SUPREME COURT OF QUEENSLAND

CITATION:	*Israel Antonio Quintanilla v The Minister for Education of Queensland and Another* [2000] QSC 029
PARTIES:	**ISRAEL ANTONIO QUINTANILLA** (applicant) v **THE MINISTER FOR EDUCATION OF QUEENSLAND** (first respondent) and **THE STATE OF QUEENSLAND** (second respondent)
FILE NO:	681 of 2000 - Brisbane Registry
DIVISION:	Trial Division (Brisbane Registry)
DELIVERED ON:	2 March 2000
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2000
JUDGE:	Shepherdson J
ORDER:	**Application dismissed**
CATCHWORDS:	MASTER AND SERVANT – CONSTRUCTION OF STATUTES – *WorkCover Queensland Act 1996* – application under s305 of Act for leave to commence proceedings despite non-compliance with s280 – applicant is "a person mentioned in" s253(1)(a)(ii) of Act and therefore entitled to seek damages for injury – notice of claim under s280 can be given up to and including 30/3/2001 – comments on onus to produce evidence lying on persons seeking leave under s305. . *Bonser v Melnacis & Anor* [2000] QCA13 judgment8/2/2000 referred to
COUNSEL:	Mr J S Douglas QC with Mr Rangiah for applicant Mr Hoare for respondents
SOLICITORS:	Murphy Schmidt for applicant Bradley & Co for respondent

[1] **SHEPHERDSON J:** The abovenamed applicant has applied for leave pursuant to s305(1) of the *WorkCover Queensland Act* 1996 to bring a proceeding against the respondents despite non-compliance with the requirements of s280 of that Act.

[2] The application raises similar points to those raised by the application of *Ruiz* (No 847 of 2000). The applicant relies on two affidavits of Luke Thomas Murphy solicitor and partner in Murphy Schmidt solicitors who act for the applicant and the respondent relies on an affidavit of Dell Patricia Stevens.

[3] The material before me shows the following:

1. The applicant was first employed by the first respondent in 1994.

2. On 30 March 1998 the applicant signed an application for compensation (Exhibit LTM01 to Murphy's affidavit filed 28/1/2000). That application disclosed (inter alia):

   (i) the applicant speaks Spanish at home;

   (ii) the nature of the injury was said to be bilateral carpal tunnel syndrome (answer to Q21);

   (iii) the injury was said to have happened at South Brisbane State High School, Vulture Street, South Brisbane (Q23);

   (iv) Q24 "When did the injury happen?" was not answered but in response to Q29 asking "Did the injury happen?" followed by a series of boxes the applicant ticked the box "Over a period of time".

4. Murphy's affidavit material deals with matters occurring before and after 1 February 1997 on which date *WorkCover Queensland Act 1996* came into force.

5. On 10 June 1999 the applicant was assessed pursuant to ss196 and 197 of the *WorkCover Queensland Act 1996*.

6. Exhibit LTM05 is a copy letter dated 11 June 1999 from WorkCover's Medical Assessment Tribunals to Murphy Schmidt attaching a copy of the Tribunal's findings.

7. Exhibit LTM06 contains the findings and the closing part of the findings read:

> "The Tribunal determined that the worker has not sustained a degree of permanent impairment (1999). There is a complaint of pain in the left arm from the neck to the fingers and numbness of the fingers namely the little and ring fingers on the left side.
>
> Apart from this subjective pain and numbness involving the little finger and part of the ring finger in the left hand the Tribunal finds nothing abnormal on clinical examination of the left upper limb and neck.

> X-Ray of the cervical spine shows minor degenerative change commensurate with his age.
>
> The Tribunal is of the opinion that continuing symptomatology is due to the natural progression of the pre-existing condition of degeneration in the left upper limb."

8. The applicant was born on 30 November 1945.

9. The applicant's solicitors have obtained a report dated 9 July 1999 from Dr Gregory Couzens who specialises in surgery of the hand and wrist and micro surgery.

10. This report is Exhibit LTM07. ON 6/7/1999 Dr Couzens examined Quintanilla in the presence of an interpreter for the purposes of preparing his report. Dr Couzens listed 12 documents which were available to him. Almost all of those documents are not before me. In the "opinion and impairment" parts of his report Dr Couzens said:

"**Opinion:**

Mr Quintanilla has developed bilateral upper limb pain which he attributes to the nature of his work as a School Cleaner.

He has worked as a cleaner since 1991 and first complained of symptoms sometime around 1993.

He believes that the use of the industrial polisher is the cause of the problem.

Carpal tunnel syndrome is relatively common in cleaners due to a number of tasks they are required to perform. The use of the polisher may also have contributed to the carpal tunnel syndrome.

The right lateral epicondylitis could also be attributed to the prolonged lifting or static loading of the wrist whilst cleaning.

It is more difficult to attribute the ulnar nerve irritation at the elbow to the nature of his work. In most cases the ulnar nerve entrapment is idiopathic and no cause can be identified. Certainly there are risk factors such as resting the elbows on a hard or sharp surface for prolonged periods. It has also been suggested that working with the elbows flexed, or repetitive flexion and extension of the elbows can contribute to an entrapment neuropathy at the elbow.

If the industrial polisher was used with a repetitive flexion and extension of the elbows, as one might imagine that it could be, then it may have attributed to the development of the ulnar neuritis. I do not however recall being consulted by a Cleaner for a similar problem.

Impairment:

The symptoms related to median and nerve entrapment of the right wrist have resolved. The residual symptoms related to the epicondylitis and entrapment neuropathies account for a 6% impairment."

In my respectful view the above opinions rather tenuously suggest that Quintanilla's use of the polisher in his employment "may have contributed to the carpal tunnel syndrome" and that "if the industrial polisher was used with a repetitive flexion and extension of the elbows ... then it may have attributed to the development of the ulnar neuritis."

Furthermore, Dr Couzens states Quintanilla's belief that his bilateral upper limb pain is attributable to the "nature of his work as a school cleaner" and Quintanilla's belief that the "use of the industrial polisher is the cause of the problem".

It is significant that Dr Couzens does not state that he endorses Quintanilla's above beliefs.

Also before me is a copy report dated 27/5/1999 from Dr Fergus R Wilson an orthopaedic surgeon, provided to Education Queensland (Ex LTM04). This report does not disclose any work related cause for the complaint made to Dr Wilson viz persisting discomfort in the form of numbness in the right and left fifth and fourth digits. Dr Wilson's report was one of the documents available to Dr Couzens and mentioned in Dr Couzens report Exhibit LTM07.

11. Exhibit LTM08 to Murphy's affidavit filed 28/1/2000 is a copy of a notice of assessment by WorkCover dated 4 March 1999 in which the applicant was offered payment of lump sum compensation in the amount of $4,625. Exhibit LTM08 shows that the injury was "right upper limb" and date of injury was "30/03/98". The injury mentioned in LTM08 is a non-certificate injury and the notice of assessment required the applicant Quintanilla to make a decision about the degree of permanent impairment and to indicate his decision by ticking either box A or box B in the notice. The degree of permanent impairment was said to be 5 per cent and WRI to be 4 per cent.

12. According to Murphy's affidavit filed on 28 January 2000:

> "the applicant has deferred the offer and my firm is presently investigating the applicant's claim for common law damages. To protect the applicant's right to claim common law damages <u>for injuries sustained during the course of his employment between 1 February 1997 and 27 March 1998</u> we seek leave to bring a proceeding against the respondents despite non-compliance with the requirement of s280 of the *WorkCover Queensland Act* 1996.
> (the underlining is mine)

13. The notice of assessment (LTM08) was not the only notice of assessment which the applicant received. An affidavit of Dell Patricia Stevens a Damages Case Manager in the employ of *WorkCover* shows:

    (i) another offer of lump sum compensation was made by WorkCover to the applicant on 4/3/1999. This was also for "Permanent Impairment from Injury" being a left wrist injury and was a non-certificate injury. A copy of this notice of assessment (Exhibit DS1 to Stevens' affidavit) shows the date of injury to be 30/03/98 and

the injury to be "left wrist"; degree of permanent impairment attributable was said to be 0 per cent, the WRI is 0 per cent and the amount of lump sum compensation to which the applicant is entitled is 0 per cent. The applicant has ticked a box on Exhibit DS1 stating that he disagrees with the degree of permanent impairment. He signed this box B on 1 April 1999.

(ii) Exhibit DS2 to Stevens' affidavit is a copy of the reference to the Orthopaedic Assessment Tribunal dated 10 June 1999.

(iii) Exhibit DS3 to Stevens' affidavit is a copy of a third notice of assessment issued by WorkCover to the applicant. It is dated 29 June 1999. It was in respect of "Permanent Impairment from Injury" and was for a non-certificate injury. This certificate mentions two injuries – injury 1 "Left upper limb" and injury 2 – "Right upper limb". This certificate shows "date of injury: 30 March 1998".

(iv) The certificate shows the following:

"The degree of permanent impairment attributable to the injury 1 ... is 0.00 per cent. The WRI is 0.00 per cent.
The degree of permanent impairment attributable to the injury 2 ... is 5.00 per cent. The WRI is: 4.00 per cent.
The amount of lump sum compensation to which you are entitled is $4,625."

(v) The third notice of assessment shows an offer of lump sum compensation in the amount of $4,625. The applicant has not decided whether to agree or disagree with the degree of permanent impairment.

13. I note that Exhibit DS2 commenced by saying:

"The abovenamed, born 30 November 1945 applied for compensation on 30 March 1998 in respect of a condition certified as 'carpal tunnel syndrome' which he attributed to his employment as a cleaner with Education Queensland – Brisbane State High School ."

Exhibit DS2 later referred to the application for compensation dated 30 March 1998 and said "the application for compensation was accepted and compensation paid from 31 March 1998 to 1 April 1999."

14. The second affidavit by Murphy filed 3 February 2000 speaks of the applicant having sustained injuries to his neck and shoulders in a motor vehicle accident on 8 September 1998. It goes on to say that the applicant has instructed Murphy that his work related injuries may have been aggravated as a result of the motor vehicle accident, that until the injuries which the applicant has sustained in a motor vehicle accident are completely investigated by appropriate medical specialists the applicant is not in a position to address adequately the issues required to provide a compliant notice of claim of damages under s280 and in particular those

issues required by regulation 74(1)(f)(g) and (h) of the *WorkCover Queensland Regulation* 1997.

[4] This application is very similar to that of *Ruiz* (No 847 of 2000) in which I am delivering judgment today. Quintanilla suffered injury on 30/3/1998 which was a date after *WorkCover Queensland Act* commenced. He has received notices of assessment for those injuries. He is entitled to seek damages for those injuries suffered on 30/3/1998 because he is eligible under s253(1)(a)(ii) and he has received a notice of assessment from WorkCover (s259(1)). In respect of Injury 1 described in Exhibit DS3 ss259(2) and (3) do not apply. However in respect of Injury 2 described in Exhibit DS3 for which he was offered $4,625 lump sum compensation those subsections apply. Quintanilla has not signed any of the election boxes in Exhibit DS3. It seems that he must be taken to have deferred the decision whether to accept, reject or defer (see s207(4)).

[5] In so far as concerns the injuries of 30/3/1998 where the time limitation period expires on 30/3/2001, the applicant has not attempted to give a notice of claim under s280, apparently for the reasons stated in Murphy's second affidavit filed 3/2/2000.

[6] If the applicant were to obtain leave under s305 to bring proceedings in respect of the 30/3/1998 injuries those proceedings would be on condition that they will be stayed until the applicant had complied with parts 5 and 6 of Chapter 5 and time limits would be imposed within which a notice of claim must be given. It seems to me that with the time limitation for that action expiring in about 13 months time there is no valid reason why the applicant could not have given the s280 notice of claim complying as best he could with the requirements of reg.74 of WorkCover Queensland Regulations despite the subsequent motor vehicle accident. He still has plenty of time to give such a notice before 30/3/2001. I would refuse the application in so far as it relates to the injuries of 30/3/1998.

[7] I refer now to the extract from Murphy's affidavit filed 28/1/2000 which I quoted earlier (see p4 (item I2) ante). The reference there to common law damages I take to mean a claim at common law for damages for personal injuries caused by alleged negligence or breach of statutory duty of the respondents.

[8] As I have already pointed out there is no evidence to prove that on the balance of probabilities Quintanilla suffered injuries during the course of his employment by the first respondent between 1/2/1997 and 27/3/1998. Dr Couzens' report does not discharge the burden of proving a causal nexus between the applicant's alleged injuries and his work.

[9] In my view a person who seeks damages for an injury sustained by himself or herself and who has not lodged an application for compensation for the injury and seeks to prove entitlement within s253(1)(c) must, on an application under s305 provide evidence showing a prima facie causal nexus between the injury and the workplace in which it is said the injury was suffered as well as prima facie evidence of negligence or breach of statutory duty.

[10] It is not the legislative intent of *WorkCover Act* that in the absence of such evidence leave under s305 to begin a proceeding should be lightly given. At first blush

Section 305 may appear to offer the possibility of starting an action when all the applicant has is a hope that perhaps by the time the action comes to trial, he or she will be in a position to prove on the balance of probabilities the causal nexus between the injury complained of and the work being performed by the applicant at the time of the injury as well as negligence or breach of statutory duty

[11] Consideration of the *WorkCover Queensland Act* has shown that that Act has revolutionised the law applicable to projected claims by would-be plaintiff workers against employers for damages for personal injuries caused by alleged negligence or breach of statutory duty of or by the employer. The Act has erected a number of hurdles to be cleared by would-be plaintiffs before becoming entitled to start the proceedings for damages. I mention as one hurdle "PART 5 – Pre-Court Procedures" the object of which is, as s279 says – "to enable WorkCover to enter into early negotiations with claimants to achieve early resolution of claims for damages before the start of proceedings". Proof that a would-be claimant falls within a class in s253 is another of these hurdles.

[12] In my respectful view the present application is one where the applicant has nothing more than hope in respect of the alleged injuries referred to in Murphy's affidavit.

[13] I therefore dismiss the application and shall hear from the parties on costs.

[14] I add that in reaching my decision in this case, I have taken account of the views expressed by the Court of Appeal in *Bonser v Melnacis* (2000) QCA 13 judgment 8/2/2000 as to the effect of the *WorkCover Queensland Act.* I have not repeated in the present reasons those sections of the Act set out in *Bonser* and in my decision in *Gamero* (ante).