial
PROCEEDING:	Application for extension of time
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	24 April, 2003
DELIVERED AT:	Cairns
HEARING DATE:	30 January, 2003
JUDGE:	Jones J
ORDER:	**1. That the period of limitation for the plaintiff's action for damages for personal injury be extended so that it expires on 16 October 2002 inclusive.** **2. That the costs of this application be costs in the cause.**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – where the limitation period for an action for damages for personal injury to the plaintiff allegedly caused by her employer's negligence and/or breach of contract and/or breach of statutory duty – whether the period of limitation for the action should be extended. *Limitation of Actions Act* 1974 (Qld), s 30, s 31 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234
COUNSEL:	D V C McMeekin SC for the plaintiff/applicant B L P Hoare for the defendant/respondent
SOLICITORS:	Macrossan & Amiet for the plaintiff/applicant Bruce Thomas Lawyers for the defendant/respondent

[1] The plaintiff/applicant is applying for an extension of the period of limitation up to and including 16 October, 2002 on which date she filed a claim for damages for personal injury. This injury she alleges was caused by the negligence and/or breach

of contract and/or breach of statutory duty of the defendant, who was the owner and/or operator of the abattoir which employed her as a meat packer.

[2] The plaintiff/applicant alleges she was injured over the course of her employment between 29 May 1995 and 30 October 1995. She also refers to a specific incident which occurred on her last day at work when she was engaged in transferring cartons of meat from rollers to a rack. Thus, under the *Limitation of Actions Act* 1974 s 11 ("the Act") she was required to have brought her action before three years had expired, namely, on or before 29 May, 1998.

[3] Pursuant to s 31(2) of the *Limitation of Actions Act* 1974, the court may order that the period of limitation for an action be extended if it appears to the court *inter alia* "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 after the commencement of the year last preceding the expiration of the period of limitation for the action". The section permits an extension of the limitation period for one year only after the relevant date.

[4] Thus, if the fact the plaintiff alleges is a material fact of a decisive character relating to the right of action to make her claim, it needs to have come to the knowledge of the applicant on some date between 16 October 2001 and 16 October 2002.

Was there a material fact of a decisive character?

[5] The plaintiff relies primarily upon the fact that the true nature and extent of her injury was not within her means of knowledge until 5 June 2002 when she received advice from Dr Comben that she had sustained an injury to a disc in her spine that would interfere with her capacity to work and may require surgery. This advice led to the plaintiff on 6 August 2002 retaining solicitors who then made appropriate inquiries which led to the commencement of this action. Those inquiries led to expert opinions being received from Dr Cook, orthopaedic surgeon and Mr Kahler, forensic engineer. The plaintiff relies also on the fact that advice from these sources were also material facts not within her means of knowledge.

[6] By her claim the plaintiff identifies her injuries as –

(a) An injury to the lower back;
(b) An intra discal disruption at the L5-S1 level;
(c) An aggravation of pre-existing degenerative changes in the lumbar spine.
(d) …"

The plaintiff had experienced problems with her lower back during the period she was employed by the defendant as well as some episodes of back pain on earlier occasions. For example between 1989/1993 she worked as a meat packer for the Tancreds company at Innisfail. She recalls an incident in August 1991 when she suffered pain in her back while lifting a heavy weight. The symptoms she suffered were of short duration. Again in July 1993 there was another visit to a medical practitioner whose notes indicate a complaint of pain in her back over a period of a few weeks.[1]

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[1] See ex "SJW 11" to the affidavit of Suzanne Wishart sworn 29 January 2003

[7] After commencing work with the defendant, the plaintiff felt pain in her back when lifting heavy cartons of meat. This pain in her back subsided with rest but returned when she resumed her work duties. The nature of her work as described by Mr Kahler was quite strenuous and would most likely have exposed any pre-existing weakness in the plaintiff's back. She apparently managed to work between May – September 1995 without seeking medical help. On 11 September she attended the Atherton Hospital for treatment for back pain and this was followed up on 15 September 1995. On her last day of work with the defendant – 30 October 1995 – she had to cease work early and again attended the Atherton Hospital for treatment. She had in her previous visits to Atherton Hospital ascertained that she was pregnant. On each of her visits to the Atherton Hospital she was diagnosed as having muscular pain and prescribed simple analgesics and exercise. On the last occasion she was given a Pethidine injection and a certificate for time off work for five days.

[8] The plaintiff, on ceasing work, made a claim for Workers' Compensation which was initially denied, but after being interviewed by WCB Officers on 14 November 1995 was allowed.

[9] The plaintiff had decided not to return to work because of her pregnancy. During the next three years the plaintiff did not work for remuneration but fulfilled her role as mother and carer. She, in this time, had two children born respectively on 29 April 1996 and 16 April 1999. Any back problems she experienced during this period were attributed to her pregnancies and child caring activities.

[10] In August 2000 the plaintiff suffered severe pain in her lower back in respect of which she consulted Dr Comben and other medical practitioners at the Hibiscus Medical Centre at Mackay. Initially she was prescribed anti-inflammatory tablets and an exercise regime. On 8 May 2001 a plain X-ray was taken after which Dr Comben advised that she had early degenerative changes in her spine and advised her to continue with her medications and exercise.

[11] Her condition worsened and on 27 July 2001 she experienced muscle spasm for which she was again treated at the Hibiscus Medical Centre. Dr Comben reviewed her on 1 August 2001 but the treatment regime was essentially unchanged.

[12] On 5 December 2001 Dr Comben in his affidavit acknowledged that he had a suspicion that the plaintiff may have had a disc injury but he did not communicate this fact to her. After further visits to the medical centre which indicated no significant improvement in her condition Dr Comben referred the plaintiff for a CT scan on 29 May 2002. At the subsequent visit on 5 June 2002 the plaintiff was told that she had injured her L4-5 and L5-S1 discs.[2]

[13] The plaintiff's understanding of her physical state is expressed in her affidavit sworn 23 December 2002 in the following terms:-

> "99. Prior to receiving Dr Comben's advice that I had an injury to a disc I thought that I had some form of muscle strain. I assumed that this was as a result of my ordinary daily activities. I was not concerned by it as I thought the condition would settle in time. After hearing that I had an injury to a disc I was concerned that the injury may have been caused by the hard work that I performed at the meat

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2 Ex GCP 14 to the affidavit of Gene Patterson sworn 23 December 2002

> works. I knew of no other possible source of injury. The work at the [defendant's] meat works at Tolga placed very significant strains on my back. I became concerned about my ability to work in the future."

[14] The plaintiff was subsequently examined by Dr Cook who expressed his opinion at "the probable cause of the injury suffered by [the plaintiff] to her L5-S1 disc relates to work she performed between May of 1995 and October of 1995 lifting boxes of meat."[3]

[15] One point of evidentiary conflict arises from a report of Dr Andrew McLaughlan, Radiologist, which contains a comment under the heading Clinical Notes –

> "15 years of low back pain."[4]

[16] It is difficult to know the origin of this comment in the X-ray report. Dr. McLaughlan is a radiologist who was interpreting the plain X-rays requested by Dr McFayden of the Hibiscus Medical Centre. The referral letter is not included in the exhibit and there is nothing in the relevant notes of the medical centre to indicate any such long term problem. The plaintiff when questioned on this issue said she had never seen Dr McLaughlan (transcript 15/10) and had never given any such history to Dr McLaughlan nor to Dr McFayden nor to any other doctor (transcript 21/35).

[17] As the comment appears in a radiologist's report without reference to the source of the statement and is directly contradicted by the plaintiff's sworn evidence and by her recorded medical history, it seems to me that it does not provide any indication of the plaintiff's pre-accident back condition. The direct evidence from the records of the Cairns Medical Centre (9 April 1990)[5] and Dr Merlo, Atherton Hospital, (July 1991)[6] rather suggests the plaintiff only experienced isolated episodes of back pain. This was indeed the interpretation accepted by Dr Cook (transcript 30/20).

[18] Moving then to the relevant issue in this application the question is whether the nature and extent of the plaintiff's back injury was within her means of knowledge for the purpose of s 31 of the Act. The defendant draws attention to the fact that from August 2000 the plaintiff was suffering significant back symptoms. By May 2001 she is suffering sufficiently to be sent for X-ray examination. She was aware that her work with the defendant produced similar symptoms in 1995. The defendant argues that these were matters that ought to have put her on inquiry but this was not done until contacting her solicitors over a year later in August 2002. The defendant thereby contends that the plaintiff has failed to take appropriate advice for the purpose of the section.

[19] Section 30(b) of the Act relevantly provides:-

> "(b) material facts relating to a right of action are of decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts would regard those facts as showing –

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3 See para 6 affidavit of Alan Cook sworn 23 December 2002

4 See ex "GCP10" to affidavit of Jean Patterson sworn 23 December 2002 at p 42

5 See transcript 27/50

6 Ex SJW 11 to Wishhart Affidavit sworn 29 January 2003

> (i) that an action on the right of action would…have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
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> (ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account bring an action on the right of action;"

[20] The evidence discloses that the plaintiff did seek advice about her medical condition from time to time, that she accepted the diagnosis of the various medical practitioners and complied with their advice. Relying upon the diagnoses given in 1995 and subsequently until 5 June 2002 the plaintiff could only have come to the view that there was no serious injury. It was certainly not one that would cause her to consider initiating a claim for damages. I find that this was her state of mind throughout that period. In the all circumstances it was reasonable for her to comply with the advice of the medical practitioners. See *Sugden v Crawford*.[7] In those circumstances I would not expect her to have sought any other type of advice nor would the circumstances have justified the institution of proceedings.

[21] Section 30(d) imposes an obligation on a person to take all reasonable steps to ascertain the decisive fact which was not within that person's knowledge within the limitation period. The remarks of Thomas J in *Nielson v Peters Ship Repair Pty Ltd*[8] he said (at 440):-

> "But it may be said of s 30(d)(ii) that not many "steps to ascertain the fact" can reasonably be expected of a client when he is in ignorance of the need to ascertain it."

[22] The plaintiff had no need to make enquiries until the seriousness of her injury was discovered. Obviously some time had to elapse for the solicitors to make inquiries and to engage experts to provide the necessary opinions upon which the claim for damages would be based. See *Dick v University of Queensland*[9]. There can be no suggestion that the plaintiff acted other than reasonably in obtaining expert opinions. In fact she commenced her action on her claim prior to her solicitors receiving some of the reports.

[23] The defendant argued that the plaintiff was well aware of the weights of the cartons she was required to lift and of the relationship between those tasks and the onset of pain. Counsel for the defendant referred to *Do Carmo v Ford Excavations Pty Ltd*[10] to argue that the plaintiff was aware of all the relevant facts and that ignorance of whether these constituted negligent conduct was not itself a "material fact". As I understand the plaintiff's argument, the reference to the report of Mr Kahler is not that the report itself disclosed the material fact, which could not have been ascertained, but rather it is relied upon in a sense that there was no need to obtain advice from that source until after the plaintiff was aware of the seriousness of her injury which justified the commencement of the action. The respondent's reliance

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7 (1989) 1 QdR 683

8 (1983) 2 QdR 419

9 (1999) QCA 474 at para 36

10 (1984) 154 CLR 234

upon *Do Carmo* does not go to this point. It is sufficient for the plaintiff to rely upon the disclosure of the serious nature of the injury which I am satisfied was a material fact of a decisive character.

[24] For the purpose of this application counsel for the defendant concedes that the combined effect of the reports of Dr Cook and Mr Kahler satisfies the requirements of s 31(2)(b) that there is evidence to establish the right of action.[11]

Exercise of discretion

[25] Once satisfied that the requirements of s 31(2) have been met there remains the exercise of the Court's discretion whether to grant the extension. The respondent argues that it would suffer prejudice if the applicant were to be granted an extension of time. This submission is based principally on the respondent's solicitors being unable to locate certain of the applicant's medical records, or to find co-workers with adequate recall of the system of work and also on the fact that the employer has since the date of the plaintiff's employment, destroyed records.

[26] So far as the medical records are concerned the defendant engaged in a search of the plaintiff's medical history covering 18 years from 1 February 1984 to 31 July 2002 – effectively for the whole of the plaintiff's adult life. Despite the defendant's failure to make contact with some of the doctors who examined the plaintiff since 1984, extensive medical records do exist and have been disclosed. The WorkCover records are available as well as the plaintiff's medical history for the years immediately prior to the period of her employment and of course all the medical records for the subsequent period.

[27] As well, there are key witnesses available to the defendant particularly of the manager and supervisor of the meat works at the relevant time and the foreman. Mr Kahler's report has identified in great detail the system of work which the plaintiff contends was in place at the time of her employment. This system is of relatively narrow scope and ought to be able to be recalled by the works foreman and the manager of the business at that time who one expects would be able to give instructions to legal advisors for the purpose of obtaining expert opinion.

[28] Whilst an extension of the limitation period might be expected to cause some prejudice and this is a factor which must necessarily be taken into account in the exercise of the discretion, I am not persuaded on the evidence before me that the difficulties which the defendant points to on this application constitutes such prejudice that it would be unreasonable to order that the limitation period be extended. *Brisbane South Regional Health Authority v Taylor*[12].

[29] In those circumstances I will allow the application.

Orders

[30] I make the following orders:

1. The period of limitation for the plaintiff's action for damages for personal injury be extended so that it expires on 16 October 2002.
2. Costs of and incidental to this application to be costs in the cause.

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11 See respondent's Outline para 4 and transcript 42/15

12 (1995) CLR 541