SUPREME COURT OF QUEENSLAND

CITATION:	*Platen v WWP Pty Ltd* [2004] QSC 258
PARTIES:	**ROBERT PLATEN** (plaintiff) **v** **WWP PTY LTD** ACN 010 676 561 (defendant)
FILE NO/S:	4356 of 2004
DIVISION:	Trial
PROCEEDING:	Application for extension of time
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2004
JUDGE:	White J
ORDER:	**Application dismissed with costs**
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 applicant labourer, more probably than not, contracted Q-fever 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 *Limitation of Actions Act* 1974, s 30, s 31 *Berg v Kruger Enterprises* [1990] 2 Qd R 301,cited *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, considered *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306, cited *Dick v University of Queensland* [2000] 2 Qd R 476, followed *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325, followed *Miller v Broadbent and Anor*, unreported decision of 12 August 1999 no 9682 of 1998, cited *Muir v Franklins Ltd* [2001] QCA 173, cited

COUNSEL: R W Trotter for the applicant
R M Treston for the respondent

SOLICITORS: Gudkovs Power Osborne for the applicant
Bruce Thomas Lawyers for the respondent

[1] The applicant seeks an extension of the limitation period pursuant to s 31 of the *Limitation of Actions Act* 1974 to 19 May 2004 the date on which he issued proceedings for damages for personal injury arising out of the employment with the respondent.

[2] The applicant contracted Q-fever endocarditis more probably than not whilst working as a labourer for the respondent at its wool processing plant at Warwick. He became symptomatic and attended the Warwick Base Hospital in May 1993 but was erroneously diagnosed as having glandular fever not Q-fever. That diagnosis was not made until 18 December 2001. Q-fever is caused by the bacterium Coxiella burnetii which afflicts sheep and cattle. It may be contracted by inhalation or the ingestion of spores. The respondent does not contend that the applicant ought to have commenced proceedings before diagnosis but since the cause of action probably arose in May 1993 contends that proceedings ought to have commenced within one year of diagnosis or, at the latest, February 2002. Proceedings were issued on 19 May 2004. The applicant contends that a material fact of a decisive nature was not within his knowledge or means of knowledge until the end of October 2003.

[3] The applicant was born on 3 April 1972. He started farm work at the age of 16. In December 1990 he commenced employment with the respondent, a wool processing company in Warwick. A detailed description of what was involved in his work is set out in the applicant's statement to WorkCover Queensland dated 20 March 2002. He was required to open the greasy wool bales and lift the wool onto a conveyor belt which fed into the scourer line. He processed about 50-100 bales a day. He also worked on the scourer line which washed the wool. This included scraping mud out of the washing bowls. The wool was passed on a conveyor belt into driers and on occasion the applicant would get into the driers to clear out the wool and in so doing would inhale acid dust and wool fibres. Further processing occurred to the wool before being pressed into bales. The applicant observed that the dust and fibres floating in the air in the premises was sometimes so thick he could not see. He had not been vaccinated against Q-fever by his employer or advised that it was desirable.

[4] In about May 1993 he began to feel sick, experiencing flu-like symptoms of hot and cold chills and headaches. He attended the Warwick Base Hospital and was tested for a number of conditions including Q-fever but was diagnosed with glandular fever. At about the same time a number of fellow-workers were diagnosed with Q-fever. The applicant had two weeks off work, recovered, and returned to work where he remained until 1998. From time to time he experienced flu-like symptoms, was sick for a few days and then returned to work. He also began to experience chest pain associated with the flu-like symptoms from about October 1993. When well he played regular sport. His work entailed physically hard labour.

[5] The applicant commenced work at the Killarney sawmill in 1998. He experienced chest and abdominal pain and again attended the Warwick Base Hospital where he was given medication and sent home. In 1999 he worked for about a month at Rose City Wool & Skins which involved handling sheep skins and occasionally bales of wool. In March 2000 the applicant commenced farm labouring work with Cameron Pastoral Co. carrying out spraying, ploughing, planting, harvesting and machine maintenance. He did not work with farm animals.

[6] In August 2000 he again experienced flu-like symptoms and felt lethargic and with no energy. After three days bed rest he returned to work. He experienced similar symptoms in February/March 2001 and then worked satisfactorily until 2 December 2001 when he experienced severe chest pain. He self-treated with analgesics putting his symptoms down to the long hours he had been working. This continued for some days and eventually the applicant drove himself to the Goondiwindi Hospital. After an EEG he was admitted to hospital and airlifted to Archerfield and thence by ambulance transported to the Princess Alexandra Hospital.

[7] The applicant underwent numerous tests and on 8 December 2001 he was informed by a coronary specialist that a diagnosis of Q-fever endocarditis had been made. He underwent an ultrasound, gastroscopy and had three wisdom teeth extracted. He was advised by Dr Julie Munday, director of the department of cardiothoracic surgery that urgent surgery was required to replace the aortic and mitral valves in his heart due to damage cause by Q-fever. He was asked on or about 14 December if he had been inoculated against Q-fever by a consultant in infectious diseases or his registrar and said that he had not. The applicant had also contracted an infection in hospital and needed six weeks of antibiotics before surgery. He was advised not to work during this period. The surgery took place on 7 February 2002 and he was discharged on 12 February to St Andrew's Hospital cardiac unit for rehabilitation. He underwent regular blood tests and reviews by a team of multi-disciplinary specialists and took antibiotics and other medication.

[8] The applicant agreed in cross-examination that after diagnosis in December the doctors emphasised to him the life-threatening nature of his illness, that he would probably need to take antibiotics for the rest of his life and drugs to thin his blood. As a consequence of the latter medication he agreed that he was told that he would need to exercise extreme caution at work and at home to avoid fatal bleeding. To reduce this risk he gave up playing sport. He agreed he needed to monitor his condition constantly and would need regular review of his condition by specialists. Nonetheless, the applicant was firm in his evidence that the many specialists who treated him at this time told him that he could recover and would be able to return to work which, in due course, he did although not performing the heavy labouring tasks he was previously able to do.

[9] On 13 March 2002 the applicant applied for WorkCover benefits based on his employment with the respondent. The advice he had received from his general practitioner, Dr I Mitchell, was that employment with the respondent was the most likely source of his infection.

[10] It would appear that WorkCover referred the claim to Dr V Madden of Toowoomba for review. In his report of 20 March 2002 Dr Madden sought further information and although by 7 August 2002 he was able to confirm the diagnosis of Q-fever endocarditis it seems he was unable to venture an opinion as to when the applicant

had contracted it. Accordingly, Dr Whitby, an infectious disease specialist who had treated the applicant in February was retained by WorkCover to advise and this he did on 11 October 2002. Dr Whitby concluded that it was highly likely that the applicant had contracted Q-fever endocarditis whilst employed by the respondent. WorkCover did not communicate this report or its contents to the applicant at the time. The applicant first saw it when he obtained a copy of his file from WorkCover in September 2003 a month after he had requested it.

[11] The respondent has produced a bundle of compensation certificates signed by Dr Mitchell in 2002 and into 2003 in which he describes wool processing as the source of the disease.

[12] Somewhere about April to June 2003 WorkCover case officers who had been handling the applicant's file told him that he would receive an offer of payment from WorkCover and that if he was unhappy with the offer he could go to court. They told him that what he could then do would depend on whether he was assessed with an impairment over or under 20 per cent and that if it were over he could take the money and sue. The applicant deposed that the officers told him he would have to wait until the Q-fever stabilised before WorkCover could pay him. The applicant further deposed, and it was the tenor of his oral evidence, that from what the officers said to him he was under the impression that he did not need to decide about seeing a solicitor until he received an offer. They also told him that they were uncertain which legislative regime applied to him.

[13] At another meeting in about August 2003 these things were discussed again with the case officers. The applicant's father was present at most WorkCover meetings. He pressed the officers about the amount of any offer. Reluctantly and "unofficially" they said "$30,000 to $40,000." Mr Platen reacted strongly remonstrating that his son had lost 30 years of his working life and would have to pay for his future care. The officers advised at that meeting that the applicant should see a solicitor. These conversations, or the effect of them, were not denied by the respondent, neither was it put to the applicant in cross-examination that these conversations did not occur as the applicant recalled them.

[14] In about July 2003 WorkCover sent the applicant a copy of a report from Dr K Hossack, a specialist in cardiology. This report is not in the material but Dr Madden has made reference to it in his letter of 6 August 2003. The applicant says that he could not understand the report, told WorkCover (the officer agreeing with the applicant) and WorkCover asked Dr Madden to interpret it for him. Dr Madden notes that Dr Hossack determined that the applicant had a 35 per cent permanent impairment of the whole person and a 65 per cent impairment of his capacity to work and maximum medical improvement might be expected for the applicant in 16 months. Dr Madden recommended to WorkCover that the applicant not be offered a permanent impairment sum then but that Dr Hossack should be asked to comment further. It appears that Dr Hossack by letter dated 14 August 2003 indicated that it was appropriate to offer a permanent impairment payment immediately on the basis that the applicant's condition was stable. The applicant saw his solicitor on 10 October 2003 who undertook investigations on his behalf.

[15] In early December WorkCover wrote to the applicant advising an assessment of 35 per cent permanent partial disability and later an officer telephoned to inform him that approximately $35,000 would be paid to him.

[16] In late October Mr Platen had obtained material from Michell Australia the present owner of the wool processing business. It comprised a copy of the Q-fever information kit for the Australian Meat Industry provided by the Meat Research Corporation and a copy of a document, Preliminary Human Health/Risk Assessment Michell Australia – Warwick Wool Processing Plant prepared by PPK Environment and Infrastructure dated February 2002. The applicant contends that until he looked at these documents he was not aware of what standards the respondent should have maintained to protect its workers from Q-fever, what controls could have been in place to reduce the risk of contamination or that it was even possible to prevent Q-fever. He deposes, and his solicitor supports his contention, that it was not until those documents had been perused that it became clear the respondent had been negligent in failing to provide a safe system of work at the Warwick premises.

[17] Ms Treston submitted, compellingly it seems to me, that it is difficult to find anything in either document which would have added to the knowledge which the applicant already had about relevant standards in respect to Q-fever. The passages extracted in the applicant's affidavit need to be read in context. In para 15 he deposes

> "Both those documents seem to say that there was certain things that an employer should be doing to protect its employees from the risk of getting Q-fever. The PPK environment and infrastructure report talked about the risk of getting Q-fever through 'the inhalation of spores from the inspection of greasy wool bales and spores distributed into the air from the conveyor belt' I knew from my work at the Warwick wool processing plant that WWP had not done a lot of the things it could have done to prevent Q-fever."

The report which had been commissioned by the new owners of the wool processing plant stated in the executive summary

> "The study assessed that the risks of contracting Q-fever … from wool processing are low"

At 3.3 the following appears

> "The identifiable health risks from the inspection of the greasy wool bales includes:
> - ingestion or the inhalation of disease from contaminated wool; and
> - the dermal absorption of residual pesticides in the greasy wool.
>
> The literature review of sheep and wool handling revealed a number of pathogens that can impact on human health. The diseases attributed to pathogens from sheep and wool handling include:
>
> ...
> - Q fever
>
> Of these identified diseases, most were extremely uncommon within Australia.

> Anthrax and Q-fever were revealed by the literature review as the most relevant diseases in Australia in comparison to the other diseases. An overview of the disease and the likelihood of contracting them are discussed below."

[18] In the section dealing with Q-fever the following appears

> "Weinstein et al (1993) states that many infected people remain asymptomatic or suffer no more that a mild febrile illness. Symptoms that do eventuate mostly resemble flu-like illness, with some chronic cases leading to long-term heart and liver problems. Relapsing symptoms can persist for years leading to chronic impediment in up to 20 % of cases.
>
> Qld Health (2001) state that an average of 229 cases of Q-fever are reported in Queensland each year. The highest risk occupations were abattoir workers followed by farm or dairy workers. Wool scouring was an occupation with one of the lowest reported cases.
>
> It is understood that some of the personnel at the plant have previously contracted Q-fever however, it is unknown whether the wool processing plant was the sole source of the Q-fever for these personnel. Other possible sources of Q-fever contamination include farm work and direct contract with infected animals.
>
> A National Q-fever Management Program was implemented in November 2001, offering free immunity testing and vaccination for workers at risk. However, workers within the wool scouring industry are not eligible for the program as it is presumed they are not considered a high-risk group by the implementers of the program.
>
> In conclusion, a potential risk exists for workers to contract Q-fever through the inhalation of spores from the inspection of greasy wool bales and spores distributed into the air from the conveyor belt, prior to the suint process.
>
> However, according to Queensland Health data, the risk of contracting Q-fever from the wool processing industry is considered low."

There is nothing in the document relating to the meat industry which could have added anything to the question of the relevant standard of care.

[19] Most of the recommendations in the report relate to dust etc leading to upper respiratory and eye infections. Whilst the report mentions the possibility of contracted Q-fever from greasy wool it does not make any particular recommendations about it apart from general personal protection. It does not mention inoculation save to say, as already quoted, that free vaccination was not offered in the wool scouring industry. The applicant already knew that there was a vaccine available at the relevant time.

[20] The applicant's solicitor deposes that he had concerns regarding both the time limitation and liability issues after he had obtained the documents on the applicant's WorkCover file in October 2003. He deposes that it was not until after he received the documents in respect of the Q-fever report and information kit that he believed that the applicant had a case against the respondent. He considered those documents in December, in February had a conference with counsel and on 9 March briefed him to draw the claim and statement of claim.

[21] The legislation dictates with some precision the approach to be taken to an application to extend time. Section 31(2) provides

> "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
>
> (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 as 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."

[22] What constitutes material facts is set out in s 30(1)(a) and they are, in effect, the elements of the relevant cause of action

> "(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…"

[23] What makes material facts decisive is set out in s 30(1)(b)

> "(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 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 circumstances 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 –
>
> (i) the person does not know the fact at that time; and
>
> (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.

[24] Accordingly, the applicant must demonstrate that the facts of which he alleges he was unaware were material facts and, if they were, that they were of a decisive character and that such facts were not within his means of knowledge until the date after the commencement of the year last preceding the expiration of the period of limitation for the action.

[25] The applicant argues that it was not until September 2003 when he read the medical reports in his WorkCover file that he realised how serious and permanent his condition was and how guarded his future would be. He particularly noted in cross-examination that he realised for the first time that he faced the prospect of liver damage. He said that he did not realise until he read Dr Whitby's report that his employment with the respondent had caused him to contract Q-fever. He relies on the documents obtained from Michell Australia that it was not until then that he understood that he could establish a case in negligence against the respondent.

[26] On his own admission the applicant was aware that he had contracted a very serious illness which would more likely than not have life-long consequences for him both in terms of his quality of life and his ability to earn an income comparable to that which he had been able to earn prior to becoming very ill. He was probably aware of those matters in a general way after the diagnosis of Q-fever in mid December 2001 but it would have become very real after the operation and his discussions with his specialists and whilst on rehabilitation in February 2002. I accept that the applicant was concerned to be able to work. He was, after all, only 29 when this operative procedure was carried out. He understood that after recovery and with great care he would be able to work again but on light duties of a more clerical kind. I cannot accept that it was not until he had the assessment produced by Dr Whitby that he understood that he had a serious and permanent condition.

[27] Again it is difficult to accept that the applicant did not realise with any clarity until he read Dr Whitby's report that it was his work with the respondent which had caused him to contract Q-fever. He clearly accepted the earlier advice from Dr Mitchell, his general practitioner. It is not relevant to this question that Dr Mitchell now says that he was not an expert in the field of infectious diseases. The application for WorkCover benefits made in March 2002 attributes the contraction of the disease to the applicant's work with the respondent. The numerous medical certificates from Dr Mitchell allocate the cause to wool processing. The applicant was aware that his fellow workers had contracted Q-fever more than likely from the respondent's premises. Dr Madden's doubts about the source of the infection were never communicated to the applicant.

[28] The onus which is on an applicant for an extension of time was discussed in the judgment of Macrossan J in *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325 at 333

> "In cases like the present, an applicant for extension 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. He must show that without the newly learnt fact or facts he would not, even with the benefit of appropriate advice, have previously appreciated that he had a worthwhile action to pursue and should in his own interests pursue it. This is what the application of the test of decisiveness under s 30(b) comes down to: *Taggart v The Workers' Compensation Board of Queensland* [1983] 2 Qd R 19, 23, 24 and *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 251 per Deane J."

That passage was cited with approval by Lee J with whom McPherson and de Jersey JJ agreed in *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306 and adopted by Connolly J with whom Ryan and Cooper JJ agreed in *Berg v Kruger Enterprises* [1990] 2 Qd R 301. That test was adopted by Muir J in *Miller v Broadbent and Anor*, unreported decision of 12 August 1999 (no 9682 of 1998) at 6.

[29] The evidence demonstrates that the applicant did have actual knowledge or belief that his condition was serious enough to warrant legal action against the respondent. He may not have appreciated quite how serious in percentage terms his condition was but that does not alter the fact that he knew he was seriously injured from his work with the respondent and that, at the least a vaccine had been available. It was then worth consulting a solicitor. What he did not appreciate was the time by which he needed to commence proceedings. That is not a material fact of a decisive nature. In *Dick v University of Queensland* [2000] 2 Qd R 476 the applicant for an extension of time did not understand that he had a right to claim common law damages in addition to a statutory right under the workers' compensation legislation. Thomas JA with whom Pincus JA and Cullinane J agreed on this point said at 483

> "To the extent to which this introduces knowledge of the legal effect of the facts within the respondent's knowledge, it is an erroneous test, and an affirmative answer to it would not justify an extension. In *Do Carmo v Ford Excavations Pty Ltd* it was recognised that:
>
> > "[t]he ignorance of a material fact to which those sections refer is, in my view, ignorance of a factual matter in the ordinary sense and not ignorance either of the law itself or of the legal consequences of the material facts."
>
> Wilson J adverted to the "clear distinction between facts and the legal consequences of those facts", and observed that "[k]nowledge of the legal implications of the known facts is not an additional fact which forms part of a cause of action". Dawson J observed:
>
> > "[I]t seems to me that the reference to material facts in par (i) of s 57(1)(b) does not include a reference to a cause of action in negligence but is rather a reference to the facts

> which constitute the acts or omissions, including those facts which are necessary to show the negligent character of those acts or omissions, upon which such a cause of action might be founded."
>
> On this question a consistent view is expressed by four members of the court (Wilson, Brennan, Deane and Dawson JJ), with only Murphy ACJ taking the view that the existence in law of a right of action is a relevant "material fact" for the purposes of legislation."

[30] A reasonable person in the applicant's circumstances would have taken advice in early 2002.

[31] It is with regret that I am unable to extend the limitation period for this applicant. I had the benefit of seeing him and his father in the court room. They are not sophisticated people. The applicant was a fit, hardworking young man when he contracted Q-fever and persevered over many years with increasing illness. The applicant was dependent upon public services which failed him. Warwick Base Hospital misdiagnosed his condition which, it might be supposed if recognised in 1993, may have been resolved without very serious consequences for him. Or even in 1998 when he consulted the Hospital again. He was in contact with cases officers at WorkCover from early 2002. He could not be expected to understand the intricacies of the WorkCover legislation – indeed experience in this court shows that as each new legislative regime replaces an earlier regime the lack of capacity of solicitors let alone WorkCover officers and, needless to say, manual workers to understand its complexities is daily demonstrated. WorkCover took a very long time to process the applicant's claim. It seemed reluctant to accept it.

[32] As I have noted above, the applicant's WorkCover case officers were aware of his concerns about the assessment outcome and of the serious consequences of his illness. They did not disabuse him of the impression which he gained from them that he needed to make a choice about litigating only when he received a percentage disability assessment. WorkCover had no obligation to give him legal advice or even to say he should seek it at an early time but it does choose (as standing behind the respondent) to take the limitation point against the applicant.

[33] As required by s 31(2)(b) there is evidence to establish the right of action apart from the limitation defence.

[34] Because of the conclusion which I have reached it is unnecessary to reach a conclusion on prejudice to the respondent in having a fair trial over 10 years after the alleged wrongful act. Apart from the long passage of time there are other matters to consider. The premises were burnt down in 1994. Most records have long since been destroyed and there are new owners of the business. The risk of a defendant being unable to have a fair trial after the expiration of a limitation period is well recognised, *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553-5 per McHugh J. The time for assessing prejudice is the situation at the time of the application, *Taylor* per Toohey and Gummow JJ at 548-9 and see the discussion by Mullins J in *Muir v Franklins Ltd* [2001] QCA 173 at [53].

[35] The applicant's solicitor has spoken to a fellow worker who contracted Q-fever. He worked on the same shift as the applicant in May 1993. There are likely to be

other people who worked at those premises available to give evidence but this is speculation. There may be plans available for the previous premises since the fire would have been investigated. But again this is speculation. The detailed report for Michell Australia was made in February 2002. It contains layouts of the various processes and photographs. Employees from 1993 could be asked if the layout was the same before the fire. It might have been necessary to adjourn this aspect of the application for further material to be put before the court.

[36] The order is that the application for an extension of time is dismissed. Unless there are submissions to the contrary it should be with costs.