SUPREME COURT OF QUEENSLAND

CITATION:	*Looby v State of Queensland* [2003] QSC 092
PARTIES:	**BRIAN LOOBY** (Plaintiff/Applicant) v **STATE OF QUEENSLAND** (Defendant/Respondent)
FILE NO/S:	S.475 of 2002
DIVISION:	Trial
PROCEEDING:	Application for extension of time
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	2 April 2003
DELIVERED AT:	Townsville
HEARING DATE:	31 March 2003
JUDGES:	Cullinane J
ORDER:	**Application is dismissed with costs to be assessed**
CATCHWORDS:	LIMITATION OF ACTION – PERSONAL INJURIES – EXTENSION OF TIME – KNOWLEDGE OF MATERIAL FACTS – plaintiff suffered abdominal pains in 1997 – symptoms did not subside – plaintiff eventually diagnosed with spondylolisthesis – plaintiff given opinion in 2002 that initial failure to identify cause of his symptoms was negligent – whether opinion in 2002 should have led a reasonable person to institute proceedings EVIDENCE – WITNESSES – expert evidence – opinion given by a witness with chiropractic and scientific qualifications but with no medical qualifications – whether evidence about an issue that is medical in nature may be admitted when given by a witness who has no medical qualifications

Limitation of Actions Act 1974 (Qld) s 31(2)(a), s 31(2)(b)

Commissioner for Government Transport v Adamcik (1961) 106 CLR 292, considered

COUNSEL: A Moon for the Plaintiff/Applicant
C Fitzpatrick for the Defendant/Respondent

SOLICITORS: Connolly Suthers for the Plaintiff/Applicant
Tress Cocks & Maddox for the Defendant/Respondent

[1] The plaintiff was born on 30th June 1960. These proceedings were instituted on 17th June 2002.

[2] In late August and early September in 1997 the plaintiff developed symptoms in the abdomen. He attended his general practitioner who arranged for him to be admitted to the Mount Isa Base Hospital. He was admitted to the hospital on or about 10th September. According to a report provided by the then Acting Deputy Director of Medical Services who saw the plaintiff and which is dated 28th November 2002;

> *"Mr Looby complained of being unwell for about 10 days, he described eating spaghetti bolognaise on 31st August 1997, later he went to work and developed severe cramping abdominal pain, followed by marked urgency of his bowel, passing a very loose stool. --- subsequently he had worsening abdominal pain, cramping and squeezing in character moving around his abdomen ---."*

[3] Investigations did not reveal any cause. It was thought that the initial symptoms had been caused by food poisoning but no explanation could be found for the persisting abdominal pain.

[4] The plaintiff continued to suffer from these symptoms and subsequently after he moved to Townsville he presented at the Townsville General Hospital on 26th December 1997, complaining of them.

[5] There is a report of Dr Masson, the Director of Gastroenterology at the Townsville General Hospital at the time. This report has been provided to the solicitors for the respondents. Investigations including biopsy failed to reveal any cause for the symptoms. A psychiatric assessment was obtained.

[6] The plaintiff says that he was told that his condition was a somatic disorder.

[7] The symptoms did not subside and he saw his general practitioner who in time referred to him Dr Low, an orthopaedic surgeon. Dr Low diagnosed him as having a spondylolisthesis at L5 and operated on him. In fact, he has carried out, it would seem, three procedures, the first in June 2000 and the last in August 2001.

[8] It does not appear that the plaintiff has gained any real relief from the procedures which include a fusion.

[9] The plaintiff at all times, it would seem, suspected that his ongoing acute abdominal symptoms were spinally derived. There had been no change in these symptoms and he had at all times suspected that the cause was the same. It is common ground that in late 1999 the plaintiff received advice from a general practitioner that he was suffering from a spinal problem.

[10] The material fact of a decisive nature relied upon is that until a report was obtained from Dr Giles which is dated 11th March 2002, the plaintiff was not aware that the failure to identify the cause of his symptoms was negligent. Dr Giles expresses this view in the report which was obtained by the plaintiff's solicitors.

[11] Dr Giles, whose qualifications I will refer to shortly, was at the time the Director of the Multi-Disciplinary Spinal Pain Unit at the Townsville General Hospital. The plaintiff had commenced to attend there, seeing another doctor, Dr Winter. He did not see Dr Giles initially. However after some discussion with some friends he mentioned to Dr Giles his concern that he had been misdiagnosed and that he was thinking of legal proceedings and he shortly after that saw a solicitor. The report was provided to those solicitors shortly afterwards.

[12] Two principal issues arise.

[13] Firstly, there is an issue whether (assuming the material fact alleged) this was within the plaintiff's means of knowledge prior to the relevant date which is 17th June 2001. It is said on behalf of the defendant that the plaintiff (who was cross-examined before me), having been informed that his condition was (as he had suspected) at all times derived from the spine, ought to have sought advice as to whether the failure to establish this was or might have been negligent. That is, it was said that he should have sought advice in the way that he did at the end of 2001 and the beginning of 2002.

[14] The second issue is as to the admissibility of Dr Giles' opinion that there was a failure to exercise proper care in the investigation of the plaintiff's symptoms when he presented at the Mount Isa Hospital and subsequently the Townsville Hospital, and that if proper care had been taken then the spondylolisthesis would have been established. There is evidence that x-rays taken in late 1997 show a spondylolisthesis. Dr Giles' evidence is that the symptoms presented should have suggested referred pain from the back which should have been investigated.

[15] Dr Giles has impressive qualifications but he does not have any medical qualifications. He has a Doctorate of Chiropracty from Canada, a Master of Science from the Faculty of Science at the University of Western Australia and a Ph.D in the Faculty of Medicine at the University of Western Australia's Department of Anatomy and Human Biology.

[16] He describes himself as a clinical anatomist specialising in spinal problems.

[17] He has published extensively in this field and he has held senior positions in various institutions including universities and government departments. As I have said, he was at the time the plaintiff spoke to him the Director of the Multi Disciplinary Spinal Pain Unit.

[18] If his evidence is not admissible then the plaintiff's application must fail. Whether the matter is considered by reference to section 31(2)(a) or 31(2)(b), this must be the result. The material fact of a decisive nature to which I have referred depends upon his opinion and there can be no basis for the making of an order unless there is evidence of the existence of the material fact relied upon. Similarly for the purposes of section 31(2)(b) there must be some evidence that can be pointed to, to establish the right of action apart from a defence founded on the expiration of the period of limitation.

[19] In this case the evidence in each case comes from Dr Giles.

[20] The subject matter of the evidence is plainly one requiring, if it is to be received, evidence of somebody with the necessary qualifications to qualify him as an expert.

[21] More specifically, the subject is, obviously enough, what might reasonably be expected by way of investigation of a medical practitioner where a patient has presented with such symptoms. I was not referred to any authority by either counsel on the subject. The matter falls to be determined by reference to general principle.

[22] In my view, the issue is plainly a medical one and for an opinion on the subject to be admissible the expert must have medical qualifications. Whilst as Windemeyer J said in *Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292 at 302:

> *"It would be going too far to say that any legally qualified medical practitioner is to be regarded as sufficiently qualified as an expert to express an opinion upon any matter of medical science',*

in this case it is not necessary to go anything like that far.

[23] This finding is fatal to the plaintiff's application.

[24] I think also that the plaintiff has failed to establish that a reasonable person in his position would not have sought advice earlier as to whether there had been any negligence in his treatment. He was, as I have already said, aware as early as late 1999 that his problems were spinally derived but did not seek any advice as to whether there any been any failure to take proper care until late 2001, early 2002 when he spoke to Dr Giles and then saw solicitors. Whilst it can be readily understood that, as he said, his focus was on obtaining a cure of or some relief for his acute symptoms, this cannot be a complete answer to what is raised against him in this regard.

The limitation period would not have expired until the second part of 2000 so far as the conduct of medical staff at the Mount Isa Hospital is concerned and the end of 2000 so far as the conduct of the medical staff at the Townsville Hospital was concerned. I think that it is not possible to conclude that the plaintiff has established that a reasonable person, given what was known to the plaintiff, would not have sought advice as to whether there had been negligence on the part of those responsible for his care at those hospitals, with the consequence that proceedings would have been instituted earlier.

[25] In these circumstances the plaintiff's claim must fail. A further issue was raised relating to what is said to be the absence of any evidence of an entitlement to damages, or at least damages of any significance. It is not necessary to consider this issue.

[26] The application is dismissed with costs to be assessed.