SUPREME COURT OF QUEENSLAND

CITATION:	*Mears v Coles Myer Ltd* [2000] QCA 342
PARTIES:	**ANDREW CHARLES MEARS** (plaintiff/appellant) **v** **COLES MYER LTD** ACN 004 089 936 (defendant/respondent)
FILE NO/S:	Appeal No 8312 of 1999 SC No 99 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 August 2000
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2000
JUDGES:	McMurdo P, Davies JA and Holmes J Separate reasons for judgment of each member of the Court; Davies JA and Holmes J concurring as to the orders made, McMurdo P dissenting.
ORDER:	**Appeal dismissed. Parties to make written submissions as to costs, to be filed and served within seven days.**
CATCHWORDS:	STATUTES – INTERPRETATION ACTS AND CLAUSES – PARTICULAR WORDS AND PHRASES – SPECIFIC INTERPRETATIONS – s 182D *Workers' Compensation Act* 1990 (Qld)– "approved form" – repeal by *WorkCover Queensland Act* 1996 *Acts Interpretation Act* 1954 (Qld), s 14B, s 20 *Limitation of Actions Act* 1974 (Qld), s 31(2) *Motor Accident Insurance Act* 1994 (Qld), s 37(1), s 39(5) *WorkCover Queensland Act* 1996 (Qld), s 402, s 532, s 551, s 558 *Workers' Compensation Act* 1990 (Qld) s 32, s 182A, s 182B(6), s 182D, s 182E

Neuss v Roche Bros Pty Ltd [2000] QCA 130; Appeal No 9447 of 1999, 13 June 2000, applied
Young v Keong [1999] 2 QdR 335, considered

COUNSEL: D O J North SC, with D R Kent, for the appellant
R J Douglas SC for the respondent

SOLICITORS: Shepherds Lawyers (Beenleigh) for the appellant
Mullins & Mullins Lawyers for the respondent

[1] **McMURDO P**: I have read the reasons for judgment of Holmes J who has set out the relevant facts and issues.

[2] Between October 1998 and the appellant's assessment by WorkCover on 24 December 1998 there were a number of requests by the appellant for the assessment to take place. The appellant's action became statute barred on 10 January 1999, a few days after the issue of the writ. The respondent applied to strike out the proceedings after the writ was served in March 1999 and advised that if fresh proceedings were issued they would rely upon the *Limitation of Actions Act* 1974 in their defence. The respondent knew of the appellant's desire to seek damages at law well within the limitation period and the appellant's solicitors were endeavouring to progress the matter. There was some confusion, even within WorkCover, as to the correct procedure at this time. In those circumstances I find it disappointing that a statutory body such as WorkCover would take the limitation point.

[3] The appellant's first contention is that "seek damages at law" under s 182D(1) *Workers Compensation Act* 1990 ("the Act") does not include the issuing of a writ. I agree with Holmes J for the reasons she has given that the primary judge was correct in his construction of that section; as the appellant had not received an offer of lump sum compensation under s 32 of the Act nor a certificate under s 182D of the Act, he was not prima facie entitled to seek damages for his injury when he issued the writ in those proceedings on 6 January 1999.

[4] I also agree with Holmes J's reasons and conclusions as to the appellant's contention that the limitation period should be extended under s 31(2) *Limitation of Actions Act* 1974.

[5] The appellant's final contention is that the writ was properly issued because it was impossible to comply with s 182D of the Act as there was no "approved form" on which to apply to the Board for a certificate under s 182D(1) and consequently the writ was properly issued.

[6] Section 182D(2) provides:

> "(2) The worker must apply in the approved form to the Board for a certificate".

[7] No form under s 182D of the Act had been approved by WorkCover at the time of the Act's repeal on 1 February 1997 when the *WorkCover Queensland Act* 1996 ("the 1996 Act") came into force. This Court considered the question of what

constituted an "approved form" under s 182D of the Act in *Neuss v Roche Bros Pty Ltd* [2000] QCA 130; Appeal No 9447 of 1999, 13 June 2000. The Court rejected WorkCover's argument that its memorandum of 7 February 1997 lawfully provided that a written statement requesting assessment of permanent impairment or a Form 4 clearly marked as "DAMAGES CLAIM ONLY" was an "approved form" under s 182D of the Act. Pincus JA (with whom de Jersey CJ agreed) stated:

> "[8] It appears to me that a wide variety of documents could fulfil the description of an 'approved form' under s 182D. However badly expressed or difficult to use, such a form could be one which is validly prescribed if it is identifiable as an application for a certificate under s 182D. Neither of the forms now relied on is so identifiable.
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> ...
>
> [10] ... legislation cutting down the right of access to the courts must be read strictly and … the prospective plaintiff might have no obligation to apply for a certificate unless there is an approved form of application in existence. … I read s 182D as requiring a worker to apply in the form which has been approved by the Board and as not requiring, or permitting, an application in any other form. Where as here, there is no approved form there is no obligation to apply."

[8] The Chief Executive Officer of WorkCover approved another form under the 1996 Act at least by 8 July 1997; that three page form is headed "APPLICATION FOR DAMAGES CERTIFICATE" below which are the words "THIS FORM IS TO BE COMPLETED BY PERSONS CONSIDERING SEEKING DAMAGES WHO HAVE NOT PREVIOUSLY LODGED AN APPLICATION FOR COMPENSATION". Nowhere on the form is any reference made to s 182D of the Act, the Act itself or the 1996 Act.

[9] The Court in *Neuss* did not have to consider whether this form was an "approved form" under s 182D of the Act.

[10] Although the July 1997 form may perhaps be inferred to be an application for a damages certificate under the 1996 Act currently in force, the 1990 Act had been repealed. In those circumstances, without a reference to s 182D of the Act, the form is not readily identifiable as a mandatory form under that section; it is not an "approved form" under s 182D of the Act. As there was no approved form under s 182(2) of the Act at the time the writ was issued there was no obligation to apply for a certificate under s 182D(1) of the Act. Consequently, the respondent cannot rely on the appellant's failure to obtain the certificate and the appellant properly commenced his action: see *Neuss* [1], [12], [22].

[11] I would allow the appeal with costs to be assessed, set aside the order of 18 August 1999 dismissing the appellant/plaintiff's action with costs and instead order that the respondent/defendant's application to strike out the appellant/plaintiff's action be dismissed with costs to be assessed.

[12] **DAVIES JA:** I agree with the reasons for judgment of Holmes J and with the orders she proposes.

[13] **HOLMES J:** This appeal concerns the construction of s 182D of the *Workers' Compensation Act* 1990 and the effect of a purported approval of forms for the purposes of that section, where that approval took place after the repeal of the 1990 Act by the *WorkCover Act* 1996 ("the 1996 Act"). The relevant subsections of s 182D are as follows:

> "(1) A worker who has not received an offer of lump sum compensation under section 132 may seek damages at law for an injury suffered after the commencement only if the board gives to the worker a certificate under this section.
>
> (2) The worker must apply in the approved form to the board for a certificate.
>
> (3) The board may only, and must, give the certificate if -
>
> (a) the board decides the injury is an injury within the meaning of this Act and was suffered after the commencement; and
>
> (b) the degree of the worker's permanent impairment resulting from the injury has been assessed in the way mentioned for the injury under section 130A(1).
>
> (4) However, the board may issue the worker with a conditional certificate if -
>
> (a) the degree of the worker's permanent impairment is not agreed or has not been decided by a tribunal; or
>
> (b) there is an urgent need to bring proceedings for damages.
>
> (5) If a conditional certificate is given, the worker may start proceedings at law for damages for the injury, but the proceedings are stayed until the board makes the certificate unconditional."

[14] The relevant chronology of events and legislative change in this case is as follows:

January 1996	Plaintiff applies for compensation for work injury
1 January 1996	Part 11 of *Workers' Compensation Act* 1990, including s 182D, commences
1 February 1997	*Workers' Compensation Act* 1990 repealed by *WorkCover Act* 1996
7 February 1997	Memorandum issued, purporting to approve form for purposes of s 182D(2)
8 July 1997	Memorandum issued advising approval of "Application for Damages Certificate" form
16 October 1998	Plaintiff's solicitors seek assessment of disability from

	WorkCover
24 December 1998	Plaintiff attends for assessment of permanent impairment
6 January 1999	Writ of summons filed in respect of plaintiff's claim
1 March 1999	Notice of assessment issued by WorkCover
8 March 1999	Writ of summons served on WorkCover Queensland and defendant

[15] It should be said that between 16 October 1998 and the plaintiff's assessment there were other requests by his solicitors for the assessment to take place, but they are not crucial to the sequence of events here. After the writ was served in March 1999, the respondent's solicitors advised the appellant's solicitors of their view that the issue of the writ was a nullity. They applied to strike out the plaintiff's action on the ground that the plaintiff, having received neither an offer of lump sum compensation under s 32 of the *Workers' Compensation Act* 1990("the 1990 Act"), nor a certificate under s 182D of the 1990 Act, was not entitled to seek damages for his injury. The plaintiff resisted that application, and cross-applied under s 31(2) of the *Limitation of Actions Act* 1974 for an extension of the period of limitation to 9 January 2000 to enable him to commence fresh proceedings against the respondent. He was unsuccessful in both respects, the order of the learned judge at first instance being dismissal of the plaintiff's action and of his summons for an extension of time.

[16] Before the learned judge at first instance, counsel for the plaintiff, Mr D. North SC argued, as he did here, that the expression "seek damages at law" used in s 182D(1) of the 1990 Act should be read as confined to steps taken by a litigant after proceedings were served. He made the points firstly, that rights of access to courts were not to be taken away except by express or clear language; and secondly, that in any event, on an ordinary construction the issue of a writ did not constitute the seeking of damages. Its effect was merely to preserve rights rather than, prior to service of it, to make any demand upon a defendant.

[17] The expression "seek damages at law" is not defined; but s 182B, which in subsection 2 requires a worker to choose between accepting lump sum compensation and seeking damages, provides at subsection 6 as follows:

> "The worker is taken to seek damages at law for the injury when the worker -
>
> (a) seeks to negotiate a damages settlement with the board; or
>
> (b) starts proceedings at law for damages."

Although the learned judge at first instance recognised that s 182B(6) had no immediate application in this case, because no lump sum offer had been made, he considered that the expression "seek damages at law" should be given a consistent meaning through s 182A to s 182E of the Act. Accordingly, the definition in s 182B(6) should be adopted in construction of the expression "seek damages at law" in s 182D.

[18] For the appellant plaintiff it was argued on this appeal, however, that the very fact that the legislature had chosen to provide a definition of the term for the purposes of s 182B without expressly extending it to s 182D was an indication that it was to be given different meanings as between the two sections. Section 182D was also to be contrasted with ss 37(1) and 39(5) of the *Motor Accident Insurance Act* 1994, held in *Young v Keong* [1999] 2 Qd R 335 to impose mandatory requirements, because those provisions used the unequivocal expression "before bringing an action in a court for damages".

[19] Counsel for the respondent, Mr R. Douglas SC, argued that the learned judge at first instance had properly sought a construction of the expression "seek damages at law" which achieved comity of meaning with s 182B. Section 182D itself, in subsections 4 and 5, provided for the issue of a conditional certificate enabling a worker to "start proceedings at law for damages" where the degree of impairment had not yet been determined. Those subsections were inconsistent with the notion that a worker could issue a writ, so long as it remained unserved, in advance of receiving a certificate. Finally, the explanatory notes to the *Workers' Compensation Amendment Bill (No 2)* 1995 which introduced *inter alia* ss 182A-E could, by virtue of s 14B of the *Acts Interpretation Act* 1954, be used to provide or confirm an interpretation. Those notes contain this passage:

> "Section 182D outlines the process to apply where a statutory worker's compensation claim has never been received and/or where an offer of lump sum compensation has never been made. Where these conditions exist, the section requires a worker to apply to the Board for a certificate so that he/she may *commence common law proceedings*." (italics added).

That note put it beyond doubt, Mr Douglas submitted, that the reference to seeking damages at law in s 182D(1) encompassed the commencement of an action by issue of a writ.

[20] In my view, the learned judge at first instance was correct in his construction of s 182D(1). The expression "seek damages at law" in its ordinary and natural meaning is wide enough to encompass all stages of the bringing of legal proceedings, including their commencement by issue of initiating process. The reference in subsections 4 and 5 to the provision of a conditional certificate where there is an urgent need to bring proceedings supports that construction. If, contrary to that view, it can be said that there is any ambiguity in the provision, the explanatory notes put it beyond doubt that the subsection envisages the obtaining of a certificate before commencement of common law proceedings, not merely before service of the relevant process.

[21] The second limb of the argument of Mr North SC for the appellant turned on the issue of whether there was at relevant times an "approved form" for the purpose of making application as required by s 182D(2). Section 206A of the 1990 Act provided as follows:

> "The Board may approve forms for use under this Act."

Section 30 empowered the general manager to exercise the Board's powers and functions.

[22] At the time s 182D came into effect on 1 January 1996 no form had been approved. The *Workers' Compensation Act* 1990 was repealed by the *WorkCover Queensland*

Act 1996 with effect from 1 February 1997. As at that date there had still been no form approved. Section 532 of the 1996 Act was in the following terms:

> "The Chief Executive Officer may approve forms for use under this Act."

Section 402 permitted him to delegate his powers.

[23] According to affidavit material relied on in an another appeal before this court, *Neuss v Roche Bros Pty Ltd* No 9447 of 1999, a memorandum purporting to prescribe the manner in which application could be made for the issue of certificates under s182D(2) was issued on 7th February 1997. The decision in that appeal has now been given (*Neuss v Roche Bros Pty Ltd* [2000] QCA 130); the Court's conclusion was that the memorandum failed, for reasons concerning the content of the proposed forms and the lack of evidence as to the authority of the officer issuing the memorandum, to effect the requisite approval of the forms. However, in July 1997, a further attempt was made at approving a form, entitled "Application for Damages Certificate". It was not argued in the present case that there were deficiencies in that form, or that it was not approved by the Chief Executive Officer .

[24] Rather, Mr North's argument was that at the time of the repeal of the 1990 Act (1st February 1997), the appellant had an accrued right to sue for damages, since there was in existence at that time no approved form. That accrued right was preserved by s 20 of the *Acts Interpretation Act* against the repeal of the 1990 Act. The 1996 Act did not, either in its transitional provisions or elsewhere, confer on the Chief Executive Officer of WorkCover any express power to make forms for the purposes of the 1990 Act. Consequently, no attempt at approving a s182D(2) form made after the repeal of the 1990 Act could succeed. The appellant retained, therefore, his right to proceed.

[25] That argument must fail for two reasons. The first is that s 20(2)(c) of the *Acts Interpretation Act* preserves, on the repeal of an Act, only rights accrued under that Act. A common law right to seek damages for a workplace injury cannot properly be described as "accrued" under the 1990 Act, notwithstanding that the Act recognises the existence of such rights (see, for example, s 90(1)). Secondly, it disregards the effect of two sections of the 1996 Act, which provide, relevantly, as follows:

> "551.(1) This section applies if a worker sustains an injury before the repeal of the repealed Act.
> (2) The repealed Act applies in relation to the injury as if the repealed Act had not been repealed.
>
> 558.(1) This section applies if, after the commencement of this part, a provision of a former Act is to be applied for any purpose.
> (2) A reference in the provision to the general manager may, if the context permits, be taken as a reference to WorkCover's Chief Executive Officer."

[26] Section 551 continued the application of s 182D so far as the appellant's injury was concerned. Section 558 then applied, to enable the reference to the general manager in s30 of the 1990 Act to be taken as a reference to the Chief Executive

Officer; so that the Chief Executive Officer was enabled, as the general manager had been, to approve forms for use under the 1990 Act.

[27] In my view, those provisions enabled forms to be approved for the purposes of s 182D after the repeal of the 1990 Act. There being no basis for supposing that the "Application for Damages Certificate" form was not duly approved in July 1997, there existed at the time the Applicant issued his writ in January 1999 an approved form for the purposes of s182D(2). Since s182D continued in its application to the appellant, he was precluded by s182D(1) from seeking damages without first having received WorkCover's certificate.

[28] The decision of the learned judge at first instance to refuse an extension of time was also the subject of a ground of appeal and was raised in the appellant's first outline of submissions. It was not however the subject of any oral argument in the appeal. I do not consider it a ground capable of success; the appellant could not in my view demonstrate the existence of any "material fact of a decisive character" within the meaning of s 31(2) of the *Limitation of Actions Act* 1974.

[29] For the reasons given the appeal must be dismissed. The parties should be given the opportunity to make submissions in writing on the question of costs, to be filed and served within seven days.