SUPREME COURT OF QUEENSLAND

CITATION:	*Pittaway v W H Tutt & Quinlan & Anor* [2002] QCA 336
PARTIES:	**JASON PITTAWAY** (plaintiff/respondent) **v** **W H TUTT & QUINLAN** (first defendant/first appellant) **STEPHEN E KERIN** (second defendant/second appellant)
FILE NO/S:	Appeal No 10016 of 2001 SC No 6683 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2002
JUDGES:	McMurdo P, McPherson JA and Wilson J Separate reasons for judgment of each member of the court, each concurring as to the orders made.
ORDERS:	**1. That the appeal be allowed.** **2. That the order of the primary judge be set aside.** **3. That the respondent's claim be dismissed.** **4. That the respondent pay the appellants' costs of the claim and of the appeal to be assessed on the standard basis.**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACT, TORTS AND PERSONAL ACTIONS – WHEN TIME BEGINS TO RUN – PARTICULAR CAUSES OF ACTION – NEGLIGENCE – where defendant solicitors advised plaintiff that he had no realistic hope of success in a personal injury claim – where plaintiff alleged that defendants' advice was negligent – where plaintiff sued defendants for damages for negligence outside limitation period – where defendants pleaded limitation defence and sought summary judgment in their favour – whether the defendants' allegedly negligent advice precluded the plaintiff from instituting proceedings against the defendants inside limitation period – whether question of limitation defence ought to be resolved on summary

judgment application

PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – where plaintiff injured when he drove car into tree – where no other vehicles involved – where plaintiff alleged accident caused by employer forcing him to drive when he was overtired - where firm of solicitors advised plaintiff that he had no realistic hope of success – where plaintiff sued firm of solicitors for negligence outside limitation period – where firm of solicitors pleaded limitation period defence – where application for summary judgment was dismissed – whether judgment should have been given for the defendants

Limitation of Actions Act 1974 (Qld), s 10, s 11
Uniform Civil Procedure Rules 1999 (Qld), r 293

Cheney v Duncan [2001] NSWCA 197; (2001) 34 MVR 28, referred to
Gorton v The Commonwealth of Australia [1992] 2 Qd R 603, distinguished
Hawkins v Clayton (1988) 164 CLR 539, distinguished
Johnson v Perez (1988) 166 CLR 351, referred to
Sampson v Zucker, unreported, CA (NSW) No 40834 of 1995, 11 December 1996, referred to
Toomey v Western Aboriginal Legal Service [1999] NSWSC 560, No 500054 of 1997, 10 June 1999, referred to
Wardley Australia Ltd v The State of Western Australia (1992) 175 CLR 514, referred to
Wilson v Rigg [2000] NSWSC 16, No 20364 of 1998, 7 February 2000, referred to

COUNSEL: P A Keane QC, with K N Wilson, for the appellants
J A Griffin QC, with D R Kent, for the respondent

SOLICITORS: McInnes Wilson for the appellants
Richardson McGhie for the respondent

[1] **McMURDO P**: I agree with the reasons and orders proposed by Wilson J.

[2] **McPHERSON JA**: I have read the judgment of Wilson J and agree with the orders she has made.

[3] **WILSON J**: This is an appeal against the decision of a judge of the Trial Division of the Supreme Court dismissing an application for summary judgment made by the defendants pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*). The respondent plaintiff has submitted that the decision was correct, and further has filed a notice of contention seeking to have the decision affirmed on a ground other than that relied on by the primary judge.

[4] The respondent suffered personal injuries in a motor vehicle accident on 25 February 1988, when he was aged 20. He was the driver of a motor vehicle which

struck a tree when he blacked out and lost control. In short, he alleges that the accident was caused by the negligence of his work supervisor, in forcing him to attend work and to drive the vehicle on a hot morning, knowing that he was ill, exhausted and weakened by lack of food, and in failing to call a doctor to treat him.

[5] At all material times the first appellant was a firm of solicitors and the second appellant was a solicitor in its employ. In March 1990 the respondent retained the first appellant to advise him in respect of a cause of action against his employer. He consulted the second appellant, and claims to have given him full instructions in relation to the accident. By letter dated 16 March 1990 the second appellant advised the respondent that as the accident "was a single vehicle collision due to your 'blacking out' from possible tiredness and overwork, we believe there is no realistic hope of success". He alleges that this advice was negligently given - in particular, that he was not advised that legal proceedings must be commenced within three years of the date when his injuries were sustained, or that a claim against his employer would become statute barred if proceedings were not commenced within that period.

[6] The respondent did not seek any other relevant advice until he consulted his present solicitors on 13 December 2000. Of course, by that time not only had the limitation period for bringing proceedings against his employer expired[1], but so, too, had the limitation period for bringing proceedings against the appellants[2].

[7] The present proceedings, in which the respondent sues the appellants for negligence, were commenced on 25 July 2001. As well as denying negligence, the appellants pleaded that the cause of action against them was commenced outside the applicable limitation period and so not maintainable. In his reply, the respondent pleaded –

> " 6. As to paragraph 13 of the Defence, the plaintiff denies that the present action is statute barred and not maintainable and says that the defendants' wrongful act in the giving of the negligent advice referred to in paragraphs 9 to 12 of the Statement of Claim effectively precluded the institution of proceedings by the Plaintiff and in the circumstances, for the purposes of s 10(1)(a) of the Limitations [sic] of Actions Act, the cause of action did not accrue until the plaintiff received correct advice concerning the matter on 13 December 2000.
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> Particulars
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> (a) The plaintiff was, at the time, 22 years of age;
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> (b) His education was limited to the High School level;

[1] on 25 February 1991: *Limitation of Actions Act 1974* s 11.

[2] on 26 February 1997 - six years after the expiration of the limitation period for bringing proceedings against the primary tortfeasor: *Limitation of Actions Act* s 10; *Cheney v Duncan* [2001] NSWCA 197; (2001) 34 MVR 28 at 32 per Ipp AJA; cf *Johnson v Perez* (1988) 166 CLR 351 at 366-7.

(c) The plaintiff was engaged in a manual occupation and had no experience in legal matters;

(d) The defendants did not inform the plaintiff of the three (3) year limitation period, or recommend that he seek a second opinion;

(e) The defendants were, to the plaintiff's knowledge, experienced solicitors expert in the law relating to personal injuries in master/servant actions;

(f) In the circumstances the plaintiff had no reason to, and did not, question the defendants' advice until 13 December 2000."

[8] Rule 293 of the *UCPR* is in these terms:

> "**293** (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
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> (2) If the court is satisfied—
>
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
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> (b) there is no need for a trial of the claim or the part of the claim;
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> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[9] As the primary judge quickly appreciated, the respondent relied on the following dictum of Deane J in *Hawkins v Clayton*[3] -

> " ..... it could not have been the legislative intent that the effect of provisions such as s 14(1) of the *Limitation Act*[4] should be that a cause of action for a wrongful act should be barred by lapse of time during a period in which the wrongful act itself effectively precluded the bringing of proceedings."

Accepting for the purposes of the application before him that the dictum was correct, the primary judge was satisfied that the evidence before him was sufficient to leave open the inference that the respondent was in fact precluded from suing his solicitors by his belief in the correctness of the advice which was given to him. He said –

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[3] (1988) 164 CLR 539 at 590.

[4] His Honour was referring to NSW legislation, which is the analogue of s 10 of the *Limitation of Actions Act 1974* (Qld).

> "It seems to me that that is sufficient for the plaintiff for present purposes. The defendants' task is to satisfy me that there is no real prospect of success and no need for a trial. I think the plaintiff has put enough before me, particularly in light of the fact that the defendant has put no material before me, to satisfy me that a trial is needed to resolve the applicability of the limitation defence.
>
> I do not think, on the material before me, that the plaintiff could reasonably have been expected to get other advice when given the advice which he received by his solicitors. Nor was there any reason why he should have doubted that advice or commenced proceedings or given instructions for the commencement of proceedings contrary to it.
>
> I am not satisfied therefore that there is no real prospect of success in the plaintiff's case."

[10] Mr Keane QC, who appeared as senior counsel for the appellants, submitted that there was a non sequitur at the heart of what the respondent said was an arguable case - namely, that by negligently failing to advise the respondent that he had an arguable case against his employer and in failing to advise him that he had three years in which to bring that claim the appellants had prevented him from seeking advice that would have enabled him to bring an action against them. As Mr Keane correctly pointed out, there was no allegation in the pleading and no sworn evidence that the appellants did anything which caused the respondent to be unaware of his rights to sue them, and, of course, when he consulted them, no such rights had arisen.

[11] Mr Griffin QC, who appeared as senior counsel for the respondent, argued that the primary judge had erred in rejecting the respondent's submission that questions of limitation defences should not be relied on to dispose of actions in a summary way, but should be determined at trial with evidence adduced and tested on both sides. He relied on a passage in the joint judgment of Mason CJ, Dawson, Gaudron and McHugh JJ in *Wardley Australia Ltd v Western Australia*[5]. However, Their Honours were there considering cases where there can be doubt when the cause of action accrued, and if the dictum of Deane J (assuming it is correct) could not logically apply to the circumstances pleaded in the present case, then there would be no point in deferring the argument until trial.

[12] The correctness of Deane J's dictum was not argued on appeal. Mr Keane's submission was that, assuming the dictum was correct, it was simply not applicable to the present case. It could apply only –

[5] (1992) 175 CLR 514 at 533.

> "when the very act of negligence that inflicts the injury also has the effect of precluding the bringing of an action for damages. There must be a coincidence between the negligent conduct and the conduct that conceals from the plaintiff that he or she has a cause of action."[6]

In Mr Keane's submission, that was not so in the present case.

[13] The facts in *Hawkins v Clayton* are distinguishable from those of the present case. There the defendant firm of solicitors was holding the original will of a deceased client. It negligently failed to locate the executor, Mr Hawkins (who was also the residuary beneficiary) and inform him of the will until more than six years after the testatrix's death. In consequence the principal asset of the estate, a house property, was allowed to fall into disrepair and to lie vacant. Mr Hawkins sued the solicitors. Brennan and Gaudron JJ held that the cause of action did not accrue until the executor assumed office, and so the action was not statute barred. Deane J was of the view that the limitations defence failed because the cause of action did not accrue until the expiration of the period in which the wrongful act itself effectively precluded the bringing of proceedings. As Gleeson CJ put it in *Sampson v Zucker*[7] -

> "In other words, the very tortious act upon which the defendants were being sued made it impossible to sue them within the limitation period."

[14] Here the negligence of the appellants[8] in advising the respondent that he had no prospects of successfully suing his employer did not cause him to be unaware that he could sue them for that negligent advice. Further, there was no conduct on the part of the appellants after March 1990 which prevented the respondent from seeking other advice (which he ultimately did in December 2000) or which prevented him from commencing proceedings against the appellants before the expiration of six years from his losing his rights against his employer. This case is in the same category as *Sampson v Zucker*[9], *Cheney v Duncan*[10], *Toomey v WALS* [11] and *Wilson v Rigg*[12] where plaintiffs were unsuccessful in their attempts to rely on Deane J's dictum[13]. It is distinguishable from *Gorton v Commonwealth of Australia*[14] In that case the plaintiff sued the Commonwealth for negligence on the part of a medical officer of the Australian Military Forces who examined him prior to his discharge from the Army in 1945. The examination revealed that he was suffering from hypertension, but the medical officer did not inform him of this, or that the condition might be war-related, or that he might be entitled to a war-service pension and other benefits. He learnt of his condition in 1950, but did not learn that

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[6] *Cheney v Duncan* [2001] NSWCA 197; (2001) 34 MVR 28 at 32 - 33 per Ipp AJA.
[7] unreported, CA (NSW) No 40834 of 1995, 11 December 1996.
[8] For present purposes, it is assumed that the advice was negligently given.
[9] unreported, CA (NSW) No 40834 of 1995, 11 December 1996.
[10] [2001] NSWCA 197; (2001) 34 MVR 28.
[11] [1999] NSWSC 560, No 500054 of 1997, 10 June 1999.
[12] [2000] NSWSC 16, No 20364 of 1998, 7 February 2000.
[13] In *Sampson v Zucker* and *Cheney v Duncan* the plaintiffs learned of the first solicitors' negligence within the limitation period for suing those solicitors, but did not commence proceedings until after its expiration. I do not regard that as a relevant fact for the purpose of distinguishing those cases.
[14] [1992] 2 Qd R 603.

it was war-related until 1986. But in that case, as in *Hawkins v Clayton*, the tortfeasor wrongly held on to documents which would have disclosed the true position to the plaintiff, and in doing so effectively precluded the institution of proceedings.

[15] In short, even if the respondent made out the facts alleged in his reply at trial, the dictum of Deane J would be inapplicable. The appellants' application for summary judgment ought to have been granted. I would make the following orders:

(i) that the appeal be allowed;

(ii) that the order of the primary judge be set aside;

(iii) that the respondent's claim be dismissed;

(iv) that the respondent pay the appellants' costs of the claim and of the appeal to be assessed on the standard basis.