

SUPREME COURT OF QUEENSLAND

CITATION: *Purcell v Indigenous Land and Sea Corporation & Anor*
[2024] QSC 58

PARTIES: **NATHAN PATRICK PURCELL**
(applicant)
v
INDIGENOUS LAND AND SEA CORPORATION
(first respondent)
PRIMARY PARTNERS PTY LTD ACN 108 266 548
(second respondent)

FILE NO/S: S 2 of 2024

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 12 April 2024

DELIVERED AT: Rockhampton

HEARING DATE: 15 March 2024

JUDGE: Crow J

ORDER:

1. That pursuant to s 31(2) of the *Limitations of Actions Act* 1974 (Qld), the period of limitation for the Applicant's action in respect of personal injury arising from the incident on 7 March 2013 be extended so that it expires:
 - a. in respect of the First Respondent, on 30 June 2023; and
 - b. in respect of the Second Respondent, up to and including the date which is 60 days from the date the Applicant complies with s 295 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).
2. The Respondents pay the Applicant's costs of and incidental to the Application to be assessed on the standard basis.

CATCHWORDS: LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURY MATTERS – where the plaintiff sustained a workplace injury

– where the plaintiff did not seek to bring common law proceedings until approximately 10 years following the date of injury – whether the new material fact amounted to that of a decisive nature – whether the plaintiff took reasonable steps to ascertain relevant facts without languishing in time – whether the applicants’ time limit should be extended

Limitation of Actions Act 1974 (Qld), s 31, s 30(1)(b), s 30(1)(c)

Personal Injuries Proceedings Act 2002 (Qld), s 59

Workers’ Compensations and Rehabilitation Act 2003 (Qld), s 302

Castillon v P&O Ports Ltd [2007] QCA 364

Stephens & Anor v Paradise Ultrasound Specialists Pty Ltd & Anor [2019] QSC 134

Neilson v Peters Ship Repair Pty Ltd [1983] 2 Qd R 419

COUNSEL: M Rothery for the applicant
D L K Atkinson KC for the first respondent
K J Kluss for the second respondent

SOLICITORS: Crew Legal for the applicant
Moray and Agnew for the first respondent
BT Lawyers for the second respondent

- [1] The applicant Mr Purcell was an employee of the second respondent, Primary Partners Pty Ltd (“Primary Partners”), who performed work at Mimosa Station near Gayndah. The Station was owned by the first respondent, Indigenous Land and Sea Corporation (“ILSC”). Although Mr Purcell suffered personal injury on 7 March 2013 and succeeded in bringing a WorkCover statutory claim in respect of the injury, he did not seek to bring any common law proceedings concerning his injury until more recently. On 8 January 2024, Mr Purcell filed an application in the Supreme Court seeking an extension of time pursuant to s 31 of the *Limitation of Actions Act* 1974 (LAA) to bring proceedings against ILSC and Primary Partners.
- [2] Mr Purcell served Primary Partners with a notice of claim under the provisions of the *Workers’ Compensation and Rehabilitation Act* 2003 (WCRA) on 22 November 2022. The notice was deemed compliant on 15 December 2022. In terms of Mr Purcell’s application against his employer, Primary Partners, it is necessary for Mr Purcell to show that the material fact of a decisive nature came into his means of

knowledge after 15 December 2021 (as he had lodged a complying notice of claim on 15 December 2022)).¹

- [3] On 19 May 2023, Mr Purcell had obtained s 59 leave pursuant to PIPA and issued a claim and statement of claim against ILSC. Mr Purcell served ILSC with a Form 1 notice of claim under the *Personal Injuries Proceedings Act 2002* (PIPA) on 3 April 2023, however, it was not deemed compliant on 24 May 2023.
- [4] As against ILSC, it is necessary for Mr Purcell to prove that a material fact of a decisive nature came into his means of knowledge after 19 May 2022 (one year prior to the issuing of proceedings against ILSC on 19 May 2023).
- [5] Mr Purcell is currently 43 years of age having been born on 2 May 1980. Mr Purcell left school halfway through year 11, then took up work as an abattoir worker, an apprentice butcher and station hand. In 2006, aged 25 or 26, Mr Purcell suffered an injury to his right knee in the nature of a rupture to his anterior cruciate ligament. He was taken to surgery and according to medical reports, received a good result from that procedure. Mr Purcell was able to return to his occupation as a butcher after the 2006 injury without ongoing problems.
- [6] In 2010, Mr Purcell commenced working as a trainee station hand at Mimosa Station, situated near Gayndah. By 2013, Mr Purcell was the senior station hand and trainee supervisor.
- [7] At approximately 7:00am on 7 March 2013, Mr Purcell went to one of the cottages on Mimosa Station in order to collect a farmhand by the name of Davin Lorraine to commence work for that day. As it rained on the morning of 7 March, the veranda of the cottage and the ground outside was wet. Mr Purcell walked up the steps to the front door of the cottage, knocked on the front door, announced to Davin Lorraine that he was there to collect him, and then turned and walked back to the steps to commence walking down the steps with the intention of going back to his vehicle.
- [8] In his oral evidence, Mr Purcell described calling out to the working dogs as he was doing this. Mr Purcell describes walking down the steps, placing his left foot on the first step down and then his right foot on the second step when he suddenly slipped

¹ *Workers' Compensation and Rehabilitation Act 2003* (Qld), s 302.

and he fell, landing awkwardly on the ground below sustaining an injury to his right knee.

- [9] Mr Purcell's said that Davin Lorraine did not see the accident but did come to his aid after the accident to help him. The accident was reported to the station manager, Mr Russell Purcell, the father of the applicant, and an incident report was completed.
- [10] Mr Purcell was able to describe the area where he slipped as being a set of stairs with three wooden treads about 1.5m in length, which were old and worn and in generally poor condition. The stairs did not have a handrail on either side and the stairs did not have any non-slip applications on the nose of the steps or any anti-slip grip applied to them at all. There are photographs of the stairs in the report of Intersafe Engineers
- [11] In the eleven years since the injury on 7 March 2013, Mr Purcell has had some periods of difficulty with his right knee and it would appear longer periods of good function with his right knee. Importantly, Mr Purcell has been able to remain in employment and continues to remain in employment as a butcher.
- [12] As a result of the injury of 7 March 2013, Mr Purcell lodged a WorkCover claim and it was accepted. Mr Purcell underwent a revision right knee ACL reconstruction and medial meniscal repair on 12 June 2013 performed by Dr Lawrie.
- [13] Mr Purcell's evidence, which was not challenged, was that at the time of the surgery, Dr Lawrie advised Mr Purcell that he would be able to return to his full duties as a senior station hand within 9 – 12 months' time. The full period of rehabilitation was approximately 15 months as Mr Purcell described he was unable to attend on physiotherapists as there were none near Gayndah and he had in fact returned to work soon after the event.
- [14] From Mr Purcell's perspective, although he had some aggravations in June 2013, September 2013, March 2014 and June 2014, his knee had settled by September 2014. His WorkCover claim was closed. He was not sent off for assessment of any degree of permanent impairment. Mr Purcell deposed, and it was not challenged, that he sought no legal advice at the time because he did not think his knee would cause him any significant impairment or any financial loss in the future. Mr Purcell

went back to working full time as a senior station hand undertaking hard, heavy physical work and in respect of which he deposes “My knee did not cause me any issues.”²

- [15] On 9 March 2015, whilst performing fencing duties near an incline, Mr Purcell twisted his right knee, causing a flare up of right knee pain. Mr Purcell attended upon his general practitioner, Dr Woodhouse, who referred him back to the orthopaedic surgeon, Dr Lawrie who, on 1 April 2015, recommended conservative treatment.
- [16] Mr Purcell deposes, and again it was not challenged that he attended upon physiotherapy, the symptoms in his right knee settled and he was able to return to his full duties as a senior station hand within a few weeks. Mr Purcell did see Dr Lawrie for review on 14 May 2015 and Dr Lawrie told Mr Purcell that he was happy with Mr Purcell’s right knee and advised that no further treatment was required.
- [17] Mr Purcell continued working in a heavy occupation as a senior station hand until early 2017 when he moved back to Noosaville with his partner and children as his partner did not enjoy the remoteness of living at Mimosa Station. Mr Purcell then commenced work as a butcher in early 2017 performing heavy work. In particular as a butcher Mr Purcell was required to be on his feet all day and frequently lift and hold weights of 15-25 kg. Mr Purcell performed tasks such as lifting and moving 48 cartons of meat per day.
- [18] In December 2017, Mr Purcell noticed that something in his right knee would catch when he would bend down, causing him to suffer some knee pain. Mr Purcell again consulted his general practitioner, Dr Woodhouse, who recommended some physiotherapy. Mr Purcell undertook that physiotherapy, however, conservative treatment did not resolve the symptoms. Mr Purcell applied to have his WorkCover claim reopened.
- [19] WorkCover sent Mr Purcell to Dr Tony Keays, orthopaedic surgeon. Dr Keays diagnosed a failed medial meniscal repair from the 2013 injury and so WorkCover reopened Mr Purcell’s claim. Mr Purcell then returned to see his treating

² Paragraph 49 of Affidavit filed 22 January 2024.

orthopaedic surgeon, Dr Lawrie, on 13 August 2018. Dr Lawrie performed an arthroscopic repair of Mr Purcell's right medial meniscus on 29 August 2018. The surgery was funded by WorkCover. Mr Purcell was able to return to suitable duties as a butcher within a couple of weeks, and by mid-September 2018, performed his normal duties. As far as Mr Purcell was concerned, the surgery was successful as the catching and pain resolved. Again WorkCover closed his claim and did not send him for an assessment for a degree of any permanent impairment as there was no suggestion Mr Purcell suffered from any permanent impairment.

- [20] Between 2018 and 2021, Mr Purcell described his right knee as being pretty good but not perfect. There was some locking reported in April 2018 but,³ Mr Purcell was able to continue working without restriction in his occupation as a butcher and had no major issues of concern or any "real functional restrictions or pain".⁴
- [21] In addition to working as a butcher full time, Mr Purcell was also working in his own small business providing cattle management services to cattle breeders. Mr Purcell considers that it was some time in 2021 that he felt again the catching sensations in the right knee. Although these catching sensations did not stop Mr Purcell from working, he was required from time to time to put strapping or ice upon his right knee to settle the symptoms.
- [22] On 19 October 2021, Mr Purcell attended upon his general practitioner, Dr Busch, and was referred firstly for an MRI then back to Dr Lawrie, orthopaedic surgeon. Mr Purcell then contacted WorkCover again on 8 November 2021 to ask again for his claim to be reopened.
- [23] According to the WorkCover communications report, Mr Purcell telephoned WorkCover at 10:24am on 8 November 2021. The customer service officer recorded Mr Purcell as saying "...Knee wasn't perfect when claim closed last time and thought it would get there... Wasn't catching straight away, but thinks somewhere over 12 months ago started catching ..." The catching was described as "horrible catching, it doesn't stay locked but horrible pain and sensation."

³ Exhibit SAC-22.

⁴ Paragraph 71 of Affidavit filed 22 January 2024.

- [24] The customer service officer advised Mr Purcell to discuss the matter with Dr Lawrie, and if Dr Lawrie considered that something went wrong with the prior surgery then he should ask Dr Lawrie for a Workers' Compensation medical certificate so that he could request a reopening.
- [25] At 3:57pm on 8 November 2021,⁵ Mr Purcell again telephoned WorkCover and the customer services operator recorded Mr Purcell as saying that he:
- “Just got out of Dr Lawrie. He said nothing I could do surgically with knee. Wearing process as no meniscus. Wear and tear and arthritic an (sic) he said for me to get back into physio therapy and stabilise knee more than it is and that was sort of it.”
- [26] WorkCover again sent Mr Purcell back to Dr Keays, orthopaedic surgeon, who performed an independent medical examination (IME) on 11 January 2022. As it was an IME and not a consultation for treatment, Mr Purcell did not receive advice from Dr Keays and did not become aware of the contents of Dr Keays' report until after he consulted his own solicitor, Crew Legal, on 17 February 2022. In his report, Dr Keays opined that Mr Purcell had no incapacity for work from the injury and he was not stable and stationary as he needed to complete 6 physiotherapy sessions.
- [27] On 13 June 2022, Dr Lawrie wrote to Dr Busch stating that he could see some improvement after 3 physiotherapy sessions and that Dr Lawrie was happy for Mr Purcell to continue with this. Accordingly, by early 2022 with 2 orthopaedic surgeons opining that Mr Purcell could continue to work, it appeared plain at that point in time, that Mr Purcell did not have a “worthwhile claim”.
- [28] On 1 February 2022, Mr Purcell telephoned Crew Legal and spoke to its principle solicitor, Mr Shane Crew, about his right knee injury. Mr Purcell retained Crew Legal as his solicitor on 4 February 2022.
- [29] Mr Purcell's WorkCover claim was reopened. Six physiotherapy sessions were funded and Mr Purcell was then referred to Dr Peter Winstanley, orthopaedic surgeon, for IME which took place on 10 March 2022. Dr Winstanley completed a report dated 14 March 2022 and it was emailed to Mr Purcell and his solicitor, Mr Crew, on 22 March 2022.

⁵ Mr Sivyers Affidavit of 13 March 2024, page 25 of annexures.

- [30] Mr Crew has been a solicitor practising in the area of personal injury law for 21 years. Mr Crew became an accredited specialist in personal injury in 2016. Mr Crew's evidence is that upon obtaining Mr Purcell's instructions to act on his behalf, he first obtained the WorkCover file. Mr Crew also obtained Dr Winstanley's report of 14 March 2022 on or about 22 March 2022. Mr Crew reviewed the material and in particular the report of Dr Winstanley of 14 March 2022.
- [31] In his report of 14 March 2022, Dr Winstanley had opined that Mr Purcell had suffered from a 19% impairment of his right lower limb, but that 50% of the degenerative change related to the right knee injury in 2006 and 50% to the 2013 injury. Mr Crew was accurate in his assertion that no part of Dr Winstanley's report provided any occupational prognosis, that is, any advice as to how the injured right knee would likely progress and impact upon Mr Purcell's ability to work as a butcher. On 12 May 2022, Dr Lawrie examined Mr Purcell and concluded that "at present his knee is actually pretty good."
- [32] WorkCover had offered Mr Purcell a lump sum payment for permanent impairment of \$49,761 on 17 March 2022, and as Mr Crew said, a decision had to be made within 28 days as to whether to challenge the 19% impairment, and a further decision had to be made whether to accept the lump sum offer or pursue a common law claim. Mr Crew estimated the costs of bringing a common law claim in the sum of \$50,000 to \$70,000, and as an extension of time application was required for a common law claim, an additional \$30,000 to \$40,000 would likely be expended.
- [33] Accordingly, in assessing whether Mr Purcell had a "worthwhile claim", a total of sum \$80,000 to \$110,000 would have been expended on legal fees. Mr Crew asserted and it was not challenged, that⁶:

"I further informed the applicant and decided that in order for myself to assist the applicant to reasonably determine whether it was worthwhile pursuing a common law damages claim, it was necessary to obtain further evidence as to the likely future affects of the plaintiff's right knee injury given he was still able to persist with his full time work."

⁶ Paragraph 16 affidavit of Shane Crew filed 22 January 2024.

- [34] Mr Crew accurately, in my view, determined the most efficient way to obtain the further opinion was to request a supplementary report from Dr Winstanley. Mr Crew did on 23 June 2022 send a request for a further report to Dr Winstanley, and Dr Winstanley promptly replied, issuing a supplementary report on 27 June 2022.
- [35] Dr Winstanley's supplementary report of 27 June 2022 contained opinions that Mr Purcell would be unlikely to continue working as a butcher until normal retirement age, that Mr Purcell would be unlikely to be able to continue with heavy work activities within a period of 7-10 years, that he would require a total knee replacement in the future, and after having a total knee replacement, his permanent impairment would be between 37-50% of his right lower limb if the surgery was successful.
- [36] Mr Crew swore, and he was not challenged, that it was a result of Dr Winstanley's further written opinion that he formed his own opinion that Mr Purcell's common law claim for damages, should it be successful, would be monetarily worthwhile. I accept Mr Crew's evidence on this issue, it is, with respect, the only sensible conclusion.
- [37] Mr Crew was challenged in cross-examination as to what occurred between the three month period between when he received Dr Winstanley's first report on 22 March 2022 and his request for the supplementary report on 23 June 2022. Mr Crew explained that during this three month period, he had discussions with Mr Purcell in order to make a decision as to whether or not to challenge the level of permanent impairment fixed at 19%, and if so, what course of action to take. Secondly, Mr Crew advised that Mr Purcell had to determine whether he would accept a lump sum offer or pursue common law damages.
- [38] The most significant issue between the parties is determination of the point of time when there was a "critical mass of information" or sufficient information to reach the "tipping point" where the information available to Mr Purcell showed that he had a worthwhile claim and that in his own interests, he ought to pursue that claim.
- [39] On behalf of ILSC, it is argued that at the very latest, by the receipt of the report of Dr Winstanley on 23 March 2022, Mr Purcell had a worthwhile claim, and

furthermore if he did not, then the supplementary report which further clarified matters could have been obtained in a very short period of time, such that by the end of March 2022, Mr Purcell had a worthwhile claim. On behalf of ILSC, it is submitted that as the material demonstrated Mr Purcell had a worthwhile claim by the end of March 2022, it was required to issue proceedings by the end of March 2023, and as he had not done so, his claim cannot succeed.

[40] On behalf of Primary Partners, who are indemnified by WorkCover, it is argued that Mr Purcell had such a critical mass of information by 7 March 2016, or at the very latest, by the report of Dr Lawrie of 8 November 2021, that Mr Purcell had a worthwhile claim and ought to, in his own interests, pursued it.

[41] I accept the submission of Mr Atkinson KC that some weight can be placed upon the numerous written materials as providing a contemporaneous record, as opposed to Mr Purcell's recollection. As Mr Purcell had consulted his own general practitioners and his treating surgeon, Dr Lawrie, on over 20 occasions, Mr Purcell could not be reasonably expected to recall all that was said in each consultation. Accordingly what is recorded in the contemporaneous notes is of far more assistance, however, I do not accept that simply because something is recorded in a medical report, that it was something that was said to Mr Purcell.

[42] Two of the more important contemporaneous notes are the WorkCover communication report entries of 8 November 2021. As set above, the contemporaneous recording of Mr Purcell states at 10:24am on 8 November 2021 that he thought his right knee would recover.

[43] Following the consultation with Dr Lawrie on 11 November 2021, Mr Purcell told the WorkCover customer service officer at 3:57pm that Dr Lawrie had said there was nothing that could surgically be done with the knee, there was a wearing process as he did not have a meniscus and that he had wear and tear and arthritic change. Mr Purcell told the WorkCover customer service officer that Dr Lawrie had recommended that if he got back into physiotherapy that would stabilise his right knee. I accept therefore on 8 November 2021 Mr Purcell did know that he had an arthritic right knee and further, he was told that there was nothing that could surgically be done with the knee, so physiotherapy was recommended to stabilise the knee.

[44] It seems to me that although Mr Purcell knew he had an arthritic knee and wear and tear in his right knee, he was advised to undertake further physiotherapy and it would appear on Mr Purcell's history that had worked well for him in the past. It seems to me there is nothing in the information relayed to Mr Purcell by Dr Lawrie on 8 November 2021 which would suggest that Mr Purcell had a worthwhile personal injury claim.

[45] Indeed, Mr Purcell's impression that his knee, whilst arthritic, was not in bad condition, is fortified by the letter of Dr Lawrie to Dr Busch of 12 May 2022 where Mr Purcell reported his knee had improved, that he was doing full duties at work, but still getting lateral knee pain. Dr Lawrie then set out the type of symptoms Mr Purcell was suffering before commenting that:

“On examination today, his knee clearly has responded to his rehab. The physio does report that his symptoms are becoming much less regular. His quads are really good now. ... There is no effusion or crepitus. His knee is actually stable from his revision ACL reconstruction with negative Lachman's test and negative pivot shift test. There is no clicking or cracking in his knee. Meniscal provocation tests are negative. His knee is strong, stable and quiet.... Realistically Nathan's knee is about as good as we are going to get it. I don't see any joy in any further surgery.... At present his knee is actually pretty good ... His knee is very stable, strong and will definitely support him with what he wants to do... He will return to see me if or when his knee deteriorates.”

[46] It seems to me on the basis of Dr Lawrie's report of 12 May 2022, Mr Purcell did not at that stage have a worthwhile claim for damages for personal injury. On behalf of ILSC, it is argued that Dr Lawrie's report of 13 September 2018 shows that Mr Purcell did know he had significant right knee injury and worthwhile claim by September 2018. Dr Lawrie's report of 13 September 2018 is, as is recorded, a post-operative report which records that two weeks after the right knee arthroscopy, Mr Purcell's right knee was settling down nicely. The report records that due to the removal of soft tissue, there was bone on bone articulating “and that was always going to be an issue for him and is going to slowly deteriorate over time.”

[47] The report, however, continues:

“Today Nathan is really happy with his knee. It is settling down very well from his surgery. He is keen to return to work tomorrow as a butcher. ... I am very happy for Nathan to return to work. ... He will return to see me in 6-8 weeks if he is having troubles. Long term,

there is more and more damage to his knee each time I see him, no doubt arthritic change is going to catch up with him sooner rather than later, every time he loses more tissue he will become more symptomatic. Nathan has taken this onboard.”

- [48] I accept Mr Atkinson KC’s submission that the reference to Nathan taking this onboard ought to be construed as Dr Lawrie explaining the contents of his report to Mr Purcell in a fashion such that it appeared to Dr Lawrie that Mr Purcell understood Dr Lawrie’s advice. The advice was essentially, however, that Mr Purcell had an arthritic knee which was “going to slowly deteriorate over time”.
- [49] As recorded in the WorkCover note of 8 November 2021, it is apparent that Mr Purcell did know that he had an arthritic right knee and I would infer that he would know that it was going to slowly deteriorate over time. The question is to what extent and when? Indeed, the slightly cautious views of Dr Lawrie on 13 September 2018 should be contrasted with the optimistic views of Dr Lawrie on 12 May 2022. It seems to me that it ought to be accepted that it was not explained to Mr Purcell that he would be unable to continue working in his trade as a butcher or in any other occupation any time prior to 27 June 2022. Mr Purcell’s evidence at paragraph 100 of his affidavit filed 22 January 2022, and paragraph 10 of the affidavit sworn on 12 March 2024, was that he had never been told he couldn’t work to retirement age. This was not challenged, and in the numerous medical reports in evidence this appears to be correct as there is no written suggestion that Mr Purcell could not continue to work until normal retirement age. What was in fact explained was that he had an arthritic knee and that it would slowly deteriorate but that he could continue working such that his knee would “definitely support him in what he wants to do.”
- [50] Exhibit SAC-25 is the report of Dr Peter Winstanley dated 14 March 2022. It was received by Mr Crew on behalf of Mr Purcell and by Mr Purcell on or about 22 March 2022. As Dr Winstanley recorded, the purpose of the evaluation was to assess Mr Purcell’s permanent impairment. The report contains a diagnosis, an assessment of permanent impairment at 19%, but not a prognosis, a work prognosis nor advice on any further treatment. There is no criticism of Dr Winstanley in this regard as the report was not obtained for general purposes but rather for the purpose solely of a permanent impairment assessment.

- [51] On page 4 of the report, Dr Winstanley records his opinion that the increased symptomology in November 2021 without specific incident or injury related to the progression of Mr Purcell's underlying degenerative change in the right knee joint. Dr Winstanley then summarised the November 2021 incident as follows:

“He has had a flare of his degenerative process.”

- [52] Dr Winstanley also noted that Mr Purcell continued in full time work activity and that his condition was stable and stationery. Dr Winstanley did opine that “50% of the degree of degenerative change associated with the right knee relates to the initial injury of 2006 and 50% relates to the injury of 2013.”
- [53] As stated above, Mr Crew, after having reviewed Dr Winstanley's report of 14 March 2022, took the view that he did not have sufficient information to determine whether Mr Purcell had a worthwhile claim. I consider that this was a reasonable view. It is one thing to apportion a degree of permanent impairment, however, in teasing out the more difficult questions of causation, general prognosis, work prognosis and any future treatment, all of those matters were critical to determination of even the wildest guess as to what the claim would be worth. The most substantial component of damages for personal injury, in non-catastrophic cases, is usually economic loss. In the 11 year period from 7 March 2013 to 2023 Mr Purcell lost approximately 70 weeks of employment, however, 65 of those weeks from March 2013 to May 2014 Mr Purcell was in receipt of WorkCover benefits and had been performing some return to work duties. Since May 2014 Mr Purcell has had only 5 weeks off work, about 3 weeks in April 2015 and about 2 weeks from 24 August 2018 to September 2018. Past economic loss is minimal, maybe \$5,000.
- [54] Prior to Dr Winstanley's report of 27 June 2022, Mr Purcell may have received a small global award in the vicinity of \$50,000 to \$75,000 for loss of economic capacity, as there was no evidence to suggest that Mr Purcell could not work to a normal retirement age. Dr Winstanley's report of 27 June 2022 changed that parameter entirely. After Mr Crew asked Dr Winstanley the appropriate questions about occupational prognosis, the opinion of a cessation of heavy work was expected within 7 to 10 years from 2022, meaning it was probable Mr Purcell would cease work between 2029 (when aged 49) and 2032 (when aged 52). On acceptance

of that opinion Mr Purcell may receive an amount for loss of economic capacity between \$409,200 (\$1,200 per week for 15 years delayed by 10 years, multiplier 754-413)) to \$534,000 (\$1,200 per week for 18 years delayed by 7 years, multiplier 754 – 309)). Absent Dr Winstanley’s report of 27 June 2022, Mr Purcell would be better off accepting the lump sum WorkCover offer, particularly given the risks and costs of pursuing a common law claim and an extension application.

- [55] It seems to me therefore that upon the receipt of the report of Dr Winstanley of 14 March 2022 and upon costs estimated between \$80,000 and \$110,000, it could not reasonably be concluded that Mr Purcell had a worthwhile claim but after the receipt of the report of 27 June 2023 it ought be concluded Mr Purcell had a worthwhile claim.
- [56] Mr Atkinson KC on behalf of ILSC submitted that if the important matters referred to been the subject of an enquiry from Dr Winstanley in a timely manner, then that information would have been received by the end of March 2022. The issue is whether those material facts were of a decisive character within the meaning of s 30(1)(b) of the LAA and whether those facts were within the means of knowledge of a person at a particular time within the meaning of s 30(1)(c) of the LAA.
- [57] Section 30(1)(b) and 30(1)(c) of the *Limitation of Actions Act* 1974 provide:

“30 Interpretation

- (1) For the purposes of this section and sections 31, 32, 33 and 34—
- (a) the material facts relating to a right of action include the following—
- (i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
 - (ii) the identity of the person against whom the right of action lies;
 - (iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;
 - (iv) the nature and extent of the personal injury so caused;
 - (v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

[...]

- (c) a fact is not within the means of knowledge of a person at a particular time if, but only if—
 - (i) the person does not know the fact at that time; and
 - (ii) as far as the fact is able to be found out by the person—the person has taken all reasonable steps to find out the fact before that time.”

[58] As may be observed from s 30(1)(b) and 30(1)(c), although in determining whether material facts relating to a right of action are of a decisive character, the person is deemed to have been taken appropriate advice upon those facts, it is important to emphasise that the means of knowledge is personal to the applicant, in this case, Mr Purcell. The ILSC argument is to the effect that as Mr Crew did not immediately seek clarification from Dr Winstanley, which he acknowledged was possible, that the additional facts were within the means of knowledge of Mr Purcell. I do not accept this submission for the following reasons.

[59] In *Stephens & Anor v Paradise Ultrasound Specialist Pty Ltd* [2019] QSC 134, I addressed this issue in paragraphs 38 to 44. I respectfully agree with the insightful reasons of McPherson J in *Neilson v Peters Ship Repair Pty Ltd*⁷ where McPherson J said:

“Placing the matter in the hands of apparently competent solicitors with adequate instructions including information relevant to the cause of action would ordinarily amount to taking all reasonable steps to ascertain the relevant facts, provided that the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action. In the present case the plaintiff had no reason to suspect that any further facts were required in order to enable his solicitors to pursue his claim. He was not aware of the demise charter or of the identity of the charterer. In these circumstances I do not think that he can reasonably have been expected to make inquiries or to take other steps to ascertain facts the existence and significance of which he was ignorant. Nor do I consider it in the circumstances unreasonable for him to have absented himself from his residence for a period of some four and a half months at a time when, having given his instructions, he had no reason to suspect that during that period his solicitors might wish to inform him of facts of that character. That being so, it follows that material facts of a decisive character were not within the means of knowledge of the plaintiff at any time before December 11, 1982.”

⁷ [1983] 2 Qd R 419.

- [60] In the present case, Mr Crew is a very experienced personal injury solicitor who is an accredited specialist in personal injury law. He is plainly an apparently competent solicitor and it seems to me that Mr Purcell, in placing the matter in the hands of Mr Crew, and, as he did, providing him with adequate instructions and information relating to the cause of action, did amount to taking all reasonable steps to ascertain the relevant facts. Mr Purcell did not languish in his conduct of the matter in any sense. Mr Purcell, a butcher, cannot be criticised for failing to tell Mr Crew, a very experienced personal injury solicitor, to investigate this claim more rapidly.
- [61] I find that the “critical mass of information”⁸ did not reach the tipping point such that it could be reasonably concluded that Mr Purcell had a worthwhile cause of action until he received the report of Dr Peter Winstanley dated 27 June 2022. It seems to me on the basis of Mr Purcell’s description of the worksite let alone the photographic and other evidence contained in the Intersafe report, that there is evidence to establish a right of action apart from a defence founded upon the expiration of the period of limitation.
- [62] I find that the opinions as set out in the report of Dr Winstanley of 27 June 2022 does constitute a material fact of a decisive nature relating to that right of action that was not within Mr Purcell’s means of knowledge until 27 June 2022. In these circumstances, a discretion to extend the period of limitation is enlivened.
- [63] The issue of prejudice has been raised by ILSC but not Primary Partners. In respect of Davin Lorraine, the defendants have not yet located Davin Lorraine, however, Mr Purcell is in contact with him and has provided, the defendants with the contact details for Mr Lorraine. Although, on Mr Purcell’s evidence, which I accept, Mr Lorraine did not witness the incident, Mr Lorraine may be able to give evidence as to the state of the stairs that Mr Purcell slipped upon. Mr Lorraine, however, is not the only witness that may do this and the property manager, Mr Rodney Purcell is also available to provide that type of information. As the property was a training property and ILSC kept records, there may be numerous other persons who can provide information as to the state of the stairs as at 7 March 2013.

⁸ *Castillon v P&O Ports Ltd* [2007] QCA 364 at 35.

- [64] The report of Intersafe Engineers suggests a number of matters concerning the stairs which may have contributed, being low slip resistance of the treads of the stairs, the absence of handrails, the lack of nosing and edge delineation and possible inconsistencies in the dimensions of the stairs. There is nothing in the photographic evidence taken by the Intersafe engineer to suggest there has been any alteration to the area in the last decade. Indeed, the presentation of the stairs suggests it is highly improbable there has been any change to the stairs in the last decade. In any event, there are witnesses available to speak to that issue, being at least the former manager Mr Rodney Purcell, and Mr Davin Lorraine.
- [65] Although it is submitted there is some prejudice to ILSC in not having the claim notified earlier so as to enable an earlier medical examination, it seems to me there is no significant prejudice in this regard as there are numerous medical reports upon Mr Purcell's injuries, such that it is proper to conclude there is no prejudice in this regard.
- [66] The plaintiff's application ought to succeed.
- [67] The orders are to be the following;
1. That pursuant to s 31(2) of the *Limitations of Actions Act* 1974 (Qld), the period of limitation for the Applicant's action in respect of personal injury arising from the incident on 7 March 2013 be extended so that it expires:
 - a. in respect of the First Respondent, on 30 June 2023; and
 - b. in respect of the Second Respondent, up to and including the date which is 60 days from the date the Applicant complies with s 295 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).
 2. The Respondents pay the Applicant's costs of and incidental to the Application to be assessed on the standard basis.