SUPREME COURT OF QUEENSLAND

CITATION:	*Dowd v Swift Australia P/L* [2008] QCA 228
PARTIES:	**RAYMOND JAMES DOWD** (plaintiff /respondent) **v** **SWIFT AUSTRALIA PTY LIMITED** ABN 011 062 338 (defendant/applicant)
FILE NO/S:	Appeal No 2572 of 2008 DC No 219 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	8 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2008
JUDGES:	Keane JA, Mackenzie AJA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused with costs**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – NOTICE OF INJURY – GENERALLY – where respondent employed by applicant as meatworker – where respondent commenced action for personal injuries against applicant – where respondent pleads three time periods in which injury may have been suffered – where respondent received notice of assessment specifying the date of injury – where applicant brought application to strike out parts of the statement of claim referring to two of the three time periods – where District Court judge at first instance dismissed application – where applicant sought leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) – whether by nominating three time periods in which the injury may have been suffered the respondent should be taken to be alleging three separate injuries – whether *WorkCover Queensland Act* 1996 (Qld) requires respondent to plead an injury so that it relates to a specific event – whether leave should be granted and whether order of learned District Court judge should be set aside

WorkCover Queensland Act 1996 (Qld), s 33, s 253, s 266

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 37, applied
Re Moage Ltd (in liq) v Jagelman & Ors (1998) 153 ALR 711; [1998] FCA 296, discussed
Wardley Australia Ltd v The State of Western Australia (1992) 175 CLR 514; [1992] HCA 55, followed
Wilkinson v Stevensam P/L & Ors [2006] QCA 88, distinguished

COUNSEL: J A Griffin QC for the applicant
A J Moon for the respondent

SOLICITORS: A K Compensation Lawyers for the applicant
Connolly Suthers for the respondent

[1] **KEANE JA**: I agree with Dutney J that the application should be refused with costs for the reasons given by his Honour.

[2] **MACKENZIE AJA**: I agree with the reasons of Dutney J and with the orders proposed by him.

[3] **DUTNEY J**: The applicant, seeks leave under s 118 (3) of the *District Court of Queensland Act* 1967 (Qld) to appeal against a decision of a judge of the District Court dismissing an application to strike out part of the respondent's statement of claim.

[4] At the material time, the applicant operated a meatworks in Townsville. The respondent was employed by the applicant as a meatworker and claims to have been injured during the course of his employment.

[5] An action for personal injuries was commenced by the respondent against the applicant in May 2004. By his statement of claim, the respondent alleges that he suffered an injury to his lumbar spine. He alleges that the injury occurred on 13 April 2002; or, alternatively, over a period of time between September 1999 and 13 April 2002. Further in the alternative, the respondent was put on light duties after 13 April 2002 and alleges that he suffered the injury on 15 May 2002 as a result of the tasks he was required to perform while on these light duties.

[6] Before the District Court, the applicant applied to strike out those parts of the statement of claim which dealt with the allegations that the respondent's injury was suffered over a period of time culminating in the incident on 13 April 2002 or while the respondent was on light duties on 15 May 2002.

[7] The applicant submits that the respondent is precluded by the provisions of the *WorkCover Queensland Act* 1996 (Qld) ("the Act") from pursuing those parts of the statement of claim to which objection has been taken.

[8] Prior to the commencement of the proceedings, the respondent received a Notice of Assessment for an injury to his lumbar spine. The Notice of Assessment specified the date of the injury as being 13 April 2002.

[9] In dismissing the application, the primary judge proceeded on the basis that there was only one injury pleaded in relation to which compensation was sought and that was the injury as described in the Notice of Assessment. His Honour found that the cause of the injury and the date on which it was suffered were matters that should properly be left to the trial.

[10] The submissions of the applicant before the primary judge, and before this court, were predicated upon the assumption that the Act requires an injury to be related to a specific event. By nominating alternative events as giving rise to the injury the respondent should be taken to be alleging three separate injuries.

[11] The applicant's argument was framed around s 33 of the Act which defined an "event" as anything resulting in an injury to a worker and s 253(1)(a)(ii). The latter provision allows a worker with an assessed WRI exceeding per cent to claim for any other injury arising out of the same event.

[12] Sections 253 and 266 of the Act in force at the time of the respondent's injury, limited the right to commence an action for damages for personal injury to a worker who had received a Notice of Assessment for the injury. Section 266 identified the Notice of Assessment as one under Chapter 3 Part 9 of the Act.

[13] Chapter 3 Part 9 is concerned with the identification of, and assessment of permanent disability arising from an injury. While undoubtedly, the date an injury is suffered is significant in its identification, it is not per se a matter to which the statutory provisions make reference.

[14] I am not persuaded that either s 33 or s 253(1)(a)(ii) of the Act advance the matter any further at this point in time.

[15] When pressed during the course of argument, senior counsel for the applicant identified *Wilkinson v Stevensam P/L & Ors* [2006] QCA 088 as the authority providing most support for the arguments advanced.

[16] I am not satisfied that *Stevensam* in fact provides the support the applicant seeks. What *Stevensam* makes clear is that a determination of the facts will almost inevitably have a significant bearing on the outcome of arguments such as those advanced here.[1]

[17] In the circumstances, the approach of the primary judge, deferring consideration of the respondent's entitlement to claim until the relevant facts are ascertained by a trial is one which is difficult to criticise. It was in accordance with the approach adopted by the High Court in the context of limitation periods in *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514. However, the cautious approach for which *Wardley* is authority extends beyond limitation periods and includes applications to strike out pleadings for failing to disclose a cause of action. This was recognised by Burchett J in *Re Moage Ltd (in liq) v Jagelman & Ors* (1998) 153 ALR 711 at 721.

[18] In *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177, the High Court adopted the statement of the approach to interlocutory

[1] See for example paragraphs [25] ff.

appeals formulated by Jordan CJ in *In re the Will of FB Gilbert (Dec'd)* (1946) 46 SR (NSW) 318 at 323:

> "… I am of opinion that,… there is a material difference between an exercise of discretion on a point of practice and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in Chambers to a Court of Appeal."

[19] For my part, that approach has much to commend it in this case. The applicant has not identified any prejudice likely to be suffered if the case proceeds to trial on the issues as they now stand. Whatever the outcome of the application to strike out the pleadings, the applicant would still have to address the issue of whether or not the damages the respondent claims to have suffered arose out of the assessed injury or some other injury.

[20] The absence of any prejudice to the applicant makes it impossible to identify any matter of justice or otherwise to justify the grant of leave to appeal.

[21] I would refuse the application with costs.