SUPREME COURT OF QUEENSLAND

CITATION:	*Gorman v Crown Equipment Pty Ltd* [2004] QSC 249
PARTIES:	**ROBERT KEITH GORMAN** (applicant) **v** **CROWN EQUIPMENT PTY LTD** **(ACN 000 514 858)** (respondent)
FILE NO/S:	9208 of 1997
DIVISION:	Supreme Court
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2004
JUDGE:	White J
ORDER:	**1. The limitation period for commencing these proceedings is extended to 10 October 1997 pursuant to s 31 of the Limitations of Actions Act 1974.** **2. The costs of and incidental to the application be costs in the cause.**
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 – applicant, a forklift mechanic suffered back injury at work – where sufficient evidence to establish a cause of action – time when actual knowledge acquired – whether such facts within applicant's means of knowledge *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, considered *Limitations of Actions Act* 1974 (Qld), s30, s31 *WorkCover Queensland Act* 1996 (Qld) *Workers Compensation Act* 1990 (Qld)
COUNSEL:	C Newton for the applicant/plaintiff G W Diehm for the respondent/defendant

SOLICITORS: Carter Capner Lawyers for the applicant/plaintiff
O'Mara's Lawyers for the respondent/defendant

[1] There are two applications before the court. In the first the applicant/plaintiff seeks an extension of the limitation period to 10 October 1997, the date his writ was issued in respect of a claim for damages from the respondent/defendant, his former employer. The second relates to an aspect of disclosure by the respondent which has now been provided so that an order is unnecessary.

[2] The applicant is a 49-year-old fitter and turner who commenced work with the respondent as a forklift mechanic in 1987 in its Sydney premises in the workshop. The work involved the servicing and repair of forklifts made by the respondent. The applicant has no complaint about the nature of the mechanical assistance available in Sydney for carrying out the heavy aspects of this work. Towards the end of 1988 he moved to Queensland and was employed by the respondent at premises at Acacia Ridge. The set up at Acacia Ridge was, according the applicant, without heavy lifting equipment. He contends that he and the other workshop forklift mechanics requested the provision of safe, up-to-date lifting equipment without success.

[3] The workshop was very busy, and there was, the applicant says, pressure to move equipment being serviced. After some weeks he was required to work as a road service forklift mechanic on his own which, as the name suggests, required him to repair and service the forklifts on site. Some of these machines were the clients' own property and others were leased from the respondent. Where the machines were leased the respondent required them to be serviced on site, allegedly, to avoid paying transportation costs. When the units were owned by the client the client would be responsible for those costs to the Acacia Ridge workshop.

[4] The applicant describes his two toolboxes which he was frequently required to carry to the forklift, sometimes up flights of stairs. He estimates the weight of the smaller tool box at 5-10kg and the larger between 30-50kg. The applicant has a slight frame. It seems, however, that his main complaint concerns the manually heavy nature of the various procedures as well as the awkward bodily movements involved in repairing and servicing many of these machines.

[5] The applicant has set out in considerable detail in his affidavit the kinds of activities which he found particularly arduous and which, in his opinion, ought to have been carried out in the workshop rather than by a single serviceman on site. He was, however, directed by his superior, Kevin Cutlack, to repair them or service them on site in order, he alleges, to avoid paying transport costs.

[6] In due course the applicant was promoted to leading hand and was responsible for supervising 10 road service men.

[7] The applicant filled out a job service card for each call out. On the card, which was provided to the respondent via Mr Cutlack, he described the work performed and any problems in the performance of it, for example, difficulty in removing parts because of weight. It was the whereabouts of these jobs cards which prompted the application for better disclosure. The respondent deposes that it had no systematic process for destroying records and whether that occurred depended on storage needs. It is unable to locate records, including the job cards, from 1987-December

1996. The only clearly labelled archived documents are those from 1999. It is possible that some documents from the 12 months earlier period, that is for 1998, may be able to be found.

[8] In March 1989 the applicant first began to experience pain in his lower back. He consulted his general practitioner, Dr Joseph Hui, who, together with his locum from time to time has been the only medical practitioner whom the applicant has consulted until February 1997 about his back problems.

[9] On this first consultation the applicant described the nature of his employment to Dr Hui who had x-rays taken which showed no abnormalities. Dr Hui was of the opinion that the applicant had muscle strain and would make a full recovery. He was treated with Difflam cream and instructed to do exercises which gave relief.

[10] A year later the applicant consulted the locum with back pain and was again prescribed Difflam and heat.

[11] On 24 August 1992 the applicant attended Dr Hui's surgery complaining of low back pain. Dr Hui's notes mention an overuse injury. Dr Hui cannot now recall the circumstances in which he came to write that note and the applicant cannot recall this expression being used. The applicant had also fallen off a bike shortly prior to the consultation but says that he did not hurt his back. He recalls Dr Hui attributing the pain to muscle strain and that he would recover.

[12] The next consultation with back pain was on 26 April 1994. Dr Hui referred the applicant to a physiotherapist but that did not help and on 28 April Dr Hui recommended exercises and a non-steroidal anti-inflammatory cream. The applicant next consulted Dr Hui with low back pain on 25 August 1994 after lifting a piece of heavy equipment at work the previous day. He was certified for one day off work and advised that it was soft tissue injury.

[13] On 7 November 1994 the applicant again consulted about low back pain which Dr Hui advised related to muscle strain. He was advised to use Voltaren cream and that the condition would resolve.

[14] The applicant sustained an injury to his right foot at work which proved to be an ongoing problem. He consulted with Dr Hui from 29 March 1995 and was in receipt of WorkCover benefits. He was required to take a considerable amount of time off work and was, for this reason, at risk of dismissal and quite anxious.

[15] In May 1995 the applicant returned to work on full duties. On 27 December 1995, 6 March and 10 August 1996 he again consulted Dr Hui about low back pain. He was advised that he had muscle strain and was treated with massage and on the later date prescribed Panadeine Forte.

[16] Following a particular episode at work on 10 February 1997 the applicant suffered increased back pain and on the morning of 13 February woke in severe pain and consulted Dr Hui who arranged for a scan which revealed L4/5 disc bulging. The applicant then saw an orthopaedic specialist who concluded that his symptoms would settle with physiotherapy. The applicant sought a second opinion from Professor Bruce McPhee who concluded in his report dated 5 June 1997 to WorkCover that the applicant

> "... has long standing degenerative number disc disease. He has been symptomatic for 2 years with a history consistent with lumbar spine instability. The heavy nature of his employment and inappropriate workplace practices have contributed to his current status. While no specific incident has been the cause of his present state the work practices aggravated his pre-existing degenerative change."

[17] In his affidavit filed 21 July 2004 Dr Hui deposes at para 26

> "It was my opinion that, at least until the consultation on 13 February 1997 and I thereafter received the results of the CT scan referred to above, that Mr Gorman was suffering from muscular strain in his lower back, that such muscular stain came and went from time to time, and that such muscular strain would not prevent Mr Gorman from continuing in his employment."

Dr Hui continued in para 27

> "This condition clearly came and went as is evidenced by the fact that over a period of approximately 6 years (and excluding the consultation on 13 February 1997) Mr Gorman had consulted me in relation to back pain on only 9 occasions. Given the apparently heavy nature of his employment, such ongoing complaints of back pain did not surprise me and, for an individual in employment such as Mr Gorman's, back pain from time to time caused by muscle strain is not unusual."

Professor McPhee concluded that surgical intervention was not appropriate and the applicant attended a pain management program in July 1997.

[18] On 31 July the applicant consulted his solicitors after WorkCover had written terminating his benefits. The writ in these proceedings (S 9208 of 1997) in respect of the *Workers Compensation Act* 1990 was issued on 10 October 1997 and served on the Workers Compensation Board on 17 September 1998 and the following day on the respondent. There have been two other proceedings commenced under the *Workers Compensation Act* 1990 as amended in 1996 and the *WorkCover Queensland Act* 1996 (S 12020 of 1998 and D 371 of 2000 respectively). Mr Ian Brown, the applicant's solicitor, sets out in his affidavit his contact with WorkCover from first obtaining instructions in 1997 dealing with the complexity of the applicant's claims which extend over three different legislative regimes. It is unnecessary to set out the many steps that have occurred since then involving WorkCover suffice it to say that there is no suggestion that the applicant or his solicitors have not pursued matters with diligence.

[19] Both the applicant and Dr Hui were cross examined on this application. Mr G Diehm, who appeared for the respondent identified expressions in Dr Hui's and Professor McPhee's reports that might, at first reading, suggest that the applicant had told them he had experienced lower back pain constantly since 1991 in the case of Dr Hui with some serious episodes, and for two years prior to February 1997 in the case of Professor McPhee. The applicant denied that he had said this to Dr Hui or to Professor McPhee or that it was in fact so.

[20] Mr Diehm submitted that had the applicant been in constant pain and believing that the work practices were unsafe and causing his problem he must have known that he would need to change his occupation to avoid serious injury and was aware that he had a claim against his employer. Dr Hui said it was his practice to advise patients of the need to reconsider their employment in circumstances such as those of the applicant. He thought he might have discussed this with the applicant but cannot now recall if he actually did. Dr Hui has made no note to this effect on the patient cards – the principle source of his recollection – and the applicant denies that he received any such advice or that he thought he ought to change employment which I accept.

[21] The applicant did not question his general practitioner's advice that his low back pain was the result of muscular strain rather than an emerging condition which would ultimately make it impossible for him to continue working as a fitter and turner. There was no obvious reason for him to reject his general practitioner's explanation. The consultations and treatment with anti-inflammatory cream and exercise was effective for many years. It was not until the CT scan in February 1997 and the subsequent advice of Professor McPhee that the applicant understood that he suffered an injury in the form of a seriously disabling degenerative condition brought about at least in part by his employment which would prevent him from working in the future. These are material facts and they are of a decisive nature relating to the nature and extent of the personal injury caused by the applicant's employment, s 30(1)(a)(iv) and falls within s 30(1)(b). There is sufficient evidence to establish the right of action, s 31(2)(b).

[22] The respondent relies on the discussion in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 554-6 to assert prejudice. There are contentious issues about the nature of the tasks the applicant was required to perform and the circumstances which have been set out in detail in the respondent solicitor's affidavit which were provided to her by Mr Cutlack. That detailed recollection does not suggest prejudice of the kind adverted to by McHugh J. The job cards are unlikely to have been preserved but at least from the end of March 1995 when the applicant was in receipt of WorkCover benefits in respect of his injured foot and which continued over a lengthy period prudence might have suggested that all documents relating to the applicant's work with the respondent should be retained. The loss of the cards is not sufficient prejudice which ought to preclude the discretion from being exercised in favour of the applicant.

[23] Accordingly, the limitation period for commencing these proceedings is extended to 10 October 1997 pursuant to s 31 of the *Limitations of Actions Act* 1974. The costs of and incidental to the application be costs in the cause.