

SUPREME COURT OF QUEENSLAND

CITATION: *Russell v Australia Meat Holdings Pty Ltd* [2003] QSC 232

PARTIES: **ASHLEY JOHN RUSSELL**
(plaintiff /applicant)
v
AUSTRALIA MEAT HOLDINGS PTY LIMITED
ACN 011 062 338
(defendant/respondent)

FILE NO/S: S.669 of 2000

DIVISION: Trial

PROCEEDING: Application for extension of time

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 18 July 2003

DELIVERED AT: Townsville

HEARING DATE: 14 July 2003

JUDGE: Cullinane J.

ORDER: **The application is dismissed with costs to be assessed.**

CATCHWORDS: LIMITATION OF ACTIONS – PERSONAL INJURY – EXTENSION OF TIME – where plaintiff was injured on 13 October 1996 but proceedings not instituted until 19 October 2000 – where plaintiff gave evidence of ongoing and worsening back pain during 1998 – whether a reasonable person in similar circumstances to that of plaintiff would have brought an action within limitation period

COUNSEL: P Lafferty for the plaintiff/applicant.
G Cross for the defendant/respondent.

SOLICITORS: O'Shea & Dyer for the plaintiff/applicant.
Abbot Tout for the defendant/respondent.

[1] The plaintiff seeks an extension of time within which to institute proceedings against the defendant in respect of a back injury said to have been sustained by him on 13 October 1996 in the course of his employment with the defendant at its Townsville meat works.

- [2] Proceedings were issued on 19 October 2000. The issue before the court was whether there was a material fact of a decisive nature which was not within the plaintiff's means of knowledge until 19 October 1999.
- [3] It seems to me there is evidence to satisfy the requirements of s.31(2)(b) of the *Limitation of Actions Act* and it was not contended otherwise.
- [4] The applicant's case as reflected in his affidavit and the material filed on his behalf generally was that on 30 October 1996 he slipped and fell in a wet area of the work place. He suffered an injury to the right knee and experienced some minor lower back pain which subsequently became worse.
- [5] He says that he saw his general practitioner on 18 November complaining primarily about his right knee and right ankle. He says however that he mentioned that he was suffering pain in his lower back.
- [6] His right knee and ankle continued to trouble him and he received Workers' Compensation for a period.
- [7] In the latter part of 1996 his general practitioner referred him to Dr Lewis, an orthopaedic surgeon, in relation to his right lower limb problems.
- [8] The plaintiff says that his right knee and leg problems recovered but he continued to experience ongoing lower back pain but that he was able to continue his work as a slicer and believed that with time he would recover from the injury. Dr Petersen, who is a doctor engaged by the respondent, had seen the plaintiff and prescribed some anti-inflammatory medication for his knee and leg. He spoke to Dr Petersen in 1997 about his back pain, being concerned that it might have something to do with his kidneys. He says that he was referred for tests at the Park Haven Hospital in relation to the kidneys but that the tests showed that there was no problem.
- [9] In July 1998, the plaintiff saw Dr Petersen in relation to his ongoing back problems. Dr Petersen's notes support this but suggest that the plaintiff had suffered some injury to his back as a result of some incident at home. He says that he saw Dr Ward at about this time and it is plain that about this time Dr Ward referred him to Dr Lewis. Primarily, according to the plaintiff, he saw Dr Lewis in relation to a problem with his left hand but mentioned to Dr Lewis his ongoing back pain. Just what was said between he and Dr Lewis at this time has become a matter of critical importance given the way in which the cross-examination of the plaintiff unfolded, and I will return to it shortly.
- [10] The plaintiff in his affidavit says that towards the end of the 1999 season, he noticed an increase in his lower back pain and was taking time off work, having obtained a certificate from Dr Ward.
- [11] It appears that the plaintiff was concerned that his difficulties with his back would result in the respondent dismissing him and he says that Dr Ward in granting him the certificates would, at his request, not specifically refer to the back problem but simply refer to a "medical condition".
- [12] At the beginning of the January 2000 season, the plaintiff says that his back had improved following the period during which the meat works was closed but that

once he commenced work the pain in his lower back became much worse and he experienced pain down his left leg and into his foot.

- [13] He saw Dr Petersen and was put on alternative duties for a period. Dr Petersen referred him for a further x-ray of the lumbar spine and a CT scan, copies of which are before the court.
- [14] In late February he saw Dr Ward and made a claim for compensation. He was referred to Dr Gibberd, an orthopaedic surgeon, by WorkCover. He had seen Dr Gibberd earlier, including in 1998 when according to the plaintiff, Dr Gibberd told him that he should go back to work. He says he informed Dr Gibberd of his back complaints in 1998.
- [15] He saw Dr Lewis again on 25 May 2000 and Dr Lewis expressed the view at this time that the plaintiff would not be able to continue in work as a slicer at the meat works. The plaintiff says in his affidavit that this was the first time that he knew that there were any significant restrictions upon his capacity to work and he realised that his problem was a more serious one than he had previously thought and that he would not be able to continue working as a slicer.
- [16] There is reference in the plaintiff's affidavit to a conversation with his solicitors in which they are said to have conveyed to him the effect of a phone conference with Dr Lewis in July 2000, when Dr Lewis expressed the opinion that on the balance of probabilities the plaintiff would have been able to continue working until aged 50-55 but for the incident which occurred on 3 October 1996.
- [17] It seems that the plaintiff had a congenital condition of his back and that the view of Dr Lewis is that the trauma in the 1996 accident has aggravated that condition and left him with a disability which restricts his capacity to continue working.
- [18] The plaintiff was cross-examined at some length.
- [19] It is fair to say that in many respects his evidence was confused and contradictory.
- [20] It is clear from his evidence that during 1998 he was taking anti-pain medication in substantial quantities. His evidence on this was not entirely clear but I think the ultimate effect of it was that this started to increase towards the latter part of 1999 when the consumption on his account became very significant indeed.
- [21] The plaintiff says that he had spoken to Dr Petersen about his back at various times and was told that he could continue working.
- [22] In late August 1998 he saw Dr Lewis. He says that he raised with Dr Lewis his back symptoms. According to his affidavit "Dr Lewis did not suggest that I would not be able to continue working and I was relieved that my ongoing back pain was nothing serious".
- [23] Dr Lewis, on the other hand, in an affidavit which was filed on behalf of the plaintiff, says that he recalls the plaintiff raising with him on 24 August 1998 the subject of back pain from which he was suffering. Dr Lewis says his notes indicate that his back was not stopping him from working and that he had injured his back in a fall at work about two and a half years previously.

- [24] Dr Lewis goes on to state that as the plaintiff had not been referred to him in relation to his back, he thinks that he would have told the plaintiff this and told him that if he wished to have Dr Lewis examine his back and express an opinion, he should speak to his general practitioner and obtain a further referral. Dr Lewis says: “Certainly I would have said nothing to Mr Russell in relation to either his arm or his back to indicate that Mr Russell would not be able to continue working at the meatworks.”
- [25] So far as the back is concerned, I understand Dr Lewis to be saying that he would not have expressed any opinion about that because he had not examined his back, the plaintiff not having been referred to him for that purpose.
- [26] In cross-examination the plaintiff, as I have said, gave evidence which was to some extent confused and contradictory.
- [27] He is a man of relatively limited education and I mean no disrespect to him when I say that he could not be described as a man of high intelligence.
- [28] Nonetheless on at least two occasions he gave evidence in cross-examination that Dr Lewis in 1998 had told him that because of his back symptoms he should or might need to seek lighter work. On one occasion he said that Dr Lewis had told him in 1998 that, but for the damage to his spine sustained in the 1996 incident he would have been capable of working for another 10-15 years whereas the plaintiff said that his personal view was that he should have been able to work for much longer than that.
- [29] These accounts are of course at odds with Dr Lewis’s account which is in part based upon his general practice.
- [30] It should be mentioned that in a number of respects what the plaintiff says about consulting doctors about his back does not appear to be wholly borne out by the evidence of the medical practitioners and their notes.
- [31] The plaintiff says that he had seen Dr Petersen about his back and had been given, in effect, an “all clear” a month or so before he saw Dr Lewis.
- [32] It seems to me that if the plaintiff’s evidence is accepted that he was aware in late 1998 that he had a condition of his back as a result of the 1996 incident which would require him or make it desirable that he cease the heavy work he was doing and seek lighter work, this is the same or very similar to the material fact of a decisive nature which he claims was not within his means of knowledge until about a year later. It seems to me that a reasonable person, having been informed that he was no longer suitable for the sort of heavy work that he had previously done and that he should or might have to confine his employment to lighter work, would have taken steps to obtain appropriate advice and would have been likely to have instituted proceedings in his own interest. A somewhat more definite opinion in 2000 that he had to cease work could not be regarded as constituting a “decisive” fact in my opinion.

- [33] I recognise that given the concerns I have expressed about the plaintiff's reliability and given what is said in Dr Lewis's affidavit, what the plaintiff has said occurred at that consultation may be somewhat questionable.
- [34] However, it seems to me that even if the matter is considered by reference to the factual scenario raised in Dr Lewis's report, namely that Dr Lewis told him that if he wanted to have his back examined he ought to see his general practitioner and obtain a further reference to him, an ordinary person in the plaintiff's position concerned with the symptoms in his lower back, which by that stage had persisted for a couple of years although becoming worse as time progressed, and who was taking such significant quantities of pain killing drugs would have taken that course. Presumably he would have been informed by Dr Lewis on such a reference and following a full examination of the restrictions upon his capacity to earn an income.
- [35] I recognise that it is impossible to be certain of this because the plaintiff says that his condition worsened in 2000 and it might well be that had Dr Lewis examined him in relation to his back in late 1998 he would have had a different opinion.
- [36] However the onus rests upon the plaintiff to persuade the court that circumstances justifying the grant of an extension of the limitation period exists and in this case, whether the matter is considered by reference to what the plaintiff says Dr Lewis told him at his consultation with him in late August 1998 or whether the matter is considered by reference to what Dr Lewis says in his affidavit, the plaintiff in my view must be taken to have failed to make out the grounds for an extension of the limitation period which is sought.
- [37] The result will be that the application is dismissed with costs to be assessed.