SUPREME COURT OF QUEENSLAND

CITATION:	**Holmes v Adnought Sheet Metal Fabrications Pty Ltd & The Queensland Corrective Services Commission** [2003] QSC 321
PARTIES:	**JAMES CLIVE HOLMES** (Plaintiff/Applicant) v **ADNOUGHT SHEET METAL FABRICATIONS PTY LTD** (First Defendant/First Respondent) and **THE QUEENSLAND CORRECTIVE SERVICES COMMISSION** (Second Defendant/Second Respondent)
FILE NO:	S620 of 2002
DIVISION:	Trial Division
DELIVERED ON:	23 September 2003
DELIVERED AT:	Rockhampton
HEARING DATE:	22 August 2003
JUDGE:	Dutney J
ORDERS:	**1. The action is struck out;** **2. The application for an extension of time within which to commence proceedings is dismissed.**
CATCHWORDS:	PERSONAL INJURIES – LEAVE NUNC PRO TUNC – where provisions of *WorkCover Queensland Act* 1996 (Qld) and *Personal Injuries Proceedings Act* 2002 (Qld) not complied with – whether proceedings a nullity – whether leave can be granted nunc pro tunc where prerequisites are substantive law requirements LIMITATION OF ACTIONS – PERSONAL INJURIES - EXTENSION OF TIME – MATERIAL FACTS OF A DECISIVE CHARACTER – where plaintiff/applicant's work related impairment

assessed at 20-25% - where plaintiff/applicant must have been aware that the objective facts disclosed a reasonable cause of action before the limitation period expired

Limitation of Actions Act 1974 (Qld) ss 30 and 31
Personal Injuries Proceedings Act 2002 (Qld) ss4, 7, 9, 18, 43 and 77D
WorkCover Queensland Act 1996 s252, s280, 302, 304 and 305

Bonser v Melnacis [2000] QCA 13, followed
Emanuel v Australian Securities Commission (1996-1997) 188 CLR 114, considered
Moriarty v Sunbeam Corporation Limited [1988] 2 Qd R 325, cited
Taggart v The Workers' Compensation Board of Queensland [1983] 2 Qd R 19, cited
Tanks v WorkCover Queensland [2001] QCA 103, followed
Wicks v Queensland University of Technology [2000] QSC 034, cited

COUNSEL: Mr Trotter (by phone) for the Plaintiff
Mr O'Driscoll for the First Defendant
Ms Philipson (by phone) for the Second Defendant

SOLICITORS: John Murphy & Co for the Plaintiff
Searles Solicitors for the First Defendant
Crown Law for the Second Defendant

[1] Clive James Holmes ("the plaintiff") was a sheet metal worker employed by Adnought Sheet Metal Fabrications Pty Ltd ("the first respondent"). The first respondent carried out a business of mechanical repairs and light industrial fabrications from, inter alia, a leased area of the Rockhampton Correctional Centre ("the prison").

[2] While working at the prison on 23rd December 1999 the plaintiff was grabbed from behind by two prisoners, tied with duct tape and carried to and placed in the rear of his own utility. The two prisoners involved in the seizure then attempted to make good an escape from the prison in the utility.

[3] While the vehicle was in motion, the plaintiff managed to free himself from the tape and leapt from the moving vehicle to get free of the escapees.

[4] As a result of what has just been described the plaintiff suffered injury.

[5] On the day of the incident the plaintiff consulted a chiropractor and a general practitioner and was given a certificate to be off work until 4th January 2000. On 4th January 2000 the plaintiff was certified fit to return to work. Because of ongoing treatment the plaintiff did not in fact return to work until 14th January. He returned on normal duties but the work was such that he found difficulty in performing it.

[6] Between January and March 2000 the plaintiff consulted a psychologist concerning the experience he had suffered at the prison. On 26th May 2000 the difficulties the plaintiff was experiencing at work became too severe and he ceased work. He was given a certificate until 9th June 2000, later extended to 26th June 2000.

[7] WorkCover had the plaintiff examined by Dr South, an orthopaedic surgeon, on 14th July 2000. Dr South recommended ongoing treatment by another orthopaedic surgeon, Dr Baker. Dr Baker recommended surgery. Another orthopaedic surgeon engaged by WorkCover, Dr Licina, also confirmed the need for surgery on 24th July 2000. An L4-5 diskectomy was performed by Dr Licina on 31st July 2000. The plaintiff returned to work on 12th October 2000.

[8] By April 2001, the plaintiff had consulted his present solicitors. On 19th April those solicitors wrote to WorkCover seeking an assessment of permanent disability. WorkCover referred him to Dr Steadman who reported on 2nd May 2001 that:

> "His prognosis would be poor. I would have no expectation of him making a full recovery or ever being symptom free."

[9] On 4th June 2001 the plaintiff received a Notice of Assessment. His work related impairment ("WRI") was assessed at 25%. His injury was thus a certificate injury. The plaintiff disagreed with the assessment and required the matter to be referred to the Orthopaedic Assessment Tribunal. The Tribunal

reduced the assessed WRI to 20%. It was still a certificate injury. Before the Tribunal the plaintiff relied on a statement which read in part:

> "I continue to feel concern on a daily basis in my work situation. I returned to work in order to maintain my income to meet payment of my debts. In my work situation I have to stand most of the time. I have to crouch and stoop as well to cut out and weld metal. When I have to reach forward strain is placed on my back. I have a burning sensation in my leg and foot from the time I start work until I finish… I am not as efficient in my work as before the incident. Whilst I believe I am well regarded by my employer I worry about my job security."

[10] The statement also referred to loss of enjoyment of life, inability to continue recreational pursuits, constant pain and social withdrawal all related to the condition.

[11] On 19th December 2001 the plaintiff accepted the offer of lump sum compensation and instructed his solicitors to write to WorkCover stating that his acceptance was on the basis that he would not be precluded from pursuing a common law damages claim.

[12] The plaintiff states that even at that time he did not realise that he had injuries that would further impair his working ability and was still carrying out his normal duties without too much discomfort. This seems somewhat at odds with the statement to the Tribunal.

[13] The plaintiff suffered a further aggravation of his back condition or a further injury on 4th October 2002.

[14] The plaintiff asserts that he was unaware of the serious nature of his injuries until he read in a report from Dr White dated 26th May 2003 that he was unfit for "work involving heavy physical labour, prolonged standing, prolonged sitting, lifting or repetitive bending." Despite this assertion the plaintiff filed a claim and statement of claim seeking damages on 20th December 2002. In it the plaintiff claims against both his employer as first defendant and the State of Queensland as second defendant.

[14] To claim against the employer the plaintiff must fulfil the requirements of the *WorkCover Queensland Act 1996*. To claim against the State of Queensland the applicant must fulfil the requirements of the *Personal Injuries Proceedings Act 2002* ["*PIPA*"]. He has fulfilled neither set of requirements.

[15] In relation to the employer, the proceedings were commenced without leave and without lodging a Notice of Claim under s280 of the *WorkCover Queensland Act*. Section 280(1) states that:

> "before starting a proceeding in a court for damages, a claimant must give notice under this section within the period of limitation for bringing a proceeding for damages under the *Limitation of Actions Act 1974"*.

The provisions of the *WorkCover Queensland Act* are mandatory[1]. Section 302 relevantly provides:

> "The claimant may start a proceeding in a court for damages only if the claimant has complied with –
> (a) …;and
> (b) part 5, other than as provided by section 304 and 305; and
> (c) …"

[16] Since section s280 falls within Part 5 and no application has been made under s304 or s305, it follows that the plaintiff was not entitled to commence proceedings against the employer when he did. The result is that the first defendant is *prima facie* entitled to have the action against it struck out. The applicant seeks to avoid that result by inviting me to make an order under s305 of the *WorkCover Queensland Act*. Section 305(1) provides:

> "Subject to section 303, the claimant may start the proceeding if the court, on application by the claimant, gives leave to bring the proceeding despite noncompliance with the requirements of s280."

[17] Subsection (1) of s303 to which s305 is subject provides:

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[1] See also *Wicks v Queensland University of Technology* [2000] QSC 034 (per Shepherdson J).

> "The claimant may start the proceeding if any of the following have happened –
> (a) at least 6 months or, for a terminal condition, 3 months have elapsed after –
> (i) the clamant has given, or is taken to have given, a complying notice of claim; or
> (ii) WorkCover has waived the claimant's concompliance with the requirements of s280 with or without conditions; or
> (iii) the court has made an order under section 304 or 305

[18] It is clear from these provisions that the right to commence a proceedings arises only upon compliance with s280 or, alternatively, subsequent to the court making an order under s305. Section 252(1) makes it plain that these requirements are to be regarded as substantive law rather than procedural. A consideration of the decision in the Court of Appeal in *Tanks v WorkCover Queensland*[2] inevitably leads to the conclusion that until there has been compliance with s280 or an order made under s305 there is no right to commence proceedings and any proceedings commenced in the circumstances of this case must be void and a nullity. In *Tanks* Williams JA at [50] said:

> "…the provisions of Chapter 5 operate so that proceedings to enforce the common law cause of action cannot be commenced (the worker cannot sue) unless the requirements specified therein are complied with; the right to commence proceedings is suspended until the requirements of the Act are satisfied."

[19] To like effect is the passage from the judgement of Davies JA at [26]:

> "…the effect of the decision of this Court in *Bonser*[3] is, in my opinion and as the learned primary judge held, to the effect that, generally, no cause of action arises in respect of an injury to which the Act applies, before the entitlement conditions are complied with. That is to give the entitlement conditions substantive effect … as s252(2) requires."

[20] Since the cause of action is postponed until the requirements of the legislation are met I do not believe this Court has the power to grant leave under s305 of the Act to commence proceedings having retrospective effect to a period

[2] [2001] QCA 103
[3] *Bonser v Melnacis* [200] QCA 13

before the cause of action arose. It follows that the existing proceedings against the first defendant should be struck out.

[21] *PIPA* similarly provides for the giving of a notice as a preliminary step prior to commencing proceedings. Section 9(1) is worded in a similar manner to s280(1) of the *WorkCover Queensland Act*. It provides:

> "Before starting a proceeding in a court based on a claim, a claimant must give notice of the claim, in the approved form, to the person against whom the proceeding is proposed to be started."

[22] Section 7 of *PIPA* makes the requirement to give the s9 notice a provision of substantive law. Subsection 4(c) of *PIPA* identifies one of the aims of the legislation as:

> "ensuring that a person may not start a proceeding in a court based on a claim without being prepared for resolution of the claim by settlement or trial".

[23] Section 43(1) of *PIPA* allows the court to give leave to commence a proceeding in a case of urgency notwithstanding noncompliance with the requirements of the Act.

[24] There is no analogue in *PIPA* to s302 or s303 of the *WorkCover Queensland Act.* There is no unequivocal legislative statement in PIPA that an action cannot be commenced except in certain circumstances as there is in the case of the WorkCover legislation. Instead there is an express power given by s18 to relieve a claimant from the obligation to give a notice. Relevantly, s18 provides:

> (1) A claimant's failure to give a complying notice of claim prevents the claimant from proceeding further with the claim unless –
>
> (a) …
>
> (b) …
>
> (c) the court, on application by the claimant –
>
> (i) declares that the claimant has remedied the noncompliance; or

(ii) authorises the complainant to proceed further with the claim despite the noncompliance.

(2) An order of the court under subsection (1)(c) may be made on conditions the court considers necessary or appropriate to minimise prejudice to a respondent from the claimant's failure to comply with the requirement.

[25] Notwithstanding that the requirement to give the notice under s9 is a requirement of substantive rather than procedural law the power to make an order under s18(1)(c) suggests that noncompliance is not intended to be necessarily fatal to the right to bring a proceeding in the absence of an order under s43. This is not the same as saying that a step taken in contravention of the mandatory statutory requirement is other than void. Section 18 seems to me to operate only in futuro. It does not address steps taken prior to its being called in aid. The court may only excuse *nunc pro tunc* a failure to satisfy a procedural requirement. Therefore it seems to me that even in the absence of the strong language of the *WorkCover Queensland Act* s9 is sufficiently clear to prohibit the commencement of proceedings without some other court intervention first occurring. I regard the proceedings commenced against the second defendant as void.[4] The ability of the court to grant leave to proceed under either s43 or s18 is an exception to the general prohibition on the commencement of proceedings. As such the failure to obtain leave deprives the court of jurisdiction to consider the proceedings thus commenced. This is reinforced by making the prerequisites to the commencement of an action substantive law requirements.

[26] Despite all this the transitional provisions of *PIPA* in my opinion provide scope for the plaintiff to carry on with his claim but not in the present action.

[27] Section 77D of *PIPA* alters the limitation period for actions arising out of incidents occurring before 18th June 2002 (such as this one) where the limitation period expired between 18th June 2002 and 18th December 2003 and

[4] See the discussion in *Emanuel v Australian Securities Commission* (1996-1997) 188 CLR 114 at 124 (per Brennan CJ), 124 – 12 (per Dawson J) and 129 (per Toohey J) where the distinction was drawn between a requirement going to jurisdiction as opposed to a requirement merely conferring a control on the exercise of jurisdiction. This seems to equate to the distinction between a substantive law prerequisite and a merely procedural prerequisite.

where no action has been commenced. The limitation period for this action would ordinarily have expired on 23rd December 2002. Paragraph 77D(2)(b) permits an action to be commenced with leave within 6 months after a complying notice of claim is given provided the action is commenced by 18th December 2003.

[28] The reference in s77D(1)(b) to an action not having been commenced cannot be a reference to an action which is void. The consequence of the proceedings commenced being void is that the proceedings have no legal effect. A reference to a proceeding must, in my view be a reference to a valid proceeding. Therefore the applicant may, provided he gives a complying notice of claim under s9, commence fresh proceedings against the second defendant up until 18th December 2003.

[29] In the event that I considered the consequence of the plaintiff's failures to be fatal to the proceedings, the plaintiff sought an extension of the limitation period. I do not believe that s31 of the *Limitation of Actions Act 1974* permits me to extend time in this case. Section 31 permits an extension of the limitation period where:

> "...a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation of the action."

[30] No valid action has yet been commenced. Even assuming that the existing proceedings were valid the earliest date on which the plaintiff must have known the material fact would have been 22nd December 2001. The material fact identified here is the severity of the condition and its effect on the plaintiff's capacity to work.

[31] Section 30 defines what constitutes a material fact of a decisive character for present purposes in these terms:

> "[M]aterial facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing –
> (i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
> (ii) that the person whose means of knowledge is in question ought in the person's own interest and taking the person's circumstances into account to bring an action on the right of action."

[32] I do not accept the plaintiff was not aware that a WRI of 20% to 25%, coupled with the difficulties outlined in the statement to the Tribunal to which I earlier referred, did not indicate a worthwhile cause of action. The referral of the original 25% assessment to the Tribunal indicates how severely the plaintiff regarded the injury. Even if I were of the view that the plaintiff left to his own devices and not taking a solicitor's advice might not have regarded the injury as sufficiently serious to justify an action, the statute requires that I consider the position of a reasonable person having taken appropriate advice. Such a person must have been aware that the objective facts disclosed a reasonable cause of action which he would be justified in bringing in his own interests by June 2001 at the latest. Any additional information would go only to quantum.[5] On no view could an injured party with an otherwise good cause of action, as is the case here, having received proper advice, have regarded an injury justifying a 20% to 25% WRI and suffering the difficulties in performing his normal work duties the plaintiff claims to have suffered as being likely to result in an award "too small to bother about". I am fortified in this conclusion by the plaintiff's express reservation of rights in accepting the lump sum offer of compensation on 19th December 2001. I am satisfied that no material fact of a decisive character within the meaning of the statute came to the plaintiff's knowledge after 22nd December 2001.

[5] *Taggart v The Workers' Compensation Board of Queensland* [1983] 2 Qd R 19 at 23-4; *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325.

[33] In the light of the above discussion I make the following orders:

1. The action is struck out;
2. The application for an extension of time within which to commence proceedings is dismissed.