SUPREME COURT OF QUEENSLAND

CITATION:	*Jackson v Claric Ninety Five P/L* [2005] QSC 374
PARTIES:	**PAUL DAVID JACKSON** (applicant) **v** **CLARIC NINETY FIVE PTY LTD** (respondent)
FILE NO:	7134 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	15 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2005
JUDGE:	Douglas J
ORDER:	**Application dismissed**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – WHETHER REASONABLE STEPS TAKEN TO ASCERTAIN FACTS – where applicant injured on 25 October 1993 – where applicant seeking extension of limitation period to 7 October 2005 – where applicant's back injury occurred at work – where contemporaneous evidence has diminished – where applicant was initially refused worker's compensation – where applicant appealed against that refusal claiming that "I am at present able to … work full time at my workplace, but that may not be possible if immediate medical attention is not received" – where applicant was diagnosed with "left sided posterolateral disc protrusion in the disk between the lower most lumbar vertebral body and the transitional vertebra which on … is causing quite marked compression of the theca and also of the left L5 nerve root" – where applicant claims he was not aware of the extent of his injuries due to this diagnosis not being explained to him in terms he understood until recently – whether the applicant's alleged failure to comprehend the seriousness of his injuries constituted a lack of knowledge on his behalf of a material fact

Limitation of Actions Act 1974 (Qld), s 30, s 30(1)(c)(ii), s 31

Berg v Kruger Enterprises [1990] 2 Qd R 301, cited
Bougoure v State of Queensland [2004] QCA 485, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, followed
Byers v Capricorn Coal Management Pty Ltd [1990] 2 Qd R 306, cited
Healy v Femdale Pty Ltd (CA No 37 of 1992; 9 June 1993, unreported, BC 9303277), considered
Moriarty v Sunbeam Corporation Ltd [1988] 2 Qd R 325, cited
NF v State of Queensland [2005] QCA 110, compared
Stephenson v State of Queensland [2004] QCA 483, distinguished
Taggart v Workers' Compensation Board of Queensland [1983] 2 Qd R 19, distinguished
Wrightson v State of Queensland [2005] QCA 367, applied

COUNSEL: R J Oliver for the applicant
D V C McMeekin SC for the respondent

SOLICITORS: Walker Pender for the applicant
Tresscox for the respondent

[1] **Douglas J**: The plaintiff in this action was injured on 25 October 1993, having been born on 2 October 1973. His application is for an extension of the period of limitation in respect of his claim to 7 October 2005, pursuant to s 30 and s 31 of the *Limitation of Actions Act* 1974.

Background Facts

[2] The plaintiff's case is that, on the day when he suffered his injury, he was working as an apprentice motor mechanic employed by the defendant and was asked to remove a rotary engine from a workshop area. He says that the engine weighed approximately 200 kg, that he could not lift it completely off the floor but manoeuvred it onto a "creeper", a metal rectangular tray used by mechanics to slide themselves under vehicles. He says that he lifted one end of the engine onto the creeper, steadying the creeper with his foot and then moved the other end of the engine onto it, still keeping it in place with his foot. While he was doing that he felt a sharp pain in his lower back but continued to work that day and did not report the injury. He thought that the pain would disappear but, after approximately two to three weeks, reported the incident to his foreman because the pain was still present. He continued to work until 31 December 1993. By then the pain had increased and he consulted his general practitioner who gave him a medical certificate from 4 January 1994 until 21 February 1994 and referred him for physiotherapy.

[3] He applied for worker's compensation. That application was investigated by the Workers' Compensation Board, which took a statement from his foreman, a Mr Cheetham, who said that Mr Jackson complained to him after he had installed a differential in his own car at the rear of his work premises. He says that it would

have been most unusual for Mr Jackson to have attempted to lift a rotary engine onto a creeper by himself because of the large number of other employees available at the time to help. He was also sceptical of the assertion that there were no witnesses to the incident complained of by Mr Jackson.

[4] Mr Cheetham is still available to give evidence but has told the defendant's solicitors that his memory of the events has faded substantially with the passage of time to the extent that he had no other knowledge or memory of the circumstances of the accident beyond the statement he made on 21 January 1994. He could recall that the respondent provided equipment in addition to co-workers who would have been available to assist the applicant with shifting the rotary engine but could not recall whether a hydraulic engine crane or a gantry was in use at the workshop at that time. He could also recall that the applicant would have received training during his apprenticeship in relation to the methods to be adopted when undertaking lifting tasks in the workshop. He was also able to remember the names of four other employees at the time, two of whom have been contacted by the defendant's solicitors and two of whom have not. The two who have been contacted by the solicitor could provide no useful information about the circumstances of the accident.

[5] The solicitor was unable to find any records of the defendant relating to the plaintiff. Many of its records had been destroyed. The Workers' Compensation Board file is, however, still available and she has been able to obtain medical records of the applicant from the Wishart Medical Centre, where he was treated. The doctor who then treated him is now overseas but, no doubt, may be available to give evidence should the matter proceed to trial.

[6] The plaintiff's application for workers' compensation was initially rejected by the Workers' Compensation Board. He lodged an appeal and before the hearing of the appeal his claim was accepted and the appeal was compromised. He received workers' compensation for the time he was away from work. He then continued to work with the defendant until his employment was terminated at the end of his apprenticeship in late 1994. After that he worked at a Shell Service Station for approximately six weeks and then worked for a firm called Pedders for about three years until 1997. During that period he continued to suffer lower back pain but that did not stop him from working full time.

[7] During 1995 he reopened his workers' compensation claim. In a letter of 22 May 1995 he told the Workers' Compensation Board that his back condition had again deteriorated to such an extent that he had to seek medical assistance. His general practitioner had indicated to him that he should be referred to an orthopaedic surgeon. He asked for the Board's permission to secure an appointment with such a surgeon as soon as possible. He concluded by saying "I am at present able to … work full time at my workplace, but that may not be possible if immediate medical attention is not received".

[8] Before he reopened his claim, on 10 June 1994, he had been diagnosed by a Dr Robert Morgan, a radiologist, as suffering from a "left sided posterolateral disc protrusion in the disk between the lower most lumbar vertebral body and the transitional vertebra which on the scan was labelled L4-5". Dr Morgan said "this lesion is causing quite marked compression of the theca and also of the left L5 nerve root".

[9] In his statement to the Workers' Compensation Board of 28 June 1995 for his reopened claim, the plaintiff said that he found that when he was bending over, working on cars, he had constant pain across the back. When he changed employers and began to work for Pedders he did not have to do as much bending but sometimes had to work under the bonnets of vehicles, which could cause a flare-up of his back pain. He was given Mersyndol tablets in May 1995 and said in his statement that he had ongoing problems with his back since his return to work in February 1994.

[10] In August 1995 he was examined by Dr Nielsen for the Workers' Compensation Board. The symptoms Dr Nielsen said, in his report of 15 August 1995, that the plaintiff reported to him were:

> "His current situation is that he continues to get lower back pain which only allows him to sit for half an hour and to stand for approximately 3 hours. He can lay [sic] for approximately 10 hours. He gets minimal pain with a change in position. He currently takes Mersyndol approximately eight per day and says that out of 30 days he may get 10 days without experiencing any pain."

[11] The plaintiff also told Dr Neilsen that he had stopped surfing because of his back, on a bad day was unable to put his shoes on without his fiancé's help, could not play rugby league anymore and had problems with ten pin bowling. Dr Nielsen's provisional diagnosis was that his injury had stabilised and that there was no indication for further treatment or investigation. His view was that he suffered a total permanent disability equivalent to 5%.

[12] The plaintiff did not become aware of Dr Nielsen's conclusions about his permanent disability until he requested a copy of his file from the Workers' Compensation Board on 3 May 2005.

[13] Before then, and after he saw Dr Nielsen, he said that his symptoms had subsided, that he had returned to work and continued working. He left Pedders in 1997 and then obtained work with another firm until 2000 before obtaining employment with a training academy for six months and then with a tyre company as a tyre fitter. He remains employed there but has been unable to work since receiving WorkCover benefits from October 2004.

[14] At that stage he began to experience more severe symptoms, attended his general practitioner, a Dr Goldston, and was referred to an orthopaedic surgeon, Dr Brazel. Dr Brazel informed him on 7 October 2004 that he would need to stop working as a motor vehicle mechanic and would have to engage in lighter work if he wanted to reduce his back symptoms. The plaintiff says that it was not until he saw Dr Brazel that he realised that the condition of his back was "far worse than I had ever expected it was, as a result of the lifting incident in 1993".

[15] As to the report of Dr Morgan of 10 June 1994, the plaintiff said in his affidavit that, although he had a copy of that report after the CT scan to which it related was taken, he did not know what the report meant as no doctor explained its contents to him in terms from which he understood the true seriousness of his condition.

[16] He was represented by solicitors when he challenged the rejection of his claim for workers' compensation in 1994 but says that he received no advice from them as to

what his legal remedies were. He says that had he known of the percentage impairment assessed by Dr Nielsen in 1995 he would have sought further legal advice as to his legal rights to compensation against his employer and that at no stage in the intervening period had he realised that he had any permanent impairment of his lower spine which would impact on his ability to continue to work in his trade for the remainder of his working life.

[17] During his cross-examination, the plaintiff conceded that by mid-1995 he knew that he had a lumbar disc prolapse, that that was not "the greatest thing to have" but he did not know "if it was that severe", that his pain had then been continuous for nearly two years, that he had "flare-ups" when he bent over the bonnet of a car doing his normal work that were bad enough to require him to see a doctor and that his condition was causing him problems everyday of his life; see T14 ll 10-30. He also admitted the accuracy of the symptoms he had described to Dr Nielsen with the exception of the number of Mersyndol tablets he was taking on normal days; see T15 l. 18 - T16 l. 23. His understanding of the nature of his disc protrusion was, he said, limited, but he knew that it was not a simple muscle strain, that the disc was "poking out" and that there was compression of something in his spine in circumstances where two of the other discs referred to in Dr Morgan's report appeared quite normal.

[18] Perhaps the most telling feature of his evidence was his statement in his letter to the Workers' Compensation Board on 22 May 1995 to which I have already referred that he was then able to work full time "but that may not be possible if immediate medical attention is not received". After that he missed between one and two weeks of work per year according to his account to a Dr Donnelly in ex. LN2 and used sick days and holidays to cope with his symptoms.

Legal Issues

[19] To succeed in his application he is required to show that a material fact of a decisive character was not within his means of knowledge until a date after 25 August 2004, one year before the commencement of his action, that there is evidence to establish the right of action and that no prejudice will be occasioned to the respondent that would justify disallowing the application. No issue was taken as to whether there was evidence to establish the right of action.

Material fact of a decisive character – means of knowledge – reasonable steps

[20] The material fact relied upon by him is the nature and extent of the personal injury he suffered. He says that at no stage, apparently until he saw Dr Brazel on 7 October 2004, had he realised that he had any permanent impairment of his lower spine which would impact on his ability to continue to work in his trade for the remainder of his working life; see para 33 of his principal affidavit. He needs to show that he had taken all reasonable steps to find out that material fact before 25 August 2004; see s 30(1)(c)(ii) of the Act.

[21] Mr McMeekin SC submitted, in my view accurately, that if one considered the plaintiff's position from August 1995 to July 2004 the evidence established the following:

"(a) he had had 6 weeks off work initially with physiotherapy not affecting [sic] any improvement, and returned to work whilst still suffering symptoms;

(b) he was in possession of a CT scan report (Ex PDJ10) indicating that he had a disc protrusion but he says that he did not understand what it meant;

(c) his GP plainly was aware in July 1994 that he had a disc prolapse in his spine;

(d) he changed his employment but at that employment avoided lifting and had little need to spend long periods bent over an engine well yet when he did so he had severe exacerbation of his pain sufficient to seek a reopening of his workers' compensation claim and to seek referral to a specialist (see his letter of 22 May 1995 – Ex PDJ6 and his statement of 28 June 1995 – Ex LN4);

(e) in August of 1995 (nearly 2 years post accident) his recreational activities were severely curtailed (see Dr Nielsen's report – Ex PDJ9);

(f) by August of 1995 he was taking approximately 8 Mersyndol per day and had 20 days out of 30 in pain (see Dr Nielsen's report – Ex PDJ9);

(g) a reasonable person in his position must have appreciated that another severe exacerbation was a reasonable possibility;

(h) his own letter of 22 May 1995 (Ex PDJ6) acknowledges the risk of being unable to continue with his work in the future;

(i) according to his account to Dr Donnelly, he missed 1 to 2 weeks of work per year thereafter (Ex LN2);

(j) according to his account to Dr McGrath, he used sick days and holidays to cope with his symptoms with more severe episodes settling in 3 to 4 days (Ex LN3)."

[22] He submitted that those were numerous facts calling for a prudent inquiry by the plaintiff to protect his own health and legal rights; see *Healy v Femdale Pty Ltd* (CA No 37 of 1992; 9 June 1993, unreported, BC 9303277) where the Court said:

> "The question then is whether it can be said that in the circumstances the plaintiff took all reasonable steps to ascertain the fact that her injury was serious enough to justify the bringing of an action. She did not ask her doctor questions of this kind. The question whether an injured person has taken all reasonable steps to ascertain the seriousness of the injury depends very much on the warning signs of the injury itself and the extent to which it or any other facts might be thought to call for prudent enquiry to protect one's health and legal

> rights. It is difficult to say that a person who finds herself able to get on with her 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 done so. A question of fact is involved here, and in the present matter the chamber Judge before whom the plaintiff appeared and was cross-examined has some advantage."

[23] In my view it would not be correct to say, in the light of that evidence, that the plaintiff had taken all reasonable steps to find out the relevant fact during the critical period in this case. He presented orally, and in the statements and letters he had written, as someone with a reasonable level of education – to year 10 standard followed by prevocational training for two years and a successful three and one half year apprenticeship. Although he was only a young man when injured, and perhaps not as likely to look after his own welfare as someone older, there were numerous early warning signs of the nature and extent of his injuries and significant opportunities for him to seek advice both from the doctors treating him and the lawyers acting for him on his workers' compensation claim. In my view the circumstances were such as to make it reasonable for the plaintiff to seek such advice.

[24] His personal circumstances were not such as to prevent him from appreciating the nature and significance of the injury he had suffered and its likely consequences; cf. *NF v State of Queensland* [2005] QCA 110 at [2], [29]-[31]. His own letter of 22 May 1995 recognised the risk that he may not be able to continue to work full time at his workplace. In other words, unlike the applicant in *Healy v Femdale Pty Ltd*, he has not shown that the material fact of a decisive character relating to his right of action was not within his means of knowledge at the relevant time.

Material fact of a decisive character – means of knowledge – appropriate advice

[25] Section 30(1)(b)(ii) also provides that material facts relating to a right of action are of a decisive character only if a reasonable person knowing those facts and "having taken the appropriate advice on those facts" would regard them as showing that an action would have a reasonable prospect of success and result in an award of damages sufficient to justify bringing it.

[26] In other words, the applicant must show that, without the newly learned fact or facts he would not, even with the benefit of appropriate advice, have previously appreciated that he had a worthwhile action to pursue and should in his own interests pursue it; see *Moriarty v Sunbeam Corporation Ltd* [1988] 2 Qd R 325, 333; *Berg v Kruger Enterprises* [1990] 2 Qd R 301, 305; *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306, 309; *Bougoure v State of Queensland* [2004] QCA 485 at [48]. Had the plaintiff sought advice in or before July 2004, at a time before he was told of the permanent disability affecting his future employment prospects, he should, appropriately advised, have appreciated that he had an action worth pursuing. Mr McMeekin's submission was that, even without the information relied upon now as the material fact of a decisive character, any competent solicitor would have been of the view that a substantial award of general

damages would have been obtained and that an amount would need to be allowed for the effect on his future earning capacity "if only to the extent of compensating him for periods which to that stage he was managing with sick leave and holidays".

[27] I agree with that submission and with the submission that the material fact now relied upon by the applicant merely helps to enlarge his prospective damages which were certainly not "too small to bother about" on the information he already had; see *Taggart v Workers' Compensation Board of Queensland* [1983] 2 Qd R 19, 24; *Stephenson v State of Queensland* [2004] QCA 483 at [44]-[46]. In other words, to answer the question, when did all material facts which were then of a decisive character come within the means of knowledge of the applicant,[1] the answer must be: well before August 2004 and probably by August 1995, evidenced, among other sources, by his own letter to the Workers' Compensation Board of 22 May 1995 and his description of his symptoms to Dr Neilsen of 15 August 1995.

Prejudice

[28] It was also submitted on behalf of the defendant that it would be prejudiced should the application be granted. The lapse of time of itself is prejudicial because of its effects on the availability and the quality of the evidence; see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551. The delay between the alleged injury and the report by the plaintiff to his foreman is also significant because of the inability to investigate the facts at the time. Nor can Mr Jackson identify who gave him instructions to carry out the lift, nor do the witnesses who have been identified now remember independently facts that might be relevant to the defence. It is true that there is a workers' compensation file with the statement by Mr Cheetham to which I have referred but his memory does not extend significantly beyond the terms of the statement.

[29] The fact that the defendant would have been substantially prejudiced in some of these ways if the action had been brought within the limitation period is irrelevant; see *Brisbane South Regional Health Authority v Taylor* at 548-549, 554-555. The lack of a contemporaneous investigation, the limited memories of potential witnesses and the destruction of potential records of the employer at the time establishes that the defendant would suffer significant prejudice were the application allowed.

Order

[30] The application is dismissed. I shall hear the parties further as to costs.

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[1] See *Stephenson v State of Queensland* [2004] QCA 483 at [14] and *Wrightson v State of Queensland* [2005] QCA 367 at [10], [17], [43]-[49].