44A/76

SUPREME COURT OF VICTORIA — FULL COURT

HEVEY v LEONARD

Gillard, Menhennitt and Dunn JJ

25, 26 February, 31 March 1976 — [1976] VicRp 64; [1976] VR 624

LIMITATION OF ACTIONS – KNOWLEDGE OF MATERIAL FACTS IN RELATION TO THE CAUSE OF INJURY – APPLICANT KNEW IN MAY 1973 WHEN THE NEGLIGENCE OF ANOTHER PERSON CAUSED PERSONAL INJURY – APPLICANT WAS REQUIRED TO MAKE APPLICATION WITHIN 12 MONTHS OF THAT DATE – ACTION NOT TAKEN UNTIL JUNE 1975 – WHETHER APPLICANT'S RIGHT TO TAKE ACTION HAD EXPIRED – FINDING BY JUDGE THAT ACTION TAKEN WITHIN TIME – WHETHER JUDGE IN ERROR: *LIMITATION OF ACTIONS ACT*, S23A.

L. was involved in a car accident in May 1970, and treated for shock and anxiety. After suffering headaches and shoulder pain which he did not associate with the accident, he eventually discovered in May 1973 that he had incurred ligament damage to the neck and narrowing of spinal discs. This medical report indicated that he was not grossly disabled and the chances were that he would improve. After consulting solicitors, he decided not to pursue legal action. In February 1975 a specialist advised that his condition would deteriorate and his employment as a drainer would aggravate his condition. The basic difference between the two opinions was that the 1973 opinion indicated he could continue his present work, whereas the 1975 opinion said otherwise. Argued that the difference was insufficient to show that material facts relating to the cause of action were unknown to L. when time ran out under the Act.

HELD: Judge's Order set aside. Summons dismissed with costs.

1. As was decided in *McManamny v Hadley* [1975] VicRp 70; [1975] VR 705 at p713, in the context, the expression "so caused" is a reference back to the cause referred to in par.(e), that is caused by negligence, nuisance or breach of duty. Hence, in the present case the applicant had to establish that he learned for the first time in February 1975 the nature or extent of the injury caused to him by the alleged negligent driving of the proposed defendant on 27 May 1970.

2. The injury caused to an injured person is ordinarily caused by the act or neglect constituting the negligence and although subsequent facts may be looked at to quantify the damages thereby suffered, the injury for which the damages are awarded occurs when the negligent act occurs.

3. The applicant did not know for the first time in February 1975 any aspect of the nature or extent of the injury caused by the motor collision on 27 May 1970. On the contrary, he knew the nature and extent of the injury so caused by the end of 1973. It followed that the Trial Judge was in error in deciding that the applicant did not know until February 1975 the extent of his injury within the meaning of s23A(3)(g). The applicant did not establish that any material fact relating to the cause of action was not known to him, within the meaning of subs(2) and subs(3) of s23A, at any time after December 1973. As there was absent an essential condition necessary to permit an extension of time, namely, knowledge, within one year of the date of the application, of the nature or extent of the injury, no extension of time pursuant to s23A could be granted.

4. Accordingly, the appeal was allowed with costs and the order made by the Judge on 17 September 1975 set aside and the summons dismissed with costs.

The Full Court (Gillard, Menhennitt and Dunn JJ) delivered the following judgment: ... As pointed out in *McManamny v Hadley* [1975] VicRp 70; [1975] VR 705, at p712, the expression "material facts relating to the cause of action" in s23A(2)(a) is wider than the expression "material facts constituting the cause of action". However, in subs(3) the expression which is being defined is not "material facts" but "'material facts' in relation to the cause of action", the wider concept above referred to. This means, however, that definitions in pars (a) to (h) inclusive of subs(3), being definitions of the wider concept, stand on their own and it is not permissible to apply to them a second time the words "relating to the cause of action".

By s23A(3) it is provided that for the purposes of subs(2) material facts in relation to a cause of action include:—

"(f) the nature of the personal injury so caused; and

(g) the extent of the personal injury so caused."

As was decided in *McManamny v Hadley*, *supra*, at p713, in the context, the expression "so caused" is a reference back to the cause referred to in par.(e), that is caused by negligence, nuisance or breach of duty. Hence, in the present case the applicant must establish that he learned for the first time in February 1975 the nature or extent of the injury caused to him by the alleged negligent driving of the proposed defendant on 27 May 1970.

The injury caused to an injured person is ordinarily caused by the act or neglect constituting the negligence and although subsequent facts may be looked at to quantify the damages thereby suffered, the injury for which the damages are awarded occurs when the negligent act occurs (*Ruby v Marsh* [1975] HCA 32; (1975) 132 CLR 642; (1975) 49 ALJR 320, at p325; 6 ALR 385; *East v Breen* [1975] VicRp 2; [1975] VR 19, at p38).

There may be a situation in which operative treatment may be necessitated by the injury and this may cause further injury which is properly characterized as caused by the negligence. *McManamny v Hadley* was such a case. But no such operative treatment causing further injury occurred in the present case. What happened in the present case was that the applicant did not know until May 1973 that his injury was caused by the motor collision. But this was ignorance of the fact that the negligence caused personal injury within the meaning of par.(e) of subs(3). Indeed, it was the learning of this knowledge which the applicant relied upon in his first affidavit, but, as to this knowledge acquired in May 1973, the one year within which the application must be made, as provided by subs(2), had long since expired when the applicant came to make his application by summons dated 13 June 1975.

The evidence establishes that by the time Dr Ingpen had reported in December 1973 the applicant knew the nature and extent of the injury caused to him by the motor collision. He knew that the injury caused to him was injury in and to the neck and he knew the extent of that injury because he then knew that he had probable soft tissue injury and ligament damage to his neck and that there was slight disc space narrowing between cervical vertebrae C4 and C5 and probable soft tissue injury at vertebrae C6, C7.

In our opinion there are three separate reasons why what the applicant learned from Mr Bryant Curtis in February 1975 was not knowledge of the extent of his injury.

In the first place "injury" in paragraphs (f) and (g) of subs(3) means the physical injury and not the signs and symptoms thereof. Pain and stiffness do not constitute the injury. They are merely evidentiary of it. All the applicant learned from Mr Bryant Curtis was his opinion as to the effects of his then employment on the pain and stiffness which were signs and symptoms of the injury. If "injury" included signs and symptoms, every case of a continuing injury would be covered by s23A, because the pain and stiffness resulting from an injury may vary according to weather, climatic conditions, the activity of the person and various other factors. If "injury" meant no more than signs and symptoms, in every case of a continuing injury it would be permissible to extend the time for instituting proceedings. If this was what the provision was intended to cover very different language would have been necessary to produce such a result.

In the second place, "injury" within paragraphs (f) and (g) does not comprehend effects on the working capacity of the injured person. Such effects are consequences of the injury but, although they may constitute evidence of the nature or extent of the injury, they are in themselves neither "the nature of the personal injury" nor "the extent of the personal injury".

In the third place, the nature and extent of an injury does not depend upon the possible varying prognoses of medical practitioners whom the applicant may consult. Any such prognosis is no more than an expression of opinion as to what the effects of the injury will be in the future. But such an opinion does not reveal to the applicant knowledge of the nature or the extent of the injury.

Accordingly, the applicant did not know for the first time in February 1975 any aspect of the

nature or extent of the injury caused by the motor collision on 27 May 1970. On the contrary, he knew the nature and extent of the injury so caused by the end of 1973. It follows that the learned County Court judge was in error in deciding that the applicant did not know until February 1975 the extent of his injury within the meaning of s23A(3)(g). The applicant has not established that any material fact relating to the cause of action was not known to him, within the meaning of subs(2) and subs(3) of s23A, at any time after December 1973. As there was absent an essential condition necessary to permit an extension of time, namely, knowledge, within one year of the date of the application, of the nature or extent of the injury, no extension of time pursuant to s23A could be granted. Accordingly, the appeal should be allowed with costs and the order made by his Honour Judge Stabey on 17 September 1975 should be set aside and the summons dismissed with costs.

Appeal allowed with costs to be taxed. Order of Judge Stabey set aside and in lieu thereof, summons dismissed with costs to be taxed. Certificate granted under the *Appeal Costs Fund Act* to the proposed defendant.

Solicitors for the proposed plaintiff: Norris, Coates and Hearle.
Solicitors for the proposed defendant: HL Yuncken and Yuncken.
