SUPREME COURT OF QUEENSLAND

CITATION:	*Maconachie v Woolworths Limited & Anor* [2005] QSC 249
PARTIES:	**LEONIE MACONACHIE** (Applicant) v **WOOLWORTHS LIMITED** **(ACN 000 014 675)** (First Respondent) **WOOLWORTHS (QLD) LTD** **(ACN 000 034 819)** (Second Respondent)
FILE NO/S:	420 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	9 August 2005
DELIVERED AT:	Cairns
HEARING DATE:	4 August 2005
JUDGE:	Jones J
ORDER:	**1. The application to extend time to 9 September 2003 is allowed.** **2. The costs of and incidental to this application are to be assessed on the standard basis, as costs in the cause.**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS AND PROCEEDINGS GENERALLY – PERSONAL INJURY CASES – application for order pursuant to s31 *Limitation of Actions Act* 1974 that the period of limitation be extended – applicant suffered injury while working in respondents' store – applicant undertook surgery to ameliorate injury – applicant awaited outcome of surgery before making claim – whether negative outcome of surgery and poor prognosis following surgery constitutes a material fact of a decisive character
COUNSEL:	Mr M Glenn for the applicant Mr G Houston for the respondents
SOLICITORS:	The Law Office for the applicant

Bolton Cleary & Kern Lawyers for the respondents

[1] On 9 September 2003 the applicant commenced proceedings against the respondents, her employer, claiming damages for personal injuries sustained during the course of her employment between late 1990 and October 2003. She seeks by this application to extend the time within which to commence the proceedings pursuant to the provisions of s 31 of the *Limitation of Actions Act* 1974 ("the Act").

[2] The respondents do not contest that the applicant suffered work-related injuries during the course of her employment, nor do they suggest that they would suffer any prejudice by the granting of the extension sought. The respondents also acknowledge that there is evidence to establish a right of action as required by s 31(2)(b) of the Act, except for any injury sustained between 1 July – 20 December 2001. That exception is raised because the applicant has not complied with the various procedural requirements of the amending Act which came into force on 1 July 2001. This reservation by the respondent is of small moment because for all but three months of that period the plaintiff was not working so as to undergo treatment for her injured wrists.

[3] The only issue which falls for determination is the time at which a material fact of a decisive character came to the knowledge of the applicant. The applicant contends that this was reached only after the results of surgery undertaken on 23 August 2002. The respondent contends that the material facts were known by May 2002 when the applicant received an assessment from Dr Pozzi, orthopaedic surgeon, as to the prospects of success of that surgery. For the plaintiff to succeed a decisive fact must have come to her knowledge only after 9 September 2002.

Background facts

[4] The plaintiff first suffered symptoms of pain and tingling in her wrists and hands some time after June 1997. Up to that time she had worked continuously for the respondent save for a period of maternity leave between February 1994 and January 1995. In June 1997 the applicant took over the duties of one Christine Lockyer, which involved the wrapping of trays and meat at a wrapping machine in one of the respondent's stores in Cairns. This task required repetitive wrist actions whilst

standing at the machine. The plaintiff worked fulltime in this position, 8 hours a day, 5 days per week.

[5] After working in this position for some time the plaintiff experienced in her hand and wrists symptoms of pain and tingling which became increasingly severe. She sought medical opinion which led initially to conservative treatment followed by surgical intervention in the form of carpal tunnel release on both of her wrists on 16 August 2001.

[6] The surgery completely relieved the symptoms in her right hand but not in her left. The plaintiff returned to work on 22 October 2001 with altered duties in the hope that the symptoms in her left hand would settle over time. When this did not happen she again consulted medical practitioners, leading to her referral to Dr Pozzi, orthopaedic surgeon, in May 2002.

[7] Dr Pozzi recommended she undergo revision surgery on her left wrist. To the applicant he expressed the view that the operation "had a 50/50 chance of working but if not undertaken…(the condition) will gradually deteriorate".[1] The applicant had a positive outlook about the proposed surgery. In evidence the following exchange occurred:-

> "And in May of 2002 you were advised by Dr Pozzi that the further surgery could well be a failure and your symptoms will get worse and obviously you'd have to stop work?—No, he said to me that there was a 50/50 chance that the surgery would be successful---
>
> Which meant? --- but he was still very positive and I took the positive side of the --- the 50 that it would be successful and I wouldn't have any more problems.
>
> Which meant also there was a 50/50 chance that the operation would be unsuccessful and you'd have to stop work? --- Well, I didn't want to think about that. I wanted it to be successful.
>
> Yes. Well, that's what I'm going to put to you right now, is that at that stage after you'd spoken to Dr Pozzi, surely you realised that your working capacity, your earning capacity was at serious risk and that was a time to go and see a solicitor about making a claim? --- No, I -- I wanted to have the operation and I was hoping that the operation would be successful."[2]

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1 Transcript at p 2

2 Transcript at p 13

[8] The applicant submitted to the procedure on 23 August 2002 which unfortunately did not improve her condition. She returned to work as a checkout operator on part-time basis (three hours per day) and thereafter continued to seek avenues for further treatment.

[9] She first contacted solicitors in January 2003 and changed to her present solicitors in February 2003. Those solicitors then set about undertaking the pre-commencement procedures required by the Act resulting in the proceedings being instituted on 9 September 2003.

The issue

[10] The issue then is a familiar one of determining when material facts relating to a right of action take on a decisive character within the meaning of s 30 of the Act. In the context of these facts this occurs when the taking of action would result in an award of damages sufficient to justify its being undertaken. See *Watters v Queensland Rail*.[3]

[11] Prior to seeing Dr Pozzi in May 2002 the plaintiff had sought appropriate medical advice and treatment for her injuries. The treatment rendered her free of symptoms in her right hand but with continuing symptoms in the left. She had not suffered any loss of income nor incurred any expense. Her visit to Dr Pozzi simply provided her with another avenue of treatment which had the prospect of alleviating her symptoms. Again the treatment would be undertaken without any cost to her.

[12] To the point of receiving Dr Pozzi's advice it could not be said there was any claim for damages which would justify the expense, inconvenience and risk inherent in pursuing it. The respondent argues that because the surgery carried some risk of failure, this factor would so enlarge the quantum of any claim as to make its pursuit worthwhile.

[13] The applicant had no hesitation in opting for the surgery. It was eminently reasonable for her to pursue that line of treatment because until she had done so she

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[3] [2000] QCA 51; See also *Taggart v The Workers Compensation Board of Queensland* (1983) 2 QdR 19 at pp 23-24; *Moriarty v Sunbeam Corporation Ltd* (1988) 2 QdR 325 at 329; *Sugden v Crawford*

had no means of knowing whether she would have any continuing disability nor, if disability did persist, its likely extent.

[14] It is the acquiring of knowledge of these details regarding the extent of disability which is decisive in determining whether the bringing of an action is justified. The suggestion that the commencement of proceedings was justified because of the risk of failure of an impending medical procedure, I find to be unsustainable. There is no point in speculating about the extent of the risk when the reality would soon be known.

[15] There is also the question of the costs which might potentially be thrown away should the procedure be successful. The WorkCover legislation requires extensive pre-court procedures which, though changing since first introduced in 1991, still require extensive enquiry and reporting to WorkCover or the employer if self-insured. Moreover the costs may not be recoverable. For example, unless the applicant reached a threshold of 20 percent impairment required to constitute her injury a "certificate" injury and if her award did not exceed her mandatory final offer at trial, she would not be entitled to any costs. Alternatively, if the matter was resolved at conference the applicant would not have recovered any costs. The costs of undertaking the pre-court procedures if lawyers are engaged (and it would take a brave and knowledgeable person not to engage a lawyer) are likely to be quite substantial. This, it seems to me, is a significant deterrent in pursuing a claim unless one has reliable knowledge as to the extent of the injury for which damages are sought.

[16] Until the outcome of her intended surgery was known, the applicant had no means of assessing whether she had a worthwhile cause of action. To adopt the words of the section it was not until that time that one could say that the material facts were of a "decisive character".

[17] I am satisfied that it was not until after the operation and her attempted return to work and the advice about the lack of further effective treatment that the applicant became aware that there would be no resolution of the adverse symptoms of her

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(1989) 1 QdR 683 at 685; *Berg v Krueger Enterprises* (1990) 2 QdR 301; *Byers v Capricorn Coal Management Pty Ltd* (1990) 2 QdR 306; *Wood v Glaxo Australia Pty Ltd* (1994) 2 QdR 430 at 437.

injuries. This realisation occurred after 9 September 2002, and is thus within the 12 month period allowed by the section.

[18] The applicant's conduct thereafter in obtaining legal advice was unexceptional and as I have mentioned the respondent does not suggest any prejudice.

[19] In the exercise of my discretion I would allow the application and extend time for the pursuit of the applicant's claim for damages for the relevant work related injury until 9 September 2003. I would order that the costs of and incidental to this application to be assessed on the standard basis, be costs in the cause.