SUPREME COURT OF QUEENSLAND

CITATION:	*Castillon v P & O Ports Ltd* [2005] QCA 406
PARTIES:	**LEONARD CASTILLON** (plaintiff/respondent) v **P & O PORTS LIMITED** ACN 000 049 301 (defendant/appellant)
FILE NO/S:	Appeal No 5559 of 2005 DC No 445 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	4 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2005
JUDGES:	McMurdo P, Keane JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted** **2. Appeal allowed** **3. The declaration made by the learned primary judge is set aside** **4. The plaintiff is to pay the defendant's costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	WORKERS' COMPENSATION - PROCEEDINGS TO OBTAIN COMPENSATION - PRELIMINARY REQUIREMENTS - CLAIM AND DELAY IN MAKING CLAIM - EXCUSES FOR DELAY - OTHER REASONABLE CAUSE - where respondent had worked for the appellant as a machine operator for many years - where the respondent had made an application to WorkCover for workers' compensation in December 1999 - where WorkCover issued a notice of assessment describing the date of the injury as 2 December 1999 - where respondent successfully sought leave to bring proceedings on the basis that the limitation period applicable to his claim expired on 2 December 2001 - where the appellant pleaded in its defence to the respondent's claim that the respondent's injury had been sustained at some time prior to 2 December 1999 - where the respondent sought a declaration that he and his solicitors had been entitled to rely on the dates

identified by WorkCover in calculating the limitation period applicable to his action and that his action had been validly brought within time - whether s 342 *WorkCover Queensland Act* 1996 (Qld) allows a claimant to assume that the date of injury identified by WorkCover will be binding in proceedings for damages by an employee against an employer

WorkCover Queensland Act 1996 (Qld), s 305, s 342(1), s 342(3)(a), s 342(3)(f)
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 392

Clarke v Australian Asphalt (Qld) Pty Ltd [2004] QSC 302; SC No 6111 of 2002, 15 September 2004, cited
Legione v Hateley (1983) 152 CLR 406, cited
Royal British Bank v Turquand (1855) 5 E & B 248; 119 ER 474, considered

COUNSEL: D V C McMeekin SC for the appellant
G J Cross for the respondent

SOLICITORS: Bruce Thomas Lawyers for the appellant
Hoolihan's Lawyers for the respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for granting the application for leave to appeal and allowing the appeal. I also agree with Keane JA's proposed orders.

[2] **KEANE JA:** On 21 June 2005, the learned primary judge made orders in which, inter alia, he declared:

> "That the applicant/plaintiff was entitled to rely on the descriptions in the Notices of Assessment and Damages Certificates by WorkCover in calculating the limitation period and in applying for the s 305 order and that the applicant/plaintiff is not prevented from commencing these proceedings for the injury the subject of the claim for compensation unless the limitation period is found to have already expired by 22 May 2001."[1]

[3] The applicant for leave to appeal to this Court is the defendant to proceedings in the District Court for damages for personal injury in which the learned primary judge made this declaration. To avoid confusion, I will refer to the applicant as "the defendant", and to the respondent as "the plaintiff".

[4] It is common ground between the parties that leave to appeal is necessary because the decision below did not involve a final judgment.[2]

[5] To understand the arguments which arise on the application it is necessary to set out the factual background in some detail.

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1 The reasons for this order will be cited as *Castillon v P & O Ports Ltd* [2005] QDC 180; DC No 445 of 2003, 10 June 2005.

2 See s 118(2) and s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

Factual Background

[6] The plaintiff has worked for the defendant as a machine operator for many years. On 6 December 1999, the plaintiff made an application to WorkCover for workers' compensation in respect of "bilateral carpal tunnel syndrome".

[7] In response to the question in the standard form of application for workers' compensation, the plaintiff indicated that the injury occurred over a period of time, and stated that he first consulted a doctor for his condition on 2 December 1999. In response to the request, "Please detail what you were doing at the time of your injury and how your injury happened", the plaintiff wrote: "Driving heavy fork-lift; front end loaders; Hyco; and other machinery over a period of 27 years". The plaintiff indicated on the form that he stopped work because of this injury on 26 November 1999 at 2.30 pm. In answer to the question "Have you previously suffered any similar injury?" the plaintiff responded in the affirmative, saying in addition: "Reported condition to local doctor one year ago".

[8] It is common ground between the parties that the application form completed by the plaintiff describes an injury which occurred over a period of time. The learned primary judge found that the plaintiff had consulted a general practitioner, Dr Wong, in 1997 in relation to numbness in his hands.[3]

[9] On 1 November 2001, the plaintiff made a further application to WorkCover for workers' compensation in respect of an injury to "shoulder, wrist, hand" which was said to have occurred over a period of time.

[10] On 22 May 2001, WorkCover issued a notice of assessment which described the date of injury as "2 December 1999".

[11] On 15 July 2002, the plaintiff applied to WorkCover for a damages certificate in relation to an injury described as "chronic pain syndrome and adjustment disorder with depressed mood". On 8 August 2002, WorkCover issued a conditional damages certificate for that condition. It is common ground between the parties that this certification referred to the injury the subject of the claim of 6 December 1999.

[12] WorkCover also issued a notice of assessment and a conditional damages certificate in respect of the injury the subject of the plaintiff's application for workers' compensation of 1 November 2001. For present purposes it is not necessary to be concerned with that aspect of the matter, save to note that this notice and certificate described the injury to which they referred as having occurred over a period of time, in contrast to the notice of assessment of 22 May 2001 and the conditional damages certificate issued on 8 August 2002.

[13] On 21 November 2002, the plaintiff sought leave to bring proceedings for damages for personal injuries against the defendant pursuant to s 305 of the *WorkCover Queensland Act* 1996 (Qld) ("the Act")[4] despite non-compliance by the plaintiff at that stage with the requirements of s 280 of the Act. This leave was granted by a consent order filed on 27 November 2002. After receipt of the plaintiff's

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[3] *Castillon v P & O Ports Ltd* [2005] QDC 180; DC No 445 of 2003, 10 June 2005 at [43].

[4] It is common ground that, notwithstanding the repeal of the Act by the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), the issues which arise in these proceedings are still to be resolved by the application of the provisions of the Act.

application, the solicitors for the defendant had written to the plaintiff's solicitors on 25 November 2002 advising them that the defendant did not agree that the limitation period applicable to the plaintiff's claim in respect of this injury would expire on 2 December 2002 and stating: "It appears to us that the limitation period may in fact have already expired some time ago".

[14] The plaintiff's claim and statement of claim were filed on 15 August 2003. The defendant pleaded in its defence that the injury in question was sustained "on or prior to 1 December 1999 and not thereafter". This position was maintained, aside from a change in the date to 2 December 1999, in the amended defence filed at a later date.

[15] The plaintiff brought an application seeking, inter alia, a declaration that the proceedings had been validly commenced in relation to the injury in question. That application was supported by an affidavit sworn by the plaintiff's solicitor, Mr Carman, which was to the effect that the plaintiff's solicitors had relied upon:

> "the Notices of Assessment for specific dates as correctly identifying the date of injury for the plaintiff's injuries and assumed that WorkCover had correctly identified that the injuries were over a period of time."

[16] One may pause here to note that, for the plaintiff's solicitors to assume that "WorkCover had correctly identified that the injuries were over a period of time", the plaintiff's solicitors must necessarily have known that, in truth, the plaintiff's injury had occurred over a period of time. In other words, it is clear that, on the plaintiff's side, it was understood that the injury in question had occurred over a period of time before 2 December 1999.

[17] But it is not the understanding of either side as to when the plaintiff's injury had occurred which was crucial in the case. The crucial assumption said to have been generated in the minds of the plaintiff's solicitors by WorkCover's communications was the assumption that WorkCover accepted that the limitation period for an action for damages by the plaintiff against the defendant would not commence to run before 2 December 1999. In this regard, Mr Carman also deposed that:

> "Had WorkCover correctly noted in the Notices of Assessment that the injuries were for 'over period of time injuries' as opposed to specific date injuries, then leave pursuant to s.305 *WorkCover Act* would have been brought sooner than they were. The plaintiff's solicitors assumed WorkCover were taking the date of the first symptoms as the date when the cause of action accrued."

[18] Mr Carman was not cross-examined on his affidavit. The learned primary judge found that the plaintiff's solicitors "did act on the relevant assumptions and did not have actual knowledge that they would be incorrect".[5]

[19] The learned primary judge then concluded that:[6]

> "… it appears to be consistent with s 342 to conclude that the applicant, through his solicitors, was entitled to rely on the descriptions in the documents issued by WorkCover in calculating the limitation period and in applying for the s 305 order and that he is

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5 *Castillon v P & O Ports Ltd* [2005] QDC 180; DC No 445 of 2003, 10 June 2005 at [30].

6 *Castillon v P & O Ports Ltd* [2005] QDC 180; DC No 445 of 2003, 10 June 2005 at [31].

not prevented from commencing these proceedings for the injury the subject of the claim for compensation, unless the limitation period is found to have already expired by the time of issue of the Notice of Assessment, being the earliest WorkCover document upon which the plaintiff's solicitors relied for a description of the date of the injury. Misdescriptions in the WorkCover documents cannot now be relied upon to assert to the contrary."

[20] The issue which the applicant seeks to agitate on appeal to this Court is whether s 342 of the Act provided support for the assumptions which the learned trial judge found had been made by the plaintiff's solicitors. The entitlement of the plaintiff through his solicitors to rely upon these assumptions, as his Honour found they had, depends on s 342 of the Act. That is clearly so, in my view, because one cannot, by any stretch of language or imagination, draw out of the terms of the certificate and notice considered by themselves an assurance from WorkCover that the plaintiff could proceed on the assumption that 2 December 1999 would be taken by the defendant as the date of the plaintiff's injury for the purposes of the plaintiff's claim for damages. That issue had not been raised in any discussion between the parties; and nothing was said on WorkCover's side to suggest that they were announcing the attitude which WorkCover and the defendant intended to adopt to any limitation issue which might arise in the event that the plaintiff commenced proceedings for damages.

[21] At this point, it is necessary to note the terms of s 342 of the Act. It provided relevantly:

"**(1)** If a person has dealings with WorkCover -

(a) the person is entitled to make the assumptions mentioned in subsection (3); and

(b) in a proceeding about the dealings, any assertion by WorkCover that the matters that the person is entitled to assume were not correct must be disregarded.

…

(3) The assumptions that a person is, because of subsection (1) … entitled to make are -

(a) that, at all relevant times, this Act has been complied with; and

…

(f) that the … employees and agents of WorkCover have properly performed their duties to WorkCover.

(4) However, a person is not entitled to assume a matter mentioned in subsection (3) if -

(a) the person has actual knowledge that the assumption would be incorrect; or

…"

There are a number of other assumptions that may be made under s 342(3)(b) - (e) but none of those assumptions are relevant to this appeal.

The application for leave to appeal

[22] The defendant contends that the view taken by the learned primary judge of the effect of s 342 of the Act involved an erroneous interpretation of the effect of the statute which, though the Act has been repealed, it is still important to correct because the substance of the provision has been reproduced in s 392 of the *Workers'*

Compensation and Rehabilitation Act 2003 (Qld). It is submitted that, because the defendant's position in this regard is fairly arguable, there is good reason to grant leave to appeal.

[23] It may also be noted that it seems that the effect of the order made by the learned primary judge was to deny the defendant the benefit of the limitation defence which was otherwise available to it. This equivocation is necessary because his Honour's declaration is expressly concerned with "the commencement of proceedings". Usually, the existence of a good limitation defence is not a bar to the commencement of proceedings.[7] That is because a defendant may choose not to rely on the defence or may be precluded from doing so by its conduct; but the bringing of an action is not prohibited because it is brought outside the limitation period.[8] In this regard, a limitation defence is to be distinguished from the express prohibitions on commencing proceedings contained in Ch 5 of the Act. In the present instance, it appears to be the case that, as the defendant submits, his Honour's declaration was directed to holding that the defendant's right to rely on any limitation defence that would otherwise have been available to it was to be circumscribed in the manner declared by his Honour.

[24] In these circumstances, in my respectful opinion, the defendant has shown a sufficient basis for the Court to grant leave to appeal, and to proceed to determine the legal merit of the point sought to be agitated on appeal.

The defendant's arguments on the appeal

[25] Shortly put, the defendant's argument is that the terms of s 342 do not warrant the assumption made by the plaintiff "through the plaintiff's solicitors", namely that the description of the injury by reference to the date 2 December 1999 was to be taken as WorkCover's (and hence the defendant's) statement that, for the purposes of any proceedings for damages which the plaintiff might be disposed to commence, the injury was to be taken to have occurred on 2 December 1999.

[26] It is possible to imagine cases where such an assumption might well be made as a matter of fact. For example, WorkCover and a potential plaintiff may have been at loggerheads over the date on which an injury could be said to have occurred, and WorkCover's statement in the notice of assessment or damages certificate may be taken, against that factual background, to represent the statement of WorkCover's considered position on the issue and, because WorkCover will have the carriage of any proceedings for damages on behalf of the defendant, a statement of the defendant's position as well. This is clearly not such a case. Nevertheless, the learned trial judge's finding of fact based on uncontradicted evidence must be respected as establishing that the plaintiff's solicitors did, in fact, make the assumption that WorkCover had announced that it and the defendant would treat the limitation period for any action by the plaintiff in relation to the carpal tunnel injury as commencing on 2 December 1999 and not before.

[27] The defendant contends that s 342 relevantly authorises the making of assumptions by the plaintiff, not by his solicitors, and that, because the plaintiff knew that the injury in question had occurred over time, s 324(4) of the Act precluded reliance by

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7 See, eg, the discussion of the effect of s 5(6) of the *Limitation of Actions Act* 1958 (Vic) in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 405, 425.

8 See, eg, *Pullen v Gutteridge, Haskins and Davey Pty Ltd* [1993] 1 VR 27 at 72 - 73; *Cigna Insurance Asia Pacific Ltd v Packer* [2000] WASCA 415 at [36]; (2000) 23 WAR 159 at 171.

the plaintiff on the assumption. Having regard to my view as to the resolution of the principal issue, it is not necessary to determine whether this contention by the appellant is correct. The principal issue, in my view, is whether s 342 of the Act could afford any warrant for the making of the relevant assumption, whether by the plaintiff or by the solicitors acting on his behalf.

[28] In approaching the resolution of this issue in which the plaintiff seeks to rely upon something in the nature of an estoppel by reason of the operation of the Act, the terms of the statute must be considered closely to see whether they are apt to give the assumption made by the plaintiff's solicitors the effect of establishing, for the purposes of the plaintiff's action for damages against the defendant, a fictional date of the plaintiff's injury. The date would be a fiction in the sense that both parties to the proceedings knew that the plaintiff's carpal tunnel injury was suffered over time prior to 2 December 1999. In this regard, in *Legione v Hateley*,[9] Mason and Deane JJ approved the following statement from *Coke's Littleton*:

> "Every estoppell, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference."[10]

[29] In my respectful opinion, the plaintiff may hold the defendant (and WorkCover) to make good the assumption made by the plaintiff's solicitors having regard to the terms of the notice or assessment on the damages certificate and, conversely, WorkCover (and its insured defendant) may not resile from a position so announced, only if one reads into s 342(1), s 342(3)(a) and s 342(3)(f) respectively something that is not stated there nor anywhere else in the Act, viz, that it is the function of WorkCover under the Act to determine in a notice of assessment or damages certificate when an injury occurred for the purposes of a claim for damages for personal injury against an employer, or that it is one of the duties WorkCover's employees or agents owed to WorkCover to reach such a decision.

Did the Act require WorkCover to determine when an injury occurred?

[30] It is to be emphasised that s 342, which appeared in Ch 6 of the Act, was concerned to permit outsiders dealing with WorkCover to have the benefit of a presumption of regularity so far as the internal management of WorkCover is concerned. It may thus be seen to enact a statutory approximation of the "indoor management" rule in *Royal British Bank v Turquand*.[11] The purpose of that rule, and its statutory analogue, is to ensure that persons who have dealings with WorkCover may assume that acts within WorkCover's constitution and powers have been properly and duly performed, and that such "outsiders" are not bound to inquire as to whether acts of internal management have been regularly performed as between WorkCover and its employees or agents.[12]

[31] Chapter 5 of the Act regulated access to damages by employees against their employers. It is to Ch 5 of the Act to which one must look to see what functions of

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9 (1983) 152 CLR 406 at 435.

10 See also *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355 at 375; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23 at 60; [1972] AC 741 at 757.

11 (1856) 6 E & B 327; 119 ER 886.

12 The rationale for the indoor management rule was expressed in similar terms by Lord Simonds in *Morris v Kanssen* [1946] AC 459 at 474 - 475. This statement of principle was referred to with approval by the High Court in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 155, 181, 207, 212.

WorkCover, or duties owed to WorkCover, might afford an outsider the kind of protection afforded by s 342. In this regard, there was no provision in Ch 5 of the Act, or anywhere else in the Act, which, for the purposes of s 342(1) and s 342(3)(a), made it a function of WorkCover to determine the date of an injury by a statement in a conditional damages certificate or notice of assessment so as to bind an employer for the purposes of an action for damages by the employee against the employer. Mullins J reached a similar conclusion in *Clarke v Australian Asphalt (Qld) Pty Ltd*;[13] but it would seem that this decision was not drawn to the attention of the learned primary judge.

Did employees of WorkCover have a duty to WorkCover to determine when an injury occurred?

[32] The assumptions which the plaintiff was entitled to make under s 342(1) and s 342(3)(f) relate to the performance by WorkCover's employees and agents of "their duties to WorkCover". Nowhere in Ch 5 or anywhere else in the Act, is there a provision which casts upon any employee or agent of WorkCover an obligation owed to WorkCover to determine whether an injury to a worker occurred on a particular date for the purposes of proceedings for damages by an employee against an employer.

Conclusions and orders

[33] For these reasons, in my respectful opinion, the learned primary judge erred in concluding that s 342 of the Act operated to bind the defendant in the proceedings for damages commenced by the plaintiff to the position that the plaintiff's injury was to be taken to have occurred on 2 December 1999 for the purpose of determining when the plaintiff's cause of action accrued in relation to his carpel tunnel injury.

[34] I would grant the application for leave, allow the appeal and set aside the declaration made by the learned primary judge.

[35] I would order that the plaintiff pay the defendant's costs of the appeal to be assessed on the standard basis.

[36] **ATKINSON J:** I agree with the reasons for judgment of Keane JA and the orders proposed.

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13 [2004] QSC 302; SC No 6111 of 2002, 15 September 2004 at [43] - [55].