SUPREME COURT OF QUEENSLAND

CITATION:	*Maddern v Woolworths (Qld) P/L* [2002] QSC 275
PARTIES:	**RICKY ALBERT JAMES MADDERN** (applicant/plaintiff) **v** **WOOLWORTHS (QUEENSLAND) PTY LTD** ACN 000 034 819 (respondent/defendant)
FILE NO/S:	284 of 2002
DIVISION:	Supreme Court
PROCEEDING:	Application to Extend Time Application to Commence Proceedings
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	12 September 2002
DELIVERED AT:	Townsville
HEARING DATE:	10 September 2002
JUDGES:	Cullinane J
ORDER:	**1. Period extended within which to institute proceedings against the respondent in respect of an injury sustained by the applicant on 6 February,1997 in the course of his employment with the respondent so that it expires on 13 September 2002.** **2. Applicant given leave pursuant to s 305 of the *WorkCover Queensland* Act 1996 to commence proceedings in respect of the said injury on the condition that the applicant comply with the requirements of Chapter 5 of the said Act.** **3. The applicant to pay the respondent's costs of and incidental to the application including reserved costs to be assessed.**
CATCHWORDS:	LIMITATION OF ACTIONS – PERSONAL INJURIES – EXTENSION OF TIME – KNOWLEDGE OF MATERIAL FACTS – whether material facts relied upon were within the applicant's means of knowledge prior to date when injury

was sustained – where applicant went back to work following recovery - whether applicant acted unreasonably in not taking matters further – whether fair trial possible on the evidence

WorkCover Queensland Act 1996 (Qld), s 305
Limitation of Actions Act 1974 (Qld), s 31(2)(b)
Evidence Act 1977 (Qld), s 92

Healy v Femdale Pty Ltd (CA 37 of 1992, 9 June 1993)

COUNSEL: A Moon of the applicant/plaintiff
M O'Sullivan for the respondent/defendant

SOLICITORS: Connolly Suthers for the applicant/plaintiff
Hunt & Hunt for the respondent/defendant

[1] The applicant seeks an order extending the limitation period within which to institute proceedings against the respondent so that it expires on 13 September, 2002. The applicant also seeks an order pursuant to s 305 of the *WorkCover Queensland Act* 1996 granting leave to commence proceedings in respect of the relevant injury.

[2] The considerations, it was accepted, which arise on both applications are the same and if an order is made extending the period of limitation then an order should be made under s 305.

[3] The applicant sustained an injury to his right knee in the course of his employment with the respondent at its Bowen supermarket on 6 February 1997. He was at the time an apprentice butcher.

[4] According to his affidavit he had been working in the butcher shop in the supermarket and in order to access a toilet, it was necessary for him to go to the second floor of the building. He left the supermarket, walked down an alleyway, and then walked up three flights of stairs to the second floor where the toilet was situated. He was wearing gumboots and used hot water from a high pressure hose to clean the soles of his gumboots to remove any fat or debris. This is what he had been instructed to do.

[5] After going to the toilet and on his way back down the stairs his right foot slid off the end of one the steps and he fell to the floor on his right foot which took the weight of his body.

[6] He says that he heard a crunch and found that he could not get off the floor. He was experiencing a good deal of pain in his right knee.

[7] He says that there were no witnesses to the incident. He called out and another employee who was working near the stairs came on the scene (one Helen Paul). She requested first aid assistance and one Lyn Carroll (an administration officer)

came on the scene. Shortly afterwards the meat unit manager (Michael Hart) came along.

[8] The Applicant has expressed the opinion that his foot slipped because the tread pad on that step was worn and smooth in the middle. This, if I understand him correctly, was common to the tread pads on the stairs. They were approximately two inches wide and extended across the width of the stairs. At the edges, there was some tread but the pads were worn away and smooth in the middle.

[9] The Plaintiff was away from work for about three months during which time he had surgery. He says that when he returned to work all of the slip pads on the stairs had been replaced, both on the set of stairs that he slipped on and on other stairs. He says that there was also a policy introduced prohibiting people wearing gumboots outside of the meat department. So that, if someone wished to access the toilet in the way in which he did, it would be necessary for them to take their gumboots off and leave them outside before climbing the stairs.

[10] There is a report of Kenneth Leslie King who is a safety engineer. Photographs of the stairs are available and were provided to Mr King. In his report he expressed the view that there were three factors which gave rise to the risk of somebody slipping and falling in the circumstances in which the Applicant did fall. The stairway was at the minimum dimensional range recommended by a number of standards and a person wearing unusually bulky footwear such as gumboots would be at some additional risk of slipping and if there was an inadequate nosing strip this would have increased that risk. As I have said the Applicant has expressed the opinion that his foot slipped off a tread pad which was worn and thus had no or little resistance.

[11] Mr King was subsequently shown a copy of a plan of the stairs prepared by a draftsman. He prepared a further brief report which effectively reiterated what he had said in his earlier report.

[12] The Respondent accepts that the requirements of s 31(2)(b) have been made out.

[13] The Applicant was referred by his general practitioner to Dr Low, an orthopaedic surgeon of Townsville. He was seen to be suffering from a tear of the medial meniscus and a rupture of the anterior cruciate ligament. These problems were identified on arthroscopy.

[14] There was some delay in obtaining full mobility and he was informed that he needed to perform exercise. The Applicant returned to work after four months and thereafter worked as a butcher without any time off. He says, and I accept, that he returned to playing football for some time until the competition ceased and he also engaged in boxing and boxing training.

[15] He says that he had occasional symptoms of pain, particularly in cold or wet weather but did not otherwise suffer any ongoing consequences of the injury.

[16] There was evidence from his former wife, Lainie Frew. She swore an affidavit and was cross-examined. She said that after the 1992 incident the Plaintiff made regular and ongoing complaints of pain in the knee and that she would, at his request,

provide a hot covered pack to assist him with the pain. She says that he also wore a knee guard, particularly after exercise. Her description of his symptoms after he returned to work would have him suffering much more in the way of pain than he said in evidence. There is obviously bad blood between the Applicant and his former wife. Having heard the evidence I am inclined to accept that the truth of the matter is closer to what the Applicant has said. I think Ms Frew has exaggerated the complaints the Applicant made. Ms Frew acknowledges that the Plaintiff's inability to get around was not impeded and that he did not seek treatment. I accept what the Plaintiff says about his symptoms.

[17] On 3 July 2001 he was at work at the Respondent's supermarket helping unload meat in a cold room. He was unloading cartons which were on a pallet and which weighed about 25 kilograms each. The cartons were picked up by blue plastic straps around them. He says that as he lifted one of these cartons he started to move in the direction of a shelf where it was to be placed. As he stepped towards his left his right knee "just crunched and popped". He says that he felt pain straight away and dropped the carton.

[18] He saw his general practitioner who referred him again to Dr Low.

[19] He underwent an arthroscopy on 1 September 2001 and a high tibial osteotomy was performed by Dr Low on 3 November 2001.

[20] I have reports from Dr Low and Dr Maguire, both of whom were cross-examined. It is clear that the Applicant now has a serious disability of the knee and it is likely that the Applicant will have to cease working as a butcher. He limped markedly in court.

[21] Both Dr Low and Dr Maguire expressed the view that the Applicant's current disability is causally related to the injury in 1997. Dr Low in a report and Dr Maguire in his evidence expressed the view that this was the primary cause of his present condition. However in cross-examination, Dr Low was asked some questions based upon medical records of a Dr Hudson who saw the Applicant in 1995 and in which it was recorded that the Applicant had suffered an injury to the right knee whilst playing football and that there was observed some "laxity of the cruciates". Dr Low expressed the view that if this was so, that could be regarded as the initiating process which caused the degenerative change he saw in 1997 and which culminated in the 2001 damage. Nonetheless even on this view, Dr Low was of the view that the 1997 incident was a significant factor in the Applicant's current condition.

[22] The Applicant denies that he suffered any injury to his right knee in 1995 but says that he suffered an injury to his left knee and says that this was operated on by Dr Gibberd, an orthopaedic surgeon. There was no affidavit from Dr Gibberd before the court.

[23] The evidence satisfies me that the material facts of a decisive nature relied upon, namely that the 1997 incident was a cause of the Applicant's present serious condition and the consequent restrictions upon his capacity to work were not within his means of knowledge prior to 13 September 2001.

[24] This is a case in which the Applicant after suffering an undoubtedly significant injury in 1997 managed after treatment to return to work and performed his work without any difficulties and resumed quite vigorous physical activity such as boxing and football. He did not thereafter have any time off work until July 2001.

[25] The remarks of the Court in *Healy –v- Femdale Pty Ltd* (CA 37 of 1992, 9 June 1993) are applicable here:

> "It is difficult to say that a person who finds herself able to get on with life, and returns to employment without significant pain or disability fails the test merely because she fails to ask for opinions from her doctor about the prospect of future disability or effect upon her working capacity. There is no requirement to take 'appropriate advice' or to ask appropriate questions if in all the circumstances it would not be reasonable to expect the Plaintiff to have to do so."

[26] The Applicant, in my view, was justified in not pursuing legal advice in respect of the 1997 incident given that he had suffered no significant loss, his loss of earnings and medical expenses being met by WorkCover. He did not, in my view, act unreasonably in not taking matters any further at that time.

[27] The Respondent contends that the application should fail on discretionary grounds.

[28] This issue focussed on two matters. The first concerns evidence of injuries to the Applicant's right knee prior to 1997. There is evidence that the Applicant saw a medical practitioner in 1990 complaining of pain in the right knee. He says that he has no recollection of this. The second relates to a matter already mentioned, namely an attendance on a doctor in 1995 in which he is said to have complained about an injury to the right knee at football and in respect of which he was referred to physiotherapy. As already mentioned the Applicant denies any such injury and says that he sustained an injury to his left knee which resulted in surgery. The physiotherapist who treated the Applicant on one occasion, cannot according to material before the Court, be found. However both of the medical practitioners concerned (Dr Johnson in 1990 and Dr Hudson in 1997) are available as are their records. No doubt the provisions of s.92 of the *Evidence Act* can be used to have the physiotherapist's records placed before the court if after the taking of appropriate steps his whereabouts at that time are not able to be established. It can hardly be expected that he would have any personal knowledge of the matters contained in the records.

[29] In my view the evidence demonstrates that so far as this issue is concerned there is no impediment to a fair trial of it.

[30] The second issue concerns the Applicant's claim that the tread had been worn away and that upon his return to work, all of the steps had new tread pads.

[31] The Applicant in one of his affidavits refers to a number of people who were employed at the supermarket at the relevant time. The Applicant reported the matter and the relevant Workers' Compensation documentation was completed. This refers to the incident in general terms and no reference is made to any

inadequacy of the tread although what the Plaintiff says he was doing and the particular step from which he fell are specified.

[32] There are affidavits from a number of employees or former employees to the effect that they do not now recall whether the treads had been changed.

[33] According to an affidavit of Mr Deboni the store manager at the Respondent's supermarket in Bowen, any maintenance requests for work to be done are only held for 18 months after completion of the work and are then destroyed. Because of this, there are no records in the Respondent's possession in relation to any work which might have been performed on the stairs subsequent to the incident in 1997.

[34] One of the deponents (one Helen Rae Paul) recalls the incident in the sense that she recalls hearing a noise and going out to find the Applicant laying upon the ground. She called upon another employee to come and assist.

[35] She deposes:

> 5. *"With respect to the stairs, the location of the alleged incident, I do not have any recollection if the slip pads in question were changed directly after the incident."*
>
> *6. I do recall the slip pads being changed on the stairs at some point. However I cannot remember whether it would have been before or after the said incident."*

[36] A co-employee, one Lynn Violet Caroll, who recalls being called to the incident site and taking some details says that she has no recollection of inspecting the slip pads on the stairs and does not recall if they were changed shortly after the incident although she recalls that the slip pads on other steps were replaced at some point.

[37] As I have said, the Applicant identified a number of people who were in the area at the time. These included the assistant manager who he says is still employed by Woolworths or an associated company. Although affidavits have been obtained from a number of the persons mentioned (including Paul and Carroll) no affidavit has been obtained from him and there is nothing to indicate that he has been approached about the matter. Lainie Frew, the Applicant's ex-wife is employed by the Respondent and was at the relevant time. She worked at the supermarket at the time and witnessed the applications for compensation. Her affidavit is directed only to the question which has already been referred to, that is, the Applicant's complaints between the time of the 1997 incident and when they separated in 1999 and does not address the question of the alteration to the treads. It may be that this is merely an oversight and that she has not been asked about the subject. It is however, reasonable to infer that there are witnesses who might be able to help who have either not been asked or do not assist the Respondent's position.

[38] Another deponent who was called, one Alan Reck, is a contract cleaner for the Woolworths Bowen store and has been for some seven years. He was a cleaner at the time of the incident. There is some evidence that he told the Applicant and in a separate conversation the Applicant's wife, that he recalled the incident and he recalls the slip pads being changed shortly after that. Reck in his affidavit, says that he has no recollection of the slip pads being replaced.

[39] In cross-examination he said that he has some rather vague recall of the pads being changed but as there was no record in his diary where he would have expected it to be noted he could not be sure. He says that he has no recollection of telling the Plaintiff that he could recall the pads being changed.

[40] The Applicant's wife, in her affidavit, says that Reck told her in a conversation that the slip pads had been replaced shortly after the Applicant's injury and that he was prepared to provide an affidavit to that effect.

[41] She says that on the following day Reck telephoned her at home and told her that he did not want his name mentioned in the Applicant's application as he was concerned he might lose his contract with Woolworths if it was. She says that he went on to say that he would deny that he had had any conversation with her or the Applicant about the replacement of slip pads if he was asked about it in court. He admitted that he had said this.

[42] It is sufficient for the purposes of this application to say that on my assessment of Reck it is probable that if called as a witness he is in a position to provide helpful evidence on this subject.

[43] When the whole of the evidence on this fairly narrow subject is considered I am satisfied that a fair trial on this issue can still be had if the limitation period is extended.

[44] I extend the period within which to institute proceedings against the respondent in respect of an injury sustained by the applicant on 6 February, 1997 in the course of his employment with the respondent so that it expires on 13 September, 2002. I give the applicant leave pursuant to section 305 of the *WorkCover Queensland Act* 1996 to commence proceedings in respect of the said injury on the condition that the applicant comply with the requirements of Chapter 5 of the said Act.

[45] I order the applicant to pay the respondent's costs of and incidental to the application including reserved costs to be assessed.