SUPREME COURT OF QUEENSLAND

CITATION:	*Marjanovic v Fitzroy Shire Council & Ors* [2003] QSC 156
PARTIES:	**MARA MARJANOVIC** (plaintiff/applicant) **v** **FITZROY SHIRE COUNCIL** (first defendant/respondent) **DAVID PICKERING** (second defendant) **ADAM PRATT** (third defendant)
FILE NO:	S 3525 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	22 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2003
JUDGE:	B W Ambrose J
ORDER:	**Application dismissed. I order that the plaintiff pay to the first defendant/respondent its costs of and incidental to this application to be assessed on a standard basis.**
CATCHWORDS:	LIMITATION OF ACTIONS – Personal injuries – Extension of time – application for an extension of the period of limitation – where plaintiff injured by collision with bicycle rider while walking on footpath – where action commenced after expiration of limitation period – whether material fact of decisive nature within knowledge of the plaintiff prior to that date *Limitations Act* 1974 (Qld), s 30(1)(b), s 30(1)(c), s 31(2) *Personal Injuries Proceeding Act* 2002 (Qld), Ch 2, Part 1 *Traffic Regulations* 1962 (Qld)
COUNSEL:	P W Hackett for the applicant S T Farrell for the respondent
SOLICITORS:	Gadens Lawyers acting as Town Agents for Capital Lawyers for the applicant Barry & Nilsson for the respondent

[1] **AMBROSE J:** This application for an extension of the period of limitation pursuant to s 31(2) of *Limitations Act* 1974 was made on 17 April 2003 when the

plaintiff also filed a claim and statement of claim for damages for injuries she received on 6 June 1996.

[2] Should the plaintiff succeed on her application to extend the period of limitation she also seeks leave to start proceedings in respect of her injuries despite her non-compliance with Chapter 2, Part 1 of the *Personal Injuries Proceeding Act* 2002. She seeks to have her action stayed pending compliance with the provisions of that Act should the period of limitation be extended.

[3] There was a great deal of evidence filed on behalf of the plaintiff upon this application but no evidence was filed on behalf of the first defendant or for that matter on behalf of the second or third defendants.

[4] It is not clear to me that in fact either the second or third defendant has been served with the application although they are respondents to it. No affidavit of service was filed and I will proceed then to consider making an order effective only with respect to the first defendant. From the terms of the appearance slip it seems that counsel appearing to oppose the plaintiff's application appeared only for the first defendant.

[5] Any order that is made therefore will be binding only upon the first defendant Fitzroy Shire Council.

[6] It is convenient to state briefly the facts relevant to the determination of this application.

[7] On 6 June 1996 the plaintiff a 48 year old woman who resided at Queanbeyan near Canberra was injured when a 13 year old school boy riding a bicycle down a concrete path in Rockhampton on which she was walking collided with her.

[8] Her statement of claim pleads that the concrete pathway down which she was walking immediately prior to the collision was a "shared footway" within the relevant *Traffic Regulations* (Qld) 1962; such a footway may be used by both pedestrians and cyclists. She pleads that the second and third defendants who were then cycling to a nearby school were proceeding down the concrete pathway travelling in the same direction as that in which she was walking. She alleges that the third defendant swerved to the left off the footpath onto the dirt/grass beside it shortly before reaching her. She said that this startled her because she had no prior warning of his approach and she jumped towards her right. As she did so the second defendant was passing her on her right hand side and she stepped in front of the bicycle he was riding which collided with her causing her injury.

[9] The plaintiff pleads that the first defendant was guilty of negligence in failing to erect signs and mark the concrete footpath in such a way as to warn people using it either as pedestrians or cyclists that it was a "shared footway".

[10] More importantly however to the determination of this application she also pleads that the footpath was not constructed to comply with the accepted Australian standard for a shared pedestrian/bicycle footpath. She pleads that the first defendant failed to ensure that the footway was "wide enough for the movement of cyclists and pedestrians side by side". She pleads also that the first defendant "promoted" the use of the shared footpath "without considering the inadequacies of the width of

the footpath". She pleads specifically that the first defendant was negligent in failing to ensure that the footpath was at least 3 metres wide.

[11] She particularises damages (both general and special) amounting to nearly $.5m.

[12] It is clear upon the material that the plaintiff was a visitor to Rockhampton where she had been only for a short period of time. She was taken to hospital on the day of her injury and remained there for 3 days. After her discharge from hospital she returned to her home at Queanbeyan on 12 June 1996 where she received medical treatment for a significant period of time. She was not able to resume her previous occupation as a chef.

[13] It is unnecessary I think to further analyse the vast amount of evidence touching on the events that occurred subsequent to her injury for the purpose of determining this application.

[14] It is clear that the *Limitations Act 1974* requires that any proceedings she wished to institute against any of the defendants be statute barred if not commenced on or before 6 June 1999.

[15] She did retain a firm of solicitors in Canberra who upon the evidence assembled concluded that she did not have a cause of action against the first defendant upon which she could succeed and advised her accordingly.

[16] For whatever reasons her solicitors in Canberra did not institute proceedings as apparently the plaintiff pressed them to do. Indeed on 9 August 1999 – about 2 months after her action was statute-barred her solicitors wrote a letter referring to "previous conversations" that they had with her concerning the prospects of her successfully suing the first defendant reminding her that she had already received legal advice that she "did not have a case against the council". Interestingly that letter advises that if she wished to proceed with the action she should sign a duplicate copy of that letter. The letter asserts that her solicitors had advised her on more than six occasions prior to 9 August 1999 that she did not have a valid cause of action against the first defendant.

[17] In a police report made shortly after the plaintiffs injury it is recorded that the second defendant admitted that he saw the plaintiff walking in the middle of the pathway in front of him. He said he saw the third defendant ride off the pathway to the left to overtake the lady. He said that he did the same to overtake her on her right hand side entirely leaving the concrete path. He said that as he did this the plaintiff stepped sideways to her right in front of him and he could not avoid colliding with her at a time when she was entirely off the concrete footpath. The third defendant gave the police a statement consistent with that given by the second defendant. He said that he saw the plaintiff walking in about the middle of the concrete pathway. He left the pathway to go to her left when he was about three or four metres behind her. He said that after he passed her he turned around to see where the second defendant was and observed that he also left the pathway to overtake the lady on her right hand side. He said he observed the plaintiff, step to her right off the concrete pathway directly in front of the second defendant who collided with her causing her injury.

[18] In the year 2000 the plaintiff sued her former solicitors for professional negligence in failing to commence proceedings on her behalf within the period of 3 years that

followed the date of her injury. In that statement of claim the plaintiff pleads that she instructed her solicitors to seek compensation for her injury from the first, second and third defendants on 4 July 1996 – ie within one month of her injury.

[19] It is unnecessary and unhelpful to further analyse that statement of claim which relates to the chance she lost of recovering judgment against the defendants in an action of the kind she has now taken on the assumption that she will obtain an extension of the period of limitation.

[20] In the course of investigation of the plaintiff's prospects of successfully pursing a cause of action against the defendants in her action for professional negligence against her then solicitors in Canberra her present solicitors obtained a report from an expert in among other things the design of pathways and in particular pathways for the use of both pedestrians and cyclists.

[21] Nobody seems to have been retained by the plaintiff or her former or present solicitors to measure the width of the concrete pathway down the middle of which she was walking just prior to her injury.

[22] Surprisingly in the course of his report the engineer observes –

> "The width of the finished path is not stated although it would appear to be in the vicinity of 2 metres when compared to other features seen in the copies of the photographs…".

He refers to a kerb and channel shown in those photographs which are attached to his report. The photographs indicate that they were taken on 1 July 1997 – more than four years prior to the preparation of his first report on 25 September 2001; who took them and for what purpose does not emerge in the evidence.

[23] In that section of his report dealing with "path width" he refers to the "Austroads guide" which recommends path widths. He observes –

> "As mentioned, it is estimated the width of the path in question was no more than 2 metres (the absolute minimum recommended)."

[24] He then referred to the fact that the path would have a relatively high usage for a short period each day before and after school with little usage at other times. He observes –

> "This time related variation and usage may influence any decision to provide a "minimum specification" facility although, if the desirable 2.5 metre width path was available, the incident in question may still have occurred (with cyclists overtaking on either side of the pedestrian)."

[25] The author of the report then sets out on page 6 of his September 2001 report three diagrams for paths to be shared by cyclists and pedestrians. The first diagram indicates that the "Absolute minimum" width for a shared path is 2 metres. The second diagram indicates that the "Desirable minimum" width for a shared path is 2.5 metres. The third diagram indicates that the desirable minimum width for a busy shared path is 3 metres. This expert advice therefore was available to the plaintiff – through her solicitors – from the time when that report of 25 September 2001 was received.

[26] On the basis of that report on the assumption that the concrete path was at least 2 metres in width I would find it unsurprising that the plaintiff's original solicitors advised her against proceeding with her action against the first defendant. The estimate however was that the path was "no more than" 2 metres in width; no effort seems to have been made to measure its width.

[27] However on 2 march 2002, about 5 months after the engineer's first report had been received the plaintiff's son visited Rockhampton and inspected the scene of the accident. He then estimated that the width of the path where the plaintiff had been injured was only 1.2 metres.

[28] Armed with this information the plaintiff's current solicitors (acting for her in her professional negligence action against her first solicitors) got a second expert report dated 19 April 2002. In this report (at page 5) the assumption is made that the concrete path had a width of 1.2 metres. The view expressed was that this was a "general minimum design width" for a pedestrian only path, as set out in the "Austroads, (1995) Guide to Traffic Engineering Practice: Pedestrians…".

[29] In his second report the expert observes that the path was initially constructed to meet only pedestrian needs but subsequently was used by cyclists.

[30] On page 7 of the report precisely the same diagrams are set out as were set out on page 6 of his earlier report of 25 September 2001.

[31] Although no opinion is expressed in this second report concerning the failure of the first defendant to construct a footpath sufficiently wide to meet the standard of the Austroads requirements of a minimal width of 2 metres for a footpath to be shared by pedestrians and cyclists, precisely the same extract from that road standards publication is set out.

[32] It is clear that the failure of the first defendant to comply with the standards recommended for the construction of a concrete path with a minimum width of 2 metres if it were to be used by pedestrians and cyclists would be evidence of negligence; it would not necessarily however lead to a finding of negligence. The construction of a footpath of less than the minimum recommended or even required width by Austroads would only be one consideration in determining whether in the circumstances the first defendant was guilty of negligence. Undoubtedly however it would be some evidence of negligence – indeed one might infer the only evidence of negligence which might have any reasonable prospect of being established against the first defendant – ignoring at this stage the absence of signs, markings on footpaths etc.

[33] On 30 April 2002 the first defendant advised the current solicitors for the plaintiff that in fact the width of the path was 1.5 metres. One might infer perhaps that the council would not have given that advice unless somebody connected with the council had actually taken the trouble to measure the width of the footpath. In this case however that would not be the only inference that might be drawn.

[34] The plaintiff in this case seeks to have the period of limitation extended to the date of her application and the filing of her claim and statement of claim – ie 17 April 2003. It is clear therefore that pursuant to s 31(2) of the *Limitations Act* 1974 she must show that a material fact of a decisive character relating to her right of action against the defendants was not within her means of knowledge (including that of her

then legal representatives assembling evidence on her behalf) until a date after 17 April 2002.

[35] She must also of course establish that there is evidence to establish her right of action against the defendants apart from a defence based on the *Limitations of Action Act* 1974. Should she establish these things then it would be appropriate to order in this case that the period of limitation for her action be extended so that it expires on 17 April 2003. On the facts canvassed upon this application it is unnecessary to consider whether she has established such an arguable cause of action; I will assume that she has.

[36] Under s 30(1)(b) material facts relating to the plaintiff's right of action are of a decisive character only if a reasonable person knowing those facts and having taken the appropriate advice on them would regard them as showing that the action she has instituted would have a reasonable prospect of success.

[37] Under s 30(1)(c), a fact was not within the plaintiff's knowledge subsequent to 17 April 2002 only if –

(i) The plaintiff did not then know that fact and

(ii) As far as the fact was able to be found out by her she had taken all reasonable steps to find out that fact.

[38] It seems that neither the plaintiff nor either of her solicitors took any steps whatever to measure the width of the concrete path at any time prior to the institution of proceedings for damages against the defendants in this case. Indeed it was not until approximately 5 months after the first expert report of 25 September 2001had been received, more than five years after her injury, that the plaintiff's son visited the scene of her injury and estimated the width of the concrete path to be 1.2 metres. Even when this estimate was received no steps seem to have been taken to measure the width of the path and it was the estimate of the plaintiff's son on 2 March 2002 that led to a second amended expert report being obtained on 19 April 2002.

[39] Whether the path was in fact 1.2 metres or 1.5 metres in width as the first defendant later advised the plaintiff's solicitors does not emerge in the material. Indeed as far as the material demonstrates, the width of the footpath has never been measured by anybody from the time of the plaintiff's injury on 6 June 1996 until the time her application for extension was argued on 16 May 2003.

[40] Counsel have referred to all the principal authorities dealing with the characterisation of "a material fact of a decisive character" as one which a reasonable person knowing that fact would conclude gave him a reasonable prospect of success in an action – a conclusion to which he would not otherwise necessarily have come.

[41] In my view upon receipt of the expert engineer's report relating to minium widths for shared paths dated 25 September 2001 both the plaintiff and her solicitors were well aware that the "Austroads Guide" recommended that the "absolute minimum" width for a shared path was 2 metres.

[42] By early in March 2002 the plaintiff and her solicitors were well aware that the shared path on which she was injured was significantly less than the minimum recommended width of 2 metres; at least they had available evidence that the

relevant path had a width significantly less than the recommended minimum of 2 metres.

[43] Any prospect the plaintiff had of successfully pursuing the first defendant for damages for negligence depended substantially upon –

(a) Knowledge of the width of the path on which she was injured and

(b) The fact that the Austroads Guide to traffic engineering practice recommended a "an absolute minimum" path width of 2 metres.

[44] Upon the evidence I am forced to the conclusion that both these matters were within the knowledge of the plaintiff and her legal advisors long before 17 April 2002.

[45] In my view the fact that the width of the path was on 30 April 2002 admitted by the first defendant to have been 1.5 metres and the fact that the second expert report relating to path width was received on or subsequent to 19 April 2002 are of no assistance to the plaintiff upon her application for an extension of time. The critical matters are that the plaintiff was well aware of all relevant matters contained in the second report when the first report was received 5 months earlier. She was also aware within a few days of 2 March 2002 – approximately 6 weeks before 17 April 2002 – that the path upon which she was injured was substantially narrower than the minimum width of 2 metres recommended by Austroads.

[46] Even if those two facts be categorised as material facts of a decisive nature to a determination by the plaintiff to pursue the action she commenced against the first defendant on 17 April 2003 she clearly did not institute those proceedings or make this application within 12 months of those facts coming to her knowledge.

[47] I dismiss the application

[48] I order that the plaintiff pay to the first defendant/respondent its costs of and incidental to this application to be assessed on a standard basis.