

# SUPREME COURT OF QUEENSLAND

CITATION: *Spear v State of Queensland & anor* [2003] QSC 310

PARTIES: **BARRY PHILIP SPEAR**  
(Plaintiff)  
v  
**STATE OF QUEENSLAND**  
(First defendant)  
**THE MINISTER FOR EDUCATION QUEENSLAND**  
(Second defendant)

FILE NO/S: 141 of 2001

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 13 August 2003

DELIVERED AT: Cairns

HEARING DATE: 10 July 2003

JUDGE: Jones J

ORDER: **1. That the period of limitation in respect of the plaintiff's claim for damages for personal injury suffered on 4 September 1989 be extended up to and including 9 October 2001.**  
**2. That the costs of and incidental to this application to be assessed on the standard basis be costs in the cause**

CATCHWORDS: LIMITATIONS OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF A DECISIVE CHARACTER – where injury sustained in the course of the plaintiff's employment – whether a material fact of a decisive character was within his means of knowledge not earlier than 12 months before he commenced his action.

*Limitation of Acts Act 1974 (Qld), s 30(b), s 31*  
*Moriarty v Sunbeam Corporation Ltd* (1988) 2 QdR 325

COUNSEL: Mr K Priestly for the applicant  
Mr G Houston for the respondent

SOLICITORS: Gayler Cleland Towne for the applicant  
Crown Law for the respondents

- [1] On 9 October 2001 the applicant, a former school teacher, commenced an action for damages for personal injury against his employer. The claim alleges a breach of the employer's duty in failing to provide adequate ear protection against the noise of a starting pistol, the firing of which was part of the applicant's work tasks at a school athletics event on 5 September 1989. The plaintiff suffered with the symptoms of hearing loss and of tinnitus from which he has been unable to obtain relief.
- [2] The commencement of these proceedings is, thus, some nine years outside the normal limitation period for the commencement of such an action. The applicant seeks an extension of time for the commencement pursuant to s 31 of the *Limitation of Actions Act 1974* ("the Act"). The material fact of a decisive character which the applicant identifies as coming within the section is the diagnosis of a psychiatrist Dr Rose that he suffered from a moderate to severe Dysthymic Disorder secondary to the tinnitus which affected his capacity to earn income. In a further report from Dr Rose after the action was commenced the diagnosis was advanced to a Major Depressive Disorder. The major effect of his condition was to cause the applicant to cease working as a teacher in September 2000. He is now unlikely to return to that form of occupation.
- [3] There is no issue between the parties that the applicant suffers from severe depression. The respondents contend that he has done so for many years. The respondents contend that the applicant, appropriately advised, ought to have commenced proceedings well before October 2001 and, in fact, suggests the action should have started within the normal period of limitation which expired on 5 September 1992.

### **Background facts**

- [4] The plaintiff was born on 27 March 1950, he was thus 39 years old at the time of the incident. He had worked as a school teacher for all of his working life. He commenced at Cairns State High School when he was 26 years old.
- [5] On the day of the incident the applicant had been supplied with earmuffs but these were damaged during the course of the day and no replacement was available. After starting two races without ear protection on his left ear the applicant became aware of ringing in that ear. He resorted to using a wad of cotton wool. The ringing in the ear continued and the applicant reported this fact to his supervisor. He expected that the ringing noise would subside over time and did not immediately consult a doctor.
- [6] However on 1 October 1989, some three and half weeks later, he consulted Dr Story who then referred him to an ENT specialist, Dr Laing. I quote from Dr Laing's report dated 3 October 1989:-
- "Examination shows him to have normal outer and middle ears. Tuning fork tests were normal. An audiogram, a copy of which is enclosed, shows him to have some degree of sensorineural loss in both ears, but clearly the left is worse. I have explained to him that the problem is a noise induced sensorineural problem and unfortunately the hearing loss will be permanent. It is possible that the tinnitus could settle spontaneously any time in the next few weeks, but I have advised him that we must be aware of the possibility that he unfortunately has now a permanent tinnitus problem also. I have advised him against the use of medication and

tinnitus maskers at this time, until we see if he does get any spontaneous resolution.”<sup>1</sup>

- [7] The level of actual hearing loss was not so great as to be of concern. The most disturbing aspect was the tinnitus. This report was the first indication to the applicant of the possibility that the condition of tinnitus might be permanent. He lodged a workers’ compensation claim and sought other medical opinions and undertook various tests and procedures in an endeavour to overcome this infliction. These efforts continued until 2000 but there was no significant change.<sup>2</sup>
- [8] In the meantime WorkCover made a final payment based solely on the level of permanent hearing loss. The amount was \$1396.50. No allowance was apparently available for the condition of tinnitus.<sup>3</sup>
- [9] The applicant, throughout the 1990s, managed to continue with his teaching career and to get on with his life generally, but he did experience increasing irritability, decreased energy, concentration and motivation. By August 2000 the effects of the tinnitus on his wellbeing and performance had reached the point where the applicant sought further medical advice from a Dr Perrera. He was diagnosed as suffering with depression and treatment was initiated.<sup>4</sup> On medical advice the applicant took time off work and sought to reopen his Workers’ Compensation claim. He was referred by WorkCover to Ms Kapelis, psychologist, whom he saw on three occasions as outlined in her report of 16 February 2001.<sup>5</sup> He was referred, also, to Dr Wells and Dr Canti, both ENT specialists, and to a Mr Lewis, audiologist. These latter reports did not add particularly to the knowledge which the applicant had gained from his medical consultations in 1989.
- [10] However on referral to Dr Rose, psychiatrist, it was reported, on 27 December 2000, that the applicant suffered moderate/severe Dysthymic Disorder “secondary to what appears to be incurable tinnitus”.<sup>6</sup> A subsequent report from Dr Rose, dated 31 October 2001, raised this diagnosis to a Major Depressive Disorder. Based on the applicant’s current status, Dr Rose opines that he could engage in some employment other than teaching<sup>7</sup> but that, as a school teacher, he is permanently unable to perform the duties of this position<sup>8</sup>.

### **The application**

- [11] To succeed in this application the applicant “...discharges his onus not simply by showing that he has learnt some new fact which bears 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.” *Moriarty v Sunbeam Corporation Limited*.<sup>9</sup> He must show, not only that he has learnt some new fact which bears upon the nature and extent of his injury, but also that without the newly learnt fact he would not, even with the

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<sup>1</sup> Ex “BPS2” to the affidavit of Barry Spear sworn 20 March 2003

<sup>2</sup> See Spear Affidavit sworn 20 March 2003 paras 34-44

<sup>3</sup> Ibid para 41

<sup>4</sup> See ex BSP 7 to affidavit Spear sworn 20 March 2003

<sup>5</sup> Ex “BSP” 8 to affidavit of Spear sworn 20 March 2003

<sup>6</sup> Ex “BSP” 9 to affidavit of Spear sworn 20 March 2003, p 5, para 5

<sup>7</sup> Ex “BSP” 13 at p 11, para 12

<sup>8</sup> Ibid at p 10, para 9

<sup>9</sup> (1988) 2 QdR 325, per Macrossan J at 333

benefit of appropriate advice, have previously appreciated he had a worthwhile action to pursue and should in his own interest pursue it.<sup>10</sup>

- [12] What was the material fact of a decisive character of which the applicant became aware after 9 October 2000? He was at this time suffering with tinnitus which he knew was permanent. He had experienced that symptom for the preceding 11 years. He continued to seek treatment. In 1995 he returned to Dr Laing to try the latest development in hearing aids. He tried “to develop a positive attitude to the problem”<sup>11</sup>. He suffered with depression, for which he sought formal treatment only in August 2000. By then he had, for 11 years, suffered with the symptoms of this condition and lived with their effects on his work and personal relationships, but he had not sought medical advice and, consequently, he had no actual knowledge of the nature and extent of his psychological condition, of its duration or of its progression. This is one of the difficulties that often arises when the court has to consider a psychological condition, as opposed to a direct physical injury with obvious consequences. The direct impact of psychological change can only be measured subjectively. The question as to when a person ought reasonably to have sought advice for a psychological problem can often be answered only when the person’s behaviour changes to an appreciable extent or the person manifests an inability to cope.
- [13] There is reference in a memo on the WorkCover file, dated 17 February 1992, that the applicant appeared “to be at his wits end and at times even mentioned suicide”<sup>12</sup>. The reference to suicide was made to a WorkCover officer in October 1991<sup>13</sup>. There was reference, also, to the applicant having eschewed an offer of promotion in his employment in 1993. On behalf of the respondent Mr Houston of Counsel argues that this showed the applicant appreciated his limitation and that this was the time when a reasonable person would have sought appropriate advice about his medical condition. Mr Houston noted that, at this time, the plaintiff was still within the ordinary limitation period.
- [14] However the applicant’s remarks about his emotional state, at that time, have to be considered in the context of the applicant’s having to come to terms with the condition and also to decide whether to accept the sum offered by way of a permanent, partial disability payment. The quantum of the payment understandably caused the applicant to have some distress particularly as he was being advised, at the same time, that he was not able to be compensated for the effect of the tinnitus. He had initially refused to accept the payment but, after representation on his behalf by parliamentarians, he reluctantly came to the view that he had to accept.
- [15] At this time the applicant was also having relationship problems with his de facto wife. As well as this, pursuant to an earlier agreement with her, he had asked for leave of absence for one year in order to look after their child who was born in January 1991. His sick leave records (ex 1) indicated that, in each of the two years prior to having the year off, he had only 10 days sick leave. After that year of leave, the records show that he had five days sick leave in 1993, three days in 1994 and one day in 1995.<sup>14</sup>

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<sup>10</sup> Ibid

<sup>11</sup> Ex 2

<sup>12</sup> Ex “GDT” 9 to affidavit of Grant Twig sworn 30 June 2003

<sup>13</sup> See ex “GDT” 8 *ibid*

<sup>14</sup> Ex “GDT13” to Twig Affidavit sworn 3 July 2003

- [16] In 1995, also, the evidence shows the applicant was still attempting to find new developments to assist with his problem. It would seem that the applicant expected to be able to continue with his disability, although he had to resort to taking medications and it appears also to an excessive reliance upon alcohol for a period of time.
- [17] With that broad view of the applicant's work history, the reference to suicide in 1991 does not seem to be of particular significance. I view it as an overstated response to the situation in which he then found himself. I accept his evidence that the main reason for taking the 1992 year off work related to the arrangement he had previously made with his partner about caring for their child. Of more significance is the fact that, after that episode, he applied himself to dealing with the effects of the tinnitus and, in particular, to learning how to cope. The fact that he had so little time off work and did not seek medical help are the objective indicators that he believed he was succeeding in this quest.
- [18] As, at this stage of the applicant's history he had taken no time off work as a result of his physical state, any claim for damages would not have included any economic component nor the recovery of any significant expenses. It would have been limited to general damages for the inconvenience and suffering associated with the highly subjective consequence of his tinnitus.
- [19] Whether material facts relating to a right of action are of a decisive character is defined in s 30(b) to the effect that such a state is reached, "if, but only if, a reasonable person ... would regard those facts as showing...[if a claim were to be made]... "a reasonable prospect of success [and would result] "an award of damages sufficient to justify the bringing of an action". Prior to 2000, the applicant had not sought any advice relating to his emotional state. His focus was continuing to find a means of ameliorating the adverse effects of the tinnitus. It is not clear when his emotional state reached the point when a reasonable person would have sought appropriate advice from a health professional in that field. The history of his decline given by the applicant to Dr Rose and to Ms Kapelis does not particularly clarify the position. Ms Kapelis records:-

"Mr Spear stated that the hearing loss did not generally trouble him except that he could not hear when there was background noise so he did not go to meetings. However, the tinnitus had a number of psychological effects. These included changes in mood as well as changes in his ability to concentrate and carry out his job and to enjoy leisure activities.

The claimant reported that he had received ongoing treatment for tinnitus which included masking and acupuncture. This had not been effective. At one point he started drinking heavily which was a "good release" but had other negative effects so he stopped. He said that he had done much research on the subject and was still desperately looking for some relief. Mr Spear said that he had a hearing test in 2000 and one in 1995 but there had been no change in his condition.

The specific event that led to the claim occurred at the end of Term 3 last year [2000]. Mr Spear was frustrated about a difficult student and threw some papers at the Behavioural Guidance Officer...”<sup>15</sup>

[20] Dr Rose reports as follows:-

“Over the years Mr Spear gradually ceased the activities that he had previously enjoyed. He cased playing hockey, squash and golf as well as sailing... Over the five years that he had been depressed he had felt lethargic, miserable and unmotivated and had been prone to cry easily. He said that his only life saver had been his family. He had experienced thoughts of suicide and his sleep for many years had been terrible, with frequent awakening in the early hours of the morning with noise in his left ear.

Mr. Spear received a referral to attend the psychiatrist but he was prescribed no medication for anxiety or depression.”<sup>16</sup>

[21] That is the only reference in the material that I can find of the applicant seeing a psychiatrist prior to seeing Dr Rose. The applicant himself made no mention of having done so and there was no cross-examination of him to determine the fact. The plaintiff in his affidavit referred to having difficulty coping with the tinnitus from about 1998. He said –

“I didn’t see any doctors, psychologists or otherwise in relation to these feelings that were developing because I had always understood my tinnitus was permanent and that I should just get on with my life.”<sup>17</sup>

[22] It might well be that Dr Rose was in error in noting this part of the history. If, however, the applicant did see a psychiatrist before seeing Dr Rose, there is no record of that psychiatrist prescribing any medication for anxiety or depression and it seems the applicant was allowed to continue working. There is no suggestion of re-opening his compensation claim to pay for medical expenses. If this was the case it would rather suggest that his psychological state was not then of such a nature as would warrant the institution of a claim for damages. The more likely explanation is that Dr Rose has mis-recorded the history.

[23] Nevertheless I conclude from all of the above that the applicant’s emotional state worsened over a period of time prior to October 2000. On behalf of the respondent Mr Houston argued, on the basis of the applicant’s own admissions in 1991 as to the effect the tinnitus was having on his emotional state and the fact that the problem continued causing obvious difficulties, that he ought to have taken medical and legal advice much earlier. By this failure to seek advice in a timely way, Mr Houston contends, the applicant has lost his right to an extension. This submission does not take into account the fact that the applicant appears to have overcome the initial, emotional reaction and was able to focus on recovery. In the absence of any economic loss, and with an expectation that his condition would improve or at least be managed, the prospect of litigation was not high in his mind and was not worthwhile in fact.

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<sup>15</sup> Ex “BPS” 8 to affidavit of Spear sworn 20 March 2003, p 1

<sup>16</sup> Ex “BPS” 9 ibid p 2

<sup>17</sup> See affidavit of Spear sworn 20 March 2003 para 45

- [24] I find that the applicant became emotionally labile and over the years experienced varying degrees of adverse, psychological responses to his physical condition, but that was able to fulfil his teaching obligations, though with some difficulty at times. I accept that the first manifestation, that he was unable to fulfil those duties because of his psychological incapacity, was when he sought to be released from his teaching duties in September 2000. He had by this time sought advice from Dr Perera and he was in the process of obtaining appropriate advice from consultants as to the cause of his depression and whether it was treatable. The elapse of time in obtaining the opinion of Dr Rose some few months later was reasonable, *Dick v University of Queensland*<sup>18</sup>.
- [25] It was not until the nature and extent of the applicant's psychological condition and the impact of the condition on his capacity to earn was known that a judgment could be made as to whether he had a worthwhile cause of action. In *Healy v Femdale Pty Ltd*<sup>19</sup> the Court of Appeal stated:-
- “The question whether an injured person has taken all reasonable steps to ascertain the seriousness of the injury depends very much on the warning signs of the injury itself and the extent to which it or any other facts might be thought to call for prudent inquiry to protect one's health and legal rights. It is difficult to say that a person who finds herself able to get on with her life, and returns to employment without significant pain or disability fails that test merely because she fails to ask for opinions from her doctor about the prospect of future disability or effect upon her working capacity. There is no requirement to take “appropriate advice” or to ask appropriate questions if in all the circumstances it would not be reasonable to expect the applicant to have done so.”
- [26] The applicant's advice seeking, in the period between his injury and the commencement of his action, appears to have been focused on ameliorating the effects of his tinnitus. No doubt he assumed that, if he was successful in this, the emotional problems that he was experiencing would also be reduced. It was not until mid 2000 that the growing realisation of emotional difficulties culminated in his seeking advice from his general practitioner. It was only after the investigations made pursuant to that advice, was he became aware of the permanent impact his psychological problems would have on his capacity to earn. It was this new information that provided the basis for a worthwhile claim in damages. Thus, in my view, the plaintiff has satisfied the onus imposed on him. Consequently I have come to the view that the material fact of a decisive character was not within the applicant's means of knowledge until after 9 October 2002. His application should be allowed.
- [27] There is no issue between the parties that the circumstances are such to indicate, for the purpose of s 31(2), that there is evidence to establish the right of action apart from the defence founded on the expiration of the period of limitation.

## Orders

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<sup>18</sup> [2000] 2 QdR 476

<sup>19</sup> *Healy v Femdale QCA* 37 of 1993 June 9 1993 unreported, p 4-5

- [28]
1. I order that the period of limitation in respect of the plaintiff's claim for damages for personal injury suffered on 4 September 1989 be extended up to and including 9 October 2001.
  2. I order that the costs of and incidental to this application to be assessed on the standard basis be costs in the cause.