SUPREME COURT OF QUEENSLAND

CITATION:	*Payne v Jonkers Enterprises Pty Ltd & Anor* [2004] QSC 447
PARTIES:	**ALLAN HENRY PAYNE** (plaintiff) **v** **JONKERS ENTERPRISES PTY LTD** ACN 010 085 524 (first defendant) **SUNCORP METWAY INSURANCE LTD** ACN 075 695 966 (second defendant)
FILE NO/S:	SC No 7104 of 2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	16 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2004
JUDGE:	Holmes J
ORDER:	**The period of limitation for the plaintiff's action be extended so that it expires on 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 NATURE – EVIDENCE TO ESTABLISH RIGHT OF ACTION – where the plaintiff filed a claim and statement of claim in an action for damages for a back injury sustained in the course of his employment with the first defendant on 6 August 2002 – where the plaintiff concedes that he first experienced symptoms in 1998 – where the plaintiff seeks an extension of the limitation period under s 31(2) of the *Limitation of Actions Act* 1974 – whether a material fact of a decisive nature, the nature and extent of his back injury, came within the plaintiff's means of knowledge after the 6 August 2001 *Limitation of Actions Act* 1974 (Qld), s 30, s 31 *Berg v Kruger Enterprises (Division of Besser Qld Limited) Ltd* [1990] 2 Qd R 301, cited *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R

306, cited
Buckton v BHP Coal Pty Ltd [2001] QCA 35; Appeal No 3777 of 2000, 16 February 2001, cited
Dick v University of Queensland [2000] 2 Qd R 476, cited
Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234, cited
Dwan v Farquhar [1988] 1 Qd R 234, considered
Healy v Femdale Pty Ltd CA No 37 of 1992, 9 June 1993, applied
Moriarty v Sunbeam Corporation Limited [1988] 2 Qd R 325, cited
Muir v Franklins Limited [2001] QCA 173; Appeal No 9504 of 2000, 11 May 2001, applied
Pizer v Ansett Australia Limited [1998] QCA 298; Appeal No 6807 of 1998, 29 September 1998, considered
Sugden v Crawford [1989] 1 Qd R 683, applied
Taggart v Workers' Compensation Board of Queensland [1983] 2 Qd R 19, cited
Watters v Queensland Rail [2001] 1 Qd R 448, cited
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431, applied

COUNSEL: Mr Cross for the plaintiff
Mr Howe for the defendants

SOLICITORS: Watling Roche Lawyers for the plaintiff
Eardley Motteram Lawyers for the defendants

[1] On 6 August 2002, the plaintiff filed a claim and statement of claim in an action for damages for a back injury said to have become manifest on or about 6 August 1999. However, in an affidavit he concedes that he began to experience symptoms as early as 1998, and by this application he seeks an extension of the limitation period to the filing date, under s 31(2) of the *Limitation of Actions Act* 1974. In order to obtain that extension, he must show that a material fact of a decisive character - the nature and extent of his back injury - was not within his means of knowledge until a date after 6 August 2001.

The plaintiff's work and medical history

[2] The plaintiff was born in 1950. He left school at the age of 15 and worked in a series of manual jobs, as a process worker, farm labourer and truck driver. In 1996 he began work with the first defendant. From January 1997, he was required to drive a particular tow truck, which he says had a broken, uncushioned driver's seat and inadequate suspension, so that when the truck went over bumps it "bottomed out". He began to feel some pain in his lower back in 1998, which worsened during 1999. Complaints to his employer did not produce any result until the truck was replaced in or about May 2000.

[3] On 6 August 1999, the plaintiff went to a general practitioner, Dr Skinner, at the Caboolture Medical Centre. This was, the plaintiff said, the first time he had consulted a doctor in relation to back pain. In fact, the medical centre records show that in November 1995 the plaintiff gave an account of having slipped and fallen a couple of years prior. In that context he complained of paresthesia in the left arm

and left leg and low back pain aggravated by prolonged sitting. But the major issue on that consultation seems to have been symptoms of vertigo he was experiencing and no treatment for any other symptom is recorded. It may be, therefore, that the reference to an earlier fall and back and leg symptoms was purely historical, and the plaintiff is correct in saying that he had not consulted a doctor about such matters.

[4] The notes in relation to the plaintiff's attendance on Dr Skinner on 6 August 1999 record his complaint of pain in the left sacroiliac region, not referable to any trauma and aggravated by long periods of standing and walking. There is also a complaint of paresthesia down the left leg and a burning pain on walking. Dr Skinner carried out tests of the plaintiff's straight leg raising and sensation to touch, and ordered an x-ray, the results of which, the plaintiff says he was told, were "normal". The x-ray report is in evidence; it says that the plaintiff's lumbar spine exhibits facet joint hypertrophy or arthritis at three levels, and spinal canal stenosis at two. The defence submitted that the plaintiff's claim that he was told the x-ray was normal was an attempt to downplay his condition, but I do not place much importance on the discrepancy. It may be that Dr Skinner regarded the x-ray as showing age-related degeneration without any particular, remediable feature worth bringing to the plaintiff's attention. At any rate, Dr Skinner seems not to have considered that the state of the plaintiff's back required any treatment at that stage, and there was no further attendance by the plaintiff at the medical centre until 2001.

[5] On 5 January 2001 the medical centre's notes record the plaintiff's complaint of left buttock pain and left sciatica daily, aggravated by standing for a few minutes, although not by sitting. There is again a complaint of paresthesia and numbness in the left leg. At that stage, the plaintiff explained to Dr Skinner that he had spent three years driving a truck with a broken seat and experienced pain in his back from the bumping. Dr Skinner provided the plaintiff with a medical certificate for WorkCover purposes, enabling him to recover medical expenses; he did not, however, take any time off work. In his application to WorkCover, dated 23 January 2001, the plaintiff gave the date of occurrence of the injury as 6 August 1999, because, he said, that was when he first experienced severe symptoms.

[6] In late January or early February 2001, Dr Skinner referred the plaintiff to Dr Coyne, a neurosurgeon. According to a later report provided by Dr Coyne, the plaintiff, when he saw him in February 2001, gave an account of worsening back symptoms while driving a truck with a broken suspension. Although he was now driving a new truck he did not feel that his back symptoms had improved. He had relatively constant pain in the left sacroiliac region, exacerbated by some activities. Dr Coyne examined a CT scan which had been performed on the plaintiff's lumbar spine, noting that it showed degenerative lumbar disease. The plaintiff's symptoms were consistent with stress to his degenerative lumbar spine, caused by his employment circumstances. The symptoms were likely to persist at their current level, and were best dealt with by analgesia, anti-inflammatory medications, the application of heat and a back strengthening program. Dr Coyne also suggested to Dr Skinner that referral to a pain management specialist for consideration of facet joint blocks or radiofrequency lesions might be worthwhile. At that time, Dr Coyne noted, the plaintiff, who now drove a more comfortable truck, expected to continue in employment, notwithstanding his symptoms; Dr Coyne expected that that situation would continue. The plaintiff says that Dr Coyne did not suggest to him that his employment was in any jeopardy, and that is consistent with the content of Dr Coyne's report.

[7] On 12 March 2001, the plaintiff attended Dr Skinner again, complaining of episodic severe back pain and constant left leg numbness. In accordance with Dr Coyne's suggestion, he was referred to Dr Moore, an anaesthetist and pain management specialist, who performed facet joint injections. At about that time the plaintiff began to receive weekly compensation payments from WorkCover, which continued until 21 September 2001. It seems that the facet joint injections took place over March and April 2001. In May 2001, Dr Moore suggested that the plaintiff undergo radio frequency lesioning to the facet joint on the left side at three levels. That procedure was undertaken in late June, and seems to have been ineffective. Throughout August 2001, Dr Skinner's notes record acupuncture treatment given to the plaintiff for his sciatica.

[8] On 17 October 2001, the plaintiff obtained a new job as a courier driver, and remained in that employment until 26 June 2002. Then he took two further positions, the first with a tow-truck operator, lasting only three days, and the second, starting on 12 July 2002, with a transport company, in an unspecified capacity.

[9] The plaintiff continued to experience severe lower back pain and sciatica through the last half of 2001. In December 2001 he was referred to Dr James Curtis, orthopaedic surgeon, complaining of symptoms similar to those recounted to Dr Coyne. Dr Curtis gave his opinion that while the applicant would be able to cope with suitable light work for another five to ten years, he would be unable to work as a tow truck driver or to perform any similar heavy work. At about the same time, a neurosurgeon, Dr Weidmann expressed a similar view, that the plaintiff was fit for work of lighter nature, including employment as a light courier driver, but was precluded from any work of a heavy nature involving bending or lifting.

[10] The plaintiff's evidence about when he became aware that he could no longer drive a tow truck nor do similar heavy work is somewhat confused. At one point in his affidavit he says that it was on his attendance on Dr Curtis in December; at another he says it was when he was advised by his solicitors as to the reports by Dr Weidmann and Dr Curtis which, given that Dr Weidmann's report was provided in November 2001, may have been considerably earlier. To further confuse matters he refers to a report of Dr Skinner dated 31 October 2001 in which Dr Skinner said this of the plaintiff: "His prognosis is poor. We have little further to offer him and he remains in pain. He cannot drive the truck"; without making it clear which truck. The plaintiff says he remembers being advised of Dr Skinner's report in or about November 2001. Which date is correct is not crucial, given that all fall within the year by which the plaintiff seeks extension of the limitation period.

The Limitation of Actions Act

[11] Section 31(2) of the *Limitation of Actions Act* provides for extension of the limitation period:

> "Where on application to a court by a person claiming to have a right of action to an 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 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."

[12] Section 30(1)(a) identifies a number of material facts, including:

> "(iv) the nature and extent of the personal injury so caused".

By virtue of s 30(1)(b) those material facts 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 circumstances into account to bring an action on the right of action".

"Appropriate advice" is defined by s 30(2) to mean "the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts".

[13] As to knowledge, s 30(1)(c) provides that

> "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."

Evidence to establish the right of action

[14] The defendant relied on *Dwan v Farquhar*[1] for the proposition that if the litigation would be a "futility", the application should be refused. These matters were pointed to as making the plaintiff's prospects of success doubtful: there was no record of back injury to the plaintiff in the employer's accident and injury register. Dr Skinner's records of 6 August 1999 and 5 January 2001 indicated that the plaintiff's back pain was not brought on by sitting. The truck itself was only one year old, and evidence was given to the effect that after complaint by the plaintiff the seat had been checked and found to be in good repair. A new shock absorber had been fitted to it. Other employees of the company had driven the truck on occasion without experiencing any difficulty.

[15] The reference to futility in *Dwan v Farquhar* is, I think, no more than what follows from the requirement in s 31(2)(b) that the applicant put forward evidence to establish the right of action. As to that requirement, Macrossan CJ in *Wood v Glaxo Australia Pty Ltd*[2] made these observations:

> "applicants for extension of limitation periods are not intended by the legislation to be placed in the position where they must establish an entitlement to recover on two occasions, first on the hearing of the application and once more at the trial of the action. Although the requirements of the legislation must be complied with if an extension is to be granted, the extent to which an applicant must show a case on the hearing of the application to extend time will frequently depend on the impression on the judge's mind of the material which the applicant presents or the existence of which he demonstrates or points to. It is nevertheless recognised as wrong to place potential plaintiffs in anything like a situation where they must on the probability show it is likely they will succeed in their actions."

His Honour went on to say that the requirement would be met if an applicant could

> "point to the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his case"[3].

[16] The defendants' affidavits raise issues incapable of resolution on an interlocutory application; but, more to the point, there is sufficient in the plaintiff's material to show that there is evidence to establish the right of action.

Material fact of a decisive character

[17] It seems probable that the plaintiff's cause of action accrued at least as long ago as 1998 when, according to his affidavit, he first began experiencing lower back pain, so that the limitation period expired in 2001, a year or so before his action was commenced on 6 August 2002. The effect of s 31(2) is to require him to show that a material fact of a decisive character came within his means of knowledge after 6 August 2001. The material fact on which the plaintiff relies is the advice of Drs Weidmann and Curtis that his injuries would have a long term effect on his capacity for employment.

---

[1] [1988] 1 Qd R 234.
[2] [1994] 2 Qd R 431 at 434.
[3] At 435.

[18] The material fact of which an applicant for an extension of time must show ignorance must be "a factual matter in the ordinary sense", not ignorance either of the law or of the legal consequences of material facts.[4] It is well established that the fact that the consequences of an injury are more serious than had previously been known (either by way of actual or constructive knowledge) may amount to a material fact of a decisive character, if it is such as to render viable an action which was previously not worth bringing.[5] A fact which merely goes to enlarge damages in an action which a reasonable person, appropriately advised, would in any event have commenced, will not suffice.

[19] Two arguments were mounted by the defendants: firstly, that by early to mid 2001, the plaintiff's circumstances were already such as to warrant the commencement of an action; and secondly, that by then the nature of his symptoms should have put him on enquiry as to the likely impact of his back problems on his future employability. Accordingly the material fact relied on, that is the effect on future employment, was not to be regarded as being not within the means of knowledge of the plaintiff because he had not taken all reasonable steps to ascertain it; or alternatively was not decisive, because the plaintiff ought, on the facts already known to him, to have brought an action before August 2001.

[20] The defence pointed to these facts: the plaintiff had been complaining of severe back pain since 1999; he had required extensive treatment by early 2001; Dr Coyne had advised him of the permanency of his condition in early February 2001; a letter from Dr Skinner to his solicitors referred to his symptoms as increasing between 1998 and 2000 to an unbearable level; and he had required time off work on WorkCover benefits from May to September 2001. There had been a pattern of severe chronic pain which was not resolving with time off work. By early to mid-2001, he had reason to anticipate limitations on his ability to work in the future; and in any event, even if he were able to continue working, he could have expected, had he then proceeded with an action, a substantial award.

[21] For the plaintiff, it was submitted that in February 2001 he had received reassurance from Dr Coyne that he could continue to work; that position was dramatically changed by the advice of Drs Curtis and Weidmann at the end of 2001. Prior to 6 August 2001 the plaintiff's claim, it was said, would have been minimal. WorkCover had met the cost of his absence from employment between March and September 2001. There was then no reason to suppose that there was any future economic loss component claimable as damages. The plaintiff's special damages had been met by WorkCover or Medicare and pain, suffering and loss of amenities would have been the subject of a lump sum offer by WorkCover. The question of any significant financial loss did not arise until late 2001.

[22] I was invited to consider a number of decisions of judges of this court in cases involving approximately similar facts; but, as Thomas JA observed in *Pizer v Ansett*

---

[4] *Berg v Kruger Enterprises (Division of Besser Qld Limited) Ltd* [1990] 2 Qd R 301 at 302; *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 249-250; *Dick v University of Queensland* [2000] 2 Qd R 476 at 483.

[5] *Taggart v Workers' Compensation Board of Queensland* [1983] 2 Qd R 19; *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325; *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306; *Watters v Queensland Rail* [2001] 1 Qd R 448.

Australia Limited[6], questions of degree are involved. One has to determine where the case falls on a spectrum which he described as running between

> "case[s] of latent symptoms of apparently trivial injury, followed by eventual discovery of a serious condition [which] will plainly justify an extension ... [and] at the other end of the spectrum, cases of patently serious orthopaedic injury productive of observable economic loss followed by belated realisation that the consequences are likely to be worse than have been contemplated".[7]

[23] In this case, as at February 2001, the plaintiff had Dr Coyne's advice that with the benefit of a new and more comfortable truck, he ought to be able to continue in his present employment. By mid-March it seems that he had encountered difficulties in continuing to work, given what Dr Skinner describes as his "episodic severe pain" and left leg numbness, and that situation continued until September 2001. However, it is of some significance that, during the intervening period, various different methods of resolving the plaintiff's symptoms were being undertaken, beginning with facet joint injections in March and April, progressing to radio frequency lesioning in June and ending unsuccessfully with acupuncture in August. The plaintiff clearly intended to return to work and did so, although presumably not in as heavy a job as he had previously had; but he had not been told at that stage that he would be permanently unable to return to heavier work.

Ought the plaintiff to have brought an action before August 2001?

[24] The question as identified by Connolly J in *Sugden v Crawford*[8], is whether "the applicant ought, in his own interests taking his circumstances into account, hazard the risks of litigation and the time and expense involved". In considering that question in the present case, it is relevant to note that there is, and would have then been, one can assume, a serious dispute about liability[9] and that the plaintiff would be required to refund workers compensation payments for the time he had thus far spent off work and for his medical expenses.[10] On the whole, I consider that as at August 2001, the plaintiff, lacking clear medical evidence as to impairment of earning capacity, had no more than a rather risky action from which he could hope to recover a limited award for pain and suffering; an action not, on balance, worth bringing. That state of affairs changed significantly when at the end of 2001 he received the advice that his capacity to earn was permanently impaired, giving him, for the first time, a worthwhile action.

Was the material fact within the plaintiff's means of knowledge?

[25] There is no dispute that the plaintiff was unaware until the end of 2001 that his capacity to earn was at risk. But, of course, one must ask whether he had taken all reasonable steps to ascertain that fact, a question "to be determined from the viewpoint of a reasonable person endowed with the knowledge and experience of the plaintiff".[11] As to what falls to be considered,

---

[6] [1998] QCA 298; Appeal No 6807 of 1998, 29 September 1998 at para 20.
[7] At para 20.
[8] [1989] 1 Qd R 683 at 686.
[9] *Buckton v BHP Coal Pty Ltd* [2001] QCA 35; Appeal No 3777 of 2000, 16 February 2001.
[10] *Moriarty v Suncorp Corporation Limited* [1988] 2 Qd R.
[11] *Muir v Franklins Limited* [2001] QCA 173; Appeal No 9504 of 2000, 11 May 2001 per Thomas JA at para 15.

> "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."[12]

[26] Here the plaintiff was a labourer with, at the commencement of 2001, the benefit of specialist advice which gave him no cause to think he would not be able to continue working as a tow truck driver. Through that year, up to and after 6 August 2001, he continued to have medical treatment aimed at resolving his symptoms; it succeeded to the extent of enabling his return to work in September. The last of his acupuncture treatments was on 14 August 2001, a treatment which Dr Skinner described in his reports as being unsuccessful.

[27] Given that the plaintiff's symptoms had only, at the beginning of 2001, reached a level requiring regular medical attention, and that throughout that year, up to mid August, he was still receiving varying types of medical treatment, and given also that he was then considering an imminent return to work, albeit as a courier driver, I do not think that one can say that a reasonable person in his position would have been making inquiries as to limits on his future employability. It is clear that not long after that point he did think it necessary to seek the advice of solicitors in relation to his injury, and they in turn referred him to specialists who did address that question; but it is impossible to say, in my view, that that position should have been reached by early August.

Conclusion

[28] For the reasons I have given, I consider that the plaintiff has identified a material fact of a decisive character not within his means of knowledge until after 6 August 2001; until, at the earliest, November 2001. I order that the period of limitation for the plaintiff's action be extended so that it expires on 1 November 2002.

[29] I will hear the parties as to costs.

---

[12] *Healy v Femdale Pty Ltd* CA No 37 of 1992, 9 June 1993 at 3.