SUPREME COURT OF QUEENSLAND

CITATION:	*Bust v Charles Porter and Sons Pty Ltd* [2010] QSC 317
PARTIES:	**NATALIE THERESE BUST** (applicant) **v** **CHARLES PORTER AND SONS PTY LTD** **ACN 009 659 232** (respondent)
FILE NO:	S 64 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Mackay Supreme Court
DELIVERED ON:	30 August 2010
DELIVERED AT:	Rockhampton
HEARING DATE:	5 August 2010
JUDGE:	McMeekin J
ORDERS:	**1. The application for the extension of the limitation period is allowed and the limitation period extended to 8 October 2010.** **2. Counsel will be heard as to costs.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – where applicant injured her lower back at work – where there is evidence to establish a right of action – whether the applicant knew or had within her means of knowledge the fact that her back condition was permanent *Limitation of Actions Act* 1974 (Qld), s 11, s 30, s 31 *Workers' Compensation and Rehabilitation Act* 2003 (Qld), s 295 *Healy v Femdale Pty Ltd* [1993] QCA 210 *Jocumsen v Thiess P/L & Anor* [2005] QCA 198 *Moriarty v Sunbeam Corporation Ltd* [1988] 2 Qd R 325 *NF v State of Queensland* [2005] QCA 110 *Sugden v Crawford* [1989] 1 Qd R 683

COUNSEL:	G.F. Crow for the applicant G.C. O'Driscoll for the respondent
SOLICITORS:	Macrossan & Amiet for the applicant WorkCover Queensland for the respondent

[1] **McMeekin J:** Natalie Therese Bust was employed as a "casual merchandiser" by the respondent. On 2 November 2005 she hurt her back at work when she struck her lower back or sacral area on the edge of an RHS section. She now wishes to pursue a claim for damages against the respondent alleging that her injury was a result of their breach of duties owed to her as their employee. She did not commence proceedings within the limitation period applicable.[1] She applies under s 31 of the *Limitation of Actions Act* 1974 (Qld) ("the Act") to extend that limitation period to 8 October 2010.

[2] The respondent concedes that there is evidence to establish a right of action apart from the limitation period and that there is no relevant prejudice.

[3] In those circumstances, in order to succeed on this application to have the limitation period extended, Ms Bust must show that "a material fact of a decisive character relating to the right of action was not within [her] means of knowledge" until a date after, in this case, 2 November 2007: s 31(2)(a) of the Act.

[4] The court has power to extend the limitation period for 12 months from the time the relevant material fact was within the applicant's means of knowledge.[2] The parties are agreed that time ceased to run on 22 January 2010 when a compliant Notice of Claim for Damages under s 295 of the *Workers' Compensation and Rehabilitation Act* 2003 was lodged. Thus a material fact of the requisite character coming within the applicant's means of knowledge after 22 January 2009 ("the critical date") will suffice.

[5] The onus lies throughout on the applicant.

The Basis of the Application

[6] It was submitted on the applicant's behalf that there were three material facts of a decisive character not within her means of knowledge until after the critical date – the "causal contribution of the subject incident", the degree of harm suffered, and the consequences of that degree of harm.[3]

[7] The facts relied on are clearly capable of being material facts going, as they do, to knowledge of the nature and consequences of the injury, and the extent to which it was caused by the relevant act: see s 30(1)(a)(iii)(iv) and (v) of the Act.

[8] The relevant material facts are said to be found in the advices that Ms Bust received in April 2009 from a Dr Dawes, a general practitioner, from an orthopaedic surgeon, Dr Mark Shaw, in his report of 8 October 2009, and from a consultant psychiatrist, Dr Futter, in his report of 6 November 2009.

[9] Dr Dawes told the applicant on 6 and 17 April 2009 that she suffered from a disc prolapse at the L4/5 level of her spine.

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1 Three years: see s 11 of the *Limitation of Actions Act* 1974 (Qld).

2 Section 31(2) of the Act.

3 The quotation is taken from the submission of counsel for the applicant, Mr Crow, at paragraph 3.1 where that numbering first appears.

[10] On the causation point the applicant relies on a comment by Dr Shaw in his report that "[a]s a result of the work injury, Mrs Bust now has mechanical low back pain."[4] It is submitted that prior to that advice Ms Bust had received "confused and contrary advice" including that her condition was due to degeneration, that her hips were injured, or her coccyx, or that the injury was to her upper back area.[5] I note that Dr Shaw diagnoses the injury as being to the coccyx, with resolution of that injury, and an aggravation of low lumbar spondylosis causing mechanical low back pain.[6]

[11] As to the degree and consequences of the harm suffered reliance is again placed on Dr Shaw's report. He opines that "the prognosis is for long term mechanical low back pain" aggravated by activities such as bending, lifting, prolonged sitting and standing. If that opinion be accepted then Ms Bust is permanently excluded from the full range of employment activities of which she was capable prior to sustaining the subject injury.

[12] This advice is contrasted with earlier advice that the applicant says that she received from another orthopaedic surgeon, Dr Dorgeloh, following an MRI scan, to the effect that "with time the injury would heal".[7] As well the applicant says that she received similar advice from the chiropractor with whom she consulted.[8] The applicant swears that prior to reading Dr Shaw's report she had thought that she would be able to obtain treatment to relieve the back pain from which she has suffered since the subject incident.[9]

[13] Further on this issue, reliance is placed on the opinions expressed by Dr Futter that the applicant has a chronic adjustment disorder with depressed mood, that she required anti-depressant therapy and that she should commence counselling or psychotherapy. The applicant has sworn that before reading his report she was not aware that she had such a condition, that it was permanent, or that she needed the treatment described.[10]

The Respondents' Case

[14] The respondent argues that the facts now relied on were either well known to the applicant, or capable of being discovered by her had she made reasonable enquiry, well prior to the relevant date, or were not of a decisive character in the relevant sense: see s 30(1)(b) of the Act.

Subsequent Work and Treatment History

[15] I will consider the period from the subject incident until 22 January 2009.

[16] Following the subject incident Ms Bust experienced pain which she has described as "severe"[11] and "extreme"[12]. She attended on a general practitioner, Dr Goldston. She was diagnosed with bruising to the coccyx and sacrum. She was given a certificate to take time off work for about two weeks. She returned to work but on

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4 See p. 5 of the report which is exhibit GCP1 to Mr Paterson's affidavit.
5 See para 3.1 of Mr Crow's submission, where it second appears, mistakenly including the submission with the quote.
6 At pp. 5- 6 of the report.
7 Para 40 of the applicant's affidavit.
8 T1-17/15.
9 Para 102 of the applicant's affidavit.
10 Paras 105 to 107 of the applicant's affidavit.
11 Para 29 of the applicant's affidavit.
12 Report Dr De Leacy (exhibit GCP 3 to Mr Paterson's affidavit) at p. 4.

lighter duties. She has continued ever since on those light duties, with occasional periods off work, because of continuing back pain.

[17] Because of continuing problems Ms Bust lodged a claim with WorkCover which was accepted. WorkCover referred the applicant to Dr Dorgeloh on 25 November 2005. He obtained an MRI scan of her back. The applicant reports that he advised her that she had aggravated a pre-existing condition in her lower back, that there was no surgical treatment that he could offer her and that she should return to work. As indicated above the applicant says that she was told by Dr Dorgeloh that with time her injury would heal.[13]

[18] Through the following December, January and February Ms Bust sought treatment form a chiropractor and another general practitioner. By early February 2006 the applicant was reporting constant pain in her back affecting her sleep and appetite. She was prescribed an antidepressant and advised to undergo counselling for pain management. She was referred to a psychologist by WorkCover. She took further time off work.

[19] In March 2006 Ms Bust was advised by her general practitioner that she was fit only for lighter duties ("suitable duties") and required treatment for depression and back pain. She was given a script for further antidepressant medication. She attended on the psychologist. Her work duties had been altered from active sales to completing paper work at a desk. Ms Bust says that the psychologist told her that there was nothing wrong with her "head wise"[14] but nonetheless she was referred, on the psychologist's recommendation, to a psychiatrist, Dr De Leacy, whom she saw on 10 April 2006.

[20] Dr De Leacy provided a report to WorkCover dated 10 April 2006. In the report the psychiatrist recommends further counselling, a need for antidepressant medication and a rationalisation of Ms Bust's pain relieving medication. The opinion is expressed that prognosis was uncertain but with appropriate treatment her condition should plateau but "[t]he diagnosis is being maintained partly because of the ongoing concerns about how long the orthopaedic problem will last".[15] Ms Bust first saw the report only after retaining solicitors in June 2009 and says that she was not advised of the recommendations.[16] That she was not advised of the report's contents probably arises from her expressed attitude to her case officer at WorkCover, after seeing Dr De Leacy, that she "[didn't] want to do this any more" and that she was "sick of this". She says that she felt that WorkCover was "simply sending me around in a circle and was not in any way helping me with my complaint which was with respect to low back pain."[17]

[21] Ms Bust then ceased to take the antidepressant medication but says that she was emotional at times and continued to have difficulty coping. She continued to be prescribed and to take pain killing medication. On occasions relatively trivial incidents have caused a flare up in her lower back pain and she has sought chiropractic treatment. Such treatment provided only temporary relief.[18] Ms Bust avoided tasks at home and at work that aggravated her pain.[19]

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13 Para 40 of the applicant's affidavit.
14 Para 54 of the applicant's affidavit.
15 Report Dr De Leacy (exhibit GCP 3 to Mr Paterson's affidavit) at p. 2-3.
16 Paras 93, 96 and 97 of the applicant's affidavit.
17 Paras 58 and 59 of the applicant's affidavit.
18 Para 71 of the applicant's affidavit.
19 Para 67 of the applicant's affidavit.

[22] By March 2009, the date closest in time to 22 January 2009 when she provides a description of her condition, Ms Bust considered that her back pain was severe, she was struggling with her work and with her continuing back pain.[20] She then sought to reopen her WorkCover claim.

[23] I turn now to the relevant issues.

Decisive Character

[24] I summarise the material facts relied on as being that before the critical date Ms Bust did not have within her means of knowledge the awareness of three things - that the subject incident had caused her an injury to her back, that that injury was not likely to resolve so that she therefore had a permanent impairment of her ability to carry out even the modestly heavy work involved in retail sales, and that this was allied with and sustaining a psychiatric condition that required treatment and was also likely to be permanent.

[25] Section 30(1)(b) of the Act provides:

> "(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing—
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> (i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
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> (ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action."

[26] Section 30(2) of the Act provides that for the purposes of s 30 "appropriate advice, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts."

[27] In determining whether a newly learned fact has the necessary quality of decisiveness an 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": *Moriarty v Sunbeam Corporation Ltd* [1988] 2 Qd R 325 per Macrossan J at 333.[21] See also the observation of Connolly J in *Sugden v Crawford* [1989] 1 Qd R 683 at 685:

> "Implicit in the legislation is a negative proposition that time will not be extended where the requirements of s 30(b) are satisfied. Without the emergence of the newly discovered fact or facts, that is to say, where it is apparent, without those facts, that a reasonable man, appropriately advised, would have brought the action on the facts already in his possession and the newly discovered facts merely go to an enlargement of his prospective damages beyond a level which,

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[20] Paras 72 and 73 of the applicant's affidavit.

[21] Cited with approval in *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306; *Berg v Kruger Enterprises* [1990] 1 Qd R 301; *Hintz v WorkCover Qld & Anor* [2007] QCA 72 at [38] – [39].

> without the newly discovered facts, would be sufficient to justify the bringing of the action ..."

[28] If one assumes that the material facts I have summarised were not within the applicant's means of knowledge then it seems apparent that together they would have the necessary quality of decisiveness. However to an extent they are interrelated. Knowledge of the psychiatric opinions alone, without knowledge of the permanence of the back condition, would not in my view convert the action from one not worth pursuing to one that was, as it is the permanence of the back condition that provides the basis for the opinion that the psychiatric condition is also permanent.

[29] Without these opinions being assumed Ms Bust could not succeed to a significant award of damages sufficient to justify incurring the risks and expense of litigation. All she could show was an injury to her back that was likely to recover with time, perhaps due in part to a pre-existing condition, some expense of a fairly limited amount for medication and occasional treatment, no loss of income to 22 January 2009 (or indeed to the present time), and emotional difficulties that she generally coped with, at least sufficiently well to maintain her employment. Assuming those premises, any award of damages would be largely restricted to a modest sum of general damages for pain, suffering and loss of amenities. Adverse costs orders are quite possible in this type of litigation and that is a relevant consideration too: *Jocumsen v Thiess P/L & Anor.*[22]

[30] If the material facts are assumed to be established then a significant award of damages could be contemplated as likely. Ms Bust survives in employment only because of the benevolence of an accommodating employer. That cannot be assumed to be likely to last indefinitely and certainly would not be so assumed for the purpose of assessing damages. Dr Shaw's opinion would not justify an assumption of unemployability but would justify, together with the opinion of Dr Futter, a finding of significant vulnerability in the employment market. Ms Bust has a likely need for treatment of one sort or another for the rest of her life. Diminution in prospects in the labour market is plainly compensable even if not immediately productive of financial loss.[23] Thus there is now the prospect of a significant award of damages for impaired earning capacity.

[31] In my view it is plain that the claimed material facts would convert the proposed proceedings from one not worth pursuing to one well worth pursuing. Similar reasoning has been applied in many cases.[24]

[32] I turn then to the question of whether these facts were within Ms Bust's means of knowledge before the critical date.

Means of knowledge

[33] Section 30(1)(c) of the Act provides:

> "A fact is not within the means of knowledge of a person at a particular time if, but only if –
>
> (i) the person does not know the fact at the time; and

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22 [2005] QCA 198 at [37]

23 *Spain v Dipompo Jacs Constructions P/L & Anor* [2009] QCA 323 per Keane JA at [60] and the authorities there cited.

24 For example *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697 at 704 per Kirby P; *Buckton v BHP Coal Pty Ltd* [2001] QCA 35 at [35] per Davies JA and Byrne J.

(ii) as far as the fact is able to be found out by the person the person has taken all reasonable steps to find out the fact before that time."

[34] I bear in mind that the correct approach is to determine the state of knowledge attainable by this applicant and that the Act, in s 30(1)(c) does not speak of "a reasonable person". The significance of this was explained by Keane JA in *NF v State of Queensland* [2005] QCA 110 at [29]:

> "It is to be emphasized that s 30(1)(c) does not contemplate a state of knowledge of material facts attainable in the abstract, either by the exercise of "all reasonable steps", or by the efforts of a reasonable person. It speaks of a state of knowledge attainable by an actual person who has taken all reasonable steps. The actual person postulated by s 30(1)(c) as the person who has taken all reasonable steps, is the particular person who has suffered particular personal injuries. Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant. It seems to me that, if that person has taken all the reasonable steps that she is able to take to find out the fact, and has not found it out, that fact is not within her means of knowledge for the purpose of s 30(1)(c) of the Act. ..."[25]

[35] The respondent submits that the applicant should not be believed when she claims that she did not know her condition was permanent or alternatively, that had the applicant taken "all reasonable steps" as required by s 30(1)(c)(ii) of the Act, then she would have discovered the material facts now relied upon, at a time prior to 22 January 2009.

[36] In my view the submission is well made in respect to the issues of causation and the impact of the psychiatric injury.

[37] As to causation, the applicant was never in doubt that her continuing pain was the product of the subject incident. She had not had any problem prior. She had had continuing and increasing back pain commencing from the time of the subject injury. At no time was it suggested to her that the incident was not the cause of her difficulties. The label that medical practitioners put on her condition was not material.

[38] As to the psychiatric injury the applicant had been referred to a psychologist and psychiatrist and did not seek to be advised what opinion the psychiatrist held. I am conscious of the applicant's background. She appeared to have only limited insight and resources. She was educated to grade 12. She was a shop assistant. She was frustrated by her lack of progress in finding a solution. She thought her condition to be a physical one. Nonetheless in my opinion this applicant, acting reasonably, after seeing a specialist would make enquiry of that expert's opinion. The applicant chose not too. It should have been evident to the applicant that she was unlikely to have been referred to a specialist psychiatrist by a psychologist if all was well. Dr De Leacy's opinions seem to be much the same as Dr Futter's opinions. There is no reason to think that those opinions would not have been made known to her had she asked. They were therefore within her means of knowledge.

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[25] See also the comments of Dawson J in *Do Carmo v Ford Excavations Pty Ltd* (1983-4) 154 CLR 234 at 259.

[39] That leaves what seems to me to be the only significant issue in the case – whether Ms Bust knew or had within her means of knowledge the fact that her back condition was a permanent one.

[40] It is clear that by 22 January 2009 Ms Bust had had ongoing problems which were of significance. She had been on light duties for three years and two months. She had had virtually constant pain. She had needed treatment from time to time and had required pain relieving medication. Her domestic activities were restricted. Because of these matters the respondent submitted that in truth the applicant no longer believed what Dr Dorgeloh, the general practitioner Dr Goldston,[26] and the chiropractor Mr Buda, had told her and ceased to do so long before 22 January 2009. Alternatively the respondent submits that a reasonable person in the applicant's position would have taken steps to find out the facts that it is now said that she did not know.

[41] Mr Crow submitted that the applicant here was in an analogous position to the applicant in *Healy v Femdale Pty Ltd* [1993] QCA 210 a case often cited on this issue. There the court said:

> "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."

[42] The facts here are not entirely analogous to those in *Healy*. A significant distinction is that the applicant here cannot claim that she found "herself able to get on with her life, and return to employment without significant pain or disability".

[43] But the crucial point is that the applicant did not simply go along through life without any expert guidance. She did attend on a specialist orthopaedic surgeon and it is not in issue that she received advice that her back would improve with time. It seems clear that she was not disabused of that opinion before 22 January 2009. Indeed her understanding was that the opinion was confirmed by other treatment providers. There was, at times, some improvement which could justifiably have given cause for some optimism.[27] The advice from Dr Dawes in April 2009 that she had a disc prolapse seems to be the first indication she had, from a medically qualified source, that Dr Dorgeloh's optimistic views may not be correct. Even then it is not clear that the applicant appreciated that the condition could not be relieved by treatment – Dr Dawes suggested physiotherapy so that he would be "better able to treat the condition".[28]

[44] It is not that the applicant was not seeking treatment – clearly she was attending on medical practitioners and chiropractors from time to time throughout. A relatively

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[26] See T1-8/23; 1-10/5.
[27] T1-12/50-60.
[28] Paragraph 80 of the applicant's affidavit.

unsophisticated person such as the applicant, with no medical training, might expect that those treatment providers would explain to her whether there were significant and permanent problems over and above what was obvious. There is no suggestion that she was not forthcoming in her reporting of her complaints or any reason to think that she had done anything to impede the giving of careful and accurate advice.

[45] The applicant was pressed in cross examination to accept that she knew all that Dr Shaw told her before seeing him. While the transcript is not entirely clear, she did not accept that suggestion.[29] I considered the applicant to be patently honest. When giving her evidence she was distressed at times and plainly in considerable discomfort which had an obvious effect on her ability to concentrate. I bear in mind that she had an untreated psychiatric condition which might well have affected her ability to give precise and cogent responses.

[46] It is clear that the applicant was not told that her condition was a permanent one, in my view at no relevant time did she believe it to be so, and acting reasonably there was no cause for her to take any more steps than she did to discover the opinions that her advisors now have provided.

Orders

[47] The application for the extension of the limitation period is allowed and the limitation period extended to 8 October 2010, the anniversary of the receipt of Dr Shaw's opinion.

[48] I will hear from counsel as to costs.

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[29] At T1-18/30 the reference was plainly intended to be to Dr Shaw not Dr Dorgeloh and at T 1-17 the full answer requires that the commencing phrase "In the end" qualify what followed.