SUPREME COURT OF QUEENSLAND

CITATION:	*Patterson v Placer Pacific (Osborne) Pty Limited* [2006] QSC 353
PARTIES:	**JOHN MICHAEL PATTERSON** (Applicant/Plaintiff) **AND** **PLACER PACIFIC (OSBORNE) PTY LIMITED** **ACN 061 300 025** (Respondent/Defendant)
FILE NO/S:	S1019 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Townsville Supreme Court
DELIVERED ON:	17th November, 2006
DELIVERED AT:	Townsville
HEARING DATE:	10th November, 2006
JUDGES:	Cullinane J
ORDER:	**That the time for the institution of proceedings for damages for personal injuries against the respondent in respect of injuries sustained by the applicant in the course of his employment by the respondent between July and December 1999 be extended so that it expires on 26th December 2003.** **That the parties' costs be costs in the cause.**
CATCHWORDS:	LIMITATIONS OF ACTIONS - PERSONAL INJURIES – EXTENSION OF TIME – application for order pursuant to s31 *Limitation of Actions Act* 1974 that the period of limitation be extended - where the applicant suffered injury while at work - whether what the applicant learnt in 2003 had the character of decisiveness – whether prior to that time the facts within the Applicant's knowledge or means of knowledge were such that a reasonable person in the Applicant's position and appropriately advised ought to have instituted proceedings.

Limitation of Actions Act 1974 s 31

Healy v Femdale Pty Ltd CA No 37 of 1992 9693 unreported
Maconachie v Woolworths Limited & Anor [2005] QSC 249
Muir v Franklins Ltd (2001) QCA173
Pikrt v Hagemeyer Brands Australia Pty Ltd [2006] QCA 112
Pizer v *Ansett Australia Ltd* CA No 6807 of 1998 29 September 1998 (unreported)
State of Queensland v Stephenson & Anor [2006] HCA 20
Sugden v Crawford (1989) 1 QdR 683

COUNSEL: Mr M. Drew

Mr A.T. Moon

SOLICITORS: McDonald Leong Lawyers for the Applicant

Roberts Nehmer McKee for the Respondent

[1] This is an application for an extension of the limitation period under the *Limitation of Actions Act* 1974 as amended.

[2] The Applicant has instituted proceedings on 24th December 2003 so that the relevant date for the purposes of section 31 of the Act is 24th December 2002.

[3] It is accepted that there is evidence to satisfy the requirements of s.31(2)(b) of the Act and it is not contended that there are any discretionary grounds which would justify the refusal of the application if the Applicant otherwise brought himself within the terms of s.31.

[4] The Applicant was born on 23rd August 1949.

[5] He commenced employment with the Respondent at its Osborne Mine in about 1995 or 1996 which work essentially required him to drive machinery. It was however the vehicle he was driving and the conditions he was driving in between July and December 1999 that gave rise to symptoms in both elbows. On his case the steering wheel moved excessively and the surfaces on which he had to drive were excessively rough. The cause of action alleged relates to this period.

[6] The Applicant deposes to experiencing the onset of pain in his elbows between July and December 1999 and consulting a doctor on 21st December 1999 about this. He saw this doctor again on 29th January 2000 complaining of the same pain and was referred to Dr Ness, an orthopaedic surgeon. Dr Ness, in a report, says at this time he discovered some localised tenderness in the right elbow typical of lateral epicondylitis. He referred him for treatment with what is described as a lithotripsy machine. This was the only occasion upon which the Applicant saw Dr Ness. The Applicant was asked to return if he had further problems but did not return.

[7] The Applicant was off work between December and 25th February 2000 but received his full wages from the Respondent. When he returned at the end of February 2000 he was given another job which involved working in the shaft area. He had for a short period been put on another job which involved somewhat heavier

work and caused him some difficulty with his elbows. He was given some training to perform the work that he was allocated in the shaft area. He says that he managed this work without any pain, other than occasional pain, and without any loss of income. The evidence does not suggest he had time off work and he described his symptoms of pain during this time as "occasional" or "not that severe".

[8] He was asked to return to driving heavy vehicles in July 2001 and worked there for approximately 18 days. He found that when he recommenced this work he started experiencing intense pain in both elbows. At the end of this period he made an application for workers' compensation.

[9] He has not returned to work at Osborne Mine but remained on the payroll and received his full income until the position was terminated in 2004. He has since commenced a business of his own.

[10] He consulted Dr Winter, a general practitioner in Townsville. His records show a consultation about the elbows on 17th July 2001 at which time the applicant was still performing the lighter work for which he had been retrained.

[11] Following the attempt to return to work driving the machinery he saw Dr Winter again. He prescribed treatment for him including on my reading of the notes some injections and medication and exercise. Dr Winter, according to the Applicant, told him that surgery offered a good prospect of resolving his symptoms.

[12] Dr Winter referred the Applicant to Dr Mansfield, an orthopaedic surgeon in Cairns who saw him for the first time in November 2001.

[13] According to the evidence which the Applicant gave he had been informed by Dr Winter of the possibility of surgery. Work Cover had been approached with a view to meeting the costs of this. There was some reluctance according to the Applicant on the part of WorkCover to do this initially but ultimately it agreed to do so. While the Applicant was waiting for this surgery to take place (it was arranged to take place in December 2001 and did in fact take place then) the Applicant was referred by WorkCover to Dr Maguire, an orthopaedic surgeon in Townsville. Dr Maguire provided a report of 7th December 2001 in which he refers to the pending surgery. In the report he says that in his experience, 70-80% of the people who have the condition improve significantly following surgery and that it would be expected that the Applicant should be able to return to "near normal duties" by the sixth month mark. He confirmed that the Applicant suffered from bilateral epicondylitis.

[14] The surgery which had been arranged was for both elbows.

[15] Dr Mansfield in a report to Dr Winter of 14th November 2001 stated that the proposed surgery had a reasonable success rate but went on to say "As you know, nothing is 100% in this condition."

[16] It appears that the Applicant thought about surgery for a while before committing himself to it. This occurred on 17th December 2001.

[17] There are reports from Dr Mansfield to Dr Winter in December 2001 and January 2002 at which time the Applicant was recovering from the surgery. In the report of 25th January 2002 Dr Mansfield relates that "pain relief has been quite good and his function is improving."

[18] However in a report of 31st May 2002 Dr Mansfield reported that the right elbow had not settled whilst the left one was "perfect."

[19] Dr Mansfield had injected the tender area in the right elbow with steroid and expressed the hope that it would go well and if it gave him some relief Dr Winter could repeat it. The letter concluded on this note: "If it fails I may re-explore it surgically if he wished."

[20] The Applicant said that he had been told by Dr Winter and then by Dr Mansfield that the original surgery offered good prospects of a complete recovery and this was not really challenged. It is also consistent with Dr Maguire's opinion.

[21] The Applicant says that after the failure of the first procedure he was told by Dr Mansfield that a second procedure offered the chance of complete recovery and he decided to have it. It appears he was told this in mid 2002. The procedure was carried out on 3rd September 2002. Dr Mansfield reported that he didn't find anything particularly abnormal and expressed the hope that the Applicant's problems would be solved. He placed him in a plaster cast which the Applicant was to wear for four weeks and then he was “probably” to wear a collar and cuff for a further four weeks.

[22] The second surgery has also been unsuccessful.

[23] The Applicant deposes to attending upon Dr Mansfield in early 2003 and being informed that the surgery had been unsuccessful and that was it was unlikely that the Applicant could return to heavy manual labour although according to the Applicant he did not specifically refer to the position he had been occupying at the mine. A copy of a report of Dr Mansfield dated 18th February 2003 addressed to Dr Winter said that the Applicant was at that time totally unfit for his occupation and his prognosis was uncertain. He said, "We will just have to keep him under review until we resolve this issue. I think if the steroids didn't help this time I would certainly get a bone scan to see whether there are any changes on that which could explain the problem."

[24] On 14th January 2003 an occupational therapist, Heather Dale, conducted a functional capacity evaluation for WorkCover. At that assessment the Applicant was informed that Ms Dale did not think that he would be able to return to the mine in the same capacity or in any heavy work. He says that it was only after speaking to Dr Mansfield and Ms Dale that he realised that he was faced with an inability to work in the capacity that he had previously worked in. Up until that time he was proceeding on the basis that the surgical procedures which he underwent would be likely to resolve the problem in the first instance or have a chance in the second instance of resolving the problem and returning him to work.

[25] The Applicant is now precluded from heavy work including the work of driving machinery on mine sites. He is now working in a business of his own but it is apparent that he may suffer substantial economic loss because of the significant restriction of his earning capacity.

[26] The matter was litigated upon the issue whether what the applicant learnt in 2003 had the character of decisiveness. Specifically the argument turned on whether prior to that time the facts within the Applicant's knowledge or means of knowledge

were such that a reasonable person in the Applicant's position and appropriately advised ought to have instituted proceedings.

[27] I take the relevant principles applicable in a case of this kind to be as stated in cases such as *Sugden v Crawford* (1989) 1 QdR 683 and *Pizer* v *Ansett Australia Ltd* CA No 6807 of 1998 29 September 1998 (unreported) and *Muir v Franklins Ltd* (2001) QCA173 and *Healy v Femdale Pty Ltd* CA No 37 of 1992 9693 unreported.

[28] In the first of these cases Thomas JA summarised the relevant issue as being one whether prior to the relevant date the facts within the knowledge or means of knowledge of the plaintiff was such that a reasonable person appropriately advised ought to have brought an action on those facts.

[29] At paragraph 20 of his judgment he said:

> *"In appeals of the present kind, when the material fact concerns the nature and extent of personal injury, questions of degree are necessarily involved. At one end of the spectrum, a case of latent symptoms of apparently trivial injury, followed by eventual discovery of a serious condition will plainly justify an extension, and an appeal court could readily detect error in a refusal to grant it. at the other end of the spectrum, cases of patently serious orthopaedic injury productive of observable economic loss followed by belated realisation that the consequences are likely to be worse than had been contemplated, will not justify an extension, and an appeal court could likewise readily correct an erroneous decision. Somewhere between there extremes the is a range of cases where different minds might reasonably form different assessments of the level of the plaintiff's knowledge and as to whether the reasonable person should have brought proceedings."*

[30] In *Muir v Franklins Ltd* in discussing the tests to be applied Thomas JA said at paragraph 15:

> *That issue falls to be determined on the footing that the claimant had before that time taken all reasonable steps to ascertain the material facts. Whether the claimant has taken all reasonable steps is to be determined from the viewpoint of a reasonable person endowed with the knowledge and experience of the plaintiff. The answer to the question whether a reasonable person, knowing what the claimant knew, would have taken appropriate advice that would have shown a right of action with reasonable prospects of success resulting in an award of damages sufficient to justify the bringing of the action and that she ought in her own interests bring it, is rightly influenced by the attitude and character of the claimant. In the end of course the conduct must be reasonable. Further, questions if in all the circumstances it would not be reasonable to expect a reasonable person in the shoes of the plaintiff to have done so."*

[31] More recently the majority in the High Court in *State of Queensland v Stephenson & Anor* [2006] HCA 20 at paragraph 25 explained what the notion of “decisive” in s30 involves:

> *The ascription to material facts of the character of "decisive" looks to the response of an actor. It is here that the exegesis supplied by par (b) of s30(1) comes into play. The Court is to consider the response of "a reasonable person" in the manner explained in that paragraph. The particular claimant is to enjoy the advantage conferred by the provision in s30(1) for the making of an extension order only by satisfaction of criteria which look to the response of a reasonable person. In this way, s30(1) assists and controls an understanding of the compound conception in s31(2).*

[32] In cross-examination the Applicant agreed that he knew in 2000 after he had returned to work and had been placed in the position of supervising the shaft area after having had some retraining, that he was not able, with the symptoms he was suffering in his elbows, to return to the work of driving heavy machinery, something which had been the area of his primary employment in the mining industry over many years.

[33] The Applicant impressed me as a hardworking genuine man who had returned to work in 2000 after a period off work and had been given alternative employment which he managed without difficulty and without suffering any economic loss. He had not suffered any economic loss over the period he was away from work at this time. He was working in a remote area working for nine days on and five days off. His interest was in returning to employment and maintaining it without any loss of income. He was not experiencing any significant symptoms during this time and found it unnecessary to return to Dr Ness.

[34] When the Applicant was asked why he had not sought legal advice about the possibility of suing the Respondent he said:

> *"I've never sort of been one for suing people for no reason, especially when I thought I would be able to get back to work."*

[35] There he was obviously referring to the period after July, 2001. When in July 2001 he found that he could not perform the work of driving heavy machinery to which he had been directed he immediately sought medical advice and was informed that there were good prospects of resolving his condition through surgery, a course he then pursued with Dr Mansfield performing the first operation in late 2001. It does not appear that the question of surgery was raised with him when he saw a general practitioner and then Dr Ness in late 1999 and early 2000.

[36] After the surgery performed by Dr Mansfield there was a significant period of convalescence and it was not until mid 2002 that Dr Mansfield informed him that the operation on the right elbow had been unsuccessful but that he could perform it again and that in that event there was "a chance" that the condition would be cured. The Applicant used the words "a chance" to describe how Dr Mansfield spoke to him of the prospects of success of the second operation.

[37] The Respondent contends that the Applicant simply let matters go for too long before seeking advice about his position and that had he done so he would have been advised to institute proceedings. It was the Respondent's case that he ought to have sought advice at any time during this period and that had he done so he would have been advised to institute proceedings which would have been productive of a

reasonable amount of damages under the heads of general damages and economic loss. The latter being based upon the loss of some capacity to work giving rise to the risk that he might lose income in the event that he, lost his then employment or, at a later time, that the surgery was unsuccessful. The Respondent argued that this claim for economic loss could have been pursued or abandoned according to the exigencies as they stood at the time of trial.

[38] The Respondent focussed on two periods. Firstly it was said that for more than a year prior to the Applicant returning to the work of a driver in July 2001, he was aware that he was not able to perform the work of driving heavy machinery which was his normal employment in the mining industry and on which it was said he would have relied if it became necessary to leave his employment with the Respondent. It was argued that he should have sought legal advice as to his position given the impact that the problems in his elbows was having upon his earning capacity even if at that time he was not losing any income.

[39] Secondly it was said that once the Applicant had been informed that the first operation was unsuccessful and that the second operation offered only a chance of a cure, the reasonable course then to take was to seek legal advice. He had been off work for more than a year at this time although he was still in receipt of income and ought to have realised the precariousness of his position if the surgery was unsuccessful.

[40] It was not disputed that the Applicant acted reasonably when he had been advised in 2001 that surgery offered good prospects of resolving his problems in pursuing the course he did without seeking advice about an action at least until he was told the surgery was unsuccessful.

[41] Confining consideration to the Applicant's conduct during the first year and a half and indeed up until the time he was told that the first surgery had been unsuccessful, I do not think that his conduct can be said to be unreasonable. For the first year and a half he was in employment and in receipt of the same income he had been earning as a driver. He was not suffering any significant symptoms. I think it was reasonable of him in the above circumstances to continue in his employment and not to seek advice about suing his employer at that time. The definition of a material fact of a decisive nature, as Jerrard JA pointed out in *Pikrt v Hagemeyer Brands Australia Pty Ltd* [2006] QCA 112 at paragraph 22 "requires assessment of what a potential plaintiff could prove at a given time …" this is to be judged by the information that a reasonable person taking reasonable steps in relation to his position might have in his possession at any given time. During 2000 and the first part of 2001 the Applicant would have been able to establish that he had a condition of his elbows which did not preclude him from employment in a different capacity with the employer or produce any loss to him and which did not produce any significant symptoms but which prevented him from driving heavy machinery which was the area he had worked in for many years. He would also have been in possession of information had he pursued the matter with a solicitor who inevitably would have sought a medical opinion that surgery offered him good but not certain prospects of resolving his problem. Such surgery would have involved about two months off the work he was then doing. At best he might have been in the position he reached in early 2003 somewhat earlier if events had taken the same course. However as I have said I think he acted reasonably in the circumstances in which he was then in by not seeking legal advice about suing.

[42] The period after he had been informed that the first surgery was unsuccessful is also relied upon. He had at this time been off work for a considerable period.

[43] On the other hand he was receiving his income although not working and more importantly he was pursuing in accordance with medical advice a medical solution to his problems. In my view he acted reasonably in waiting for the outcome of the second procedure.

[44] It is plain that the Applicant did not wish to institute proceedings unless he had what he considered in his view to be good reason for doing so, something which he did not think he would have if he was able to return to his previous work. To use the language of Thomas J when speaking of the claim in *Muir v Franklins Ltd* (*supra*), "the evidence does not show the claimant to have been a person who was wilfully blind, negligent or even excessively casual".

[45] The Applicant here, like the claimant in *Muir*'s case was somewhat reluctant to commence legal proceedings. He sought to get on with his life initially by working in another position without loss of income and managing with some occasional and not severe pain. Once it became apparent in July 2001 that he could not continue in the work he was then required to do he sought medical advice and pursued surgery which he had reason to believe would be likely, so far as the first surgery was concerned, to resolve or in the case of the re-operation, might have resolved his problem. The matter in this regard bears some similarity to what occurred in *Maconachie v Woolworths Limited & Anor* [2005] QSC 249.

[46] The matter is one about which minds might differ but in my view looking at the Applicant's conduct as a whole in the light of the circumstances as they existed throughout the relevant period I think he acted reasonably in not seeking legal advice about the institution of possible proceedings prior to the time at which he did. As will be apparent from what I have said, different considerations applied at different times during this period but I think that throughout his conduct meets the test of reasonableness. Any action at any given time during the relevant period might have produced an award of general damages based upon pain and suffering for some period and may have produced some award of damages for impairment of earning capacity based upon the risks to which I have referred although I think this is far from certain and much would have depended upon the position things had reached when damages fell to be assessed. In relation to the important consideration of costs, I adopt what Jones J said in *Maconachie v Woolworths* at paragraph 15.

[47] I am satisfied that a material fact of a decisive nature, namely that he had a permanent incapacity for the work that he had previously done was not within the applicant's means of knowledge prior to the relevant date here.

[48] I order that the time for the institution of proceedings for damages for personal injuries against the Respondent in respect of injuries sustained by the Applicant in the course of his employment by the Respondent between July and December 1999 be extended so that it expires on 26th December 2003.

[49] I order that the parties' costs be costs in the cause.