SUPREME COURT OF QUEENSLAND

CITATION:	*Coles Group Limited v Costin* [2015] QCA 140
PARTIES:	**COLES GROUP LIMITED** ACN 004 089 936 (appellant) **v** **DEBORAH ANNE COSTIN** (respondent)
FILE NO/S:	Appeal No 9350 of 2014 DC No 1886 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Brisbane – Unreported, 5 September 2014
DELIVERED ON:	31 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2015
JUDGES:	Holmes and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The respondent's application filed on 16 April 2015 to adduce further evidence be granted.** **2. The application for an extension of time in which to bring an application for leave to appeal be granted.** **3. The application for leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) be granted.** **4. The appeal be allowed.** **5. The parties file and serve within 14 days any undertaking by the respondent and submissions on further orders, including costs orders.**
CATCHWORDS:	LIMITATION OF ACTIONS – GENERAL MATTERS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – PRINCIPLES UPON WHICH DISCRETION EXERCISED – where an employee of a supermarket suffered an injury in the course of her duties – where the employee lodged a notice of claim for damages after consulting various doctors – where the limitation period for bringing an action had

expired – where there was an unnecessary and unexplained delay by the employee's lawyers in bringing an application to extend the limitation period – where part of the claim related to inadequate training – where the primary judge granted an extension of the limitation period – whether supermarket prejudiced in that respect by the employee's delay – whether the primary judge erred in exercising the discretion to extend

APPEAL AND NEW TRIAL – APPEAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – where the supermarket purports to appeal from the primary decision as of right under s 118(2)(b) of the *District Court of Queensland Act* 1967 (Qld) – where that section provides for appeal as of right from the District Court where the claim is for or relates to property equal to or more than the jurisdictional limit – whether there is a right of appeal – whether leave to appeal should be granted

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – EVIDENCE NOT AVAILABLE AT HEARING – WHEN ADMISSIBILE – where the employee was unable to contact an important witness until after the primary decision was appealed – where a ground of appeal is that the supermarket was prejudiced by the unavailability of the witness – where the employee applies for the fresh evidence to adduced – where the application, if granted, would remove a ground of appeal – whether the evidence could have been attained with reasonable diligence

Acts Interpretation Act 1954 (Qld), sch 1
District Court of Queensland Act 1967 (Qld), s 118(2)(b), s 118(3)
Limitation of Actions Act 1974 (Qld), s 31(2)
Uniform Civil Procedure Rules 1999 (Qld), r 766
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 275

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Cairns City Supermarkets Pty Ltd v Lightbrake Pty Ltd [2011] QCA 205, cited
Eichsteadt v Lahrs [1960] Qd R 487, cited
Hertess v Adams [2011] QCA 73, cited
Myles Thompson (a firm) v Coffey [2005] QCA 131, cited
Pickering v McArthur [2005] QCA 294, cited
Praxis Pty Ltd v Hewbridge Pty Ltd [2004] 2 Qd R 433; [2004] QCA 79, followed
Westpac Banking Corporation v Jamieson & Ors (2015) 104 ACSR 657; [2015] QCA 50, cited

COUNSEL: G W Diehm QC, with A Luchich, for the appellant
M T O'Sullivan for the respondent

SOLICITORS: Dibbs Barker for the appellant
Shine Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Applegarth J and the orders he proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.

[3] **APPLEGARTH J:** Ms Costin injured her left knee on 31 July 2005 when working for Coles. She had a complicated history of treatment and surgery and, until 2009, believed further surgery would permit her to return to work. In 2009, she consulted lawyers who issued an urgent notice of claim for damages on 3 September 2009. However, the limitation period had expired. Eventually, new lawyers applied for an extension of time. Coles conceded that a material fact of a decisive character relating to Ms Costin's right of action was not within her means of knowledge before June 2009. The other requirements of s 31(2) of the *Limitation of Actions Act* 1974 (Qld) were established and Ms Costin persuaded the learned primary judge that the discretion to grant the extension should be exercised in her favour.

[4] The critical issue in this appeal is whether the primary judge erred in exercising the discretion. Coles submits that he should have concluded that it suffered significant prejudice because of Ms Costin's delay and that there could not be a fair trial.

[5] A subsidiary issue is whether Coles requires leave to appeal. Another issue is whether Ms Costin should have leave to adduce further evidence from an important witness, Ms King, who was her Line Manager at the time of the incident. If allowed, Ms King's evidence would change the complexion of the evidence that was before the primary judge. Its reception also would remove one of Coles' arguments, namely that there was prejudice as a result of its inability to contact Ms King.

Background

[6] In 2005 Ms Costin was employed as a Fresh Produce Assistant at a Bi-Lo supermarket, operated by Coles. Prior to the incident on 31 July 2005 she had some basic training in manual handling techniques. The extent to which she received additional training, and whether or not she and other witnesses were able to give evidence about its content, was an issue before the primary judge and occupied a substantial part of the argument before this Court. Her foreshadowed claim for negligence is not confined, however, to the adequacy of her training. It extends to aspects of her work at the time she was injured including that:

- she was required to work alone;
- she was under constant pressure from Ms King to process the stock;
- Coles failed to undertake a job safety analysis to identify potential hazards and assess risks.

Her affidavit sworn on 17 November 2010 which was provided to Coles' lawyers that month, and her further affidavit which was filed for the purpose of the application for an extension of time, each identified the hazard which she faced in moving boxes of fruit from a trolley on to a pallet in a "prep area" which was very small and cramped, which made it difficult to move around. Her affidavits explained how she sustained an injury to her left knee on 31 July 2005. She was working alone, moving boxes of

apples from a flat top trolley onto a pallet in the "prep area". It had to be stacked with cartons of produce eight high. The cartons were stacked vertically from the back of the pallet. She was rushing to get the job done as there had been an over-order of stock and the task she was performing had to be completed by a certain time. She lifted two 16 kilogram boxes of apples and twisted to place the boxes over and onto the pallet, without moving her feet. As she did so, she felt a click in her left knee and it gave way.

[7] She reported her injury to the Duty Manager, Mr Prescott, who completed an Incident Report. Ms Costin was in pain, but her symptoms settled. She returned to work and over the following years had some treatment. In 2007 an MRI revealed a tear in the medial meniscus. She lodged a claim for workers' compensation because, although she wanted to keep working, she realised she probably would require surgery. She saw various doctors over the following few years. In late June 2009 a new orthopaedic surgeon saw her. As a result of the news she received from him she consulted a firm of solicitors in August 2009 in order to find out what her legal rights were. On 3 September 2009 those solicitors lodged an urgent notice of claim for damages on her behalf. However, by then the three year limitation period had expired. Coles, through its solicitors, advised that it took the view that as the limitation period had already expired there was no "urgent need" to deliver the notice of claim for damages. On 13 October 2010 Ms Costin's solicitors delivered a new notice of claim for damages. Coles' solicitors informed them that it complied with s 275 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), save for the fact that it had not been delivered within the prescribed limitation period. Coles required Ms Costin to provide a draft application and supporting affidavit with respect to the limitation period defence and she agreed to do so.

[8] In February 2011 Coles informed Ms Costin's lawyers that it required her to bring an application to extend the limitation period before it was prepared to continue with the pre-court processes under the Act. There was an unnecessary and unexplained delay on her then-lawyers' part. Ms Costin believed that they were diligently preparing her case. In May 2013 she received a letter from those solicitors advising her that they were unable to continue to act on her behalf and that she should obtain independent legal advice. She did so and an application was eventually filed on 21 May 2014. The application sought a declaration as to the validity of the two notices of claim. Ultimately, however, there was no substantial dispute about this. Because Coles failed to respond in an appropriate way to the earlier notice of claim, it was deemed to be compliant. The application to extend time was initially heard on 30 May 2014, at which time Ms Costin was cross-examined. The matter was then adjourned to enable Coles to investigate the question of prejudice. At the resumed hearing Coles conceded that the discretion to extend arose, but submitted that it should not be exercised in favour of Ms Costin because a fair trial of her claim could not be held.

[9] The learned primary judge summarised the authorities, including the influential passage from the judgment of McHugh J in *Brisbane South Regional Health Authority v Taylor*[1] that:

> "When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice."

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1 (1996) 186 CLR 541 at 555.

[10] The existence and extent of any prejudice, presumptive or actual, must be assessed as at the date of the application.[2] The primary judge correctly noted that the relevant consideration is whether a fair trial is no longer possible, or is unlikely, because of the delay, rather than whether there is any significant difference between the position of the respondent as a result of the proceeding not having been commenced within the limitation period. The primary judge also provided an insightful analysis of the application of *Taylor* in the light of current legislative provisions which require notice of a claim before commencing an action, and which prevent an action from being commenced until the completion of certain pre-litigation procedures. His Honour concluded that although the giving of a notice of claim is a significant event and is relevant to the assessment of the significance of the delay, this was not a case in which it could be said that delay after the giving of the notice of claim was irrelevant, or that prejudice occasioned by reason of that part of the delay was not something which needed to be taken into account.

[11] The primary judge considered the question of prejudice, including Coles' submission that it was actually prejudiced because of its inability to locate some former employees. Relevantly, Coles was made aware of the injury and an incident report was completed that day. Ms Costin claimed that there was no-one with her at the time of the injury. As a result of the incident report and a claim for workers' compensation that was completed on 14 January 2007, Coles was in a position to check whether anyone else was present at the time.

[12] The primary judge focused upon what he anticipated would be the real issue at any trial, namely whether there had been proper training provided to Ms Costin prior to the incident. The primary judge considered contemporaneous documents which suggested that she had not been shown a manual handling instruction video.

[13] Documents recorded that Ms Costin had been observed and assessed as being competent by Mr Prescott on 19 January 2005 in relation to the manual handling of groceries and by Ms Kelman on 30 January 2005 in relation to the manual handling of fresh produce. Neither Mr Prescott nor Ms Kelman could recall undertaking the assessment. Neither Task Observation Record recorded that Ms Costin was shown a "Manual Handling Video/Worksheet". The entry for this on the form signed by Ms Costin and Mr Prescott was left blank and Ms Kelman's signature for that line on the form dated 30 January 2005 was crossed out. The forms do not suggest that Ms Costin was shown a video, and no other evidence suggests that she was. Ms King's evidence, to which I will return, is that around this time the video machine would not work or the video was not available.

[14] The primary judge found, on the basis of an analysis of the relevant contemporaneous documents and other evidence, that Ms Costin was given some instruction in manual handling in writing, using the Job Safe Practices forms. He observed in passing that given that Coles' process at the time was apparently to give instruction in manual handling by video and by written instruction, a court "may well be prepared to draw an inference that proper instruction in manual handling would not have been given in any other way".

[15] The relevant Job Safe Practices documents contain some basic "safe lifting" instructions, and the primary judge compared them with the "Manual Handling" sheet issued in August 2005.

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2 *Hertess v Adams* [2011] QCA 73 at [12].

[16] An additional ground of objection to the grant of an extension of time which was advanced by Coles before the primary judge was that there was fault on the part of Ms Costin in failing to chase up solicitors whom she had retained to pursue her claim. The primary judge considered this issue in detail and concluded that Ms Costin was an unsophisticated woman who essentially trusted her solicitors to do what was appropriate. The delay that occurred in the period after Ms Costin's then solicitors were called upon to make the application for an extension of the limitation period was their fault, rather than the fault of Ms Costin.

[17] The primary judge reached the following conclusions:

> "[38] It is possible that on some other relevant occasion the applicant was in fact shown the video but that has not been documented, or that she was in fact given further manual handling instruction in some other form which was not documented, and that the respondent's inability now to produce evidence of that fact is attributable to the passage of time.[3] That question is to be assessed by reference to all of the information which is currently available, but ultimately is a matter of judgment. My conclusion is that the risk of something of that nature having occurred is not significant, and accordingly there is not a significant risk that a trial of that issue now will be unfair for that reason. The documentation available identifies fairly clearly what training in manual handling was given; whether that did or did not discharge the respondent's duty of care can be determined just as easily at any time.
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> [39] Once one gets to that point, it is difficult to see how the factual matters which would actually be in issue on a trial of this claim would give rise to any significant unfairness to the respondent because of the delay. In those circumstances, I consider that in this matter a trial of the issues of both liability and quantum that is fair from the point of view of the respondent can still be held. I also do not consider that the more recent delay, which appears to have been attributable essentially to the inactivity of the former solicitor for the applicant, should be treated as a factor of great weight against granting the extension. Approaching the matter in the way indicated in *Taylor*, I am persuaded that in this matter the extension sought, in respect of the earlier date sought on behalf of the applicant, should be granted."

An order was made extending the limitation period for a claim by Ms Costin against Coles in respect of the injury suffered by her in or about July 2005 so that it expired on 23 June 2010.

Coles' submissions

[18] Coles' submissions on the appeal that the primary judge erred in exercising his discretion assert the existence of actual prejudice arising from:

(a) its impaired capacity to adduce evidence about the nature and quality of the instruction and training given to Ms Costin in respect of manual handling, and the limited and uncertain nature of the documents in respect of that training;

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[3] The respondent's procedures required all OH&S training to be documented, sent to State Office and kept for at least seven years: affidavit of Halpern, Exhibit DAH18, p 187.

(b) the inability to contact a likely very important witness, Ms Sandra King;

(c) the alleged uncooperativeness of another important witness, Ms Marina Kelman.

[19] Coles submits that the primary judge erred and ought to have found a fair trial could not be had because material witnesses who might be called by it to give evidence on the issue of the instruction or training provided to Ms Costin did not have any recollection of the detail of the training and instruction provided. The judge's focus on whether Ms Costin was shown the video is submitted to be far too narrow. The fact she was not shown a video was not the end of the matter: showing a video was not the only way to discharge Coles' duty of care. Delay by Ms Costin meant that Coles' witnesses could not recall and give evidence about what additional oral instructions or practical demonstrations they gave. Ms Costin may have been given additional oral instructions to compensate for the absence of the instructional video.

[20] According to Coles, the available documents did not identify "fairly clearly"[4] what training in manual handling was given. They may have identified the basic training which Ms Costin seemingly accepts she was given. They did not identify the detail of that training or what additional training was given.

[21] Next, Coles submits that the judge should have concluded that there was material prejudice to it by the fact that Ms Costin's Line Manager at the time, Ms Sandra King, was unable to be contacted. On that aspect the trial judge referred to Ms Costin's allegation in the second notice of claim that she was put under pressure by Ms King to process the stock. The primary judge concluded that Ms King's absence could be of some significance, but not on the question of what training in manual handling Ms Costin received, and remarked that it is common enough for someone in a stockroom to be under time pressure. This aspect of Coles' appeal concerning material prejudice arising from its inability to contact Ms King depends upon whether Ms Costin is given leave under r 766 of the *Uniform Civil Procedure Rules* 1999 (Qld) to adduce further evidence, particularly an affidavit sworn by Ms King on 16 April 2015.

[22] The third aspect of material prejudice concerning the alleged uncooperativeness of Ms Kelman may be briefly disposed of. Ms Kelman had been cooperative with Coles and spoke to its solicitors on 7 July 2014 and a draft affidavit was prepared for her. Voicemail messages and an email were sent to her between 10 and 14 July requesting her to review and execute her affidavit. I would not regard her failure to respond over those few days as strong evidence of a lack of cooperation. Mr Prescott similarly did not respond over the same period to similar telephone messages. The evidence is not persuasive that Ms Kelman will be uncooperative if called as a witness.[5] There is no satisfactory evidence that Ms Kelman will not comply with a subpoena or is likely to be a hostile witness. The real issue is whether she and other witnesses will be able to do much more than identify their signatures on documents and give evidence about the training they routinely provided in mid-2005.

Ms Costin's submissions

[23] On the issue of inadequate training in manual lifting, Ms Costin submits that the relevant documents did identify "fairly clearly" what training in manual handling she was given, and that the primary judge did not err in determining that a fair trial could

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4 Compare the primary judge's findings at [30].

5 Cf *Hertess v Adams* [2011] QCA 73 at [18] – [20].

be had in spite of the contention that material witnesses for Coles did not have any recollection of the *details* of the training and instruction provided to her. Reliable evidence of the manner in which the training was routinely performed, for example the usual practice described by Mr Prescott, would be received into evidence as admissible evidence of habit.[6]

The application under r 766 to adduce further evidence

[24] Coles submitted in its amended outline that it had suffered material prejudice because Ms King was "a likely very important witness". Ms King was eventually located and spoken to by Ms Costin's solicitors after the outline was filed. Because Ms Costin's application to adduce evidence from Ms King, if allowed, would remove a ground of appeal and because Ms King's affidavit addresses the issue of training, it is useful to deal with that application at this stage.

[25] In general, fresh evidence will be admitted by special leave under r 766 when it appears that the evidence:

- could not have been obtained with reasonable diligence for use at the hearing;
- is such that, if given, it would probably have an important influence on the result, although it need not be decisive; and
- is apparently credible.[7]

The evidence of Ms King is important to Ms Costin's allegations in respect of Coles' breaches of duty, including issues of training and the system of work. It includes evidence of Ms King's observations of the location at which Ms Costin suffered her injuries and her observation on or about the day of the injury that there was little space between the two pallets. Ms King's evidence is that she could understand how Ms Costin got her foot stuck. Ms King's evidence is apparently credible.

[26] Coles resists the application to adduce her evidence on the ground that Ms Costin has failed to establish that she could not have obtained the evidence with reasonable diligence. I am not persuaded by Coles' submission. Coles' own material before the primary judge referred to the steps which its solicitors had taken to contact Ms King, without success. In circumstances in which Coles, with its resources, had been unable to contact its ex-employee, the solicitors for Ms Costin in July 2014 may reasonably have assumed that additional efforts by them were unlikely to locate Ms King prior to the hearing.

[27] It was only after the judgment that the solicitors for Ms Costin resumed the search for Ms King. Inquiries of stores in the Cairns region did not bear any result. Investigators were engaged to locate Ms King. It is unnecessary to detail the various attempts that were made over the following months to contact her. Attempts were unsuccessful until 17 March 2015 when someone advised Ms Costin's solicitors that Ms King would be available to speak to them after 4.30 pm that day. Arrangements were then made for Ms King to confer with solicitors and counsel on 2 April 2015.

[28] Given the difficulty which both Coles' solicitors and Ms Costin's solicitors experienced in locating Ms King and speaking to her, I am not persuaded that her evidence could

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6 J Wigmore (rev. P Tillers), *Evidence in Trials of Common Law* (Boston: Little, Brown and Company, 4th ed, Vol 1A, 1983) 1658-59 [98]; *Eichsteadt v Lahrs* [1960] Qd R 487.

7 *Cairns City Supermarkets Pty Ltd v Lightbrake Pty Ltd* [2011] QCA 205 at [16]; *Westpac Banking Corporation v Jamieson* [2015] QCA 50 at [216].

have been obtained with reasonable diligence prior to the original hearing. The reasonable diligence of Coles certainly did not locate her. Her evidence should be received by leave under r 766.

Ms King's evidence

[29] Ms King was Ms Costin's Line Manager at the time of the incident on 31 July 2005. She was the relevant manager who completed a Fresh Produce Task Observation Record on 7 December 2004. Her evidence is that as Ms Costin's manager she was required to demonstrate each task that was listed on that document in accordance with the Safe Work Practices. Ms Costin would then have to show her the correct method of doing the task in accordance with her demonstration. If she did this correctly then the form would be marked with the letter C to indicate competency.

[30] Ms King's evidence is that the manual handling element of the Fresh Produce Task Observation Record focused on the correct lifting practice. Her practice was to demonstrate how to stand in front of a carton, keep a straight back, bend at the knees and then pick up the carton before turning to place the carton down. Ms King's affidavit does not purport to give a specific recollection of the instruction and demonstration she gave Ms Costin on 7 December 2004 in relation to manual handling of fresh produce or anything else. I read her affidavit evidence as being based upon her practice or habit at the time and what she believed she would have been required to demonstrate to Ms Costin about how to manually lift. Ms King says that she recalls that the "maximum weight that we could lift at around the time of the incident was approximately 15-18 kilograms". However, she does not say whether this formed part of her usual oral instruction, or whether she told Ms Costin about this on 7 December 2004.

[31] Ms King recalls that in addition to demonstrating how to manually lift there was also a video that the staff had to watch which demonstrated people lifting items in accordance with the correct method. The Fresh Produce Task Observation Record that she completed was not marked with a C or NC next to the Manual Handling Video/Worksheet. This is because Ms Costin apparently did not watch it. If she had, the section would have been marked. Ms King's recollection is that, at about the time of the incident, the video machine would not work on occasions or the video was not available.

[32] As to the incident itself, Ms King was made aware of it on or about the day that it occurred. She was told about it by Ms Costin who explained that she was in the cold room and was lifting a box and her foot was caught in between two pallets. Ms Costin explained that she had twisted with a box in her hands and had hurt her knee. Ms King's evidence is that:

> "I recall observing the pallets at the time that Deborah was relaying her incident to me. I recall there was little space between the two pallets and could understand how Deborah got her foot stuck.
>
> The pallets were moved around and positioned by using pallet jacks. Any staff member of Coles could use the pallet jacks.
>
> I do not recall undergoing any training or receiving any specific directions or instructions about the placement and spacing of the pallets."

Ms King went on to explain the system of work by which employees were required to lift and move boxes of fruit and vegetables, one at a time, from pallets onto flat trolleys.

The evidence of Ms Kelman

[33] Ms Kelman worked as the Produce Manager at the Bi-Lo store at Airlie Beach after early 2004. She finished in that role in January 2005 when she went on maternity leave. She was not at the store in July 2005 at the time of the incident. She had a good working relationship with Ms Costin, and identified her signature on a Fresh Produce-Task Observation Record dated 30 January 2005. Ms Kelman had no independent recollection of undertaking that assessment. She thinks she may have been Ms Costin's Line Manager at the time. Her recollection in relation to the completion of the Task Observation Record was that it would take about an hour. It would involve a review and observation of an employee's capacity to undertake aspects of work in the fresh produce department.

[34] Ms Kelman's recollection is that at these inductions she would do the task or activity and then have the person being assessed do it themselves.

The evidence of Mr Prescott

[35] The evidence of Mr Prescott is to similar effect and relates to completion of a different Task Observation Record on 19 January 2005 in relation to groceries. It had a Manual Handling Grocery Stock Room section which he completed. He had no independent recollection of undertaking the actual observation of Ms Costin or of completing the form on 19 January 2005. Around that time he had about 200 employees for whom he would have completed Task Observation Records. Therefore there was very little chance of his having any recollection of the actual observation process for Ms Costin on 19 January 2005.

[36] He described his "usual practice" was to have the staff member read and complete the prerequisites for the task in front of him to satisfy him that the person could undertake the task safely and competently. The Manual Handling Video/Worksheet part was not filled out on the form. Mr Prescott could not recall why that was, but thought that it might be because the video player did not work on that day.

[37] Mr Prescott also completed the Incident Report after the incident was reported on the day it happened, 31 July 2005. He estimated that he would have prepared close to 100 of those documents during his time with Coles and had no recollection of completing that document. He had no recollection of the incident.

Was Coles significantly prejudiced by the inability of witnesses to give evidence about the detail of the oral instructions given to Ms Costin about manual handling?

[38] There is no challenge to the primary judge's finding that the contemporaneous documents were consistent with Ms Costin not having been shown the video.

[39] Ms Costin's affidavit sworn 15 May 2014 uninformatively swore that prior to her accident she had not received "any or any adequate training in relation to manual handling techniques". Her affidavit stated that she received no specific training regarding the stacking of produce on a pallet. Her second notice of claim document acknowledged that she had received "the very basic of manual handling training". The contemporaneous documents, namely the Fresh Produce-Task Observation Record completed by Ms King on 7 December 2004, the Grocery-Task Observation Record completed by Mr Prescott on 19 January 2005, and the Fresh Produce-Task Observation Record completed by Ms Kelman on 30 January 2005, suggest that Ms Costin received at least basic training about manual handling on each of those dates.

[40] So far as Fresh Produce is concerned, the form refers to a Safe Work Practice, and this requires reference to the relevant practice for fresh produce manual handling at the time. It was of a basic kind and consists of the following instructions:

> "▼ **Always** use the five steps to 'safe lifting'.
>
> 1. Size up the load.
> 2. Move closer to the load.
> 3. Always bend your knees.
> 4. Raise the object using your legs.
> 5. Turn by moving your feet, not twisting your back.
>
> ▼ **Always** store heavier or bulky stock, for example boxes of apples or celery on middle shelving with lighter stock, for example peaches up high and down low.
>
> ▼ Work at waist height wherever possible. Use the safe-t-step to access higher shelves.
>
> ▼ Where practical, allow clearance around pallets, trolley and bins. This gives easier access to stock and minimises double handling.
>
> ▼ Do not overload trolleys. Make sure you have a clear vision of your path at all times. Push the load where practical, instead of pulling.
>
> ▼ Use a 'team lift' for heavy or awkward items. For example, bags of potatoes, unloading watermelons from deep bins, and empty pallets."

Significantly, the form does not define by reference to weight or otherwise what a "heavy" item is. It does not prohibit lifting items above a certain weight on one's own. The primary judge correctly described this document as containing some rudimentary "safe lifting" instructions and compared it with a more detailed manual handling sheet issued in August 2005.

[41] One complicating aspect of this appeal is that Ms Costin's affidavits do not descend to any detail in particularising what was inadequate in the instructions and training she received, save for alleging that she received no specific training regarding the stacking of produce on the pallet. Insofar as her affidavit alleges that she did not receive any "adequate training in relation to manual handling techniques", she does not specify the training which she received and the respects in which it was inadequate. Her second notice of claim document refers to only very basic manual handling training and says that there was no "in depth practical lifting technique training". Ms Costin was not cross-examined about this aspect. On the hearing of her appeal, her counsel made the point that Coles might have sought further particulars of the allegation in relation to inadequate training and, if the matter proceeds, further information might be sought in accordance with legislative provisions.

[42] The point remains, however, that Coles faces largely vague allegations about the respects in which Ms Costin's training was inadequate. With Ms Costin having been granted an extension of time, Coles is not in a position to call evidence at trial about what she was told by Mr Prescott, Ms Kelman and Ms King in relation to manual handling, save for what may be inferred from the documents about basic training. Those potential witnesses do not have any recollection of the detail of the training and instruction each of them provided to the respondent.

[43] Ms Costin seeks to respond to this prejudice by submitting that reliable evidence of the practice or habit by which instruction was routinely given by these individuals would be received into evidence at the trial. The issue, however, is not whether evidence of habit or practice is admissible. Clearly it is. The difficulty is the inability of Coles' witnesses to say what specific instructions were given, as a matter of habit, about matters such as weight. The affidavits of Mr Prescott and Ms King and the draft affidavit of Ms Kelman give very general evidence of their habit in giving instructions about manual handling.

[44] Their affidavits do not provide any information about what, if anything, they did to compensate because the video machine was not working or the relevant video was not available. Counsel for Ms Costin points out that their affidavits simply do not address that point, rather than positively assert that they have no recollection about what, if anything, they did to compensate for the video machine not working. However, one might question whether such a witness might be expected to reliably remember so many years after the event what, if anything, was done to compensate.

[45] The evidence of habit, so far as it goes, does not indicate whether Ms Kelman, Mr Prescott or Ms King was in the habit of instructing someone in Ms Costin's position to not lift boxes above a certain weight. Ms King's affidavit recalls that "the maximum weight that we could lift at around the time of the incident was approximately 15-18 kilograms", but does not say that this was part of the instructions which she routinely gave in the course of giving instruction in the manual handling of fresh produce. Insofar as that process is reflected in the Job Safe Practice for manual handling of fresh produce that applied in July 2005, that document did not refer to any specific weights or a maximum weight that could be lifted. Even if it be assumed on the basis of Ms King's affidavit that she was in the habit of giving instructions about the maximum weight that could be lifted, her evidence would be no more than evidence of habit. She would be unable to realistically contest the suggestion that she may have omitted to refer to such a weight, contrary to her habit, when she instructed Ms Costin.

[46] Ms Costin is able to assert that no specific training was given about the stacking of produce on the pallet. Coles and its witnesses are unable to respond to this kind of allegation because the passage of time means they have no reliable recollection of what they instructed Ms Costin about that matter or about anything else. Their evidence is of a general kind, based upon an assumption that Ms Costin would have been given the same instruction as anyone else in accordance with the usual procedure for instructing individuals about manual handling and observing their performance.

[47] Whilst the completed Task Observation Records, in conjunction with the relevant Job Safe Practice document, make it "fairly clear" that Ms Costin was given at least some basic training in manual handling, including manual handling of produce, this documentary evidence does not disclose the detail of the oral instruction given by way of basic training or what additional instruction, if any, was given.

[48] Ms Costin's written submissions note that it is extremely unlikely that any witness could have an independent recollection of the detail of the training and instruction provided to her soon after it had occurred. But this is not to the point. As the primary judge correctly observed, the relevant consideration is whether a fair trial is no longer possible or is unlikely, because of the delay, rather than whether there is any significant difference in the position of the respondent as a result of the proceeding

not having been commenced within the limitation period. One does not compare the prejudice likely at the time of the application to that which would have existed had the proceeding been commenced within time.[8] Accordingly, it is no answer to the appeal that Coles' witnesses were likely to have forgotten the detail of their instruction to Ms Costin within a period of weeks or months after giving it. Coles may have been prejudiced in that regard if Ms Costin had commenced a proceeding within the limitation period. The issue, however, is whether Coles is prejudiced by a lack of recollection in circumstances in which a proceeding was not commenced within the limitation period.

[49] I conclude that Coles would be materially prejudiced if Ms Costin was permitted to litigate that part of her claim which related to inadequate training.

[50] The principal issue is, then, whether the primary judge ought to have found a fair trial could not be had because of that prejudice. The relevant prejudice related to only one aspect of Ms Costin's previewed claim against Coles for breach of contract and breach of duty as her employer. That aspect assumes importance because it was the focus of Coles' argument about prejudice and why the discretion to extend time should not be exercised in Ms Costin's favour.

[51] To grant an extension of time without imposing conditions on Ms Costin being able to litigate that part of her claim which related to inadequate training risked an unfair trial. Ms Costin could swear that she was not given instruction on a point of detail. A trial judge might have some scepticism about whether she would recall such a point of detail so many years after the event. But there would be no competing evidence since none of the witnesses who Coles might call would be able to contradict her on that point of detail. The possible reception of evidence of habit from witnesses about their training routine does not meet the point about prejudice raised by Coles to the effect that witnesses who might be called by it to give evidence did not have any recollection of the detail of the training and instruction provided. Evidence of habit would simply be that, and the evidence of habit apparently available to Coles' was not evidence of habit in respect of matters of detail.

[52] A finding of material prejudice by the primary judge on the issue of instruction or training would not have compelled the conclusion that a fair trial could not be held or was unlikely. The relevant prejudice was only one aspect of Ms Costin's foreshadowed claim. Her claim had other important aspects to it, to which the asserted prejudice in respect of training and instruction does not apply. For example, part of Ms Costin's particularised claim related to Coles' duty to not expose her to a risk of damage or injury of which it knew or ought to have known, and to take reasonable care to ensure that the place at which she carried out her work was safe. These and other parts of its duty as employer and certain statutory duties were alleged to have been breached. Her second notice of claim alleged that Coles should have undertaken a job safety analysis to identify potential hazards and assess risks. There is no evidence that it undertook such an analysis of the obvious hazard identified in Ms King's affidavit whereby there was little space left between the two pallets. Ms King could readily understand how Ms Costin got her foot stuck. Ms Costin should be permitted to litigate such a claim in circumstances in which she reported the incident in a timely way, the incident was recorded and managers, including Ms King, were in a position to observe the hazard which caused her injury. Similar observations apply to other aspects of her foreshadowed claim, including the onerous nature of her duties and being required to work alone.

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8 *Hertess v Adams* [2011] QCA 73 at [11].

[53] Whilst it may not have been possible for Coles to have a fair trial of an issue in relation to the adequacy of Ms Costin's training and instruction because of actual and presumptive prejudice in relation to that aspect, this does not mean that a fair trial could not be had in relation to other aspects of the claim. I conclude that the primary judge erred in not concluding that there was a real possibility of significant prejudice in relation to Coles' defence of Ms Costin's claim insofar as it related to instruction and training. To the extent the primary judge erred in that regard, his discretion miscarried. The appropriate course would have been to grant the application on conditions which addressed the identified prejudice and thereby ensured a fair trial for both Ms Costin and her former employer.

[54] An appropriate condition would have been one whereby Ms Costin undertook to not litigate an allegation that she did not receive adequate training. Upon the hearing of the appeal, counsel for Ms Costin indicated that if this proved to be a critical aspect then he would obtain instructions from her.

[55] I consider that this aspect is important. Unless Ms Costin provides a suitably-worded undertaking which precludes her from litigating the issue of training and instruction, the appeal should be allowed and the application for an extension of time dismissed. The preferable course, however, is for an undertaking to be provided so that she may litigate those parts of her claim which are not the subject of significant prejudice.

[56] The parties should be given an opportunity to formulate a suitably-worded undertaking so as to enable the balance of Ms Costin's claim to be tried fairly.

Leave to appeal

[57] Ms Costin contended that Coles should have filed an application for leave to appeal because the order extending the limitation period is not one to which s 118(2) of the *District Court of Queensland Act* 1967 (Qld) applies. As a result, leave was required under s 118(3).

[58] Coles disputed that leave to appeal was required. It submitted that it had a right of appeal by virtue of s 118(2)(b) which allows a dissatisfied party to appeal if the judgment:

> "(b) relates to a claim for, or relating to, property that has a value equal to or more than the Magistrates Courts jurisdictional limit."

[59] In the alternative, Coles applied for leave to appeal and sought an extension of time to do so.

Is leave to appeal required?

[60] Coles argues that the judgment in question relates to a "claim for property" because it is a claim for damages for breach of contract and negligence. That claim represented a chose in action and thus formed part of Ms Costin's personal property. According to Coles, Ms Costin's chose in action, being her cause of action in contract and tort, had a value equal to or more than the jurisdictional limit of the Magistrates Court since her notice of claim for damages dated 8 October 2010 claimed damages in the sum of $598,205.54.

[61] The order of the District Court against which Coles appeals does not relate to a claim for property. It might be said to relate to a claim for monetary damages. The claim

foreshadowed by Ms Costin does not seek any order in respect of the property constituted by her cause of action in contract or tort, such as the transfer of that property, or a declaration concerning its ownership.

[62] Coles' submission that it has a right to appeal by virtue of s 118(2)(b) is inconsistent with the judgment of this Court in *Praxis Pty Ltd v Hewbridge Pty Ltd*.[9] That authority, which was followed in *Myles Thompson (a firm) v Coffey*,[10] is to the effect that s 118(2)(b) applies to judgments relating to claims for the recovery of land or other things *in specie* or their value, and not money claims in personal actions. The Court in *Praxis* stated:

> "The criterion adopted in s. 118(2)(b) is concerned not with simple money claims in personal actions like the present, which can be measured by the amount recovered by the judgment; but primarily with claims for the recovery of land or other things *in specie* or their value in actions for detinue and the like. The legislative history of s. 118 and its predecessor s. 92 of the Act bears this out. It is true that s. 118(2)(b) includes not only a claim 'for' property having the value specified but also to a claim 'relating to' property of that value. But the words 'relating to', although susceptible on occasions of a wide interpretation, take their meaning and colour from the context in which they appear."[11]

That case was concerned with an action to recover the amount of loss or damage caused by a contravention of the *Trade Practices Act* 1974 (Cth). The Court's reasoning applies to a claim for damages in a personal injury action.

[63] Coles submits that *Praxis* was wrongly decided because the Court was not referred to, and did not refer to, the definition of "property" in the *Acts Interpretation Act* 1954 (Qld). The definition of "property" which includes "things in action" does not particularly assist Coles' argument or persuade me that *Praxis* was wrongly decided. As I have noted, the order against which Coles seeks to appeal does not relate to a "claim for property". The claim is for monetary damages which, if awarded, will have an effect upon Ms Costin's chose in action or thing in action. But this does not alter the essential character of her foreshadowed claim as being a claim for damages. The judgment under appeal relates to a claim for damages, not a claim for property.

[64] Coles did not argue that the judgment in question "relates to a claim … relating to, property [in the form of a cause of action in contract and tort for damages for personal injury]." This is understandable since, as was pointed out in the course of argument, one is not concerned with a claim relating to a chose in action.

[65] Coles' argument confronts another difficulty. To determine whether there is a right of appeal under s 118(2)(b), one does not simply consider the amount claimed by way of damages. The subsection is concerned with the *value* of the relevant property. It may be relatively easy to establish the value of many kinds of property. The value of a claim for personal injuries is entirely different. One cannot simply say, as Coles' submissions do, that Ms Costin's chose in action, being her cause of action in contract and tort, has the value nominated by her in her notice of claim for damages. In order to place a value upon her cause of action in contract and tort one would need to assess her prospects and quantum. A claim with moderate prospects of success may have

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9 [2004] 2 Qd R 433 at 436 [8].
10 [2005] QCA 131 at [10].
11 [2004] 2 Qd R 433 at 436 [10].

a value which equates with a certain percentage of the quantum which might be assessed at the end of a trial. This might be the basis upon which the cause of action is valued in the course of settlement negotiations.

[66] The fact that Coles' interpretation of s 118(2)(b) would require a court in a case such as this to assess the value of an individual's cause of action and, in effect, conduct a preliminary determination of liability and quantum, is a good reason to reject it and to follow this Court's decision in *Praxis*. I conclude that Coles required leave to appeal.

Should leave to appeal be granted?

[67] Leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[12]

[68] Unless the appeal is allowed, Coles will be exposed to a claim that includes an alleged breach of duty arising from a failure to provide adequate training and instruction. Exposure to that aspect of Ms Costin's claim would occasion it significant prejudice in respect of a claim that was not commenced within the limitation period. Exposure to such significant prejudice jeopardises a fair trial and would expose Coles to an award of damages in the event that liability was established solely on that basis.

[69] In my view, the exercise of discretion miscarried in circumstances in which Ms Costin did not undertake to avoid the material prejudice which Coles would suffer in circumstances in which witnesses who might be called by it to give evidence on the issue of instruction or training did not have any recollection of the detail of the training and instruction provided. Leave to appeal should be granted to correct the injustice to Coles. That does not require, however, an order by this Court setting aside the order extending time, and ordering instead that Ms Costin's application for an extension of time be dismissed. As discussed, the relevant prejudice relates to only one aspect of her claim. It would be unjust to prevent Ms Costin from litigating other aspects of her claim in circumstances in which she has established the conditions required by statute for an extension of time and a case for the favourable exercise of the discretion.

[70] The identified injustice to Coles can be addressed by Ms Costin providing a suitably-worded undertaking to not prosecute that part of her claim which relates to the instruction or training provided to her by Coles. If such an undertaking is provided then the order extending the limitation period should stand.

[71] In my view, final orders in relation to the disposition of the appeal should depend upon the provision within a reasonable period, say 14 days, of a suitably-worded undertaking of the kind which I have described. The provision of such an undertaking will determine whether the order extending time stands or is set aside. Subject to that matter and submissions on costs in relation to the costs of the appeal and the costs at first instance, I would make the following orders:

1. The respondent's application filed on 16 April 2015 to adduce further evidence be granted.

2. The application for an extension of time in which to bring an application for leave to appeal be granted.

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12 *Pickering v McArthur* [2005] QCA 294 at [3].

3. The application for leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) be granted.

4. The appeal be allowed.

5. The parties file and serve within 14 days any undertaking by the respondent and submissions on further orders, including costs orders.