

# SUPREME COURT OF QUEENSLAND

CITATION: *Barnes v Tenkate Group Pty Ltd* [2004] QSC 151

PARTIES: **JEFFREY THOMAS BARNES**  
(applicant/plaintiff)  
v  
**TENKATE GROUP PTY LTD**  
**(ACN 010 472 652)**  
(respondent/defendant)

FILE NO/S: SC No 9012 of 2003

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 April 2004

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2004

JUDGE: Mackenzie J

ORDER: **1. that the period of limitation for the action of the applicant/plaintiff against the respondent/defendant for damages for personal injury arising out of the events of 22 July 1999 be extended so that it expires at the end of one year from 29 August 2003 pursuant to s 31 of the *Limitation of Actions Act 1974*; and**  
**2. that the costs of and incidental to the application be costs in the cause.**

CATCHWORDS: LIMITATIONS OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – PERSONAL INJURY CASES – material fact of decisive character – when did this come to the applicant’s attention – whether limitation period should be extended

*Limitation of Actions Act 1974 (Qld), s 30, s 31*

COUNSEL: D R Kent for the applicant  
J S Miles for the respondent

SOLICITORS: Hall Payne Lawyers for the applicant  
McMahons Lawyers for the respondent

- [1] **MACKENZIE J:** On 27 July 1999 the applicant suffered an injury to his right shoulder in the course of his employment with the respondent as a heavy machine operator. At the time of the injury, which occurred while he was working on North Stradbroke Island, the applicant was changing a tyre on an articulated dump truck. It was necessary to do so by improvised means because, at the time, it was believed that conventional equipment to do so would not be available on the island for a period which would have caused excessive delay.
- [2] While engaged in removing the wheel he felt a sharp pain in his shoulder. He was unable to continue the immediate task but kept working with the help of Panadol for the rest of the day and the next day. On the third day, a Saturday, he attended a doctor's surgery at Marcoola in the area where he resided. He had an x-ray but did not have an ultrasound done although the doctor had recommended it. He explained that it was difficult to do so because he was working from Mondays to Fridays on Stradbroke Island. He probably did not go back to the doctor after the x-ray was taken.
- [3] The applicant went back to work the following Monday because he did not believe there was anything seriously wrong with his right shoulder. He made no compensation claim to WorkCover and continued working until Friday 7 April 2000 with a break for annual leave in the December/January period. On Friday 7 April 2000 he suffered an injury to his left shoulder while working at Pinkenba. The following Monday he returned to work but saw the doctor about the injury on Tuesday 11 April 2000. During the consultation he also mentioned he was having some trouble moving his right shoulder. The doctor thought it might be frozen shoulder and sent him for physiotherapy on both shoulders which he undertook. He was certified as totally incapacitated for work for one month which was later extended for another month. X-rays were taken on 13 April 2000. They showed that there was a large full thickness tear of the right supraspinatus tendon with significant retraction of it. No normal fibres were identifiable on x-ray. There was also a probable full thickness tear of the left supraspinatus tendon without the retraction seen in the right shoulder. When he returned to the doctor with the x-rays on 5 May 2000 he was sent to an orthopaedic surgeon, Dr Welsh.
- [4] After a consultation on 10 May 2000 and review of the x-ray and ultrasound results, Dr Welsh concluded that the applicant had evidence of bilateral rotator cuff tears and that he required repairs of both cuffs. Surgery was performed without complications on the left shoulder on 15 May 2000. The applicant returned to work on 20 September 2000. For the rest of 2000 and throughout 2001 the applicant worked without having to take time off on sick leave and in 2002 worked until August when further investigations were carried out. He had had pain in his right shoulder but managed it with analgesics. He knew that Dr Welsh had said he needed an operation on his right shoulder but did not believe it would stop him from working indefinitely given his ability to work without further treatment of his right shoulder and his favourable experience with his left shoulder. After the investigations in August 2002 he returned to work taking only one day off on sick leave on account of the shoulder.

- [5] By early 2003 the condition of his right shoulder required him to take extended leave and he was operated on on 27 March 2003. The operation proved less successful than that on the left shoulder because of the condition of the shoulder. Dr Welsh reported at the time that there had been a massive tear with all of the supraspinatus and infraspinatus detached, retracted and quite tight. He observed that although the defect was repaired, the tissues were not of high quality.
- [6] According to the applicant Dr Welsh told him post operatively that the injury had been worse than expected. Also, subjectively, it seemed to the applicant that he was not recovering as well as he had from the operation on his left shoulder. During the post-operative visits Dr Welsh had voiced concerns about the progress of recovery and had said that he may not improve. He recalled Dr Welsh telling him in late August 2003 that he would not be able to return to his previous work. When WorkCover advised him in early September 2003 that it would finalise the claim he realised that he would never return to work.
- [7] The “material fact” for the purposes of s 30 of the *Limitations of Actions Act* 1974 was the nature and the extent of the injury. It was not disputed that there was a material fact and there was no claim of specific prejudice to the defendant by reason of delay. The issue was whether the material fact was of a decisive character.
- [8] The respondent’s submission was that a reasonable person, knowing what the applicant knew about the condition of his shoulder and availing himself of appropriate advice within the limitation period, ought in his own interests, in his circumstances, to have brought an action. He would have realised that such an action would have a reasonable prospect of success and result in an award of damages sufficient to justify the bringing of the action.
- [9] The applicant’s submission was that he had learnt of the material fact of the decisive character only in August 2003. It is true that the applicant had been told in 2000 that he should have an operation performed on his right shoulder as well as his left. However, while the existence of a tear was identified, reading the medical evidence suggests that it proved to be somewhat worse than at first appearance. The applicant’s experience of being able to work with some manageable discomfort for over two years after the successful operation on his left shoulder would have done little to cause him a high degree of concern over his future. The experience of recovering quickly from the left shoulder operation would also have been a factor in his mind.
- [10] Had the applicant taken advice as to the prospects of legal action resulting in a sufficient award of damages to justify bringing an action at an earlier time, in my view it is by no means certain that he would have been advised to commence proceedings. My conclusion is that discovery of the nature and extent of the injury as a result of the operation in March 2003 and subsequent events which resulted in advice that he would not be able to return to work because the shoulder would not improve from its condition as at 29 August 2003 was a material fact of a decisive character and that therefore the orders sought should be made.
- [11] I order:

1. that the period of limitation for the action of the applicant/plaintiff against the respondent/defendant for damages for personal injury arising out of the events of 22 July 1999 be extended so that it expires at the end of one year from 29 August 2003 pursuant to s 31 of the *Limitation of Actions Act* 1974; and
2. that the costs of and incidental to the application be costs in the cause.