SUPREME COURT OF QUEENSLAND

CITATION:	*Cormie v Orchard* [2003] QCA 236
PARTIES:	**ANNETTE CHRISTINE CORMIE** (plaintiff/appellant) **v** **MARK RAYMOND ORCHARD** (respondent)
FILE NO/S:	Appeal No 9337 of 2002 SC 12033 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2003
JUDGES:	McMurdo P, McPherson and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROFESSIONS AND TRADES – SOLICITOR AND CLIENT – EXERCISE OF SKILL – DUTIES AND LIABILITIES TO CLIENT - where appellant suffered personal injury – where appellant instructed respondent injury occurred on a definite date - where statutory limitation period expired – whether trial judge erred in fact and law by concluding that the respondent was not in breach of duty in failing to verify the date of the accident or the date of commencement of the appellant's employment - whether respondent breached his duty in failing to commence proceedings more expeditiously – whether learned primary judge provided adequate reasons for dismissing the claim *Limitation* Act 1969 (NSW) *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462, applied *Rondel v Worsley* [1969] 1 AC 191, applied *Voli v Inglewood Shire Council* (1963) 110 CLR 74, applied
COUNSEL:	S L Doyle SC, with G R Mullins, for the appellant J A McDougall for the respondent

SOLICITORS: Quinn & Scattini for the appellant
Quinlan Miller & Treston for the respondent

[1] **McMURDO P:** Ms Cormie, the appellant, was injured whilst visiting the Byamee Proclaimed Place, Moree, an institution to assist alcoholics, whilst she was employed as a social worker with the Moree Community Support Scheme in July 1985. She instructed Mr Orchard, the respondent solicitor, to act on her behalf in the resulting action for damages in negligence. That action was not commenced within the statutory limitation period and was therefore unsuccessful. She then brought an action against the respondent for damages for professional negligence. This appeal is from the order dismissing the appellant's claim against the respondent.

[2] The appellant was entitled to receive from the respondent the due care, skill and diligence of a reasonably competent solicitor: *Voli v Inglewood Shire Council*.[1] To establish professional negligence, the appellant must demonstrate more than a difference of opinion between solicitors as to the best practice or a simple error of judgment: *Rondel v Worsley*.[2]

[3] The appellant contends, first, that the learned primary judge erred in holding that the respondent was not in breach of his duty in failing to verify the date of the accident or the date of the commencement of her employment after receiving information from Dr Whitnall which raised doubts about the accuracy of her instructions as to the date of the accident; second, that the trial judge erred in holding that the respondent was not in breach of his duty in failing to institute her proceedings more expeditiously; and third, that the trial judge erred in failing to give adequate reasons in respect of the matters raised in the first and second grounds of appeal.

[4] The respondent acted for the appellant in some family law matters in 1988 and 1989. On 19 October 1990 she sought his legal advice about the Moree injury. A central fact was whether she instructed the respondent that the injury definitely occurred on 16 July 1985. The respondent gave evidence, supported by his diary notes, that she did. The appellant gave evidence that she told the respondent she was unsure of the accident date, even when pushed by him for a definite date; he said he would record "16 July" and check the date later. The learned trial judge accepted the respondent's evidence that on 19 October 1990 the appellant unequivocally nominated the date of her injury as 16 July 1985 without either any indication of uncertainty, or that she kept a work diary that might confirm the date of her injury, or that she could make other enquiries to confirm that date. The appellant does not challenge that finding.

[5] Over the ensuing eight months, the respondent prepared the appellant's action, attempting to find a witness, organising the preparation of medical reports, and unsuccessfully attempting to settle the claim with the insurers. He received a report from general practitioner Dr Porter dated 3 November 1990, which included the following:

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1 (1963) 110 CLR 74, 85 approved and applied to a solicitor's liability in tort for negligence in *Hawkins v Clayton* (1987-1988) 164 CLR 539 by Mason CJ and Wilson J at 544 and Deane J at 574-575.

2 [1969] 1 AC 191, 230.

> "Mrs Cormie was seen by Dr P Whitnall, Balow Street, Moree on 23/7/85. According to his notes she had slipped at work 10 days earlier and landed on her coccyx. Some of his notes are illegible to me. Over the 10 days the pain had become worse. … ."

[6] On 20 May 1991, he sent a brief to counsel to draw proceedings, and to advise on prospects and quantum. On 24 May 1991, counsel advised that it would be better for the appellant to be represented by Moree solicitors and to pursue the action in New South Wales without delay, because "(t)he *Limitation* Act 1969 (NSW) would seem to allow [the appellant] six (6) years from the 16th July 1985 to commence her action." This advice was sent to the appellant on 30 May 1991. She had a conference with the respondent and counsel on 6 June 1991 and instructed the respondent to send the matter to Moree solicitors. The respondent forwarded the file, which contained all results of his enquiries, to Cole & Butler, solicitors in Moree. The covering letter stated that the appellant had been injured on 16 July 1985 at Moree, highlighted the approaching expiration of the limitation period and requested the solicitors to ensure the proceedings were commenced prior to that date.

[7] Ms Spain was the solicitor who prepared the appellant's matter in Moree. On 13 June 1985, she requested the respondent provide her with the brief sent to counsel. She took further instructions from the appellant by telephone on 19 and 21 June 1991. The appellant gave no indication that she was uncertain about the date of the accident. Ms Spain had difficulty ascertaining the names of those responsible in July 1985 for the Byamee Proclaimed Place, an unincorporated association. Ms Spain issued proceedings in the District Court of New South Wales on 15 July 1991, the day before the expiration of the limitation period on the appellant's instructions, claiming damages for personal injury against both the occupier of the Byamee Proclaimed Place and the appellant's employers.

[8] The appellant also pursued a claim in the Compensation Court, New South Wales. At the hearing of that claim on 2 November 1985, it first emerged, in cross-examination, that the appellant had kept a daily work diary with an entry for 3 July 1985 which established that she had visited the Byamee Proclaimed Place on that day, not on 16 July 1985. The appellant explained that although she was not sure of the date of the accident, she was sure it was a Tuesday about two weeks before she saw Dr Whitnall and Tuesday, 16 July 1985 best fitted with Dr Whitnall's record of the date.

[9] Had the appellant's action for damages in negligence been filed in New South Wales just 13 days earlier, it would have been within the statutory time limit.

[10] The appellant challenges his Honour's finding that the respondent did not breach his duty of care in not following up Dr Whitnall's observations, referred to in the report he received from Dr Porter.[3] If Dr Whitnall's note was correctly recorded and accurately reported by Dr Porter, the accident occurred on Saturday, 13 July 1985, three days earlier than the appellant instructed and her action would need to be commenced by at least 12 July 1985, still ten days outside the actual limitation period. The appellant contends that this should have alerted the respondent to the

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[3] See para [5] of these Reasons.

unreliability of the appellant as to the precise date of the accident and the need to make additional inquiries and to initiate proceedings as soon as possible.

[11] His Honour found that had this discrepancy been brought to the appellant's attention, she would probably have treated it as a minor recording error on Dr Whitnall's part, the precise date not being of clinical importance to him.[4] The respondent had requested the medical reports to assist on issues of causation and quantum of damages, not because of any uncertainty as to the accident date.[5] His Honour also found that, although she told the respondent that the accident definitely occurred on 16 July 1985, the appellant probably reconstructed that date: she saw Dr Whitnall about a month before first instructing the respondent; the date referred to by Dr Whitnall, 23 July 1985, was a Thursday; she knew that she commenced her employment with the Moree Community Support Scheme in late June 1985; she was sure the accident occurred on a Tuesday about two weeks after she started work and must have decided that Tuesday, 16 July was the accident date;[6] she then gave the respondent that date as the definite date of the accident. Contrary to the submissions made by the appellant, there is no inconsistency in these findings.

[12] The appellant relies on the evidence of Mr Behan, a personal injuries litigation solicitor for over 30 years, whose expertise was admitted by the respondent. The appellant contends that the effect of Mr Behan's evidence established the following. A competent solicitor exercising care and skill, even assuming the appellant was definite about the date of the accident, would enquire why she was so certain of that date after such a long time, explaining to her the importance of the date because of the limitation period. If unable to verify the date by other enquiries, the competent solicitor would err on the side of caution and commence proceedings as soon as possible to minimise the risk of being outside the limitation period. Once a competent solicitor received Dr Porter's report of 3 November 1990, he was on notice that the date given by the appellant was uncertain and would make further enquiries. The competent solicitor would have referred the file to the Moree solicitors much sooner. The appellant contends that if his Honour decided to reject Mr Behan's evidence, which was uncontroverted on these points, he was required to give clear reasons. The appellant contends that his Honour did not give any reasons for rejecting Mr Behan's evidence, merely concluding that he was unpersuaded the respondent was guilty of the pleaded negligence; that the enquiries made by the New South Wales solicitors did not elicit any further information as to the date of the accident until 1994 and that he was "comforted by the expert evidence of Mr Behan called on behalf of the [appellant] in the circumstances".

[13] The difficulty for the appellant is that, whilst isolated portions of Mr Behan's evidence support her contentions, his evidence in its full context supports his Honour's conclusions.

[14] In his report of 28 May 2001, Mr Behan stated:

> "If, as alleged by [the respondent], and there is some support for him in the conference note, no uncertainty was expressed as to the date of the accident, then he was entitled to accept that the accident occurred on 16 July 1985 and it would be a harsh judgment to suggest that he should have made any further independent enquiries.

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4 Reasons, [39].
5 Reasons, [42].
6 Reasons, [35].

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> As a matter of general prudence, it is clearly preferable to commence proceedings well prior to the date upon which the time limit is believed to have expired, although it seems to me, that a solicitor can hardly be criticised for commencing proceedings one day prior to the expiry of the time limit, if there was no doubt in his mind, because of his instructions, about the date of the accident.
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> …
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> … Cole and Butler should have been engaged much sooner than they were. …"

[15] Mr Behan did not deal with the effect of Dr Whitnall's note in his report but in examination-in-chief he expressed the view that a competent solicitor exercising reasonable care and skill in the circumstances, learning of that note would have realised that the appellant might be wrong about the date of the accident and would point out this discrepancy to her. In cross-examination, Mr Behan conceded that Dr Whitnall's note was consistent with the accident occurring on 16 July 1985 and with the appellant's explanation in the Compensation Court. Mr Behan also conceded that all the steps taken by the respondent in preparing the matter for trial prior to sending the file to the Moree solicitors were warranted but maintained his view that the competent practitioner should have been concerned over the approaching expiration of the limitation period.

[16] In cross-examination, Mr Behan confirmed his opinion that the respondent's actions had not been those of a prudent solicitor properly investigating and prosecuting the appellant's claim because the Moree solicitors should have been instructed earlier. He agreed that if, however, the respondent was told that the date of the accident was certain and this information was conveyed to the Moree solicitors, it was reasonable for both the respondent and the Moree solicitors to act on that date. As his Honour pointed out and Mr Behan accepted, the critical matter for determination was whether the appellant instructed the respondent on 19 October 1990 that the date of the accident was certainly 16 July 1985. Mr Behan conceded that if there was no doubt in the respondent's mind about his instructions as to the date of the accident, neither he nor the Moree solicitors could be criticised for commencing proceedings just one day prior to the expiry of the time limit.

[17] This review of Mr Behan's evidence explains why his Honour rightly regarded the critical question for determination to be whether the appellant expressed any uncertainty as to the precise date of her injury as being 16 July 1985, a matter he determined in favour of the respondent. The evidence was capable of supporting that conclusion and it is not challenged.

[18] Once that was determined in the respondent's favour, Mr Behan's evidence did not establish the respondent was negligent in not making further enquiries after receiving Dr Porter's report referring to Dr Whitnall's observations. Mr Behan's evidence supports and provides "comfort" for the view taken by his Honour that it was not negligent for the respondent and the Moree solicitors to commence the

action the day before the expiry of the limitation period on the appellant's firm instructions. Mr Behan's opinion accords with common sense: the appellant apparently was an articulate, mature, woman and mother who had undertaken tertiary studies, with experience in the paid workforce and with previous contact with the legal system. The judge found she gave the respondent no reason to doubt the definite date of the accident which she provided. In those circumstances, a lawyer is entitled to rely and act on the unequivocal, definite instructions of a client of apparently normal intelligence and adequate communication skills, without undertaking further investigations to gainsay those instructions. The appellant was certainly advised, at least by 30 May 1991 when she received counsel's advice, that the date of the accident was important because of the looming expiration of the limitation period.

[19] It follows that the first ground of appeal fails.

[20] The finding that the appellant gave unequivocal instructions to the respondent as to the date of her injury also effectively disposes of the second ground of appeal, for, at least on the view of Mr Behan's evidence which was plainly accepted by his Honour, it was not negligent to commence proceedings on the day before the expiration of the statutory time limit, even had the file been sent to the Moree solicitors sooner.

[21] In any case, the evidence does not compel the conclusion that had the file been sent to the Moree solicitors earlier, the appellant's proceedings would have been issued before 3 July 1991 when the statutory time limit in fact expired. Ms Spain accepted the firm instructions supplied by the respondent that the date of the accident was 16 July 1985. She gave evidence that had she received the appellant's file earlier she would have endeavoured to issue proceedings up to a month before 15 July 1991 so as to be well within any time limits, but it was necessary for her to first make proper enquiries. The appellant had some difficulty in arranging to come to Moree to be interviewed, but Ms Spain's primary difficulty was in ascertaining the names of the defendants, a prerequisite to the issuing of proceedings. The evidence did not on balance establish that had Ms Spain received the file sooner, she would have issued proceedings before 3 July 1985: as Mr Behan pointed out, it was reasonable for her to act on the information supplied by the respondent and not disputed by the appellant in Ms Spain's interviews with her, that the accident occurred on 16 July 1985 and to issue proceedings on the day before the apparent expiration of the limitation period on 15 July 1991. On the undisputed facts found here, the appellant cannot sheet home her mistake about the date of the accident to any negligence on the part of her solicitor.

[22] It follows from what I have set out above that his Honour's findings and reasons were not an unexplained rejection of Mr Behan's evidence; the reasons provide a transparent explanation that the learned primary judge dismissed the appellant's claim because the appellant gave the respondent clear and unequivocal instructions as to the date of the accident and on the evidence the respondent was not shown to be negligent in relying on those instructions: *Cypressvale Pty Ltd v Retail Shop Leases Tribunal*[7] and *NRMA Insurance Ltd v Tatt*.[8] The appellant's third contention is without substance.

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7 [1996] 2 QdR 462, 476-7, 482, 483.

8 (1989) 92 ALR 299.

[23] It follows that, distressing as this must be for the unfortunate appellant whose life for many years has been disturbed by the anxiety of litigation, the appeal must fail.

Order:

Appeal dismissed with costs.

[24] **McPHERSON JA:** I agree with the reasons of the President. The appeal should be dismissed with costs.

[25] **JERRARD JA**: I have read the reasons for judgment of the President, and respectfully agree with those and with the orders she proposes. The submissions of senior counsel for the appellant included that a solicitor in the respondent's position, receiving correspondence from Dr Porter some three weeks after receiving instructions from the client, should compare that report with the note of his instructions to check that what the Doctor recorded as to the circumstances of the accident accorded with the solicitor's instructions. That submission has a degree of unreality. If accurate, that same conduct would be required each time a document was received which recorded information relevant to liability or quantum, for each matter the solicitor was conducting. This would be required even when, as here, clear and unequivocal instructions on the topic had been given. In at least the latter class of case that would impose an unnecessary burden on solicitors.