VERSCHUUREN v TOM'S TYRES CORPORATION LTD

In the Supreme Court of the Northern Territory of Australia

Martin J.

26 & 27 September, 15 November 1991 in Darwin

LIMITATION OF ACTION - extension of time - no provision for extension under *Workmen's Compensation Act* - whether entitled to extension pursuant to *Limitation Act* - limitation period prescribed by *Workmen's Compensation Act* disqualifies entitlement - not within statutory exception - Court has no jurisdiction to extend - *Limitation Act* s. 3, 3(5), 5, 44, 44(1) - *Workmen's Compensation Act* s. 23(3A)

WORKERS' COMPENSATION - limitation period - payment received for time off work immediately after accident - whether "compensation" - effect on limitation period - proceedings not commenced within 3 years of compensation - operation of statute - no provision for extension of time - *Workmen's Compensation Act* s. 7, 10(1), 10B(1), 11, 23(1), 23(2), 23(3), 23(3A), 23(4)

Case followed:

Fersch v PWA unreported 14 August 1989 Martin J.

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 455 of 1989

BETWEEN:

DAVID DEREK VERSCHUUREN
Plaintiff

AND:

TOM'S TYRES CORPORATION LIMITED
Defendant

CORAM: MARTIN J

REASONS FOR JUDGMENT

(Delivered 15 November 1991)

The plaintiff claims damages from the defendant arising from injuries which the plaintiff alleges he suffered whilst employed by the defendant on or about 13 December 1984. The writ was filed on 19 July 1989 and was endorsed with notice that the plaintiff sought an extension of time pursuant to s. 44 of the *Limitation Act*.

On 21 June 1991 the Master relevantly ordered as follows:

"1. That the questions:

(a) Whether the Plaintiff has received compensation under the Workers Compensation Act as contemplated by Section 23(3) of the Act;

(b) Whether the Plaintiff's causes of action are subject to the limitation period prescribed by Section 23(3A) of the Workers Compensation Act;

(c) Whether the Plaintiff is entitled to an extension of time limited to him by Section 23(3A) of the Workers Compensation Act pursuant to Sub-Section 44(1) of the Limitation Act;

(d) Whether the Plaintiff's causes of action are subject to the limitation periods prescribed by Section 12 of the Limitation Act; and/or

(e) Whether the plaintiff is entitled to an extension of time limited to him by Section 12 of the Limitation Act pursuant to Section 44 of the Limitation Act

shall be tried before the trial of the proceedings.

2. That the evidence at the trial of the preliminary questions, referred to in order 1 hereof, shall be by way of affidavit, save that each party shall have the right to cross-examine the deponents of the affidavits filed by the other party."

The preliminary questions detailed in the order came before the Court in due course and this is the ruling and reasons in respect of those matters.

Being a limitations question time is an important issue and the following represents a chronology of significant dates and events as they were presented at the trial of the preliminary issues. There was no significant dispute as to any of them.

	Prior to 13 December 1984 the plaintiff says he suffered no previous back problems.
13 December 1984	The plaintiff was employed by the defendant and was passing tyres to a work mate who was on a platform above his head. A tyre fell from above and hit him on the head.

	The plaintiff felt some pain and numbness and lay down for a period of about 10 minutes, but the pain was intense and he found he could barely stand up. He reported the incident to one of the managers of the business, Mrs Jackson who on that afternoon drove him to see Dr Gorman, and from there he was driven to see Dr Pillai who gave him a general examination. Mrs Jackson drove the plaintiff back to her house and he stayed there the night. He did not return to work on that day.
	Mr Jackson says that he worked with the plaintiff after 13 December 1984 and could not recall him complaining that he had any difficulty performing his work or that he was suffering any pain or discomfort. Mr Jackson also played indoor cricket with the plaintiff and did not observe him suffering any difficulty in any of the activities involved in playing that game.
14 December 1984	Mr Jackson, another manager of the business, took the plaintiff to Dr Gorman's surgery again where Dr Pillai was present and administered a general anaesthetic, and it appears that some of the plaintiff's joints were manipulated which gave relief to the pain in his lower back and right arm which had persisted overnight. He remained away from work for the rest of that day.
13 & 14 December 1984	Mr and Mrs Jackson paid the doctors' bills on behalf of the

	plaintiff to Dr Gorman on 13 December $27.50, on 14 December $50, to Dr Pillai on 13 December $15 and on 14 December $35 and a further amount of $70, in all $197.50. Those sums were reimbursed to Mr and Mrs Jackson by the defendant during December 1984.
17 December 1984	The plaintiff returned to his place of employment. He was paid for the period he was away from work, Thursday afternoon and Friday. He says he received no further pain in his back during the period of employment with that company.
8 February 1985	The plaintiff left the defendant's employment and commenced work with Darwin Freight Lines doing fairly heavy work. He developed a slightly sore back from time to time and attributed that to the type of work he was then doing. Mr Jackson observed the plaintiff whilst he was working for Darwin Freight Lines when he came to the defendant's workshop delivering tyres and saw him unloading tyres and on none of those occasions did the plaintiff display any difficulty doing so, nor did he make any complaint to Mr Jackson concerning pain or discomfort.
5 March 1985	Report of the injury given by the defendant to the

	defendant's workers compensation insurer, Mercantile Mutual Insurance Limited.
October 1985	The plaintiff remained with Darwin Freight Lines until this time working as a loader and driver. During his period with that company the plaintiff says he suffered minor soreness a couple of times, but did not relate it to the accident at Tom's Tyres.
23 October 1985 to 5 January 1986	According to the Department of Social Security the plaintiff was paid sickness benefit.
13 November 1985	The Director General of Social Security gave notice to Mercantile Mutual Insurance Co, the workers compensation insurer of the defendant, that the plaintiff was "A person who is, or was, qualified to receive a sickness benefit" in respect of an incapacity for work incurred in approximately December 1984, and further gave notice that he may wish to recover from the insurer the whole or some part of the amount of sickness benefit paid to the plaintiff in respect of that incapacity.
3 December 1985	A person who introduced himself as being the plaintiff telephoned a Mr Humphrey of the Workers Compensation Insurer saying that he had been off work from Darwin Freight Lines from 16 October 1985 to 11 November 1985; "He stated he has suffered an aggravation of injury 13/12/84

and was advised by Social Security to direct his claim to Tom's Tyres". Mr Humphrey said that he informed the caller that the company would not admit liability as he had been off work for only one day on 13 December 1984 for which Tom's Tyres had paid compensation. According to Mr Humphrey, the person calling became very angry, "and said he would be going to a solicitor and would get money out of someone". Mr Humphrey's recollection of that telephone call came from a contemporaneous note made by him.

December 1985 — The plaintiff went from Darwin to Townsville.

The plaintiff commenced employment at Beaurepaires, but the employment only lasted for about week. It involved the fitting of tyres on passenger cars which placed strain on his back, but he had no particular back problems or complaints. He left that employment as he was having difficulties with an injury to an elbow for which he was receiving regular treatment.

March 1986 — The plaintiff commenced employment with F J Walker Limited at Townsville. He had been unemployed in the intervening period and once again the work involved the lifting of heavy objects, but he did not have any particular back difficulty. He left the employment for reasons he says were unassociated with any physical disability.

August 1986	The plaintiff returned to Darwin having been unemployed for a period and commenced work for J R Roe & Company as a counter assistant and remained there until March 1987. During that period the plaintiff slipped on a patio at his house on his way to work and hurt his back and was off work for a week or two, but when he returned to work he felt fine with no residual soreness.
June 1987	The plaintiff commenced employment with Bridgestone in Adelaide having been unemployed in the interim period. He was employed with Bridgestone as a tyre fitter.
August 1987	The plaintiff returned to Townsville and worked for another branch of the Bridgestone group of companies as a tyre fitter.
June 1988	The plaintiff became a service fitter with a related company.
July 1988	As part of his job the plaintiff began driving trucks to a mine some 380 kilometres distant from Townsville.
August 1988	On a return journey from the mine, the plaintiff felt low back irritation which turned into considerable pain the next day although he attended work to fulfil his administrative duties. Over the following weekend the pain appeared to subside a

	little, but on the following Monday he felt pain across his lower back and also in one of his legs.
	The pain experienced on the trip back from the mine led the plaintiff to consult a doctor in Townsville, he received some treatment and he was absent from work for 4 days, returning to the doctor each day, but, with rest, he started feeling a bit better.
Mid October 1988	The plaintiff felt a pain which he says paralysed him for a number of minutes when he went to put on a boot. Since his last visit to the doctor in Townsville the pain had dwindled and he did not feel that it came back again until that particular occurrence. He went to work, but could not undertake any labour and over the next couple of days the pain subsided and he continued to work doing administrative jobs.
24 October 1988	Being a couple of days after the above incident, the plaintiff says his back seized while he was at work and on the same day he resigned following an argument with a fellow employee.
November 1988	The plaintiff was driving to Cairns as part of his then employment as a roof tiler with his brother when his back seized again and he spent the weekend in bed before going back to Townsville.

Two days after his return to Townsville the plaintiff turned around and got a severe sharp pain in his lower back and he then ceased his employment with his brother.

After taking legal advice the plaintiff was examined by Dr Watson, who, according to the plaintiff, told him after he had inspected X-rays taken previously and examined him, that the probable basis for his back injury was the 1984 accident when he was employed by the defendant. According to the plaintiff he had not recognised until he was given that advice that the cause of his back problems could be related back to the accident in the defendant's work place in December 1984.

29 November 1988

Dr Watson, a specialist in the area of assessment and treatment of musculoskeletal pain, predominantly of spinal origin, interviewed the plaintiff and came to the opinion that the plaintiff had symptoms of lumbar disc disruptions, probable protrusion and low grade root pressure and that the primary cause of that condition was the trauma to his lumbar spine suffered in an injury which the plaintiff informed him occurred on 13 December 1984 whilst employed by the defendant. In his detailed report, Dr Watson said that the recent prolonged car journey was "the straw that broke the camel's back" and would not in its own right have caused the damage unless there had been a pre-existing problem.

February 1989	The plaintiff commenced work with Beaurepaires again, by which time his back pain varied, but he remembers that on the 27th of that month he had bent down to pick up a 20 kilogram bottle, his back had seized up, and he had had to take a week off work.
June 1989 to February 1990	The plaintiff was employed by Albert Smith Signs as a general hand involving no heavy lifting although repetitive bending.
19 July 1989	Writ filed.
June 1990	The plaintiff was employed by Queensland Railways at Collinsville as a general labourer removing ballast from around the railway line and experienced increased pain in his lower back and returned to Townsville.
9 September 1991	Mr Schaeffer, neurosurgeon of Adelaide, examined the plaintiff, and on the basis of the information provided to him, his viewing of a CAT scan of 11 July 1990 and some MRI scans, was of the opinion that the plaintiff did not present as a man who displayed any clinical or radiological evidence of back disability. He did not believe that the nature of the force described by the plaintiff at the 1984 accident when the tyre fell on his head was consistent with low back injury. In short, the neurosurgeon was of the view

	that the plaintiff was fit for normal types of work including that of a tyre fitter.
September 1991	At the date of the hearing the plaintiff was employed in a supervisory capacity for a tiling contractor and was not obliged to engage in any heavy lifting.

The plaintiff was cross-examined as to the frequency and intensity of the pain and discomfort in his back during the period since the accident, but he was largely unshaken, although some inconsistencies were to be found in his evidence and what he had told Dr Watson for instance.

The plaintiff denied that he had called Mr Humphrey in December 1985 saying that he had no knowledge of the company or of the man. On the evidence available I could not find that the plaintiff made that telephone call. He denied sundry suggestions made in cross-examination that he was aware long before he received the advice from Dr Watson that such pain and discomfort as he experienced in his back was or could be related to the accident whilst he was employed by the defendant. He denied that he had ever made a claim against Darwin Freight Lines for difficulties with his back, although he made a report to that company. If he did make that call then it was clearly in relation to a claim for workers compensation and not for damages for injury suffered as a result of breach of duty or care.

I am satisfied upon the whole of the evidence, for the purposes of this application, that prior to the accident in 1984 the plaintiff had not suffered any injury to his back, that there was an accident such as he described when he was working for the defendant in December 1984, that he has suffered back pain from time and time of varying frequency and intensity

prior to seeing Dr Watson, that the pain and discomfort he suffered during the period from 1984 until he saw the Doctor may well have been an aggravation of any injury that he suffered in 1984, but that it was not until he received Dr Watson's opinion that he had reason to believe that the primary cause of his condition was trauma to his lumbar spine suffered in an injury on 13 December 1984 whilst employed by the defendant. Mr Schaeffer's report does not assist me.

The first question set down for trial as a preliminary issue is whether the plaintiff had received compensation under the *Workers' Compensation Act*. If he did, then consideration needs to be given to whether his cause of action against the defendant is subject to the limitation period prescribed in s. 23(3A) of the *Workers' Compensation Act*.

Section 23 of the *Workmen's Compensation Act* (since repealed) provides as follows:

> "23. LIABILITY OF THE EMPLOYER INDEPENDENTLY OF THIS ORDINANCE
>
> (1) Except as provided by this Ordinance, a worker shall not be entitled, in respect of personal injury (by accident) arising out of or in the course of his employment to receive compensation or any payment by way of compensation from his employer both independently of and also under this Ordinance.
>
> (2) If the injury is an injury in respect of which a worker is entitled to receive a pension, other than a service pension, under the Repatriation Act 1920-1951, the worker shall not be entitled to compensation under the provisions of this Ordinance.
>
> (3) Subject to sub-section (3A), where personal injury is caused to a worker in circumstances which appear to create a legal liability in his employer to pay damages in respect thereof and the worker has received compensation under this Ordinance, the worker shall be entitled to take proceedings against his employer to recover damages.
>
> (3A) A worker shall not be entitled to take proceedings under sub-section (3) unless he commences those proceedings -

(a) within 3 years after the date upon which he received payment, or the first payment, of compensation under this Ordinance; or

(b) if, on that date, he is under a legal disability or, as a result of the injury, a physical disability that prevents or hinders him from commencing the proceedings, then within 3 years after the date on which the disability ceases.

(4) A worker who recovers damages (other than damages for pain and suffering or loss of amenities of life in respect of the injury to a resident of the Territory, within the meaning of the *Motor Accidents (Compensation) Act*, in or as a result of an accident, within the meaning of that Act, that occurred in the Territory) from his employer in respect of an injury shall not be entitled to compensation or any payment under this Ordinance in respect of the same injury and any sum received by him under this Ordinance in respect of that injury prior to the award of the damages shall be deducted from the amount of the damages recoverable from his employer."

It is not contended that such personal injury as was suffered by the plaintiff in the accident did not arise out of or in the course of his employment (ss. (1)). Thus, except as provided by the *Act*, he is not entitled to receive compensation or any payment by way of compensation from his employer both independently of and also under the *Act* (ss. (1)). The circumstances of the accident appear to create a legal liability in his employer to pay damages (ss. (3)), (I do not decide that point), but the worker is not entitled to take proceedings under that provision unless he commences proceedings within the time prescribed (ss. (3A)). It is critical to determine whether or not he received compensation or any payment by way of compensation from his employer, the defendant (ss. (3A)).

There is no definition of "compensation". Section 7 provides that where personal injury by accident arising out of or in the course of his employment by his employer is caused to a worker, his employer shall, subject to the *Act* be liable to pay, in addition to any other

compensation payable under the *Act*, compensation in accordance with the Schedule 2. That Schedule has to do with compensation for death, partial and total incapacity for work. Compensation is also payable in respect of certain injuries (s. 10(1) and Schedule 3), but that is irrelevant to this matter except to show that it is a form of compensation other than for death and loss of income provided for in s. 7. A worker is entitled to be paid his salary or wages in full in respect of the day on which he receives an injury in respect of which compensation is payable under the *Act* (s. 10B(1)).

Medical and surgical treatment, hospital treatment and nursing and ambulance services appear not to be treated as being compensation. It is provided in s. 11, inter alia, that where an employer is liable to pay compensation in respect of death or incapacity for work, then the employer shall be liable to pay the costs of those treatments and services, but I do not think I need to decide whether payment of such costs amounts to compensation. I am of the opinion that the pay which the plaintiff received in respect of the time he was off work immediately after the accident, was compensation within the meaning of the *Act*. There was a legal liability upon the employer to pay the plaintiff's wage in respect of the day on which he received the injury, and such an amount was paid to the plaintiff. There was no evidence that that payment of wage was made gratuitously or by way of sick leave pay, by mistake or for any other reason than that it was required to be paid by the *Act*. It is clear upon the evidence of Mr and Mrs Jackson that they were aware that the plaintiff was incapacitated during the period he was off work consequent upon the accident. They were the managers for the defendant and they took him to the doctors and looked after him at their home overnight and took him back to the doctors the following day. The defendant gave notice of the accident to its insurer, albeit 3 months after the event.

Clearly, the plaintiff did not take proceedings against the defendant to recover damages

within 3 years after the date upon which he received payment of compensation. There is no provision within the *Workmen's Compensation Act* relating to an extension of time for the commencement of such proceedings.

The next question is whether the plaintiff is entitled to an extension of time to take the proceedings pursuant to s. 44(1) of the *Limitation Act*. That section provides that subject to s. 44, where the *Limitation Act* "or any other Act" prescribes or limits the time for instituting an action, a Court may extend the time so prescribed or limited to such an extent and upon such terms if any as it thinks fit.

However s. 5 of the *Limitation Act* provides that that *Act* does not apply to any action for which a period of limitation is prescribed by any other enactment other than an enactment referred to in s. 3. The *Workers' Compensation Act* is not an enactment referred to in s. 3, but it prescribes a period of limitation, and on the face of it the *Limitation Act* not applying to that action, s. 44 does not apply. The Court therefor has no jurisdiction to extend the time prescribed in the *Workers' Compensation Act*. Section 44 talks of time limitations prescribed by the *Limitation Act* or any other *Act* or an instrument of legislative or administrative character. In this context the word 'Act' and the instruments of a legislative or administrative character referred to in s. 44 can only refer to the Acts and such instruments as are referred to in s. 3. That section provides in ss. (5) that whether or not an enactment or part of an enactment applying in the Territory is repealed by virtue of s. 3, the *Limitation Act* shall apply in respect of all those actions to which it is expressed to apply. It does not apply to any action for which a period of limitation is prescribed by any other enactment, but it does apply to an enactment referred to in s. 3 (s. 5). Thus, where the *Limitation Act* or any other Act etc referred to in s. 3 comes under consideration, then the *Limitation Act* applies. But, the *Workmen's Compensation Act* is not an Act falling within the ambit of sections 5 and 3 and is thus not the subject of s. 44. As s. 5 says, the

Limitation Act does not apply to any action for which a period of limitation is prescribed by any other enactment, subject to a qualification which qualification has no application in this case. It is the *Workmen's Compensation Act* which places the limitation upon the taking of proceedings against an employer to recover damages, not the *Limitation Act*. The *Workers' Compensation Act* is an enactment which is not an enactment referred to in s. 3 of the *Limitation Act* and thus the *Limitation Act* does not apply to the action for which a period of limitation is prescribed by the *Workers' Compensation Act*. I came to the same view in *Fersch v Power and Water Authority* (unreported 14 August 1989) by a slightly different route and adhere to that view.

The answers to the questions are:

(a) Yes

(b) Yes

(c) No

(d) No

(e) No