SUPREME COURT OF QUEENSLAND

CITATION:	*Star Aged Living Limited v Lee* [2024] QCA 1
PARTIES:	**STAR AGED LIVING LIMITED** (appellant) **v** **NANCY FAY LEE** (respondent)
FILE NO/S:	Appeal No 4234 of 2023 SC No 10446 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2023] QSC 49 (Mellifont J)
DELIVERED ON:	25 January 2024
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2023; 30 November 2023
JUDGES:	Bowskill CJ and Bond and Flanagan JJA
ORDERS:	**1. The appeal is allowed.** **2. The orders of the primary judge made on 10 March 2023 and 22 March 2023 (in relation to costs) are set aside.** **3. The respondent's application to extend the limitation period is dismissed.** **4. The respondent pay the appellant's costs of the appeal and of the proceedings below.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURY MATTERS – KNOWLEDGE OF MATERIAL FACTS OF A DECISIVE CHARACTER – GENERALLY – where the respondent was employed as an Assistant in Nursing at an aged care facility controlled and managed by the appellant – where the respondent alleged that she suffered a back injury while at work due to the negligence of the appellant – where the respondent did not consult a lawyer until after the limitation period had expired – where the respondent applied for an extension of the limitation period on the basis that there were three material facts of a decisive character relating to her right of action, which were not within her means of knowledge until after the limitation period had expired –

where the application to extend the limitation period was granted by the primary judge – where, on appeal, the appellant contended that the factual conclusions of the primary judge as to the existence of each of the three material facts of a decisive character were incorrect – where the appellant also argued that the primary judge erred in the exercise of the discretion to order that the limitation period be extended, on the basis that, notwithstanding some prejudice to the appellant, the claim could still be fairly litigated – whether the primary judge erred in extending the limitation period

Limitation of Actions Act 1974 (Qld), s 30, s 31

Baillie v Creber & Anor [2010] QSC 52, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, considered
Castillon v P&O Ports Ltd (No 2) [2008] 2 Qd R 219; [2007] QCA 364, considered
GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore (2023) 97 ALJR 857; [2023] HCA 32, considered
Hertess v Adams [2011] QCA 73, cited
Holt v Wynter (2000) 49 NSWLR 128; [2000] NSWCA 143, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
NF v State of Queensland [2005] QCA 110, applied
Spain v Dipompo Jacs Constructions P/L & Anor [2009] QCA 323, applied
Sutton v Hunter & Anor [2022] QCA 208, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: B F Charrington KC for the appellant
C C Heyworth-Smith KC, with C Campbell, for the respondent

SOLICITORS: Cooper Grace Ward Lawyers for the appellant
Kare Lawyers for the respondent

[1] **BOWSKILL CJ:** The respondent alleges she injured her back when she was at work on 19 December 2015 and that the injury was caused by the negligence of her employer, the appellant. She did not consult a lawyer until December 2019, a year after the three year limitation period had expired. That lawyer took steps to urgently lodge a notice of claim under s 275 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld). Proceedings were commenced in the Supreme Court in September 2020. In September 2021, the respondent applied, under s 31 of the *Limitation of Actions Act 1974* (Qld), for an extension of the limitation period, on the basis that there were three material facts of a decisive character relating to her right of action, which were not within her means of knowledge until after the expiry of the limitation period and that justice was best served by extending the time limit. Her application was successful.[1] The appellant challenges that decision as wrong,

[1] *Lee v Star Aged Living Limited* [2023] QSC 49 (reasons).

both in terms of the factual conclusions reached as to the existence of the qualifying prerequisite to the exercise of the discretion (the contended material facts of a decisive character) and on the basis of error in the exercise of the discretion to extend the limitation period, the primary judge having found that, notwithstanding some prejudice to the appellant, the claim could still be fairly litigated.

[2] For the following reasons, I would allow the appeal, on the basis of error in finding the prerequisite to the exercise of the discretion under s 31 was established.

[3] The appellant pressed eight grounds of appeal, four of which relate to the question of "prejudice", with the remaining four relating to the contended "material facts". Although the appellant dealt with the grounds in that order, I have found it more logical to deal with the argument about the material facts first. Before embarking on the grounds, it is helpful to set out a brief understanding of the respondent's case.

The respondent's case

[4] At the relevant time, the respondent was employed as an assistant in nursing, working at the Star Gardens Nursing Home, an aged care facility controlled and managed by the appellant.

[5] Paragraph 6 of the statement of claim alleges that:

> "On or about 19 December 2015, during the course of the Plaintiff's employment:
>
> (a) The Plaintiff was working within her usual duties as an Assistant in Nursing;
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> (b) The Plaintiff was working with colleagues to care for residents at the workplace;
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> (c) The Plaintiff's colleagues advised the Plaintiff that there were no slide sheets available to assist in moving residents;
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> (d) The Plaintiff did not know where to obtain slide sheets in the workplace;
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> (e) The Plaintiff moved residents without a slide sheet;
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> (f) While moving residents, the Plaintiff began to experience back pain.
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> ('the incident')."

[6] The respondent alleges, by paragraph 7, that as a consequence of the incident, she sustained the following injuries:

(a) Discal protrusion at L4/5 causing cauda equina syndrome;

(b) Incisional hernia following corrective surgery;

(c) Adjustment disorder with mixed anxiety and depression.

[7] The allegation of negligence is contained in paragraph 10 of the statement of claim, in the following terms:

"10. The incident as aforesaid was caused by the negligence and/or breach of contract on the part of the Defendant, the particulars whereof are as follows:

(a) Failing to provide the Plaintiff with reasonable plant and equipment, namely any slide sheets;

(b) Failing to ensure the Plaintiff was using slide sheets to move residents;

(c) Failing to take reasonable care for the safety of the Plaintiff;

(d) Failing to pay due care and attention for the safety of the Plaintiff;

(e) Exposing the Plaintiff to a risk of injury which it knew or ought to have known to have been in existence and which would have been avoided by the exercise of reasonable care;

(f) Failing to ensure that any, or any reasonable risk assessment of the tasks undertaken were conducted to identify any potential hazards to which the Plaintiff was exposed;

(g) Failing to comply with its obligations pursuant to the provisions of WHSA and associated regulations and codes/standards of practice."

[8] In her affidavit, filed in support of the application to extend the limitation period, the respondent described the incident as follows:

"8. I sustained a back injury in the course of my employment as an Assistant in Nursing with the Defendant's aged care facility on 19 December 2015. It occurred during my first shift back from maternity leave.

9. I was working a shift that day between 2pm and 10pm. I do not recall at what time I injured my back.

10. During the course of my shift, I was required to move residents, however there were apparently no slide sheets available for me to use and I was told by my partner that we did not have any slide sheets. Some of the residents were in beds that were too low for me to comfortably access and my partner was considerably shorter than me. I recall that I was working with a poorly trained colleague who did not assist me with safe moving of residents and who did not use slide sheets even when they were available."

[9] The respondent was 30 years of age at the time of the incident. She had experience working as an assistant in nursing in various aged care facilities from August 2007. She had worked for the appellant at the Star Gardens Nursing home from April 2014.

The respondent's evidence as to her injury and treatment

[10] In her affidavit, the respondent says this was not her first back injury, as she suffered a disc protrusion at L4/5 in 2007. She did not make a WorkCover claim then. She suffered a "flare up of back pain in 2010" and made a WorkCover claim "for about 4 months off work". She "had a short term flare up of [her] back pain in 2012 but … did not apply for WorkCover because it fully resolved itself within a short period of time".

[11] The respondent says that after her injury on 19 December 2015, she again expected her pain would improve with time and rest, as it had in the past, but it did not. Following a CT scan, she was diagnosed with "cauda equina syndrome due to median sequestered L4/5 disc herniation", a serious spinal injury requiring surgery.

[12] She had her first surgery on 4 January 2016, which she describes as "a laminectomy and decompression of my L4/5 disc, central canal and exiting nerve roots". She then applied for WorkCover benefits on 11 January 2016.

[13] The respondent says she participated in physiotherapy and felt herself getting stronger. Although her symptoms were improving, she says her treating orthopaedic surgeon, Dr McEntee, considered she would benefit from further surgery and recommended "fusions" in June 2016. WorkCover refused to fund this, and so the respondent did not go ahead with it.

[14] The respondent says that Dr McEntee resubmitted the request to WorkCover in October 2018, because she was continuing to suffer pain and, the respondent says, "he told me that he was worried about future complications if I did not have the surgery". WorkCover agreed to fund the L4/5 and L5/S1 surgery, but the respondent had to pay for the L3/4 disc replacement herself. The surgery was performed by Dr McEntee on 27 March 2019.

[15] The respondent never returned to work after the incident on 19 December 2015. Her debilitation was so severe that her husband ceased working three months after the incident and became her carer, receiving a carer's allowance from Centrelink in that regard. He was still in that role at the time the application was heard in November 2021.

[16] The appellant emphasises, and the respondent accepted below, that by November 2018 (just prior to the expiry of the limitation period) the respondent knew that she had suffered a very serious spinal injury, which had required major spinal surgery; she believed that she had suffered that injury because her employer had not provided proper equipment (slide sheets), the system of work was inadequate (because the beds were too low) and her co-worker had not been properly trained in proper manual handling techniques; because of that injury, and since that injury, she had not been able to work, and required her husband as a full-time carer for herself and their child; she had not been able to return to work as an assistant in nursing, or anything similar, and would not be able to do so in the future; she would have trouble retraining into other work because of her narcolepsy; her injury had been accepted as work-related by WorkCover; and she was continuing to receive weekly compensation payments from WorkCover.[2]

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2 AB 775-776.

Seeking advice

[17] In terms of seeking advice about her claim, the respondent says that, about one to two years after the incident, her parents were urging her to speak to a lawyer about medical negligence "because they thought that it may have been negligent that reports went missing" and "[t]hey also expressed concern to me that my diagnosis and hospital admissions had been mismanaged". The respondent says she then googled "solicitor" and phoned the number of a local lawyer based in Jimboomba to discuss a potential medical negligence claim. This person, whose name the respondent cannot recall, said making a claim against a large hospital would be too hard, but did not otherwise say anything about "limitation dates".

[18] The respondent did not then try again to contact a lawyer until November 2019, when she posted a message on a community Facebook page. Ms Avery saw the post some weeks later, and responded to it. The respondent and Ms Avery spoke for the first time on 20 December 2019. After meeting with the respondent on 24 December 2019, Ms Avery urgently arranged to file a notice of claim on 6 January 2020.

[19] The respondent's explanation otherwise for not seeking advice earlier is that she is "inexperienced with court processes, litigation and the law generally". She says that, until she spoke to Ms Avery, she "did not understand what a statutory claim with WorkCover and a personal injury claim for damages were", nor the distinction between them, and was not aware of any limitation dates to bring a claim. She says she "believed that WorkCover would stop paying me five years after my accident and that was when I would find out the amount of the 'payout' and I would need legal advice about any further rights". It is not clear what the basis of that belief was.

Material facts of a decisive character

[20] Section 31(2) of the *Limitation of Actions Act 1974* (Qld) provides that:

> "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 –
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> (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
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> (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."

[21] As defined by s 30, material facts relating to a right of action include, relevantly, the nature and extent of the personal injury and the extent to which the personal injury is caused by the negligence or breach of duty.[3] By s 30(1)(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."

[22] By s 30(1)(c), a fact is not within the means of knowledge of a person at a particular time if, but only if, the person does not know the fact at that time; and 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.

[23] There were three "material facts" relied upon by the respondent in support of her application to extend the limitation period. As described in the respondent's submissions before the primary judge, they were:

(a) first, that the respondent "realised subsequent to back surgery on 27 March 2019 that it was unlikely that she would be able to work in any capacity";

(b) second, that she learned that her pain symptoms after the surgery on 27 March 2019 were the result of a sacral end plate fracture which was a known complication of the lumbar fusion which was undertaken in 2016, to treat the original back injury from 19 December 2015, and not because of medical negligence; and

(c) third, that she learned that her cause of action was "commercial" because there was a significant component of her impairment that was caused by the 19 December 2015 incident, as opposed to being related to and caused by pre-existing degeneration in her spine.

[24] The learned primary judge found favourably to the respondent in relation to each of these three "facts" and, there being no real argument about s 31(2)(b), was therefore satisfied the prerequisite to exercise of the discretion under s 31(2) was established.

[25] The appellant challenges the primary judge's conclusion about each of them (grounds (f), (g) and (i)), and also contends that the primary judge erred in failing to find that the respondent had within her knowledge, by the expiry of the limitation period on 19 December 2018, a critical mass of information sufficient to apprise

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[3] Section 30(1)(a)(iv) and (v) of the *Limitation of Actions Act*.

her, had she undertaken reasonable and proper inquiries, of the existence of a worthwhile right of action against the appellant (ground (e)).

First matter – inability to return to work

[26] As to the first matter – unlikelihood of ever returning to work – the respondent's evidence was as follows:

> "30. I know now that I cannot return to work as an Assistant in Nursing.
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> 31. I did not read most of the reports obtained by WorkCover. I did not understand them to be relevant for me to consider other than the report of Dr Dodd of 23 October 2017… I remember reading that report because I understood that it would determine my percentage impairment which would be relevant to WorkCover's decision as to whether they would continue paying my weekly benefits.
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> 32. I cannot recall which medical advice alerted me to being unable to return to work as an Assistant in Nursing. I do remember that, when I realised that I could not return to work, I reached out to a Facebook support group for people with narcolepsy on 29 August 2017 to ask what they thought I could do given my physical disabilities and my narcolepsy. At that time, I still thought that I might be able to work in another capacity.
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> 33. When I began discussing study options with WorkCover [which other evidence suggests was in about August 2017[4]], I started to realise that working in an alternative capacity would be difficult. WorkCover was suggesting TAFE courses such as bookkeeping and I believed that I would not be able to do that kind of work because I would not be able to stay awake due to my narcolepsy.
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> 34. My hope was that, with the further surgery on 27 March 2019, my back pain and mobility would improve enough that I could work in a role which was sufficiently physical for me to stay awake without involving heavy manual lifting."[5]

[27] Dr Dodd is an orthopaedic surgeon, who provided an independent medical examination report to WorkCover dated 23 October 2017. In this report, Dr Dodd expresses the opinion that:

> "The current work related diagnosis is aggravation of pre-existing degenerative changes at L4/5 and to a lesser extent at L5/S1 with aggravation of the L4/5 disc protrusion, which was actually present on the film from 2010."

[28] In relation to her capacity for work, Dr Dodd said:

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4 Procare report, dated 6 September 2017, AB 660.

5 Underlining added.

> "At this point in time she would find it impossible to work for many reasons. She still has problems with gait and has to use a walker occasionally. She still has difficulty bending, lifting and twisting. She still has problems with bladder and bowel…"

[29] Dr Dodd provided an approximate assessment of the respondent's permanent impairment at about 17%, noting that an assessment from a neurological point of view may result in an even greater permanent impairment.

[30] In her oral evidence, the respondent accepted that she realised, by 29 August 2017, that she was unlikely to return to work as an assistant in nursing, and indeed unlikely to return to any manual working role, dealing with patients or residents. She also gave evidence that she suffers from narcolepsy, having been diagnosed with that condition in 2012. The respondent said she knew that it would be difficult for her to retrain in different types of work, because the narcolepsy would interfere with the retraining process.

[31] The appellant's argument has two elements to it: first, it submits there was no evidence of the asserted "material fact"; and, second, in any event, that the primary judge erred in the application of the established principles to the facts.

[32] The first point is right, there is no evidence for the proposition that the respondent "realised subsequent to back surgery on 27 March 2019 that it was unlikely that she would be able to work in any capacity". In her affidavit, the respondent articulated a "hope" that, with the surgery in March 2019, she would improve enough to be able to work in a role which was sufficiently physical for her to stay awake without involving heavy manual lifting. But that statement has implicit within it an appreciation prior to that of her inability to do so. The one medical report the respondent says she did read, that of Dr Dodd dated October 2017, spoke of her finding it impossible to work.

[33] What the primary judge relied upon was a *submission* on behalf of the respondent to this effect.[6] But there is no evidence of it. In fairness to the primary judge, the appellant did not alert her to this; instead, arguing below that the contention was untenable having regard to the respondent's already existing level of disability.[7] Indeed, this point did not find its way into the appellant's grounds of appeal, or written submissions on the appeal, either. It was only raised in the appellant's oral submissions.[8] Unsatisfactory as that is, the point must be dealt with, because it is a fundamental challenge to the finding and one that has a sound basis, in my view.

[34] As to the second point, the appellant's argument on the appeal is that the knowledge the respondent had, prior to the expiration of the three year limitation period, readily satisfied the critical mass of information required to give her knowledge of a worthwhile right of action, if properly advised. As summarised in paragraph 11 of the appellant's submissions:

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6 Reasons at [89].

7 Reasons at [102].

8 Cf [43]-[44] of the appellant's written submissions; and the transcript of the appeal hearing at T 1-37 to 1-38.

"Over the course of the three-year period from the date of the subject injury to the date the limitation period expired, the respondent knew that she:

(1) had suffered a major spinal injury (cauda equina syndrome), accepted by WorkCover for compensation benefits for a three-year period

(2) had undergone major spinal surgery

(3) had ongoing and continuous significant pain and restriction in her spine

(4) had been totally incapacitated for any work

(5) would not be able to return to work as an Assistant in Nursing, or to any role within her prior experience

(6) would face significant difficulties retraining because of a serious condition of narcolepsy

(7) had required for almost that entire three-year period a carer, namely her husband as the recipient of a carer's pension from Centrelink."

[35] The notion of a "critical mass of information" comes from the decision of Keane JA in *Castillon v P&O Ports Ltd (No 2)* [2008] 2 Qd R 219, where his Honour said:

"[34] In the plaintiff's second application at first instance, the plaintiff argued successfully that the material fact of a decisive character was the fact of the termination of the plaintiff's employment with the defendant on 17 December 2004. In my respectful opinion, quite apart from the circumstance that this fact was obviously known to the plaintiff at the time his first application was heard and determined, the plaintiff had ample basis for concluding that his inability to work as a crane driver and the uncertainty attending his prospects of re-assignment were such as to give rise to a worthwhile cause of action prior to 27 November 2001. That **later information may have enabled the plaintiff to show that his right of action was 'more worthwhile' than it might have previously been thought to be,** but it does not alter the circumstance that, in accordance with the evidence supporting the findings of Rackemann DCJ, **there was a critical mass of information within the plaintiff's means of knowledge prior to 27 November 2001 which justified bringing the action**.

[35] That the critical mass of information available to the plaintiff may have been augmented by knowledge about the defendant's views of the prospects of the termination of his employment was beside the point. In *Moriarty v Sunbeam Corporation Limited*,[9] Macrossan J said:

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9 [1988] 2 Qd R 325 at 333.

> 'In cases like the present, an applicant for extension discharges his onus not simply by showing that he has learnt some new fact which bears upon the nature or extent of his injury and would cause a new assessment in a quantitative or qualitative sense to be made of it. **He must show that without the newly learnt 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**. This is what the application of the test of decisiveness under s 30(b) comes down to: *Taggart v The Workers' Compensation Board of Queensland* [1983] 2 Qd R 19, 23, 24 and *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 251 per Deane J.'

[36] In *Sugden v Crawford*,[10] Connolly J said:

> '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, without the newly discovered facts, would be sufficient to justify the bringing of the action …'"[11]

[36] The appellant submits that the respondent's knowledge (assuming this in her favour) that she would not return to any work after the surgery in March 2019 did no more than render an already worthwhile action more worthwhile, in the context of a young manual worker with a severe spinal injury and significant impediments to retraining.

[37] For the respondent, it is submitted that there was ample evidence to support the primary judge's finding that this first matter was a material fact of a decisive character, within the meaning of s 30(1) and, further, that the appellant should not be permitted to make this argument in circumstances where it has pleaded, in its defence, that the respondent was not totally incapacitated from employment.

[38] The latter point provides no answer to the ground of appeal. As to the former, whilst it is of course correct that a court on appeal exercises restraint when asked to interfere with a judge's findings of fact, the finding challenged here is not one affected by impressions about credibility or reliability of witnesses.[12] There was no evidence from the respondent to support the finding; and the appellant's further

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10 [1989] 1 Qd R 683 at 685.

11 Emphasis added. See also *Baillie v Creber & Anor* [2010] QSC 52 at [43] per McMeekin J and *Spain v Dipompo Jacs Constructions P/L & Anor* [2009] QCA 323 at [60]-[61] per Keane KA, Holmes JA agreeing.

12 Cf *Sutton v Hunter & Anor* [2022] QCA 208 at [47].

contention is that, in any event, the primary judge erred in the application of the relevant principles to the facts which were established by the evidence.

[39] In my view, that further contention should also be accepted. Having regard to the relevant principles, in light of what the respondent knew, by November 2018, it must be said that there was, at that time, a critical mass of information within the respondent's knowledge which justified bringing the action. Had it been established, that may have been augmented by knowledge that she would not be able to return to work in any capacity. But, even before that, her circumstances were such that to adopt the words of Keane JA from *Spain v Dipompo Jacs Constructions P/L & Anor* [2009] QCA 323 at [61]:

> "… a reasonable person in [the respondent's] position would have appreciated that [she] was in a situation of vulnerability in the labour market. This limitation of [her] earning capacity, together with the pain and suffering and loss of amenities [she was experiencing], would have been regarded by a reasonable person who took appropriate advice as showing that an award of damages by way of compensation would be sufficient to justify the bringing of an action at that time."

Second matter – pain after the March 2019 surgery not due to medical negligence, but original 2015 injury

[40] As to the second matter, it seems clear that what was identified as a "fact" before the primary judge – by the respondent below – is not. The primary judge records in the reasons that:

> "[117] After her surgery on 27 March 2019, Ms Lee's pain improved considerably, but then the following month she started to experience pain associated with what she understood to be an incisional hernia.
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> [118] She thought this might have been caused by medical negligence. However, due to a report prepared by Dr McEntee, who was engaged by Ms Lee's solicitors on 24 December 2019, she became aware that she had developed a sacral endplate fracture which was a known complication of the lumbar fusion which had been undertaken on 4 January 2016 to treat the original injury."

[41] It was agreed that [118] of the reasons contains an incorrect date and that the relevant report of Dr McEntee is that dated 12 September 2019. In addition, what appears in that paragraph was not the evidence of the respondent[13] – rather, the submission made on her behalf. It seems the parties (or at least the respondent) misconstrued this report of Dr McEntee and consequently misinformed the court below. The respondent did develop a sacral end plate fracture, but this was a consequence of the fusion surgery performed by Dr McEntee, in March 2019, and not a consequence of the earlier surgery performed in 2016. True it may be, that the respondent would not have needed the March 2019 surgery, but for the workplace injury. But that is not to the point. What was posited, as a "material fact of a decisive character", was something quite specific, for which there is no evidence,

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13 Cf the respondent's affidavit at [25]-[26].

but rather was based on a misreading of a report from a doctor. It is unnecessary to say any more about this. The finding below was incorrect.

Third matter – commerciality of the claim, due to a change in medical opinion about causation

[42] The third matter concerns the "commerciality" of the respondent's claim, the contention being that the respondent found out, after the expiry of the limitation period, that her claim may be "commercial" (that is, worth pursuing), due to a supposed change in medical opinion about causation.

[43] As recorded by the primary judge, the position as put below was:

> "[129] Ms Lee also submits that material became available which indicated that a claim for damages was commercial. In this respect, Ms Lee observes that during the course of the WorkCover claim, a significant volume was obtained, the effect of which was that Ms Lee's condition was related to and caused by pre-existing degeneration in her spine, and that this would have caused her to have similar problems in the future event; but that once she engaged legal representatives in late 2019, material obtained by them on her behalf established that there was a significant component of her impairment caused by the 19 December 2015 event, as opposed to pre-existing degeneration. This material meant that her cause of action was commercial."

[44] This is not a matter addressed by the respondent in her evidence, but rather comes from the evidence of her solicitor, Ms Avery.

[45] In her evidence before the primary judge, Ms Avery explained that upon her review of the WorkCover claim file, after being retained by the respondent in December 2019, her "most significant concern [in relation to the respondent's case] was the relationship between the degree of permanent impairment and the workplace incident that [the respondent] described", saying that it seemed to her:

> "… that the incident [was] relatively innocuous and that her degree of impairment was so significant that, when seen in combination with her pre-existing spinal injuries, my concern was that the medical evidence wasn't going to support a sufficient connection between her level of disability and the negligence of the defendant for the potential damages she would recover to exceed the potential statutory benefits that she had… receive[d]".

[46] Ms Avery does not, however, go so far as to say that, if her advice had been sought prior to December 2018, she would have said the respondent's claim was not worth pursuing.[14]

[47] The material in the WorkCover claim file included a report from Dr McPhee, a spinal surgeon, dated 14 June 2016, who said that the respondent "has advanced

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[14] Cf Ms Avery's affidavit at [23] and her oral evidence, referred to in paragraph [55] below. Cf also the submissions by senior counsel for the respondent which, incorrectly in my view, suggest that this was the effect of Ms Avery's evidence (T 2-30 line 15).

degenerative disc disease in the lower lumbar spine", describing the degeneration as severe for a 30 year-old female. His diagnosis was of "[a]ggravation of pre-existing lumbar spondylosis with spinal stenosis with acute dire extrusion at L4/5 intervertebral disc causing a cauda equina syndrome, treated surgically". Dr McPhee noted that:

> "The causation for the disc protrusion is uncertain. While [the respondent] cites the moving of a patient without using a slide sheet, she also acknowledges that the task was assisted and that at the time she suffered no symptoms or injury to her lower back. It is possible that the moving of the patient caused the L4/5 disc to rupture."[15]

[48] The material also included a report from Dr Richard Williams, orthopaedic surgeon, dated 18 August 2016. Dr Williams diagnosed the respondent has having suffered a:

> "Massive L4/5 discal prolapse on a background of congenital spinal stenosis with ensuing cauda equina syndrome, adequately treated by L4/5 laminectomy and discectomy surgery, with persistence of neurological deficit affecting autonomic function and including L5 and S1 radiculopathy."

[49] Dr Williams expressed the opinion that the "mechanism of injury described is not concordant with subsequent massive discal prolapse and requirement for surgical treatment", saying that:

> "Overall, I remain of the opinion that the events of 19.12.2015 have a tenuous relationship to the requirement for emergency surgery for cauda equina syndrome.[16] This is due to the relatively innocuous nature of the injury described, the claimant's inability to be able to describe the onset of symptoms at the time when the alleged event is said to have occurred, and the fact that the claimant's condition arose on the day of her return to employment after five and a half months of maternity leave. In my view, further surgical treatment would not be aimed at the management of this condition but to the pre-existing degenerative process."[17]

[50] Notwithstanding that opinion, and reflecting the fact that the evidence went both ways, WorkCover did accept the respondent's serious spinal injury as employment related.

[51] The evidence going the other way included a report from Dr Scott-Young, an orthopaedic surgeon, dated 31 March 2016, provided to WorkCover, in which he expressed the opinion that the event of moving the patient on 19 December 2015 was a significant contributing factor to the respondent's (then) current condition, and development of cauda equina syndrome; that it also constituted an aggravation of a symptomatic pre-existing condition, but "one with a catastrophic result". It

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15 Underlining added.
16 Dr Williams had earlier expressed this opinion, in an email to WorkCover of 12 February 2016.
17 Underlining added.

also included reports from the respondent's treating orthopaedic surgeon, Dr McEntee, likewise attributing the injury to the workplace incident.[18]

[52] Dr Williams prepared another report, dated 23 July 2018. In this report, he says:

> "It seems likely that the L4/5 spondylolisthesis evident on recent radiological imaging relates to the previously performed surgery which was accepted as being performed for a compensable condition. Accordingly, it seems reasonable to consider stabilisation of the L4/5 segment. I would consider that a posterior stabilisation procedure with or without interbody fixation would be reasonable treatment of same. …
>
> There may be a requirement for nerve root exploration at the L4/5 segment … I would not consider there to be any justification for surgical intervention to the L3/4 or L5/S1 segments in the context of work related injury. Any treatment at these levels in my opinion would relate to pre-existent conditions.
>
> Notwithstanding the indication for surgery, the claimant has no analgesic requirement for her back pain and, although present every day it seems minimally disabling at this time. Despite this I believe it reasonable treatment to consider stabilising the operated segment and this would be in accordance with an accepted work related injury. No other particular treatment is likely to alter the natural history of this process. It is unlikely that she will resume employment either with or without the surgery proposed."[19]

[53] In answer to certain specific questions, Dr Williams said that:

> "Employment has been accepted as a significant contributing factor to the requirement for her original surgery. The current condition is a sequela of that original surgery. Surgical intervention at this time could therefore be considered related to the original process."

[54] In relation to the L3/4 injury in particular, he reiterated that he did not consider that occurred in relation to employment. Dr McEntee was of the same opinion.

[55] Ms Avery acknowledged, in her oral evidence, that the following would have been clear to her, had she been consulted prior to December 2018: that the respondent had suffered cauda equina syndrome, which she understood to be the progression towards paraplegia if not corrected; that she was diagnosed with that two weeks after the incident she complained of at work in December 2015; that the respondent had major spinal surgery, which was paid for by WorkCover; that WorkCover had accepted an injury application by the respondent for the condition arising from the December 2015 incident; that the respondent continued to receive compensation benefits in relation to that injury and had by that time suffered three full years' loss of income; that the respondent contended her injury was sustained because of an inadequate system of work that had several features; that the respondent had consistently described concerns about her capacity to retrain; and that the

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18 Including the report dated 26 April 2016 and a further report dated 13 August 2018, in response to the report from Dr Williams of July 2018.

19 Underlining added.

respondent's husband had taken on the role of full-time carer.[20] Armed with all of that information, had she been consulted prior to the expiry of the limitation period, in December 2018, Ms Avery said she would have lodged an urgent notice of claim, "with the proviso to the claimant that I had concerns about further investigations that would be necessary before I could recommend she proceed with it".[21]

[56] After the respondent had consulted Ms Avery, steps were taken for the respondent to be assessed by more doctors. The respondent was reviewed by Dr Labrom, a spinal surgeon, in June 2020. He prepared a report dated 6 July 2020. Dr Labrom said that the respondent:

> "… has a work related diagnosis of an acute L4/5 disc extrusion resulting in severe spinal canal stenosis requiring a discectomy procedure and laminectomy on 4 January 2016. I would suggest that this should be fairly seen as an aggravation of a pre-existent L4/5 disc bulge, though the work related component is duly noted."

[57] In answer to the question whether the nature and extent of the injury was consistent with the described event (ie the workplace event, from 19 December 2015), and by reference to the opinions of Dr McPhee and Dr Williams, Dr Labrom said:

> "I would suggest that the potential for this is correlated fairly easily with regards the mechanism of injury described. I would agree with Dr McPhee in that sentiment and it appears that Associate Professor Williams has suggested that this workplace activity has not been easily correlated to this potential. However, there appears to be a potential change in this opinion in later reporting from Associate Professor Williams, though I think based upon the mechanism described to me, her pre-existent disc degenerate change predisposing her to such an outcome, and my understanding of the biomechanics involved in this manoeuvre, it would be more likely than not, probable that this person has suffered an acute annular tear and then extrusion of nuclear material from the L4/5 disc resulting in a massive disc extrusion resulting in a severe spinal canal stenosis and cauda equina syndrome at the L4/5 level."

[58] Dr Labrom said there was a 50% chance the respondent would have developed symptoms, due to her pre-existing condition, in any event. He assessed the respondent as having a 23% impairment of the whole person, with 5% of this attributable to her pre-existing condition. He also said the respondent's prognosis was "reasonable" and she "may gain some employment".

[59] The respondent was also reviewed by Dr Gillett, orthopaedic surgeon, who produced a report dated 8 May 2020 and a further report dated 11 August 2020, responding to Dr Labrom's report. In his 8 May 2020 report, Dr Gillett recorded the presence of "pre-existing pathological processes", and expressed the opinion this would only account for 5% of the respondent's whole person impairment, as assessed by him. As he had a higher starting position than Dr Labrom, this still left the respondent with a 24% impairment, from the event in December 2015, in Dr Gillett's opinion. Responding to parts of Dr Labrom's report, Dr Gillett said he

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20 AB 751-753.

21 AB 753.

accepted the respondent was at risk of having issues, as outlined by Dr Labrom, as a result of her pre-existing degenerative condition, but said this could not be estimated in a "scientific way" and Dr Labrom's indication of a 50% chance was just an estimate.

[60] The difficulty with this third contended "fact" is again an evidentiary one. The respondent did not read most of the reports obtained by WorkCover, including the reports of Dr Williams. To the extent reliance is placed on what a "reasonable solicitor" would have done, on the basis of the material then available, had the respondent sought advice prior to the expiry of the limitation period in December 2018, Ms Avery's evidence indicates such a person would have taken urgent steps to protect the respondent's legal rights – even if that person would also have recommended that the respondent obtain additional medical evidence. The medical opinion in relation to the role played by the respondent's pre-existing degenerative condition was divided before the limitation period expired, and continued to be divided. The reports from Dr Labrom and Dr Gillett are not so overwhelmingly different from what was already available as to support the conclusion that there was a significant change in the evidence.[22]

Conclusion – "material fact of a decisive character" not established

[61] In my respectful view, the primary judge erred in finding that the respondent had established the s 31(2)(a) prerequisite to exercise of the discretion to extend the limitation period. There was no evidence for the first contended "material fact", and in any event the respondent already had within her means of knowledge a "critical mass of information" which was sufficient to justify bringing the action. There was no evidence for the second contended "material fact". The evidence did not support the finding as to the third contended "material fact", given that there were already, by December 2018, divergent medical opinions as to whether the workplace incident caused or significantly contributed to the respondent's accepted serious spinal injury – that is, the evidence subsequently obtained did not significantly change the picture; the respondent did not read the medical material in any event; and whilst her solicitor, Ms Avery, expressed concerns, her evidence is that, had she been consulted prior to the expiry of the limitation period, she would immediately have taken steps to file a notice of claim to preserve the respondent's rights.

[62] My conclusion in relation to this aspect of the appeal is sufficient to determine it. As the necessary prerequisite to the exercise of the discretion was not established, there was no discretion to be exercised and the application to extend the limitation period ought to have been dismissed. Nevertheless, as the matter was fully argued, I will also deal with the second aspect of the appeal, prejudice.

Prejudice

[63] The remaining grounds of appeal, (a), (b), (c) and (d), all challenge the exercise of the discretion by the primary judge, to order that the limitation period be extended, on the basis that her Honour erred in various respects in dealing with the prejudice to the appellant, consequent upon the delay.

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22 Cf the submissions accepted by the primary judge, at [129] of the reasons.

[64] The first matter to deal with is the applicable standard for appellate review of this element of the decision-making process under s 31 of the *Limitation of Actions Act*, a matter that was raised with the parties having regard to the recent decision of the High Court in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857.

[65] That case concerned an appeal from an order of a court permanently staying proceedings on the ground that the trial would be necessarily unfair or so unfair or oppressive to the defendant as to constitute an abuse of process. The Court held that the applicable standard in that case was the "correctness standard" identified in *Warren v Coombes* (1979) 142 CLR 531 at 551-552, and that an error of principle by the court below, as applies to appellate review of a discretionary decision in accordance with *House v The King* (1936) 55 CLR 499 at 504-505, was not required to be identified.[23]

[66] That was because the exercise of power under the relevant provision, s 67 of the *Civil Procedure Act 2005* (NSW), to permanently stay proceedings on the ground that they are an abuse of process as any trial will be necessarily unfair, or "so unfairly and unjustifiably oppressive"[24] as to constitute an abuse of process, was said to be an evaluative but not a discretionary decision.[25] As the majority observed at [17]:

> "The extreme step of the grant of a permanent stay of proceedings demands recognition that the questions whether a trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process each admit of but one uniquely right answer."

[67] In contrast, the essential characteristic of a discretionary judicial decision is that it is a decision where more than one answer is legally open (at [16]).

[68] Following an invitation to consider the impact of *GLJ* in the context of this appeal, the appellant submitted that the reasoning in that case does not apply to the final element of the decision-making process under s 31, because this does involve the exercise of a discretion in the true sense of an evaluative decision upon which minds might differ. Upon appellate review of such a decision, it is the principles in *House v The King* that are applicable. In that regard:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."[26]

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23 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at [1], [15]-[17], [21], [23]-[24] per Kiefel CJ, Gageler and Jagot JJ, at [95] per Steward J and at [161] per Gleeson J (albeit Steward and Gleeson JJ disagreed with the majority as to the result).

24 Referring to *Walton v Gardiner* (1993) 177 CLR 378 at 392.

25 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at [15].

26 *House v The King* (1936) 55 CLR 499 at 504-505.

[69] The respondent submitted that *GLJ* should be applied in the present case, such that the standard of appellate review is the "correctness standard" and the principles in *House v The King* do not apply. That is on the basis, the respondent submits, that s 31 should not be construed as conferring any discretion in the true sense.

[70] The operation of s 31 of the *Limitation of Actions Act* was the subject of detailed consideration by the High Court in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. All members of the Court in that case found that s 31(2) confers a discretion upon a court to extend time. Satisfaction of the conditions in s 31(2)(a) and (b) do not give an applicant a presumptive right to an order in their favour; the applicant still bears the onus of showing that the justice of the case requires the exercise of the discretion in their favour.[27] *GLJ* involved no reconsideration of *Brisbane South Regional Health Authority v Taylor*. It remains the authoritative decision of the High Court on s 31 of the Queensland *Limitation of Actions Act*. In any event, as a matter of principle, the analysis in *GLJ* of the nature of the decision to be made, on an application for a permanent stay, is distinguishable from the decision to be made under s 31.

[71] That being the case, an appellant seeking to challenge a decision made under s 31 must show an error in the exercise of the discretion. In addition to the challenge to the findings as to the prerequisite of a "material fact of a decisive character", which has already been dealt with above, the appellant sought to do that by arguing that, in exercising the discretion, the primary judge took into account an irrelevant consideration, namely evidence relating to the general system in the workplace, in considering the prejudicial effect of the respondent's co-worker being unable to be identified. That is, the appellant submitted "that the evidence of the general systemic processes can't be relevant to the [question] of what occurred in the particular handling manoeuvres" undertaken by the respondent and her co-worker on the night in question.[28]

[72] To understand this submission, some further elaboration of the appellant's arguments on the appeal is required. It also assists to have in mind the relevant legal principles.

[73] The clearest summary of those principles comes from the reasons of Keane JA in *NF v State of Queensland* [2005] QCA 110 at [44] where his Honour said:

> "The *Brisbane South* decision is concerned to ensure that an extension of time under the Act should not become the occasion for a trial which is unfair to the defendant. It is authority for the following propositions:
>
> (a) the onus is upon the applicant who has satisfied the conditions in s 31(2) of the Act to show good reason for the exercise in his or her favour of the discretion vested in the court by that provision; [29]

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27 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544 per Dawson J, at 547, 548 and 550 per Toohey and Gummow JJ, at 551, 553, 554 and 556 per McHugh J and at 562 and 564 per Kirby J.

28 Appellant's oral submissions, T 2-5.

29 (1996) 186 CLR 541 at 544 [Dawson J], 547 [Toohey and Gummow JJ], 551 [McHugh J].

> (b) the principal consideration which guides the exercise of that discretion is the concern whether a claim, which is prima facie out of time, may yet be fairly litigated;[30]
>
> (c) if a fair trial is unlikely, the discretion conferred by s 31(2) should not be exercised in the applicant's favour."[31]

[74] In *Brisbane South*, the action the respondent wished to bring was a claim for damages for negligence by reason of an alleged failure by a doctor to give her proper advice. It was important that the principal issue in the case turned upon the terms of a conversation between the plaintiff and a doctor employed by the defendant in relation to the risks of a proposed medical procedure, alleged to have taken place 17 years before. The doctor's brief notes of the conversation were available as part of the hospital records, but attempts to locate the doctor had been unsuccessful. Even if he could be located, it was accepted as unlikely that he would have any recollection of the conversation. In those circumstances, the primary judge, McLauchlan DCJ, concluded that the defendant was placed in a position of serious prejudice having regard to the lapse of time that had occurred, such that a fair trial of the issues was highly improbable. He therefore refused to exercise the discretion to extend the limitation period. An appeal to the Court of Appeal was successful, but was overturned by the High Court. Each of Dawson, Toohey, Gummow and McHugh JJ found that the conclusion McLauchlan DCJ reached was open to him, albeit on the basis of slightly different reasoning.

[75] It suffices for present purposes to adopt the succinct summary of the principles to be taken from *Brisbane South* in the reasons of Keane JA in *NF* referred to above. There is no need, here, to delve into the subtle distinction between the approach taken, on the one hand, by McHugh J (with whom Dawson J largely agreed) and, on the other, by Toohey and Gummow JJ.[32]

[76] On a practical level, the difference, at least as between McHugh J and Toohey and Gummow JJ, is that McHugh J considered that once the primary judge had made a finding of actual prejudice, his decision to dismiss the application was inevitable (at 556), whereas Toohey and Gummow JJ were of the view that it would nevertheless have been open, on the facts as found, for him to have formed the opinion that the extension should be granted (at 548 and 550).[33]

[77] In the proceedings below, the appellant submitted that:

> "In a case involving the adequacy of training, instruction and the system of manual handling of residents by use of slide sheets, the respondent identifies the following prejudice in the present matter:
>
> a. The loss of detailed resident care plans including specific safe work method statements
>
> b. The loss of staff training records
>
> c. The loss of client specific monitoring worksheets

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30 (1996) 186 CLR 541 at 544 [Dawson J], 548 [Toohey and Gummow JJ], 552-554 [McHugh J].
31 (1996) 186 CLR 541 at 548-550 [Toohey and Gummow JJ] and 554-555 [McHugh J].
32 Cf *Hertess v Adams* [2011] QCA 73 at [26].
33 See the discussion of Priestley JA in *Holt v Wynter* (2000) 49 NSWLR 128 at 140 [69].

d. The loss of safety audit reports and schedules

e. The loss of WHS Officer hazard and safety reports

f. The loss of care manager notebooks

g. The diminution of recollection of relevant co-workers.

> The effluxion of time resulting from the delay by the applicant in taking any action whatsoever in relation to a claim has rendered a fair trial of the action unlikely, and is sufficient to establish actual as well as presumed prejudice of the kind discussed in *Taylor.*"[34]

[78] The primary judge was critical of the attempts the appellant had made to obtain relevant documents and locate potential witnesses. Her Honour's criticism was shown to be well-placed, given that in the seven days between the first day of the hearing (9 November 2021) and the second day of the hearing (16 November 2021), the appellant's officers had been able to make further fruitful enquiries, which produced relevant documents (including, for example, the names of the former CEO, care manager and "return to work coordinator" of the relevant facility, records in relation to workplace health and safety activity (such as audits, reviews, incident reports, protective assistance monitoring records, manual handling cards and hazard registers), staff training records and even "an incident report, an incident register, education sessions reports, and a WHS assessment, each relating to the injury here").[35] These enquiries revealed the name and contact details of the "general manager of residential care", Ms Baigent. The appellant's solicitor, Ms Moloney, had a brief conversation with Ms Baigent, who said she recalled the respondent and that "she injured herself while lifting a client's legs up onto a bed, which was a one-person job". Ms Baigent could not recall whether there was another employee involved in the incident, as alleged by the respondent, but suggested attempts be made to locate the rosters which may assist.[36] Earlier enquiries had identified a Ms Benyon, who was a co-worker of the respondent on the day of the incident. Ms Moloney's brief conversation with Ms Benyon revealed that she had no recollection of the respondent, but said she "[a]lways had available to her, and always used slide sheets when moving patients".[37]

[79] The appellant invited the primary judge to infer, from the efforts that had been made, that there were no other documents relevant to this matter involving the respondent which would be found, submitting in particular that her Honour should find that the relevant rosters no longer exist, and so the identity of co-workers would not be able to be ascertained.[38]

[80] The primary judge declined to draw that inference, on the bases:

(a) first, that her Honour said it was not clear there had been "a methodical search and interrogation for records by people who know where and what to look for" (at [242]);

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34 Appellant's submissions at first instance at paragraphs 47-48.
35 Reasons at [224]-[235].
36 Reasons at [233]-[234].
37 Reasons at [202]-[206].
38 Reasons at [240]-[241].

(b) secondly, that as late as between the hearing days of the application Ms Baigent, a person said to be "key", suggested to look at the rosters, yet there was no evidence that line of enquiry was then pursued (at [243]);

(c) thirdly, her Honour was not prepared to accept that Mr Qualtrough, who was described as the "go to" person for the appellant's solicitor (see [180]), was the only person with knowledge of what records continue to exist and where they are, nor that he had obtained and looked through all collections of documents that may be relevant (at [244]); and

(d) fourthly, that her Honour had concerns about the reliability of the evidence relied upon by the appellant (at [246]).

[81] Her Honour then turned to deal with the specific submissions made by the appellant. Relevantly, in relation to the appellant's complaint that it would not be able to respond to the respondent's evidence that "specific things happened", in the absence of names of patients, resident care plans and the inability to identify the co-worker, the primary judge said:

> "[254] I do accept that there is likely to be *some* prejudice arising out of the difficulty SAL [the appellant] may face in defending specific allegations in respect of a specific co-worker, (once proper enquiries have been made). I do not regard this as amounting to significant prejudice in light of the evidence that SAL can adduce as to systems, from persons such as the CEO and the Care Manager, and Ms Benyon that she always used slide sheets (thus leading to the inference that they were available.)"

[82] The appellant also made submissions about the prejudice to it as a result of the absence of training records, client specific monitoring worksheets, safety audit reports and schedules and hazard and safety reports. In each respect, the primary judge reiterated that she was not satisfied documents falling into these categories were "truly lost", and in any event did not accept the absence of some of these documents amounted to significant prejudice.[39]

[83] As to the absence of information about the identity of the "co-worker", the reasons record the following:

> "[273] SAL submit that they have only been able to ascertain the identity of one co-worker of Ms Lee on 19 December 2015, namely Ms Benyon, and she does not recall Ms Lee, let alone what happened, and that these things amount to significant prejudice because SAL is not able to say what might or might not have happened in the particular lifts or movements that are complained of. However, Ms Benyon can give evidence that slide sheets were always available, and she always used them. No attempt has been made to take a full statement from Ms Benyon, but when that does occur, it would seem likely that given Ms Benyon will be able to recall what her usual practise was in respect of the manual handling of patients, and whether she ever departed from that, and in what

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39 Reasons at [256]-[272].

circumstances. In my view, this goes some significant way to SAL defending the allegations, particularly when it is combined by others such as the CEO and Care Manager about safety systems within the workplace.

[274] SAL further submit that even if other co-workers were able to be found, that it is unfathomable that they would be able to recall anything of the circumstances of the duties that led to the onset of pain.

[275] I do accept the unlikelihood of such a co-worker being able to recall the specifics of the evening, however, such co-workers may well be able to give relevant evidence as to systems.

[276] They may well be able to recall what the systems were with respect to the movement of patients, and the use and availability of slide sheets in that respect, and whether they ever would have said to move a patient in circumstances when a slide sheet was not available. We do not know if they can, because those enquiries have not been pursued, notwithstanding the suggestion to do so by a person who appears to have adequate contemporary knowledge of what the business records were, to check the rosters.

[277] When Ms Moloney spoke with Ms Baigent on 15 November 2021, Ms Baigent suggested, in the context of Ms Lee not recalling the name of the person she was working with and/or the names of all the patients, Ms Baigent did agree that it would be very difficult to investigate the availability of slide sheets. She then suggested 'attempting to locate the rosters.' Ms Baigent, was, according to Mr Faull, the then CEO, as 'key'. There was no evidence of an attempt to locate the rosters thereafter. As well as this, Mr Faull said that he had documents as well, and there is no evidence as to what they are.

[278] I am not satisfied that SAL has placed before me evidence from which I would be satisfied that the details of the co-workers are not ascertainable, or that the co-workers would not have relevant information to give on the part of SAL.

[279] Ms Lee also points to the staff education attendance sheets, which lists over 40 staff, who, according to the document have been educated in the various staff education items, and who provide a great number of people for SAL to make enquiries as to their knowledge of Ms Lee, and the training of themselves and others, including Ms Lee, yet no evidence of attempts to do so.

[280] I am not satisfied that the asserted likely diminution of recollection of Ms Benyon and any other co-workers i[s] sufficient to establish significant prejudice."[40]

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40 References omitted.

[84] Ultimately, the primary judge concluded, on this issue, that:

> "[282] To the limited extent that I have found that SAL has placed in evidence sufficient facts to lead the Court to the view that prejudice would be occasioned, Ms Lee has shown that that prejudice does not amount to material prejudice has persuaded me that a fair trial is possible. I find that the delay has not made the chances of a fair trial unlikely. This is so even taking into account presumptive prejudice which arises by being outside the limitations period.
>
> [283] I am satisfied that Ms Lee has demonstrated the onus that the justice of the case requires the extension. She has discharged the onus on her to satisfy the Court that time should be extended."

[85] Before returning to the appellant's argument, there is another matter of principle to be addressed, as to the notion of a fair trial. This was also the subject of consideration in *GLJ*, albeit in the particular context of child sexual abuse claims, in respect of which limitation periods have now been abolished.[41] It is apparent from the reasons of the majority in *GLJ* (Kiefel CJ, Gageler and Jagot JJ) that, in the context of that kind of claim, the question of the fairness of any prospective trial must be considered in what is a fundamentally new legal context – a "new world" as their Honours described it – one in which, "in the case of an action for damages for death or personal injury resulting from child abuse, it can no longer be maintained that the passing of time alone enlivens the inherent power or any statutory power of a court to prevent an abuse of its process" (*GLJ* at [41]). To that extent, it seems right to conclude – as the appellant submits[42] – that the notion of fairness, where, as here, there is an operative limitation period, is somewhat different from that which applies where, as in *GLJ*, there is not. The majority in *GLJ* were clear, in limiting their observations to the particular circumstances of the case before them. Accordingly, it is not correct to submit, as the respondent does, that "the notion of 'presumptive prejudice by delay' is now [as a consequence of *GLJ*] a creature of the past".[43] That notion remains just as relevant as it ever was,[44] in the context of actions in respect of which there remains a limitation period.

[86] However, the majority in *GLJ* also make reference to observations in previous decisions about fair trials that are generally applicable. For example, in the civil context, the majority referred to *Holt v Wynter* (2000) 49 NSWLR 128 at 142 [79], where Priestley JA observed that:

> "[F]or a trial to be fair it need not be perfect or ideal. That degree of fairness is unattainable. Trials are constantly held in which for

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41 See *GLJ* at [33], and footnote 63.

42 Appellant's supplementary submissions, 23 November 2023, at [21]-[22].

43 Respondent's supplementary submissions, 28 November 2023, at [16].

44 As to which, see *Brisbane South Regional Health Authority v Taylor* at 544, per Dawson J (agreeing with McHugh J that "once the legislature has selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the defendant who would otherwise have the benefit of the limitation"), at 548 (accepting that it was open to McLauchlan DCJ to conclude that the defendant was "placed in a position of serious prejudice having regard to the lapse of time which has occurred") and 550 (articulating the "real question" as "whether the delay has made the chances of a fair trial unlikely") per Toohey and Gummow JJ; and at 555-556 per McHugh J.

> a variety of reasons not all relevant evidence is before the court. Time and chance will have their effect on evidence in any case, but it is not usually suggested that that effect *necessarily* prevents a fair trial."[45]

[87] As the majority in *GLJ* went on to explain, one reason that missing witnesses or evidence do not necessarily make a civil trial unfair is that the adversarial system requires a plaintiff to prove its case. As their Honours said, at [58]:

> "The common law incorporates other principles in recognition of the fact that, in the adversarial system, cases are always decided within the evidentiary framework the parties have chosen and are often decided on incomplete evidence. The legal maxim that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'[46] acknowledges 'the problem that in deciding issues of fact on the civil standard of proof, the court is concerned not just with the question "what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision"'."[47]

[88] And, further, at [60] that:

> "A court is not bound to accept uncontradicted evidence. Uncontradicted evidence may not be accepted for any number of reasons including its inherent implausibility, its objective unlikelihood given other evidence, or the trier of fact simply not reaching the state of 'actual persuasion' which is required before a fact may be found.[48] 'To satisfy an onus of proof on the balance of probabilities is not simply a matter of asking whether the evidence supporting that conclusion has greater weight than any opposing evidence ... It is perfectly possible for there to be a scrap of evidence that favours one contention, and no countervailing evidence, but for the judge to not regard the scrap of evidence as enough to persuade him or her that the contention is correct.'[49] The evidence must 'give rise to a reasonable and definite inference' to enable a factual finding to be made; mere conjecture based on 'conflicting inferences of equal degrees of probability' is insufficient.[50] As Dixon CJ said in *Jones v Dunkel*,[51] the law:
>
> > 'does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied.'"

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45 Emphasis in original.
46 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].
47 Reference omitted.
48 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.
49 *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 176 [51].
50 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.
51 (1959) 101 CLR 298 at 305.

[89] Those observations apply with equal force to a case such as the present and are relevant to consideration of whether, or not, a fair trial is likely.

[90] The appellant's focus, for the first four grounds of its appeal, is on the inability to identify the respondent's co-worker. The appellant says this is essential to its ability to fairly answer what it contends is the respondent's "true case", based on paragraph 10 of the respondent's affidavit (set out at paragraph [8] above).

[91] This focus ignores the way in which the respondent's case is pleaded in the statement of claim (see paragraphs [5]and [7] above), which puts the system of work – or lack of it – at the centre of the issue to be determined. Paragraph 10 of the respondent's affidavit does not substantially alter that – the respondent's case is that there were no slide sheets available for her to use, suggesting a systemic failure, if accepted as true.

[92] The appellant accepts that the "broad inadequate system" case can be addressed,[52] in light of the evidence that was able to be gathered after it had notice of the claim – including in the period between the first and second days of the hearing below. But the appellant submits that without the co-worker, it is significantly prejudiced, because it cannot respond to the respondent's allegations in relation to that person.

[93] Having regard to the principles referred to in paragraphs [86], [87] and [88] above, the nature of the case as pleaded by the respondent and the evidentiary material that has already been obtained (including that there is a witness, Ms Benyon, who was working on the night in question and can say slide sheets were available), I would not accept that the inability to identify a particular co-worker results in significant prejudice to the appellant, such as to render a fair trial unlikely. It is as much, if not more of, an impediment for the respondent, as plaintiff, in proving her claim. Indeed, in the face of evidence, inter alia, about training in the use of slide sheets and of their ready availability on the very night in question, the tribunal of fact may find it difficult to reach a state of actual persuasion about this aspect of the respondent's evidence.

[94] Although the appellant contends the circumstances of this case are the same, factually, as *Brisbane South Regional Health Authority v Taylor*, I would not accept that either. In *Brisbane South*, the conversation with the absent doctor was at the heart of the plaintiff's case. That is not the case here.

[95] But there is a more fundamental hurdle to the appellant's challenge to this part of the decision made below, which emerges from the clarification of the appropriate appellate standard to be applied. In its initial submissions for the purposes of the appeal, the appellant approached the matter on the basis the appellate standard was, essentially, the "correctness standard", such that it was for this court "to decide the case – the facts as well as the law – for itself".[53] Ironically, the respondent had initially approached this part of the appeal on the basis that the appellant was required to show an error of the *House v The King* kind. As discussed above, the parties' positions changed, after they were invited to consider *GLJ* more closely. The proper approach, however, is that since the nature of the decision to be made under s 31(2), once the qualifying prerequisites have been established, is a

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52 T 1-9, transcript of appeal hearing.

53 *Warren v Coombes* (1979) 142 CLR 531 at 552; the appellant originally relied, in this regard, on *Doerr v Gardiner* [2023] QCA 160 at [65]-[66] and [69]-[70].

discretionary one, to justify appellate intervention the appellant must establish an error in the exercise of the discretion.

[96] As already noted, the appellant sought to do that by arguing that the primary judge took into account an irrelevant consideration, namely evidence relating to the general system in the workplace, in considering the prejudicial effect of the respondent's co-worker being unable to be identified.

[97] That submission is not accepted. The availability of evidence as to the system of work in place, including training and availability of appropriate equipment, was plainly relevant to the respondent's pleaded case. Whilst the appellant was at pains to submit that the case as articulated in the respondent's affidavit was narrower, and focussed upon the conduct of the unidentified co-worker, it is the pleaded case that must be addressed in this context. In my view, no error, of that kind, has been shown in the exercise of the discretion. The error, as already discussed, in my view, was in finding that the s 31(2)(a) qualifying prerequisite to the exercise of the discretion was established.

[98] It is for that reason that I would allow the appeal.

Orders

[99] I would therefore make the following orders:

(a) The appeal is allowed.

(b) The orders of the primary judge made on 10 March 2023 and 22 March 2023 (in relation to costs) are set aside.

(c) The respondent's application to extend the limitation period is dismissed.

(d) The respondent pay the appellant's costs of the appeal and of the proceedings below.

[100] **BOND JA:** I agree with the reasons for judgment of Bowskill CJ and with the orders proposed by her Honour.

[101] **FLANAGAN JA:** I agree with the Chief Justice.