SUPREME COURT OF QUEENSLAND

CITATION:	*Castensen v Frankipile Australia* [2004] QSC 145
PARTIES:	**ANDREW NATHAN CASTENSEN** **and** **FRANKIPILE AUSTRALIA (ACN 000 842 240)**
FILE NO/S:	S 10007 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	18 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2004
JUDGE:	Atkinson J
ORDER:	**Application allowed.** **Period of limitation for bringing proceedings extended to 1 November 2002.**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF A DECISIVE CHARACTER – where plaintiff suffered injuries at work – where knowledge of permanent impairment constitutes material fact of a decisive character – whether knowledge of worthwhile cause of action – whether within plaintiff's knowledge or means of knowledge – whether all reasonable steps taken *Limitations of Actions Act* 1974, s 11, s 30, s 31 *Buckton v BHP Coal Pty Ltd* [2001] QCA 35, cited *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306, cited *Dick v University of Queensland* [2000] 2 Qd R 476, applied *Dixon v Australia Meat Holdings P/L* [2002] QCA 25, cited *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697, cited *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, applied *Healy v Femdale Pty Ltd* (unreported, QCA no. 37 of 1992, 9 June 1993), followed *King v Queensland Corrective Services Commission* [2000] QSC 342, cited

McNanamny v Hadley [1975] VR 705, cited
Maguire v Plumbing Industry Group Training Scheme Inc [2001] QCA 248, cited
Muir v Franklins Limited [2001] QCA 173, cited
Pizer v Ansett [1998] QCA 298, cited
Taggart v The Workers' Compensation Board of Qld [1983] 2 Qd R 19, cited
Watters v Queensland Rail [2000] QCA 51, cited

COUNSEL: GJ Cross for the Applicant / Plaintiff
RT Whiteford for the Respondent / Defendant

SOLICITORS: Shine Roche McGowan for the Applicant / Plaintiff
Tresscox Lawyers for the Respondent / Defendant

[1] This is an application pursuant to s 31 of the *Limitations of Actions Act 1974* (Queensland) ("the Act") to extend the time within which to institute proceedings for personal injuries to 1 November 2002. The plaintiff commenced an action in this court on that date claiming damages for personal injuries alleged to have been sustained by him in the course of his employment with the defendant.

[2] The plaintiff, Andrew Castensen, was a fit man in his mid-thirties who was employed as a diesel and heavy earthmoving equipment fitter by the defendant, Frankipile Australia ("Frankipile"). He was injured on 5 June 1998 in circumstances which raise a prima facie case of negligence against the defendant. He suffered an injury to his neck (the "first injury"). Mr Castensen took one or two weeks off work and was treated conservatively with massage by a physiotherapist at the Logan Hyperdome Medical Centre. His injury gradually improved and he did not think that the first injury hindered his ability to work. He was certified fit to return to work from 20 June 1998 and resumed normal full-time duties.

[3] On 10 November 1998, the plaintiff was again injured when he was working with a sledge hammer (the "second injury"). The circumstances again raise a prima facie case of failing to institute a safe system at work. He felt an immediate burning pain and numbness in his neck, right shoulder and arm.

[4] He consulted a general practitioner, Dr Powell, and was referred for x-rays and a CT scan. The CT scan of the cervical spine showed a little focal bulging of the C4 – 5 disc just to the right of the mid-line. The radiologist, Dr Moore, said he was not sure whether the disc bulge was clinically significant. Mr Castensen was again treated at the Logan Hyperdome Medical Centre and received physiotherapy. He was not referred to a specialist. After approximately six weeks off work, he returned to work on light duties for a period of two weeks prior to his return to full duties. Those full duties required extremely long hours and heavy physical labour. He was not informed that the injuries would have any long term effect on his employment.

[5] Although it appears he suffered some pain in his neck and arm, Mr Castensen was able to resume full duties including working in central Queensland for five or six weeks in very heavy work. However, on 26 October 1999 his employment with the

defendant was terminated by the defendant after he had an argument in the work place over safety issues.

[6] Dr John Talbot, an orthopaedic surgeon who examined Mr Castensen on behalf of WorkCover on 2 December 2002, says in his report that Mr Castensen stated that when he suffered the second injury his right arm became "completely paralysed" at the time of his injury and he had to move it with his left arm. Dr Talbot said that on re-questioning him about this, "it is clear that his right arm was in fact not completely paralysed, but was very weak". On cross-examination during the hearing of this application, Mr Castensen was asked about this. It became clear that he told Dr Talbot that his arm was completely paralysed, but it was Dr Talbot who concluded that it was very weak rather than paralysed. Dr Talbot also said in his report that Mr Castensen found work very difficult because of his neck and arm symptoms, to the extent that he had to cease work with Frankipile in November 1999. The source of this information was apparently Mr Castensen.

[7] On cross-examination, Mr Castensen gave a detailed account of his dismissal which was consistent with his sworn affidavit, but not with the account he apparently gave to Dr Talbot. He said that at a health and safety meeting, he highlighted some safety issues in the boiler making area. The next morning he had an argument before work started with the person responsible, who had been with Frankipile for over twenty years, and he was dismissed later that day. He was suffering some residual discomfort when he left Frankipile but he did not think that his injuries would affect his ability to obtain or retain alternative employment.

[8] On 17 January 2000, Mr Castensen commenced work in AH Plant Hire in a permanent position as a field service technician. In this position, he undertook heavy maintenance work in the field and worked extremely long hours. He also assumed a position acting as service manager while that position was vacant.

[9] In May 2000, for no apparent reason his injury flared up briefly and he took a week off work. In May 2000, AH Plant Hire took from Mr Castensen the car and mobile phone which they had provided to him while he was acting as service manager. The plaintiff took the train to work but was late on a few occasions, including three times in one week. He alleges that, as a result, his employment with AH Plant Hire was terminated on 14 June 2000. He admitted on cross-examination that he did not get on with the person appointed as service manager.

[10] During his time at AH Plant Hire he consulted a general practitioner, Dr Sharma, to discuss the residual symptoms he was experiencing from his injury. She referred him to an orthopaedic surgeon, Dr Gilpin, the appointment being scheduled for 9 September 2000. After he left AH Plant Hire, Mr Castensen received NewStart Allowance but was keen to find work because of his financial commitments. Dr Sharma did not indicate that his working ability would be restricted and he obtained a full medical clearance to return to work. As his symptoms were improving and he had a medical clearance, Mr Castensen did not keep the appointment with Dr Gilpin.

[11] Dr Talbot's report says that the symptoms in Mr Castensen's neck and right arm became worse and he had to cease working for AH Plant Hire because he was unable to undertake even light duties and he found it difficult to drive a motor car. I do not accept that this is precisely what Mr Castensen told Dr Talbot. He did not tell Dr Talbot the full story of his dismissal and it is therefore perhaps not surprising that the history given by Dr Talbot is not quite accurate. There seems to be little doubt that Mr Castensen continued to suffer discomfort, but it was not enough to prevent him working.

[12] The plaintiff obtained work as a mobile fitter at Independent Forklift Maintenance on 4 October 2000. He remained there until he was made redundant on 17 December 2000 due to a shortage of work. He had no problems relating to his injuries whilst he was at Independent Forklift Maintenance. He then worked with Marjack Transport Repairs from 17 December 2000 to 17 March 2001, when he handed in his notice in order to improve his position elsewhere. He obtained a position with McDonald Murphy Machinery at Darra staying there until 10 September 2001. He resigned this position because, as he said, he was unhappy about certain safety aspects of the job.

[13] Mr Castensen apparently said to Dr Talbot that this was very hands on work and he found it "very difficult and impossible" (to use Dr Talbot's words) to undertake with his right arm symptoms and he had to leave this employment for lighter duties. On cross-examination Mr Castensen said that he thought it was unsafe for him to be expected to do certain things because of a lack of equipment. He said, and I accept, that he clashed with management over that issue. This led to his resignation. In the same month he obtained work at Hi-Tech Line Marking at Rocklea, where he did line marking and repairs to machines. He was made redundant on 19 January 2002.

[14] It appears that there are a number of reasons for the apparent discrepancies between what Mr Castensen told Dr Talbot, and what actually occurred. The dates which were given by Mr Castensen to Dr Talbot were often inaccurate. This does not reflect on Mr Castensen's credit but does indicate that more care was taken with and precision given in the account set out in his affidavits than in the verbal account given to Dr Talbot. The evidence given in Mr Castensen's affidavits was to some extent supported, and certainly not undermined, by the reports given by his employers to the plaintiff's solicitor. It was also supported by contemporaneous medical records which suggest that his injuries were settling and he was capable of full time unrestricted work. In addition, the language used by Dr Talbot shows that he was drawing conclusions and from time to time using his own language rather than taking a verbatim account.

[15] Mr Castensen did not give the appearance when cross-examined of someone who was being deceptive or untruthful in his sworn evidence. Where they differ, I prefer the sworn evidence given by Mr Castensen to the court to the account which he apparently gave to Dr Talbot. What the sworn evidence of Mr Castensen shows is that he had no idea prior to 1 November 2001 that he had suffered injuries which would permanently affect his capacity to work in his trade. He made no claim for workers' compensation after 3 December 1998 until he was again injured in 2002.

His net income had dropped after leaving Frankipile but this was due to his various changes of employment which were not caused by any injury.

[16] The plaintiff commenced work on 24 January 2002 with Craneforce Pty Ltd as a fitter. On 25 January 2002 he sustained a further injury to his neck (the "third injury"). He attended Dr Sharma who referred him to the Spinal Unit at the Royal Brisbane Hospital. He also consulted another general practitioner, Dr Baker, who advised him to wear a neck brace. His symptoms were consistent with the symptoms he had experienced in 1998 and he assumed that his symptoms would abate and that he would be able to resume work.

[17] On 2 May 2002, the plaintiff underwent an MRI scan at the Royal Brisbane Hospital following Dr Sharma's referral. That scan revealed he had a herniated disc in his neck at the C4 level. The Medical Imaging Report found that:

> "most of the disc herniation at the C4 – 5 level is enhancing reflecting culmination of the posterior annular tear and adjacent inflammatory tissue around the herniated disc material. This would suggest a recent disc herniation rather than long standing pathology."

[18] On 24 June 2002, the plaintiff consulted Dr Day at the Spinal Unit at the Royal Brisbane Hospital to discuss the results of his MRI scan. That was the first occasion on which he received advice that his employment was under threat. Dr Day advised him that he required surgery and that his employment might be jeopardised. At that time the plaintiff was suffering from constant neck pain together with a "dead feeling" in his hands and from time to time pins and needles.

[19] He underwent surgery on his neck on 25 July 2002 where C4/C5 interior discectomy fusion with decompression of the C5 nerve root was performed. It was not until he received the results of his MRI scan and underwent subsequent surgery that he realised the severity and extent of his injuries and subsequently what a severe impact these injuries would have on his ability to pursue his chosen career. He has made a number of attempts to return to work and to retrain but has been unsuccessful.

[20] On 29 October 2002, WorkCover issued conditional damage certificates in respect of the first and second injuries. The plaintiff commenced these proceedings in respect of those injuries three days later.

[21] On 31 January 2003, Dr Day assessed Mr Castensen as having a permanent impairment equalling 15 per cent of the entire body. On 24 March 2003, Dr Boys, an orthopaedic surgeon, attributed 10 per cent of 15 per cent whole body disability to the second injury and 5 per cent to the third injury. On 24 September 2003, another orthopaedic surgeon, Dr Curtis, assessed a 25 per cent impairment of the whole person of which 6 per cent was attributable to the first injury, 6 per cent to the second injury and 13 per cent to the third injury. None of these orthopaedic

surgeons expresses the opinion that Mr Castensen will be able to return to his former trade as a fitter.

[22] The plaintiff commenced proceedings against Craneforce Pty Ltd (claim number 11435 of 2003) on 10 December 2003. There is no limitation issue in respect of these proceedings. However, the defendant has pleaded that the action in respect of the first and second injuries is statute barred because of the provisions of s 11 of the Act, which preclude an action for damages for personal injury due to negligence after the expiration of three years from the date on which the cause of action arose.

[23] Some relaxation of the statutory prohibition against commencing an action after that time is found in s 31 of the Act which provides:

> "(1) This section applies to actions for damages for negligence…or breach of duty…where the damages claimed by the plaintiff for the negligence…or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.
>
> (2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court -
>
> (a) that 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 for the action; and
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> (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;
>
> the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly.
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> (3) This section applies to an action whether or not the period of limitation for the action has expired -
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> (a) before the commencement of this Act; or

(b) before an application is made under this section in respect of the right of action."

[24] The interpretation of s 31 is governed by s 30 of the Act, which provides:

"(1) For the purposes of this section and sections 31…

(a) the material facts relating to a right of action include the following-

(i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;

(ii) the identity of the person against whom the right of action lies;

(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;

(iv) the nature and extent of the personal injury so caused;

(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material 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 interests and taking the person's circumstance into account to bring an action on the right of action;

> (c) a fact is not within the means of knowledge of a person at a particular time if, but only if -
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> (i) the person does not know the fact at the time; and
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> (ii) as far as the fact is able to be found out by the person – the person has taken all reasonable steps to find out the fact before that time.
>
> (2) In this section-
>
> "**appropriate advice**", in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts."

[25] The defendant has conceded for the purposes of this application that there is evidence to establish that the plaintiff has a right of action apart from the defence founded on the expiration of the limitation period. Further, the defendant does not oppose the application on the ground of prejudice. The application is opposed on the basis that there was no material fact of a decisive character which was not within the plaintiff's knowledge or means of knowledge until after the relevant date for the purposes of s 31 of the Act, 1 November 2001.

[26] The question to be determined in this case, stripped of its double negatives, is whether a material fact of a decisive character relating to the right of action was known to or within the means of knowledge of the plaintiff prior to 1 November 2001. The approach to be taken by the court was set out in the judgment of Dawson J in *Do Carmo v Ford Excavations Pty Limited*[1] quoted with respect to the relevant Queensland legislation by Thomas JA in *Dick v University of Queensland*:[2]

> "The form of the legislation requires, I think, a step-by-step approach. The first step is to inquire whether the facts of which the appellant was unaware were material facts: s 57(1)(b) [Qld s 30(1)(a)]. If they were, the next step is to ascertain whether they were of a decisive character: s 57(1)(c) [Qld s 30(1)(b)]. If so, then it must be ascertained whether these facts were within the means of knowledge of the appellant before the specified date: s 52(2) [Qld s 30(1)(c)]." [3]

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1 (1984) 154 CLR 234 at 256.

2 [2000] 2 Qd R 476 at [26].

3 See also *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697 at 706 per Mahoney JA.

Material facts

[27] The fact which is alleged to be material in this case is the nature and extent of the personal injury caused by the negligence of the defendant. The material fact in this case is that Mr Castensen's injuries would be likely to affect his future employment and employability for more than just a brief period. He did not know that until Dr Day explained the results of his MRI scan to him in June – July 2002. Indeed, it was not until Mr Castensen was assessed by Dr Boys and Dr Curtis in March and September 2003 respectively, that he knew the impact of the first and second injuries on his permanent incapacity.

Decisive character

[28] A material fact will be of a decisive character if, but only if, firstly under sub-section 30(1)(b)(i) of the Act, a reasonable person knowing those facts and having taken appropriate advice on those facts would regard those facts as showing that an action on the right of action would have a reasonable prospect of success and resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and secondly, pursuant to sub-section 30(1)(b)(ii) of the Act, that the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to bring an action on the right of action. Appropriate advice means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.

[29] As the Full Court of the Supreme Court of Victoria observed in *McNanamny v Hadley,*[4] questions of degree and significance are involved.[5]

[30] Once Mr Castensen knew that his injuries were likely to cause him more than just some pain and discomfort with a transient impact on his work, which had been paid for by WorkCover, but rather would cause a serious and permanent impairment of his working capacity, this was a material fact of a decisive character which would satisfy the requirements of both limbs of s 30(1)(b) of the Act.

[31] It meant that he had an action which was worth pursuing because the quantum of damages which was not refundable to WorkCover was substantially different from that which he could have pursued otherwise. Prior to that time, the quantum of damages would not have been sufficient to justify the expense and uncertainty of litigation.[6] As Kirky P held in *Ditchburn v Seltsam Ltd*:[7]

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4 [1975] VR 705 at 713.

5 See also Thomas JA in *Pizer v Ansett* [1998] QCA 298.

6 See *Taggart v The Workers' Compensation Board of Qld* [1983] 2 Qd R 19 at 24; *Watters v Queensland Rail* [2000] QCA 51 at [11], [23]; *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306; *King v Queensland Corrective Services Commission* [2000] QSC 342; *Buckton v BHP Coal Pty Ltd* [2001] QCA 35 at [35].

7 (1989) 17 NSWLR 697 at 704.

> "The test…is not one of zealous vigilance to assert and protect legal rights by immediate resort to litigation"

The material fact was of a decisive character because the enlargement of damages changed his claim from one that was not worth bringing to one that was.

Within his knowledge or means of knowledge

[32] In this case, a material fact of a decisive character relating to the right of action must not have been within the means of knowledge of the plaintiff until 1 November 2001, being one year before the commencement of the action. It would not have been within his means of knowledge if he did not know the fact at the time and, so far as the fact was able to be found, he had taken all reasonable steps to find out the fact before that time.

[33] In this case, it was not until the results of the MRI scan were explained to the plaintiff during June - July 2002 that it became apparent to him that he had sustained an injury which was likely to permanently affect his employment and his employability and therefore realised that he had an injury that was worth suing for. The applicable material fact was the circumstance that his injury was of such severity, that it was likely to preclude him from maintaining employment.[8]

[34] The only question that remains is whether or not the plaintiff had taken all reasonable steps to find out that material fact. As the Court of Appeal held in *Healy v Femdale Pty Ltd*:[9]

> "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 enquiry to protect one's health and legal rights. It is difficult to say that a person who finds [himself] able to get on with [his] life, and returns to employment without significant pain or disability fails the test merely because [he] fails to ask for opinions from [his] doctor about the prospect of future disability or effect upon [his] working capacity. There is no requirement to take 'appropriate advice' or to ask appropriate questions if in all circumstances it would not be reasonable to expect the plaintiff to have done so."

[35] The plaintiff is not expected to act with the benefit of hindsight. In this case, Mr Castensen was able to maintain employment in his trade and was not advised by any of his medical advisers that he would not be able to continue to do so. His pain and discomfort settled, albeit not completely, and he was cleared for full return to work after both the first and the second injury. In those circumstances, it would not be

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[8] See *Dixon v Australia Meat Holdings P/L* [2002] QCA 25*; Muir v Franklins Limited* [2001] QCA 173*; Maguire v Plumbing Industry Group Training Scheme Inc* [2001] QCA 248.

[9] Unreported, CA no 37 of 1992, 9 June 1993.

reasonable to expect him to go out and seek further medical advice about whether these injuries would affect his long term working capacity.

Conclusion

[36] I am satisfied that there was a material fact of a decisive nature relating to the cause of action which was not within the plaintiff's knowledge or means of knowledge until after 1 November 2001. There being no discretionary reasons to refuse the application, it is appropriate to grant the orders sought in the application. The period of limitation for bringing proceedings should be extended to 1 November 2002.