SUPREME COURT OF QUEENSLAND

CITATION:	*Wilkinson v Consolidated Meat Group P/L* [2005] QCA 432
PARTIES:	**SARA JANE WILKINSON** (applicant/respondent) **v** **CONSOLIDATED MEAT GROUP PTY LIMITED** ACN 065 093 709 (respondent/appellant)
FILE NO/S:	Appeal No 6335 of 2005 SC No 247 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	25 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2005
JUDGES:	de Jersey CJ, McMurdo P and Williams JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellant pay the respondent's costs of the appeal to be assessed**
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 DECISIVE CHARACTER – where, after the limitation period had expired, the respondent first read a specialist's report expressing the view that her injury was caused by an incident at work – where the primary Judge ordered the limitation period be extended, holding this report to be a material fact of a decisive character – where the appellant contended that the respondent could not but have appreciated the causal link between her symptoms and the work incident prior to the report – whether the report was a material fact of a decisive character to warrant extending the limitation period – whether the primary Judge's decision was infected by factual error LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION

IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – WHETHER REASONABLE STEPS TAKEN TO ASCERTAIN FACTS – where the appellant contended the respondent should have forthwith sought expert opinion on whether her injury was caused by work activity, especially given her personal view that her symptoms were work related – where the respondent had seen other medical specialists, while the limitation period was running, who attributed the injury to pre-existing degenerative changes – where the appellant contended this did not excuse the respondent from making further enquiry because the history given to those doctors differed from that given to the court and the doctor who prepared the report – where the respondent had worked only in unskilled occupations – whether the material fact was within the respondent's means of knowledge prior to receipt of the report – whether the respondent took reasonable steps to ascertain the material fact – whether there were discrepancies in the history given by the respondent – whether any discrepancies were crucial or simply went to matters of emphasis – whether fairness required the appellant challenge in cross-examination the consistency of the respondent's various histories rather than raise the matter on appeal

Limitation of Actions Act 1974 (Qld), s 30(1)(c), s 31

COUNSEL: D McMeekin SC, with Mr G O'Driscoll, for the appellant
M Grant-Taylor SC for the respondent

SOLICITORS: Bruce Thomas Lawyers for the appellant
Rees R. & Sydney Jones for the respondent

[1] **de JERSEY CJ**: The learned primary Judge ordered that the limitation period applicable to the respondent's claim for damages in respect of personal injuries sustained on or about 18 May 2001 be extended until 15 July 2005 (a week after he gave judgment). He made the order under s 31 of the *Limitation of Actions Act* 1974 (Qld) ("the Act").

[2] The respondent was at the time employed at the appellant's meat works. On that day, while she was manoeuvring boxes of offal on a conveyor belt, she experienced neck and shoulder pain. The pain subsisted. She continued to work until 24 July 2002, but has not worked since because of her condition. She wishes to claim damages for negligence against her former employer in respect of that injury.

[3] After the onset of her symptoms, the respondent consulted a number of doctors. The following featured prominently in the submissions made on appeal.

1. Doctor Beryl Turner, who practises in occupational medicine, in a report of 28 August 2002, expressed the view that the respondent suffered degenerative disease of the cervical spine, which was a pre-existing condition, aggravated by heavy manual work. The respondent had informed Dr Turner that in the year 2001 she suffered back pain.
2. A neurosurgeon, Dr Baker, in a report of 6 August 2003, recorded the respondent's complaint of pain related to work activity in 2001. He referred

to an MRI performed in July 2003, which showed the bulge of a C5/6 disc prolapse on the right. He expressed the view the respondent's symptoms were consistent with that condition.

3. An orthopaedic surgeon, Dr Morris, in his report of 27 November 2003, also recorded the respondent's complaint of pain, since 2001, brought on by the activities at work. Doctor Morris said the C5/6 disc injury was pre-existing, and that the work related injury did not increase the level of the respondent's impairment.
4. Doctor Milford, a general practitioner, gave oral evidence that a disc bulge at C5/6 could result from "age and wear and tear": a traumatic injury was not the only possible cause. I refer later to what Dr Milford told the respondent about her condition, in September 2003.

[4] The respondent consistently complained to those doctors of pain continuing since her work activity in the year 2001. The doctors saw a relationship between her symptoms and the prolapsed disc. Doctors Turner and Morris were of the opinion the C5/6 disc injury was sustained prior to the events of 18 May 2001. To the extent the work activity aggravated the pre-existing condition, on that body of evidence, it would probably not have warranted any substantial award of damages.

[5] In terms of launching a worthwhile cause of action, what the respondent lacked was the means of establishing a causal link between the activity at work and the disc injury. That came in a report dated 13 December 2004 from an orthopaedic surgeon, Dr Cook, a report which the respondent read in mid-January 2005. Doctor Cook expressed the view that the activity at work caused the cervical disc prolapse.

[6] The primary Judge held that to be the material fact of a decisive character relating to the cause of action, for the purpose of s 31(2)(a) of the Act. The appellant has challenged that finding, essentially on the basis that the respondent "could not but have appreciated the causal link between her symptoms and the subject incident – she did not need a doctor to tell her when her symptoms had commenced". But on the other hand, until the respondent received the report of Dr Cook, she lacked any means to relate, causally, the disc prolapse and the work activity, and that was obviously a matter for expert assessment.

[7] The appellant has also challenged a conclusion that the fact was not within the respondent's means of knowledge prior to her reading Dr Cook's report in mid-January 2005 (s 30(1)(c)). Doctor Milford informed the respondent on 24 September 2003 that she had a prolapsed disc in her neck, and that Dr Baker related her symptoms to that prolapsed disc. The appellant contends that acting reasonably (s 30(1)(c)(ii)), the respondent should then forthwith have sought expert opinion on whether the disc prolapse had been caused by the work activity, especially given her personal view that her symptoms were work-related, and their serious consequence in removing her capacity to work. It is the respondent's failure in that regard, from 24 September 2003 when she received Dr Milford's advice, which – the appellant submits – rendered her reaction, or lack of reaction, unreasonable.

[8] The primary Judge pointed out, however, that the respondent had consulted a number of specialists before she saw Dr Cook: none of them had informed her that the work activity was the likely cause of her condition, and two of the three specialists referred to earlier attributed it, wholly or substantially, to pre-existing

degenerative changes. In that regard, the appellant contends that the respondent gave those doctors different histories from the history she gave Dr Cook and the court, so that she should not be permitted to rely on the views those doctors expressed, as going to explain why she did not make further enquiries.

[9] The challenges to the primary judgment are intensely factual, and it falls to the appellant to demonstrate that the Judge made factual errors bearing significantly on his judgment, or that he overlooked important evidence, or that his eventual conclusions were not reasonably open.

[10] It is clear that until the respondent read Dr Cook's report, she had not been informed of any causal link between the work activity in May 2001 and the disc injury. Doctors Turner and Morris had attributed her condition to pre-existing cervical degeneration, or substantially so. Doctor Baker did not suggest that the work activity had caused the disc injury. The Judge was reasonably entitled to conclude that the respondent was not in these circumstances obliged, acting reasonably, to make further enquiry as to a possible causal relationship between the work activity and the disc injury.

[11] The respondent's position in that regard is arguably strengthened by the fact that on 26 August 2003, the respondent was (inferentially) provided with the reasons for the decision of the appellant's Claims Liability Officer rejecting her claim for compensation as not work-related: their thrust was the respondent suffered from a pre-existing condition, and that an x-ray of the cervical spine in July 2002 was normal – based on the assessments of Drs Turner and Baker. Notwithstanding the submission of Mr McMeekin SC, for the appellant, I consider that decision can be read as relating to an injury related to work activity in May 2001 and continuing thereafter; the reference to injury on 17 July 2002 relating to an alleged particular manifestation of symptoms.

[12] The appellant contends that the respondent cannot excuse her not making further enquiry by reference to what, for example, Drs Turner and Morris had said as to pre-existing degeneration, because the history she gave those doctors differed from the history given to the court and to Dr Cook. Mr Grant-Taylor SC, for the respondent, submitted this issue should not be ventilated on appeal because not raised below.

[13] The suggested discrepancy may be illustrated as follows. In her affidavit filed in the proceeding, the respondent said that when she was pushing and pulling the boxes on the conveyor belt, she experienced "an immediate and major stab of pain" in the neck and right shoulder, a "throbbing sensation" in the shoulder and a "burning pain" in the neck. In his report, Dr Cook refers to her experiencing "pain in her right shoulder and on the right side of her neck" (that is, not "immediate and major", "throbbing" or "burning"). Doctor Turner's report refers to "a gradual onset of increasing pain … in early July 2002", and does not mention an incident in May 2001, or an immediate onset of pain. Doctor Baker refers in his report to pain in a generalized sense. Doctor South, an orthopaedic surgeon who saw the respondent in September 2003, gave a report in which he said that while at work in "late 2001 or perhaps early 2002", the respondent "started to become aware of some right neck and/or upper limb discomfort".

[14] If those are discrepancies, then for present purposes they go to matters of emphasis rather than matters which are crucial. Whether or not, given the description of pain precisely as per the affidavit, those doctors would have expressed a different view, is speculative. The important feature now is the respondent's consistent complaint to doctors of developing pain in the neck and right shoulder after activity at work involving the movement of boxes on a conveyor belt. The particular discrepancy as to the year arguably concerns a matter of mere detail. That is not to say these issues may not assume considerable significance in cross-examination of the respondent at any trial.

[15] There is substance to Mr Grant-Taylor's submission that notwithstanding the respondent's carrying the burden of proof, fairness required that the respondent be challenged in cross-examination as to the consistency of her various histories – in the event the appellant sought to draw significance from suggested inconsistency. Also, one might have expected some exploration with the doctors whether, if given the affidavit account, their opinion would have been different. The primary Judge was reasonably entitled to proceed on the basis these discrepancies, now raised, carried no substantial significance to the determination required of him, where the issue was not explored in oral evidence and was not the subject of any submission from Counsel for the then respondent.

[16] I consider His Honour's finding as to the material fact of a decisive character to have been reasonably open. It is not shown to have been infected by any factual error, and it was not made in ignorance of significant evidence which was overlooked.

[17] Likewise, the Judge's finding that that fact was not at relevant times within the respondent's means of knowledge is not vulnerable. It is relevant to note that the respondent had worked only in unskilled occupations prior to working for the appellant. It was perfectly reasonable for her to rely on advice given by specialist medical practitioners she consulted, and there were a number of them. The Judge's view that she was not bound, acting reasonably, to consult more widely before approaching Dr Cook, is not susceptible of challenge.

[18] I would order that the appeal be dismissed, and that the appellant pay the respondent's costs of the appeal to be assessed.

[19] **McMURDO P**: I agree with the Chief Justice.

[20] **WILLIAMS JA**: The relevant facts and issues are fully set out in the reasons for judgment of the Chief Justice.

[21] This is one of those cases where the decision at first instance, depending on the emphasis placed by the judge at first instance on certain facts, could have gone either way. In the circumstances I cannot conclude that there was any error by the learned judge at first instance in the exercise of his discretion to extend the limitation period. That is not to say, of course, that at trial the respondent will succeed in establishing a causal connection between the incident at work on 18 May 2001 and her persisting neck pain.

[22] In the circumstances I agree the appeal should be dismissed with costs to be assessed.