SUPREME COURT OF QUEENSLAND

CITATION:	*Watson v Poynter* [2003] QCA 224
PARTIES:	**DOREEN JOYCE WATSON** (applicant/appellant) v **LANCE GABRIEL POYNTER** (respondent) **ATTORNEY-GENERAL AND MINISTER FOR JUSTICE FOR THE STATE OF QUEENSLAND** (intervenor)
FILE NO/S:	Appeal No 9291 of 2002 SC No 678 of 2001
DIVISION:	Court of Appeal - Cairns Circuit
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED EXTEMPORE ON:	26 May 2003
DELIVERED AT:	Cairns
HEARING DATE:	26 May 2003
JUDGES:	McMurdo P, Davies JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	LIMITATION OF ACTIONS - CONTRACTS, TORTS AND PERSONAL ACTIONS - THE PERIOD OF LIMITATION - ACTIONS TO RECOVER MONEY RECOVERABLE BY VIRTUE OF AN ENACTMENT - where respondent guilty of assault occasioning bodily harm - where application for compensation pursuant to the *Criminal Offence Victims Act* 1995 (Qld) filed outside limitation period - where appellant living in remote community - whether appellant's unawareness of ability to seek compensation was a "material factor of a decisive character" for the purposes of extending the limitation period LIMITATION OF ACTIONS - CONTRACTS, TORTS AND PERSONAL ACTIONS - THE PERIOD OF LIMITATION - ACTIONS TO RECOVER MONEY RECOVERABLE BY VIRTUE OF AN ENACTMENT - where appellant suffered serious injuries as a result of the attack - where appellant unaware of neurological injury until after expiration of the limitation period - whether diagnosis of neurological injury was a "material factor of a decisive character"

Berg v Kruger Enterprises [1990] 2 QdR 301, considered
Dick v University of Queensland [2000] 2 QdR 476, applied
Do Carmo v Ford Excavations Pty Limited (1984) 154 CLR 234, applied
Moriarty v Sunbeam Corporation Ltd [1988] 2 QdR 325, applied

COUNSEL: M Grant-Taylor SC, with A J Kimmins, for the appellant
No appearance for the respondent
M D Hinson SC, with S A McLeod, for intervenor amicus curiae

SOLICITORS: Tony Bailey (Samford) for the appellant
No appearance for the respondent
C W Lohe, Crown Solicitor, for the intervenor amicus curiae

THE PRESIDENT: Justice Davies will deliver his reasons first.

DAVIES JA: This is an appeal against a refusal to extend the limitation period for an application for compensation pursuant to the "*Criminal Offence Victims Act*".

The respondent was convicted and sentenced on 21 November 1997 on two counts of assault occasioning bodily harm against the present appellant on 25 February 1997. The limitation period within which to bring a claim under the "*Criminal Offence Victims Act*" therefore expired on 25 November 2000. The application was, however, not commenced until 21 September 2001.

The appellant, then approximately 23 years of age, and the respondent lived in a de facto relationship but they had separated a month prior to the assault. On the relevant date the appellant had been drinking at her aunt's house. The respondent arrived at the house. The respondent grabbed the appellant by the hair and pulled her for some distance after

she had refused to go with him. She then walked along with the respondent to the top of a hill, where they argued. He then kicked her, saying he was going to kill her. She lost consciousness as a result of being kicked apparently in the head and the respondent then apparently threw her down an embankment.

He informed the police the following morning, believing he had killed her. She was subsequently found at the bottom of the embankment, still in a semi-conscious state. She was taken to Palm Island Hospital where she was found to be suffering from a closed head injury with resultant reduction of consciousness, general abrasions and bruising.

There was, of course, a long history of violence upon the appellant by the respondent prior to the assault.

The appellant said that her first recollection after this assault was waking up in Palm Island Hospital the following morning. Her head was very sore to touch on both sides and her face was swollen. Her head was aching and her entire body was severely bruised. She remained in hospital for two weeks under observation.

She later said that she has suffered from severe headaches ever since that occasion and that she did not suffer from headaches prior to being attacked by the respondent.

The application being made outside the limitation period, the appellant sought an extension of time on the basis of lack of knowledge of a material fact of a decisive character. There were two bases upon which this application was made and, indeed, this appeal is argued. One was the appellant's unawareness of her ability to seek compensation, being a material fact of a decisive character under section 31(2)(a) of the "*Limitation of Actions Act*", that Act being made relevant by section 41 of the "*Criminal Offence Victims Act*", which provides in subsection (1) that "*Limitation of Actions Act*" sections 30 and 31 apply to applications of this kind, in effect in the same way as if they were applications for extension of limitation of time for a common law action.

It has been held in respect of actions of the latter kind that ignorance of the legal consequence of certain facts will not be sufficient to amount to a material fact of a decisive character and that the applicant must be ignorant of the facts constituting the cause of action itself for the purpose of section 31(2)(a).

The leading case on this topic is "*Do Carmo v Ford Excavations Pty Ltd*" (1984) 154 CLR 234, in which the High Court considered the New South Wales provisions in similar form to section 31(2)(a) of the Queensland "*Limitation of Actions Act*".

It was held that ignorance of the existence of a cause of action was not of itself ignorance of a material fact for the purpose of the relevant legislation.

Justice Wilson noted that there was a clear distinction between facts and the legal consequence of those facts, and that knowledge of the legal implications of the known facts is not an additional fact which forms part of the cause of action.

Justice Dawson said that:

> "It seems to me that the reference to material facts in para 1 of s 57(1)(b) does not include a reference to a cause of action in negligence but is rather a reference to the facts which constitute the acts or omissions, including those facts which are necessary to show the negligent character of those acts or omissions upon which a cause of action might be founded."

Justice Deane said that:

> "The ignorance of a material fact to which those sections refer is, in my view, ignorance of a factual matter in the ordinary sense and not ignorance either of the law itself or of the legal consequence of the material facts."

That case was followed in Queensland, unsurprisingly, in Berg v Kruger Enterprises [1990] 2 Qd R 301; see also the reasons of Justice Thomas in Dick v University of Queensland [2000] 2 Qd R 476 at paragraph 11.

Those being the principles applied to this case, in my opinion the first ground of the application and of this appeal - the second ground, in fact, argued by Mr Grant-Taylor before us today - must fail. Mr Grant-Taylor advanced somewhat tentatively, because in my opinion it has no substance, the contention that there was a difference between the requirements for a common law action in this respect and the requirements for the statutory action constituted by the "*Criminal Offence*

Victims Act". I can see no substance in that argument and I would reject it.

I turn then to the second basis for the application and for this appeal, which is that the medical evidence subsequently gathered established a material fact of a decisive character. In this case it was substantially that of Dr Boyce, a neurologist, who has expressed the opinion that there are some neurological consequences of the applicant's injuries.

The relevant principle, however, in this respect has, as Mr Grant-Taylor has conceded, been correctly set out in the judgment of Mr Justice Macrossan, as his Honour then was, in Moriarty v Sunbeam Corporation Limited (1988) 1 Qd R 325 at 333, where his Honour said:

> "In cases like the present an applicant for extension discharges his onus not simply by showing that he has learned some new facts which bear upon the nature or extent of his injury and would cause a new assessment in a quantitative or qualitative sense to be made of it.
>
> He must show that without the newly learned fact or facts he would not, even with the benefit of appropriate advice, have previously appreciated that he had a worthwhile action to pursue and should in his own interests pursue it."

That is a statement which has been accepted as stating the law correctly by this Court on a number of occasions and it is unnecessary for me to refer to those.

So the real question on this ground is whether, without the benefit of Dr Boyce's advice, a reasonable person would have

previously appreciated that she had a worthwhile action to pursue and should in her own interests pursue it.

I have no doubt that in this case the applicant had a worthwhile cause of action under the "*Criminal Offence Victims Act*" before consulting Dr Boyce. I have already described the injury, the closed head injury and the loss of consciousness, and, in addition, the fact that she said that she commenced suffering headaches and has continued to suffer headaches since the incident and had not suffered from them before.
It is obvious, in my submission, that an injury of that severity to her head was an injury which was worthwhile pursuing.

It is true that the opinion of Dr Boyce makes it more worthwhile pursuing it. That shows, in my opinion, the unfortunate circumstances of this case and one cannot help but have sympathy for the appellant because she has always had a worthwhile claim which should, in fact, have been pursued.

It is unfortunate that neither the judge below nor this Court can do anything for her in those circumstances, but the consequences of the law are as I have indicated. In my opinion, the appeal must be dismissed.

THE PRESIDENT: I agree with the reasons for judgment of Judge of Appeal Davies. The regrettable result is that because of the delay in bringing her application for criminal compensation, the unfortunate appellant is unable to be

compensated under the "*Criminal Offence Victims Act*" (1995) Qld for the injuries she received from a violent attack on her at Palm Island, which has had a significant long-term deleterious impact upon her physical and mental health.

This case highlights the need for Prosecutors to ensure all victims, including victims living in indigenous communities, are informed of their rights to compensation at any early stage as required by s 18 "*Criminal Offence Victims Act*" (1995) Qld. I hope that this case will have the result that Prosecutors in future will develop a system of communicating this information in an understandable form to victims such as Ms Watson.

For the reason given by Judge of Appeal Davies and the learned primary judge, it is not possible at this late stage to assist the appellant, and the appeal must be dismissed.

JONES J: Yes, I agree.

THE PRESIDENT: The order is the appeal is dismissed.
