# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Fanti v State of Qld* [2005] QSC 393 |
| PARTIES: | **DIANNE LENORE FANTI**<br>(plaintiff/applicant/cross respondent)<br>v<br>**STATE OF QUEENSLAND**<br>(defendant/respondent/cross applicant) |
| FILE NO/S: | BS 3511 of 2003 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Brisbane |
| DELIVERED ON: | 21 December 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 29 September 2005 |
| JUDGE: | McMurdo J |
| ORDER: | **1. The plaintiff's application filed on 7 September 2005 is dismissed**<br>**2. The claim is dismissed** |
| CATCHWORDS: | LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – PERSONAL INJURY CASES – where the plaintiff suffered asthma and severe depression from 1991 – where the plaintiff worked for the defendant from 1976 to 1991 and was exposed to glutaraldehyde – where a medical publication linked exposure to glutaraldehyde with medical conditions in 1988 – where the plaintiff only became aware of the link in 2002 – where the plaintiff claimed damages for negligence, breach of duty, breach of contract of employment and breach of statutory duty – where the plaintiff applied for an extension of the limitation period pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) – whether there is evidence to establish her right of action – whether the extension of time would not result in significant prejudice to the defendant<br><br>PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – TIME – DELAY INCE LAST PROCEEDING – where the plaintiff had not taken a step in the proceeding since filing the claim in April 2003 – whether leave to proceed is required<br><br>STATUTES – ACTS OF PARLIAMENT – |

INTERPRETATION – PRESUMPTIONS AS TO LEGISLATIVE INTENTION – where s 6 of the *Personal Injuries Proceedings Act 2002* (Qld) excluded that Act's operation in relation to an injury within the meaning the *WorkCover Queensland Act* 1996 – where an amendment passed after the hearing of these applications amended s 6 to exclude its operation in respect of an injury within the meaning of the *Workers' Compensation Act* 1990 – where the plaintiff's injury was within the meaning of the *Workers' Compensation Act* 1990 – whether the parliament intended to rebut the presumption of retrospectivity

*Acts Interpretation Act* 1954 (Qld), s 20(2)
*Limitation of Actions Act* 1974 (Qld), s 31
*Personal Injuries Proceedings Act* 2002 (Qld), s 6
*Uniform Civil Procedure Rules* 1999 (Qld) r 389(2)

*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, cited
*Holmes v Adnought Sheet Metal Fabrications Pty Ltd* [2004] 1 Qd R 378, dicussed
*Nicholls & Ors v Brisbane Slipways and Engineering Pty Ltd* [2003] QSC 193, discussed
*Tyler v Custom Credit Corporation Limited* [2000] QCA 178, cited
*Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431, referred to

COUNSEL: P J Goodwin for the plaintiff/applicant/cross respondent
D O J North SC with K F Holyoak for the defendant/respondent/cross applicant

SOLICITORS: Hall Payne for the plaintiff/applicant/cross respondent
Conrad Lohe, Crown Solicitor for the defendant/respondent/cross applicant

[1] **McMURDO J:** The plaintiff applies for an extension of the limitation period pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld). She also applies for leave to proceed pursuant to *Uniform Civil Procedure Rules* 1999 (Qld), r 389(2). The defendant applies to strike out the claim on the basis that it was commenced without compliance with the pre-court procedures prescribed by the *Personal Injuries Proceedings Act* 2002 (Qld) ("*PIPA*").

**The plaintiff's claim**

[2] The plaintiff was born in 1948. From 1976 until October 1991 she was employed by the State of Queensland at the Queensland Radium Institute, part of the Royal Brisbane Hospital complex. From some time in 1989 and 1990 she was on leave for about nine months.

[3] According to her statement of claim, she contracted asthma "in approximately 1990/1991". According to her evidence, her asthma was diagnosed by a specialist after she attended her general practitioner "in early 1991", suffering from a sore throat and a persistent cough which had developed some months earlier. She was referred to another specialist, Dr Edwards, in 1991. He then confirmed that she had asthma with permanent damage to her lungs. She says that up to that point, she had never suffered any condition or symptoms of asthma and although she did discuss with Dr Edwards the probable cause, she did not make any connection between her condition and her employment.

[4] In October 1991 she took up a full time position with the Federated Miscellaneous Workers Union as an industrial organiser. She took a year off in 1996 for family reasons before returning to work with the Union in early 1997 on the basis of a 27 hour week. She continued in this employment until late 2002, when she left for poor health. Shortly before that, in October 2002, she had visited the Queensland Radium Institute to see someone in the course of her work with the Union. A conversation with that person about working conditions at the Institute prompted her to think about the possible connection between her employment there and her asthma. In particular she began to speculate about a possible link with her exposure to glutaraldehyde. She remembered that she would become red in the face and her eyes would get watery each time she was exposed to glutaraldehyde and that "later on in [her] career" she had developed a cough and a sore throat which had prompted her to seek that medical attention in 1991.

[5] She began to conduct her own research over the Internet about the possible connection between glutaraldehyde and asthma, which she did on the advice of her brother who worked for a firm of solicitors. She saw Dr Edwards again in December 2002. He then told her of the likelihood of that connection. On 10 December 2002 he wrote a note saying that "the description of her symptoms which she suffered at the time would support a diagnosis of occupational asthma related to glutaraldehyde inhalation". On 11 December 2002 she made application to WorkCover Queensland for workers' compensation benefits for her asthma and for what she described as "acute distress" but which was eventually assessed as a major depressive disorder.

[6] WorkCover did not accept her claims but they were accepted by the General Medical Assessment Tribunal – Thoracic and the General Medical Assessment Tribunal – Psychiatric, in each case in August 2004. In particular there was a finding that her asthma was attributable to her employment at the Queensland Radium Institute and her exposure there to glutaraldehyde. She was assessed as having a permanent disability equivalent to a 5 per cent loss of bodily function in consequence of her asthma. The (Psychiatric) Tribunal accepted that consequent upon the plaintiff developing her asthma she had developed a major depressive disorder resulting in a permanent disability to the extent of a 10 per cent loss of bodily function.

[7] In a report of 14 April 2003 Dr Edwards wrote that "it is quite possible that the asthma developed or was exacerbated as a result of the exposure to glutaraldehyde fumes in her occupation". But later in the report he described it as *likely* that her exposure to the substance caused her symptoms of asthma as there did not appear to

be any other explanation for her developing asthma at that point in her life. Using the American Thoracic Society/American Medical Association Guidelines for Impairment from Asthma, he assessed the plaintiff's disability as mild to moderate impairment and he anticipated her percentage loss of function at 25 per cent. He then discussed what had been known of the relevant risk at any time during the plaintiff's employment, saying:

> "Respiratory symptoms from exposure to alkaline glutaraldehyde in medical services was reported in Scandinavian Journal of Workers' Environment Health 1988. Prior to that it was recognised that formalin could cause occupational asthma. glutaraldehyde as a cause for occupational asthma was recognised in the late 1980s when glutaraldehyde was introduced into endoscopy rooms for cold sterilisation of endoscopes and other medical instruments which were not autoclavable. Prior to that instruments were cleaned in Cidex but with the onset of HIV infection and hepatitis infections it was found that a better sterilising agent such as glutaraldehyde was required.
>
> Although it was reported in 1988 it may have taken some time for the danger of glutaraldehyde in this setting to be realised. Prior to that the maximum exposure limit to Glutaraldehyde was set at 0.7 mg/cubic metre. The new level of glutaraldehyde exposure has been reduced to 0.175 mg/cubic metre when the development of occupational asthma in relationship to the exposure to glutaraldehyde in this setting was recognised.
>
> Therefore, it is reasonable that the Royal Brisbane Hospital may not have been aware of those exposure levels which were introduced in the late 1980s as a result of a number of papers starting from 1988 onwards."

[8] The plaintiff commenced these proceedings on 17 April 2003. She claims $367,665.71 as damages for "negligence and/or breach of duty and/or breach of contract of employment and/or breach of statutory duty of the defendant between 20th of April 1976 and October 1991". In essence her pleaded case is that she contracted asthma by being "regularly exposed, almost on a daily basis, to fumes from a solution of Glutaraldehyde in the course of cleaning and preparing clinic rooms, dark rooms, sterilizing rooms and examination rooms and in the cleaning and sterilizing of equipment". She pleads the same particulars of the alleged breach of each of the pleaded duties, in which she alleges that "the defendant knew or ought to have known that there was a real risk of exposure to such fumes causing asthma". As was accepted in the argument in these applications, each of her pleaded causes of action requires proof that the risk from the substance was reasonably foreseeable, and that her condition is due, in part at least, to the defendant's action or inaction at a time when there was that foreseeability.

**Section 31**

[9] Section 31(2) provides as follows:

> "2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court -

> (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
> (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;
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> the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly."

[10] The material fact which is relied upon is the connection between her employment, and in particular her exposure to this substance, and her asthma. This is a material fact of a decisive character relating to her right or rights of action. (The contrary was not argued). I also accept that the fact was not within her means of knowledge until a date (well) after the commencement of the year last preceding the expiration of the period of limitation. At the latest, the limitation period expired in about early 1994. I accept that she did not know of the connection until she began to research the matter in late 2002 and perhaps until she saw Dr Edwards at the end of that year. I also accept that it was not unreasonable for her to have been unaware of the fact before that time.[1] (Again, whilst nothing was conceded, there was no submission to the contrary.)

[11] Next she must establish that there is evidence to establish her right of action. In *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 at 434-435 Macrossan CJ explained this requirement as follows:

> "The evidence need not at the stage at which the application is brought be in a form which would be admissible at trial and it may indeed be hearsay. It will not be possible to predict whether the plaintiff's evidence will prevail at trial when it will be subjected to challenge and forced to confront the opposing evidence of the defendant, but it is probably accurate enough to say that an applicant will meet the requirement imposed by s 31(2)(b) if he can point to the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his case."

[12] Undeniably there is evidence to establish that the plaintiff's asthma was caused by her exposure to glutaraldehyde. The present question is whether there is evidence which could establish that her asthma was caused by the negligence or other default of the defendant. According to Dr Edwards, the risk became known no earlier than "the late 1980s" and in particular in 1988 when it was reported in a particular publication. The plaintiff must prove that she is worse off because of some breach by the defendant, which according to the present evidence, could have occurred

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1 Section 30(1)(c)

only from 1988. Dr Edwards does not say, at least directly, that whether she is worse off for having been exposed to the risk from 1988 or shortly afterwards.

[13] Although she seems to plead that she was exposed to the substance from 1976, some of the evidence indicates that there was a particularly high risk in the last few years of her employment. Dr Edwards refers to a particular use of the substance from the late 1980s when he said it was introduced into endoscopy rooms for cold sterilisation of endoscopes and other medical instruments. This follows on his description of the plaintiff's work in cleaning the fibro endoscopy equipment and her exposure to the substance in the course of doing that. Then there is the fact that her symptoms were experienced only a few months before she sought medical attention in 1991. These facts indicate some prospect that it was the extent to which she was exposed to the substance only from the late 1980s which was the substantial cause of her asthma. If so, then as I have mentioned, there is some evidence to the effect that from about that time the defendant ought to have foreseen the risk.

[14] But there is also some evidence that her exposure was over a much lengthier period (as her own pleading seems to allege). According to an affidavit by a former co-employee, relied upon by the defendant, glutaraldehyde was used at each of the two places where the plaintiff worked for the Institute during the 1970s and 1980s.

[15] For the question of whether there is evidence to establish the right of action, the focus should be upon such evidence as there is which supports the claim although there is contrary evidence. Within Dr Edwards' opinion, and from the fact that the symptoms were experienced only from about late 1990, I am satisfied that there is sufficient evidence to discharge the plaintiff's onus under s 31(2)(b).

**Prejudice to the defendant**

[16] The plaintiff has thereby satisfied the conditions in s 31(2)(a) and (b). She still bears the onus of showing that the justice of the case requires the discretion to be exercised in her favour and that an extension of time would not result in significant prejudice to the defendant: *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

[17] As I have just indicated, a trial of this case would involve factual issues as to the timing and extent of her exposure to this substance, and the likelihood of her contracting asthma had the risk been avoided from about the end of the 1980s. I have mentioned that she was on leave for some months from about 1989. Presumably the plaintiff would wish to emphasise the likely impact of the period of employment from her return until the onset of symptoms towards the end of 1990 whilst the defendant would rely upon such evidence which it could procure as to an exposure to the substance before the risk was foreseeable. More broadly, the case will involve, so far as the available evidence would still allow, a factual inquiry as to the nature and extent of the use of the substance in various applications in the premises in which she worked at different times from 1976.

[18] One problem for the defendant will be to locate other witnesses who could give evidence of the timing and extent of the use of the substance at the Institute. A further problem will be that those witnesses who are located will have to recall events of so long ago. A third difficulty is that the plaintiff's medical condition at various times in the 1980s and leading up to early 1991 would have to be explored. Almost inevitably any honest witness would have difficulty in recalling when and to

what extent the substance was used in certain ways during the plaintiff's employment. That difficulty would be exacerbated by the fact that the premises which were the plaintiff's workplace from 1976 to 1983 have been demolished. Because of these difficulties from the time that has elapsed, I am not persuaded that a fair trial is possible. For that reason the application to extend the limitation period must be refused.

**Leave to proceed**

[19] The plaintiff's submission was that no leave is required, because there was a step on 30 November 2004 when the defendant filed its further particulars. The defendant says that this did not constitute a step. The particulars were delivered in July 2003.

[20] The relevant factors under r 389 were set out in *Tyler v Custom Credit Corporation Limited* [2000] QCA 178. In the present case, one significant factor is what I see is the absence of a proper explanation for the delay of more than two years. The plaintiff took no step in this proceeding between starting it and filing the present applications at the end of September 2005. There is some explanation for part of that delay. The plaintiff was awaiting advice from her Union as to legal assistance. No doubt there was also some delay caused by consideration of the defendant's point in relation to the *PIPA*. And there is the fact that the plaintiff suffers from depression. There was also a relatively small delay caused by the inaction of the plaintiff's solicitor. Still, well more than two years passed and in the circumstance where the proceeding was commenced so far outside the limitation period, the plaintiff's delay is yet more serious. The delay could only have exacerbated the prejudice to a fair trial caused by dimming memories and the difficulty in locating potential witnesses. But ultimately it is unnecessary to express a concluded view on this application, given the outcome under s 31.

***PIPA***

[21] Although it is also unnecessary to consider the defendant's cross application in reliance upon *PIPA*, it is appropriate to record the circumstances relevant to that application.

[22] When the claim was filed on 17 April 2003, s 6 of the *PIPA* excluded the operation of that Act relevantly in these terms:

> "6(2) However, this Act does not apply to—
>
> (a) …
> (b) injury as defined in the *WorkCover Queensland Act* 1996, but only to the extent that an entitlement to seek damages, as defined under that Act for the injury is regulated by chapter 5 of that Act."

[23] The *WorkCover Queensland Act* 1996 applied to injuries which occurred on or after 1 February 1997 and it provided that the (repealed) *Workers Compensation Act* 1990 applied to injuries occurring before that date as if that Act had not been repealed.[2] Accordingly the plaintiff's entitlement to seek damages was not regulated by chapter 5 of the *WorkCover Queensland Act* 1996, and the operation of *PIPA* was not excluded. At the time these proceedings were commenced, *PIPA*

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[2] *WorkCover Queensland Act* 1996, s 551

required the pre-court procedures such as a notice of a claim under s 9. In *Holmes v Adnought Sheet Metal Fabrications Pty Ltd* [2004] 1 Qd R 378 it was held that proceedings commenced without compliance with s 9 were void and similarly, in *Nicholls & Ors v Brisbane Slipways and Engineering Pty Ltd* [2003] QSC 193, it was held that such proceedings were "incompetent and a nullity".

[24] Since the hearing of the present applications, s 6 of *PIPA* has been amended by the *Civil Liability (Dust Diseases) and other Legislation Amendment Act* 2005. Section 6(2) has been omitted and replaced with the following:

> "However this Act does not apply to …
>
> (a) …
> (b) …
> (c) injury within the meaning of the *Workers' Compensation and Rehabilitation Act* 2003 and in relation to which that Act applies, but only to the extent that an entitlement to seek damages within the meaning of that Act for the injury is regulated by chapter 5 of that Act; or
> (d) injury within the meaning of the *WorkCover Queensland Act* 1996 and in relation to which that Act applies, but only to the extent that an entitlement to seek damages within the meaning of that Act for the injury is regulated by chapter 5 of this Act; or
> (e) injury within the meaning of the *Workers' Compensation Act* 1990 suffered on or after 1 January 1996 and in relation to which that Act applies, but only to the extent that an entitlement to seek damages within the meaning of that Act for the injury is regulated by part 11 of that Act; or
> (f) injury within the meaning of the *Workers' Compensation Act* 1990 suffered before 1 January 1996 and in relation to which that Act applies, but only to the extent that the injury suffered created, independently of that Act, a legal liability in the employer of the person suffering the injury for which the employer was indemnified under that Act in relation to the injury or required by that Act to be so indemnified; or
> (g) injury within the meaning of the *Workers' compensation Act* 1916 and in relation to which that Act applies, but only to the extent that the injury suffered created, independently of that Act, a legal liability in the employer of the person to pay damages in relation to the injury."

[25] On any view, the plaintiff's injury would now be within an exclusion in s 6(2). Had it been necessary to decide the defendant's application, the issue would have been whether the proceeding was saved by the present terms of s 6(2), or whether it was still bound to be struck out for non compliance with the terms of *PIPA* which applied when the proceedings were commenced. In the 2005 Act, there is no express provision for the operation or otherwise of *PIPA* upon proceedings which had already been commenced but in breach of its then requirements. Upon one view at least, a defendant against whom such proceedings had been commenced would have had an accrued right to the dismissal of the proceedings, and in particular for the purposes of s 20(2) of the *Acts Interpretation Act* 1954 (Qld), so that the amendment of *PIPA* would not affect the susceptibility of the proceeding to summary dismissal absent the expression of a contrary intent. Similarly, by its

effect upon that accrued right, the amendment to s 6 could be regarded as more than merely procedural, for the purposes of the common law presumption against retrospectivity: cf *Maxwell v Murphy* (1957) 96 CLR 261 at 277-278.

[26] But the operation of s 20(2) of the *Acts Interpretation Act* or the common law presumption against retrospectivity, is subject to the expression of a contrary intent in the statute.[3] The statute need not contain a direct statement rebutting the presumption against retrospectivity.[4] And the strength of the presumption against retrospectivity depends upon:

> "the nature and degree of the injustice which would result from giving a statute a retrospective operation … [so that] where to give retrospective operation to a statute might be considered to work some injustice to one party, but is clearly required to rectify a manifest injustice to others, there would, on principle, seem little reason for giving much weight to the presumption."[5]

[27] There is a strong case for interpreting this amendment of s 6 of *PIPA* as affecting not only claims yet to be the subject of proceedings, but those claims for which proceedings have been brought in breach of its requirements. There was no logical explanation for the terms of s 6(2), as at 17 April 2003, insofar as it distinguished claims regulated by one workers' compensation statute from those regulated by another. It was a drafting error which must have led to the omission of what has now been inserted. That is supported by the Explanatory Note to the *Civil Liability (Dust Diseases) and other Legislation Amendment Act* 2005, which said that the new subsection is "to reflect the original intention of Parliament that claims against a party only be required to proceed through one form of statutory pre-court procedure". Although it is unnecessary to express a concluded view, there would seem then to be a powerful case for applying this subsection to exclude the operation of *PIPA* even to claims already the subject of proceedings which were previously susceptible to dismissal for non compliance with that Act.

**Conclusion**

[28] The claim will be dismissed and subject to any further submission the plaintiff must pay the defendant's costs of the proceedings.

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3 As to s 20, see s 4 of the *Acts Interpretation Act*

4 Pearce and Geddes *Statutory Interpretation in Australia* (5th Edition) at [10.11]

5 *Doro v Victorian Railways Commissioners* [1960] VR 84, 86