SUPREME COURT OF QUEENSLAND

CITATION:	*Dempsey v Hack* [2005] QCA 34
PARTIES:	**PAUL ANTHONY DEMPSEY** (plaintiff/respondent) **v** **JOHN MICHAEL HACK** (defendant/applicant)
FILE NO/S:	Appeal No 8721 of 2004 DC No 2148 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2005
JUDGES:	de Jersey CJ, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed with costs to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FROM INTERLOCUTORY DECISIONS – LEAVE TO APPEAL – where Registrar renewed respondent's claim for 12 months – where Judge did not explicitly conclude that there was good reason to renew the claim – where Judge inferred applicant gave no warning of possible adverse effects of medical procedure – where applicant contends Judge gave too much weight to respondent's affidavit – where applicant contends time delay in bringing claim would prejudice applicant's case – whether order of Registrar renewing claim for 12 months should be set aside *District Court of Queensland Act* 1967 (Qld), s 118(3) *Uniform Civil Procedure Rules* 1999 (Qld), r 24 *Muirhead v Uniting Church in Australia Property Trust (Q)* [1999] QCA 513, applied
COUNSEL:	G W Diehm for the applicant A J H Morris QC for the respondent

SOLICITORS: Flower & Hart for the applicant
Londy Lawyers for the respondent

[1] **de JERSEY CJ:** The applicant seeks leave to appeal against an interlocutory order made in the District Court, dismissing an application under r 16(d) of the *Uniform Civil Procedure Rules* to set aside an order made ex parte by the Registrar renewing a claim for 12 months from 31 May 2003. It is a claim against the applicant for damages for his alleged negligence. The proceeding before the District Court proceeded as a hearing de novo. It being an interlocutory order, leave is necessary because of s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

[2] The claim arises from a consultation between the applicant medical practitioner and the respondent on 1 June 1999, in relation to severe pain in the respondent's anal area, and a procedure, either a colonoscopy or a sigmoidoscopy, carried out by the applicant upon the respondent on 8 June 1999. The respondent filed a claim and statement of claim on 31 May 2002, eight days before the expiration of the limitation period. The claim became stale on 31 May 2003. Five months after that, the respondent retained new solicitors. Then on 24 November 2003, on the respondent's application, the Registrar renewed the claim.

[3] Addressing the relevant issues, as discussed in *Muirhead v Uniting Church in Australia Property Trust (Q)* [1999] QCA 513, [4], the learned Judge noted that the delay between the procedure and the application to the Registrar, some four and a half years, was considerable but not necessarily unusually so in cases of this character; that being himself an experienced litigation lawyer, the respondent had advanced little to excuse that delay, being delay to which the applicant had not contributed; that the respondent nevertheless had established that he has a viable cause of action; and that the applicant would not be likely to be prejudiced were the claim permitted to continue.

[4] In determining whether leave should be granted, it is necessary to deal with a number of criticisms of His Honour's approach, while bearing in mind the constraints on the court when dealing with interlocutory orders. See *Westpac Banking Corporation v Klef Pty Ltd* [1998] QCA 311, [11] and *Amos v Barbi* [1998] QCA 78.

[5] The applicant points out that the Judge did not express a conclusion that there was good reason to renew the claim, said to be required by r 24 of the *Uniform Civil Procedure Rules*. Such a conclusion is plainly implicit, however, and that suffices.

[6] The applicant has criticized the way His Honour dealt with the apparent merit of the claim, in the course of assessing its prima facie plausibility. I deal now with those criticisms.

[7] The Judge inferred that the applicant gave the respondent to understand that the procedure was routine and gave no warning of possible adverse effects. The applicant contends that there was no satisfactory basis for those inferences. It was, however, reasonable for the learned Judge to proceed on that basis. That was the respondent's pleaded case (para 5(d) statement of claim), and the absence of mention of those matters on the first page of the respondent's affidavit – where he

deals, if in outline, with his early contact with the applicant – is consistent with the circumstance that no such warning had been given. See para 6 especially.

[8] The Judge considered, as "quite valuable circumstantial evidence of negligence", that the applicant regarded the immediate outcome of the procedure as "unfortunate", that the applicant chose to forego payment of his fee, that he was abruptly taken off the respondent's case – as the respondent was convalescing – to be replaced by another doctor, and as the Judge judicially noted, that colonoscopies and the like generally proceed on a routine basis with no ill effect. The applicant makes criticism of those aspects separately. The criticism went essentially to the weight to be attributed to them, and whether another view might not be open. But the combination of the circumstances did in my view warrant the conclusion drawn by His Honour. It is not a conclusion with which this court should feel free to interfere, were an appeal to proceed.

[9] The applicant also criticizes His Honour's reliance on para 29 of the respondent's affidavit, in which the respondent mentions the view of three colorectal surgeons on relevant aspects. The applicant concedes that the Judge could have regard to material in that form (cf. *Briggs v James Hardie and Co Pty Ltd* (1989) 16 NSWLR 549 and *MacDonnell v Rolley* [2001] QCA 32, [12]), but submits that His Honour gave the material too much weight. That is in principle not an attractive approach on an application in these circumstances.

[10] Mr Diehm, who appeared for the applicant, pointed out there was no evidence the respondent would not have undertaken the procedure if warned this condition might eventuate; or fixing that condition as a consequence of some particular negligence occurring during the procedure. To warrant the renewal, it was not necessary for the plaintiff to cover all matters of detail of proof. The somewhat more general approach of His Honour was appropriate.

[11] Apart from the criticisms of His Honour's approach to the question of merit, the applicant challenged His Honour's conclusions as to prejudice to the applicant. The evidence of prejudice to the applicant was contained in his solicitor's affidavit in these terms: "The defendant has been prejudiced by the delay in service of the claim and statement of claim because while the defendant retains his clinical records in respect of the plaintiff, he does not retain an independent recollection in relation to all aspects of his consultations with the plaintiff". (See also the oral evidence of Mr Sivyer, p 10 transcript.) The learned Judge noted that there were peculiar features of this situation which would tend to imprint it upon the medical practitioner's mind. Suffice it to say for present purposes, that that assertion of prejudice was very generally cast with no specific areas of absence of recollection identified.

[12] Mr Diehm submitted the learned Judge did not go through the balancing exercise appropriate to such applications. It is however evident to me that that is plainly what he did. While recognizing that the aspects of delay and explanation favoured the applicant, they did not overwhelm the justice of letting this prima facie plausible claim go forward, there being no substantial risk of prejudice to the applicant in authorizing that course.

[13] There being no substantial reason to cast doubt on the correctness of this discretionary interlocutory judgment, there being no point of general application about the case, and there being no other circumstance or feature warranting the re-agitation of the issues on appeal, leave should in my view be refused.

[14] I would order that the application be dismissed, with costs to be assessed.

[15] **JERRARD JA:** In this appeal I agree with the reasons for judgment and order proposed by the learned Chief Justice. I add that the learned trial judge held that the plaintiff's affidavit filed in support of his application to renew did show that prima facie the plaintiff had a good cause of action. It did that in part because it described the availability of a body of medical opinion evidence that the defendant had carried out the procedure negligently, and had failed to warn the plaintiff of attendant risks.

[16] Further, there was the circumstantial evidence referred to by the Chief Justice. The trial judge held, and I respectfully agree, that those circumstantial events were all matters that would make it unlikely that the defendant would forget any material fact, and much less likely than would usually be the case after more than four years had passed. That conclusion justified the finding there was unlikely to be prejudice or injustice caused to the defendant by the extension of time to enable service.

[17] **MACKENZIE J:** I agree with the orders proposed by the Chief Justice for the reasons given by him.