SUPREME COURT OF QUEENSLAND

CITATION:	*AAI Limited t/as Suncorp Insurance v Birch* [2017] QCA 232
PARTIES:	**AAI LIMITED trading as SUNCORP INSURANCE ACN 005 297 807 (applicant) v TONI-LEE BIRCH (respondent)**
FILE NO/S:	Appeal No 3794 of 2017 DC No 157 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville – [2017] QDC 66 (Durward SC DCJ)
DELIVERED ON:	13 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2017
JUDGES:	Holmes CJ and Gotterson JA and Flanagan J
ORDERS:	**1. Application for leave to appeal granted.** **2. Appeal dismissed.** **3. Appellant to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – WHAT ARE MATERIAL FACTS – where the respondent suffered nervous shock injury as a result of involvement in a motor vehicle accident – where the respondent brought a claim against the appellant as the insurer of the vehicle at fault – where the claim was filed after the expiry of the limitation period allowed under the *Limitation of Actions Act* 1974 (Qld) ("the Act") – where the respondent filed an application to extend the limitation period – where the period of limitation may be extended under the Act if a material fact arises of a decisive character relating to the right of action which was not previously within the applicant's means of knowledge – where the learned primary judge found the fact that the respondent had become medically unfit to continue employment due to an aggravation of her previous psychiatric injury to be a

"material fact of a decisive character" within the meaning of the Act – where the learned primary judge further found this material fact to have not been within the respondent's means of knowledge prior to the year preceding the commencement of the claim – whether the learned primary judge erred in applying ss 30 and 32 of the Act – whether the learned primary judge failed to identify a material fact within the meaning of the Act

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – KNOWLEDGE – REASONABLE STEPS TAKEN TO ASCERTAIN FACTS – where the respondent resigned from her employment as an audiometrist more than three years after a motor vehicle accident causing post-traumatic stress disorder ("PTSD") – where the respondent gave evidence that she resigned due to increased travel requirements and conflicts with her manager – where the respondent indicated in her resignation letter that she had secured alternative employment in the same industry – where the respondent later stated that this was inaccurate – where the applicant contends that a further motor vehicle incident occurring after the respondent's resignation, but before she had ceased work, was the actual cause of respondent's aggravated injury – whether the respondent knew, or ought to have known, that she had a serious or worthwhile claim against the applicant at a time earlier than the year preceding the commencement of the claim – whether the respondent's prior understanding of PTSD and university education inferred the respondent should reasonably have sought professional advice at an earlier stage – whether the learned primary judge erred in applying ss 30 and 32 of the Act

District Court of Queensland Act 1967 (Qld), s 118
Limitation of Actions Act 1974 (Qld), s 30, s 31

Birch v AAI Limited [2017] QDC 66, related
Castlemaine Perkins Ltd v McPhee [1979] Qd R 469, cited

COUNSEL: G F Crow QC for the applicant
G W Diehm QC, with M Glen, for the respondent

SOLICITORS: Jensen McConaghy Lawyers for the applicant
Maurice Blackburn for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Gotterson JA and with the orders he proposes.

[2] **GOTTERSON JA:** On 17 June 2016, the respondent, Toni-Lee Birch, filed a claim[1] in the District Court at Townsville for damages for personal injuries sustained by her. According to the statement of claim[2] which accompanied the claim, the respondent suffered a nervous shock injury as a result of an accident which occurred on 3 February 2012 on the Bruce Highway in the Helens Hill area.

[3] The respondent had been driving her Land Rover Discovery wagon in a southerly direction along the highway. She was following a Mitsubishi sedan being driven by Ms Charlotte Malcolm. Mr Arthur Moore was driving a Toyota Camry sedan in a northerly direction. His vehicle ventured into the south-bound lane. It collided with the Mitsubishi. The respondent braked heavily, veered left and came to a stop beside the Mitsubishi. She went to render assistance to Ms Malcolm.

[4] Mr Moore died as a result of injuries he sustained in the collision. His Toyota was insured under a compulsory third party insurance policy. The licensed insurer of that vehicle was the appellant, AAI Limited trading as Suncorp Insurance. Section 52(2) of the *Motor Accident Insurance Act* 1994 (Qld) permitted the respondent to sue it alone for damages.

[5] Prior to commencing the proceeding, the respondent filed an application[3] in the District Court at Townsville on 3 June 2016. The relief sought by the application included an order "[t]hat the limitation period in respect of the (respondent's) claim for damages for personal injuries arising on 3 February 2012 be extended up to 9 August 2016 pursuant to section 31 of the *Limitation of Actions Act* 1974 (Qld) or in the alternative up to 16 July 2016".

[6] The application was heard by a judge at the District Court on 25 August 2016. On 21 March 2017 his Honour made an order[4] extending the limitation period. Neither the reasons for judgment delivered on the same day nor the order nominated the date to which the limitation period was extended. However, it is clear from the reasons that his Honour intended the extension to be until a date after the commencement of the proceeding on 17 June 2016.

[7] On 13 April 2017, the appellant filed a notice of appeal[5] against the District Court judgment. The appeal is one for which the leave of this Court pursuant to s 118(3) the *District Court of Queensland Act* 1967 (Qld) is required.[6]

Factual context

[8] The following summary of the factual context in which the application was made is drawn from three affidavits sworn by the respondent on 3 June 2016[7] ("the First Affidavit"), 24 June 2016[8] ("the Second Affidavit") and 16 August 2016[9] ("the

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1 AB448-449.
2 AB450-453.
3 AB445-447.
4 AB489.
5 AB490-492.
6 No application for leave to appeal has been filed. However, the appellant's arguments on the merits of the appeal are such as warrant consideration by this Court and, if the decision at first instance is wrong, a substantial injustice will result to the appellant in that it will be exposed to a judgment against it in the proceeding. For those reasons, there should be a grant of leave in this case: compare *Apap & Ors v Treanor & Ors* [2003] QCA 406 at [11].
7 AB38-77.
8 AB229-233.

Third Affidavit") respectively, filed in support of the application. The respondent was not cross-examined on these affidavits.

[9] At the time of the accident, the respondent was employed as a fulltime clinical audiometrist by Active Hearing Pty Ltd which traded under the business name "Bloom Hearing Specialists" ("Bloom"). Her work was carried out at a central clinic at Townsville and clinics at a number of regional centres. The accident occurred when she was returning from the Cairns clinic to Townsville where she lived.

[10] The respondent was very emotionally upset by the accident and Mr Moore's death. It continued to get to her in the following weeks particularly when, at the end of February 2012, she was advised by police that her participation in a coronial inquest was possible.

[11] The respondent consulted Dr William Barry, a general practitioner, on 3 March 2012. He advised her that he thought she was suffering from post-traumatic stress. He prescribed an anti-depressant and referred her to a psychologist. After three months, Dr Barry recommended that she keep on with the anti-depressant which she did until May 2014 when an endocrinologist whom she had consulted about allergies, recommended that she cease taking it.

[12] Overall, the respondent attended eight counselling sessions with the psychologist between March and August 2012. She discontinued them because she felt that her functioning had improved with the anti-depressant. Later, the respondent found out that the person to whom she had been referred was, in fact, not a psychologist, but a mental health nurse.

[13] The respondent did not take time off work following the accident. She remained with Active Hearing until her resignation on 9 August 2015. During this time, she continued to drive to regional clinics at Tully, Atherton, Cairns and Charters Towers on what she called the "northern route". Initially she suffered from severe traffic anxiety. Although she learned to manage the anxiety, it never went away completely.

[14] Prior to January 2015, the respondent's relationship with her employer, Bloom, had soured. A number of factors caused her stress and anxiety in the workplace. A receptionist whom she regarded as incompetent, had been employed in March 2014. A new regional manager was also employed. The respondent underwent a "series of uncomfortable encounters" with her including an encounter in October 2014 when the manager wrongly alleged misconduct on the respondent's part.

[15] Further stress was caused in December 2014 when the manager, without consultation with the respondent, cancelled a number of the latter's appointments for January 2015. The motive for the cancellations was to direct the respondent to visit additional regional clinics south of Townsville, in Ayr, Bowen and Mackay in order to cover for another fulltime clinician who had resigned. The result was to require the respondent to drive to regional clinics both north and south of Townsville. Her time spent visiting such clinics was, in effect, doubled.

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9 AB238-273.

[16] The respondent told Bloom in January, and, again, in March 2015 that she was unable to cope with the increased travel. Thereafter, she was on leave for a number of weeks to care for her husband following surgery. She resumed work on 11 May 2015 and was required to drive to Ingham, Tully and Atherton. About a week later she was assigned to visit Ayr and Bowen. During these weeks she was suffering sleep disturbance and heart palpitations each night. She had similar experiences when she visited Atherton in mid-June 2015.

[17] On 19 June 2015, the respondent told the manager that she was not coping with the increased travel. In the following days she was required to visit regional clinics in Ayr and Bowen.

[18] The respondent consulted Dr Sunita Pawar, a general practitioner, on 24 June 2015. Blood pressure medication was prescribed. On 26 June 2015, she experienced very sharp intense chest pain and found it difficult to breathe while she was getting ready for work. She saw Dr Pawar again on 27 June 2015. She was given a certificate for time off work and was referred to a psychologist, Ms Lorraine Heilbronn.

[19] In the Second Affidavit, the respondent gave the following evidence as to her consultations with Ms Heilbronn and her resignation from Bloom:[10]

> "6. I attended Ms Heilbronn on 16 July 2015 following referral from my GP Dr Pawar. At the attendance on 16 or 23 July 2015 Ms Heilbronn advised me that the psychological symptoms I was then experiencing were an ongoing manifestation of the PTSD stemming from the original accident in 2012. At that stage;
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> (a) The realisation of the extent to which I was affected all "sunk in".
>
> (b) I accepted that I needed to get further treatment for my PTSD.
>
> 7. Prior to Ms Heilbronn advising me, on or about 16 July 2015, that my psychological symptoms were as a result of a re-aggravation of the PTSD I sustained in 2012;
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> (a) I was unaware that the reactions to travel and anxiety I was experiencing in the course of my employment was sufficient to amount to a psychological injury and that I required psychological and psychiatric treatment.
>
> (b) I was unaware that the ongoing psychological symptoms and difficulties I was experiencing in the workplace were due to the PTSD which resulted from the accident in 2012.
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> 8. By about 30 July 2015 I had come to the conclusion that I needed to leave my employment because I could no longer handle the additional driving that I was being required to carry out. However at that stage I was still finding it difficult to actually tender my resignation, as previously I had loved my

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10 Respondent's Second Affidavit: AB230.

job and it was only in recent times that the relationship had soured.

9. On Sunday, 9 August 2015 I resigned from my employment with Active Hearing Pty Ltd because I realised that I could no longer face the amount of driving required in my employment."[11]

[20] This evidence was elaborated by the respondent in the Third Affidavit as follows:

"34. As a result of the work conditions I was placed under, and particularly the unreasonable conduct of [the manager], I suffered considerable stress and anxiety and emotional turmoil, including that described herein and in paragraphs 63 – 76 of [the First Affidavit]. A lot of time and energy was spent dealing with the difficult workplace conditions and the unreasonable travel requests. I found that I was very preoccupied with attempting to cope with the demands placed upon me by my employer.

35. My anxiety symptoms gradually and progressively worsened over time, particularly in the period from May to July 2015.

36. Prior to the attendance on Miss Heilbronn on 16 July 2015 I had attributed the worsening of my symptomology to the way I had been dealt with at work. I knew the increased travel requirements imposed on me by [the manager] were impacting on my anxiety but I did not realise this was an aggravation of my Post Traumatic Stress Disorder until Miss Heilbronn told me that on 16 July 2015.

37. I refer to paragraph 7(b) of [the Second Affidavit], and state further in respect of my meeting with Miss Heilbronn on 16 July 2015 as follows. On 16 July 2015 I had a long discussion with Miss Heilbronn. I told her about, amongst other things, my work stresses and the extra travel commitments I had been put under. I told her about the motor vehicle accident back in 2012. In the course of doing that I started to cry uncontrollably. I said words to the effect "*I'm sorry - I thought I was over all that*". Miss Heilbronn told me I was still suffering PTSD from the 2012 accident. Up until she said that I had been thinking that I was feeling anxious because of all of the things that had been happening at work. I did not relate my stress and anxiety back to the motor vehicle accident in 2012. As at 16 July 2015 I realised for the first time that I was still suffering significant effects from the motor vehicle accident in 2012, and that this had worsened in my context of the unreasonable pressures placed upon me in the course of my employment at Bloom."

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11 Respondent's Third Affidavit: AB245-246.

[21] The respondent's resignation[12] was expressed to be effective on 2 October 2015. Her resignation letter stated, inaccurately, that she had secured alternative employment within the industry that did not include travel.[13]

[22] Notwithstanding the resignation, the respondent was required to undertake the northern route on 10 August 2015. On 14 August 2015 she was driving back from the Atherton clinic to Townsville. Near Malanda she saw cars pulling up and people running with mobile phones. She imagined that there might have been a motor vehicle accident. She began to have flash backs of the 2012 accident. She became very upset but managed to complete the drive to Townsville. The following day she consulted Ms Heilbronn who recommended that she see a general practitioner and advise WorkCover because she appeared to be unfit for work.

[23] On 18 August 2015, a general practitioner completed a WorkCover certificate for her. Some six days later she lodged an unfair dismissal application with the Fair Work Commission. In due course she also lodged claims with WorkCover for workers compensation for injury sustained on 3 February 2012, for injury sustained over time in her employment by Bloom, and for injury sustained on 14 August 2015.

[24] Her evidence was that until 25 August 2015, she was unaware that she could commence "a CTP claim" with respect to the accident she had witnessed 3 February 2012. By that expression she meant a common law claim for damages for personal injury.

Medical evidence

[25] Medical evidence adduced by the respondent in support of the application favoured a diagnosis of a Post-Traumatic Stress Disorder ("PTSD") caused by the motor vehicle accident in February 2012 which had later been aggravated by a range of different factors.

[26] In November 2015, in response to an inquiry from WorkCover as to the respondent's potential to return to work, Ms Heilbronn identified two aspects to the respondent's condition. She said:[14]

> "Firstly, in relation to the fatal motor vehicle accident in 2012, it became obvious that Ms Birch had not fully recovered from this accident and that treatment at the time was incomplete. Without having the strategies to deal with the triggers that contributed to her ongoing trauma, when she came across the accident on 12 August 2015, she became re-traumatised. She, once again, reported hypervigilance and a startle response.
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> I also believe that, based on Ms Birch's report of how she actively sought a response from her employer as acknowledgement of her work-related motor vehicle accident in 2012, that the eventual response of her employer to offer telephone counselling was inadequate. She reported that the apparent lack of interest by management as to

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12 AB77.

13 In an affidavit sworn by the respondent in a proceeding in the Fair Work Commission on 12 May 2016, the respondent said that, in fact, she had no alternative employment. She was considering an offer by her mother to fund her to open her own clinic in Townsville: AB414, para 66.

14 Affidavit AS Wang, sworn 15 June 2016; Exhibit ASW4: AB122-123.

> her ongoing welfare in the period following the event indicated to her that she was not valued within the organisation.
>
> Based on Ms Birch's report of her commitment to continue to work to her contract with the organisation, it appears that she was fulfilling the organisation's requirements of travel to her own detriment without the benefit of having dealt with her trauma.
>
> Secondly, when Ms Birch made it clear to her manager that she was just coping with having to undertake travel that she had understood to be required when she signed the [contract], she was increasingly put under pressure to agree to additional travel when her co-workers either resigned or decided not to travel any longer for the organisation.
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> It appears, based on Ms Birch's report that the increased pressure she was put under aggravated her condition until it became untenable for her to continue under such pressure. Her level of distress at the organisation's response appeared to escalate as time progressed, from her first appointment with me on 16 July 2015 to her last appointment on 22 October 2015. At each appointment, she would start to cry as soon as she walked in the door, with her reporting increasingly hostile responses from her employer. This level of responding contributed to her levels of Depression, Anxiety and Stress and she was not sleeping well, increasing her levels of distress further."

[27] The respondent was examined by Dr Sharon Harding, a consultant psychiatrist, in July 2016. In a report to WorkCover dated 2 August 2016, Dr Harding summarised her findings as indicating that:[15]

> "Ms Birch has shown some symptoms of PTSD since 2012 which were aggravated in the context of work-related stress, including conflict with her manager, poor performing administrative staff and management's failure to take action in this respect, increased number of trips away requiring extensive driving and finally passing a probable accident site in August 2015 with the most significant factor of these being the accident in February 2012, the next most significant factor being the perceived harassment and bullying by … her manager. Other contributing factors were the problems with administrative staff and the final issue being the further accident in August 2015."

The damages claimed

[28] The respondent's claim is for damages for negligence of $524,567.00. Principal components of it are:

General Damages	$50,000
Past Economic Loss	$100,000
Future Economic Loss	$300,000
Past and Future Loss of Superannuation	$44,000

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15 Affidavit AS Wang, sworn 17 August 2016; Exhibit ASW21: AB289.

Future Medical Expenses	$20,000

all of which are attributed to her nervous shock injury. The claim for future economic loss was made on the basis of a pleaded current inability to work as an audiometrist or take on employment that may involve travel, particularly on a highway or unfamiliar roads.[16]

The reasons at first instance

[29] The learned primary judge noted that, pursuant to the provisions of s 11 of the *Limitation of Actions Act* 1974 (Qld) ("the Act"), the limitation period for a right of action for damages for personal injury arising out of the accident on 3 February 2012, expired on 2 February 2015.[17] His Honour also observed[18] that, in order to exercise the power to extend the limitation period conferred by s 31(2) of the Act in a way that would avail the action that had been commenced, it was for the respondent to show that a material fact of a decisive character relating to the right of action was not within her means of knowledge until after 17 June 2015.[19]

[30] His Honour also observed that it was necessary for the respondent to show that there was evidence to establish the right of action[20] and that no prejudice to the defendant, in the sense of impairment of a fair trial, would result from an extension of the limitation period.[21] I mention at this point that the learned primary judge made findings favourable to the respondent with respect to evidence establishing her right of action.[22] These findings are not challenged on appeal. His Honour also made findings favourable to the respondent on the issue of prejudice.[23] They, too, are not challenged on appeal.

[31] The findings that are challenged concerned his Honour's identification of a material factor of a decisive character which was not within the respondent means of knowledge until after 17 June 2015.

[32] As to material fact, the learned primary judge referred to the facts listed in s 30(1)(a) of the Act as ones that are included within the concept of material facts relating to a cause of action for the purposes of s 31. His Honour noted that the respondent relied on "a combination of two material facts".[24] As summarised by him, those facts were:[25]

> "1. The applicant could no longer continue in her employment as an audiometrist with Bloom. This material fact is said to have come to the applicant's knowledge in or about the period between mid July 2015 to 09 August 2015; and
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> 2. The applicant was diagnosed as having suffered an aggravation of a post-traumatic stress disorder ("PTSD")

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16 Statement of Claim, para 11(d): AB452.
17 Reasons [23]: AB481.
18 Reasons [26]: AB482.
19 Section 31(2) permits an extension so that the limitation period expires at the end of one year after the date on which the material fact is within the applicant's means of knowledge.
20 Reasons [26]: AB482.
21 Reasons [52]-[53]: AB487.
22 Reasons [50]-[51]: AB486-487.
23 Reasons [54]-[57]: AB487-488.
24 Reasons [36]: AB 484.
25 Ibid.

> which had been originally caused by her involvement in the motor vehicle accident on 03 February 2012. The diagnosis was made and the applicant advised with respect to it on 16 July 2015."

He then observed:

> "[37] With respect to any alleged failure to make further enquiries in respect of the post-traumatic stress disorder condition and whether it was unreasonable so to do, depends on the circumstances. Whether the plaintiff, given her circumstances and background, had taken "*all reasonable steps*", requires an assessment focused on the plaintiff personally rather than on some fictitious person."

[33] As to decisive character, his Honour set out the provisions in s 30(1)(b) of the Act which stipulate when a material fact relating to a right of action is of a decisive character for the purposes of s 31. His Honour's observations on this element were contained in the following paragraphs of the reasons for judgment:

> "[43] There are two key components in section 30(1)(b) of the Act: the expressions "*reasonable person*" and the taking of "*the appropriate advice*". Determining whether an action is worthwhile commencing of necessity involves an assessment of the expense, cost and risks of litigation and their potential quantum and benefits of a successful proceeding. *Greenhalgh v Bacas Training Ltd & Ors* [2007] QCA 327 per Keane JA (with whom Cullinane and Lyons JJ agreed), at [22].
>
> [44] Was it in the interests of the appellant to bring an action prior to **17 June 2015**, upon appropriate advice and considering her circumstances and the facts then known to her? Would she have regarded an action as being likely to result in an award of damages sufficient to justify the bringing of the action and that it was in her interests so to do? See *Sugden v Crawford* (1989) 1 Qd R 683; and *Sunbeam Corporation Limited v 325* (1988) 2 Qd R 325, at 331 and 333.
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> [45] It seems to me that prior to that date, the applicant had not suffered any absence from employment as a result of her psychiatric condition. Her treatment requirements and expenses had been relatively minimal and the quantum of damages would have been fairly modest, perhaps something in the order of $20,000 to $50,000: see *Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (in Liquidation) & Anor* [2009] QCA 352 at [68] – [86].
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> [46] The cost of bringing the claim, including a compulsory conference and going to trial, would likely have outweighed the benefit from the damages that may have been recovered which would have been, it seems to me, very much less than the likely quantum. That regime of costs would have been adverse to a decision to bring a claim as at that date. The risks and uncertainties involved in the litigation at that time would have been significant."

[34] His Honour then turned to the element of means of knowledge. He referred to the provisions of s 30(1)(c) of the Act which define when a fact is not within the person's knowledge at a particular time for the purposes of s 31. As to whether this element was satisfied, his Honour reasoned as follows:

> "[48] In my view the new material facts placed her "*into a position where for the first time she had reasonable prospects and should in her own interests commence her proceedings*": *Wood v Glaxo Australia Pty Ltd* (1994) 2 Qd R 431 per Macrossan CJ at 437. Those material facts would not have been known to the applicant prior to 17 June 2015. See the discussion of a 'critical mass of information' in *Castillo v P & O Ports Ltd* [2007] QCA 364.
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> [49] When the applicant became unable to continue in her employment and her psychiatric condition had developed adversely, together with the diagnosis of an aggravation of her post-traumatic stress disorder attributable to the motor vehicle incident, her position was quite different: she was medically unfit to continue in employment, she sustained a significant weekly economic loss and she was then aware that here inability to work related to the post-traumatic stress disorder attributable to the motor vehicle incident."

[35] The learned primary judge concluded that the respondent had satisfied the test in s 31(1) for extension of the limitation period.[26] Immediately prior to stating his conclusion, his Honour observed by way of further discussion:

> "[58] It seems to me that in the course of the period during which the proceedings could have been commenced, the applicant was preoccupied with workplace issues and other adverse health conditions for which she was seeking treatment. The workplace issues were the alleged significant and unreasonable conduct at the hands of her employer, which it is said caused stress and a requirement to work long hours and undertake significant driving commitments. I am satisfied that it was only over time and with the gradual adverse progression of her symptoms that the applicant came to the realisation that she could no longer cope with her employment.
>
> [59] I am satisfied that having regard to her capacity to cope at work for the time after the motor vehicle incident, the medical advice she received and her personal and work circumstances, the applicant took all reasonable steps to find out the material facts."

[36] It is clear from his Honour's reasons, particularly para 45 thereof, that despite the respondent's reliance on a combination of two material facts, he found there to have been one material fact of a decisive character that was not within her means of knowledge prior to 17 June 2015, namely, that the PTSD she had sustained as a result of the accident in February 2012 had been aggravated by work pressures over time to a point where she was medically unfit to continue in her employment. That

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26 Reasons [61]: AB488.

finding was consistent with her evidence in paras 6 and 7 of the Second Affidavit and paras 36 and 37 of the Third Affidavit to which I have referred. In terms of a causative link between the respondent's employability and the aggravation of the PTSD, it was supported by the unchallenged evidence of Ms Heilbronn and Dr Harding which I have set out.

Grounds of appeal

[37] Ground 1 is an unparticularised contention that the learned primary judge incorrectly applied the law as set out ss 30(1)(b), 30(1)(c) and 32 of the Act. Ground 2 merely asserts that his Honour failed to identify a material fact within the meaning of s 30(1)(a) thereof. Both grounds are substantively developed in the grounds of appeal which follow them.

[38] Ground 3 puts in question whether there can be more than one material fact of a decisive character for the purposes of s 30(1)(a). The need to consider that issue is displaced by his Honour's finding of the single material fact to which I have referred and which, for the reasons that follow, I would uphold on appeal.

[39] The remaining grounds of appeal, Grounds 4 and 5, are as follows:[27]

> "(4) If the Primary Judge found that "the [Respondent] could no longer continue in her employment as an audiologist with Bloom" was a material fact, then the Primary Judge erred in finding that fact was a material fact within the definition of [s 30(1)(a)] or was of a decisive nature as defined in s 30(1)(b) of the Act, or outside of the Respondent's means of knowledge within the meaning of s 30(1)(c) of the Act as:
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> (i) The [Respondent's] cessation of employment is the subject of her letter of resignation of 9 August 2015 (Exhibit TLB7) said to be caused by managerial directions of her employer, Bloom, as further set out in the Respondent's affidavit filed in the Fair Work Commission (Exhibit DWG-06).
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> (ii) The [Respondent's] cessation of employment was not caused by the post-traumatic stress disorder resulting from the motor vehicle accident of 3 February 2012.
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> (iii) Prior to resigning from Bloom Audiology, the Respondent had secured alternative employment as an audiologist.
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> (iv) After tendering her letter of resignation on 9 August 2015, [the Respondent] continued to work as an audiologist at Bloom, until the subsequent motor vehicle accident on 14 August 2015, with the [Respondent] returning to work for Bloom on 10 August 2015 travelling to a northern clinic on 10, 11, 12, 13 and 14 August 2015. The [Respondent] witnessing a further motor vehicle accident of 14 August 2015.

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27 AB491.

(v) The 14 August 2015 accident caused the [Respondent] to suffer from an aggravation of her prior post-traumatic stress disorder.

(5) Insofar as a material fact of a decisive nature was alleged by the Respondent to be the diagnosis of suffering from an aggravation of post-traumatic stress disorder, the Primary Judge [erred] in concluding that the aggravation of post-traumatic stress disorder caused by the motor vehicle accident of 14 August 2015 and/or the work pressure being applied to the Respondent by her then-employer Bloom could constitute a material fact of a decisive nature in relation to the subject motor vehicle accident of 3 February 2012."

(Ground 4 repeatedly describes the respondent as an "audiologist". Her evidence was that she was an audiometrist and not a more highly qualified audiologist.[28])

[40] These two grounds are to some extent inter-related. Ground 4 contends, in effect, that by reason of the factors listed in it, it was not open to his Honour to find that the respondent's incapacity to continue with her employment was caused by an aggravation of the PTSD attributable to the accident in February 2012. Those factors may be summarised as follows: in her letter of resignation,[29] the respondent attributed her resignation to the pressure of managerial directions placed on her since the accident in 2012 and not to an aggravation of PTSD; the statement in that letter that she had alternative employment arranged; and that it was the traffic accident near Malanda on 14 August 2015 that, as a *novus actus interveniens*, had aggravated her PTSD to a point of seriously impairing her income earning capacity.

[41] As to the first of these factors, the absence of a reference by the respondent to an aggravation of her PTSD in her letter of resignation is unremarkable. The letter did not purport to be an exhaustive statement of the causes of her incapacity to continue in her employment with Bloom. With regard to the second factor, the respondent explained that there was, in fact, no alternative employment arranged for her.

[42] In regard to the third factor, the fact of the Malanda incident occurring as it did after the respondent had resigned but before the effective resignation date, did not preclude a finding that by the time she wrote her letter of resignation, the respondent's PTSD had been aggravated to a point where she could not continue with her employment in the longer term. Such a finding, made as it was for the purposes of this application, would not circumscribe the factual inquiry that would arise in the trial of her claim concerning the extent to which any then diminution in the respondent's income earning capacity was causally related to the PTSD attributable to the accident in 2012.

[43] In oral submissions, the appellant advanced two propositions which may be regarded as elaborations of Ground 5. They were:

(i) The respondent knew she had "a serious or worthwhile claim" as early as March 2014 and that, therefore, what she was advised in July 2015 by Ms Heilbronn as to the relationship between her PTSD, its aggravation by work pressures, and her

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28 AB14; Tr1-14 ll23-35.

29 Respondent's First Affidavit; Exhibit TLB7: AB77.

resultant inability to continue with her employment, could not have been a material fact of a decisive character;[30] and

(ii) Had the respondent acted reasonably in the circumstances, then she would have been advised of the relationship between those factors much earlier than in July 2015 and hence the relationship was within her means of knowledge well before 17 June 2015.[31]

[44] Each proposition warrants separate consideration.

[45] **Knowledge at March 2014:** In developing this proposition, counsel for the appellant placed much reliance upon the following paragraph in an affidavit made by the respondent in May 2016 for her proceeding in the Fair Work Commission ("the Fair Work Commission Affidavit"):[32]

> "22. In March 2014 Active Hearing's Qld Regional Manager, Lorraine Munro, visited our clinic in Townsville. During my meeting with her she asked how I was going. I told her that I was coping because I had to but it was not something I could see me being able to continue to do long term because of the physical, mental and level of fatigue experienced by me in connection with the trips. I discussed the possibility of in the near future cutting back on the trips and enquired if there would be a time where the Employer would reduce our level of service to the regional areas. Lorraine empathised with me but said there was no way the Employer would reduce the visiting regional sites. This was the last visit from Lorraine Munro as she tended her resignation from the company."

[46] In cross-examination with respect to this paragraph, it was put to the respondent that, by March 2014, the "shock and problems" she suffered from the accident in February 2012 were still affecting her. She answered: "To a degree. Yes."[33]

[47] I do not regard this answer as revealing knowledge on the respondent's part that pressures in the workplace were acting as an aggravation to any symptoms she continued to experience as a result of the accident in February 2012. At most, it demonstrates a knowledge on her part that there were some such symptoms that she continued to experience.

[48] Nor, in my view, did the contents of para 22 themselves reveal a knowledge on the respondent's part that, at that time, her capacity to work as an audiometrist was seriously impaired in the long term. What she said, which was not explored in any detail in cross-examination, is apt to mean that the degree of work travel then required of her was not something she could continue indefinitely.[34]

[49] I would respectfully agree with the reasons of the learned primary judge at [42] – [46] of his reasons concerning the worthwhileness of commencing a proceeding prior to 17 June 2015, having regard to the respondent's then state of knowledge.

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30 Appeal Transcript ("AT") 1-6 ll1-3.
31 AT1-11 ll9-16.
32 Fair Work Commission Affidavit: AB406.
33 AB18; Tr1-18 ll14-16.
34 At that time, of the two audiometrists stationed by Bloom at Townsville, she was the only one who was required to travel: Fair Work Commission Affidavit, para 20: AB405.

The costs of doing so were the subject of unchallenged evidence before his Honour.[35] Those reasons are no less applicable to the bringing of an action in March 2014.

[50] I mention at this point that, in oral submissions, counsel for the appellant implied that as early as her first consultation with Dr Barry in March 2012, the respondent knew that the PTSD that he diagnosed would have a permanent adverse effect on her income earning capacity. References made to the cross-examination of the respondent in which she said she associated PTSD with Vietnam Veterans and agreed to a suggestion that she would have known of a potentiality for PTSD to be "a long-term condition".[36] Knowledge by the respondent that PTSD has a potential to be a life-long condition does not imply that the respondent knew anything of the impact that such a condition might have on her income earning capacity in the either long or short term.

[51] In my view, for these reasons, the appellant's first proposition has not been made out.

[52] **Means of knowledge**: The appellant instanced several events as ones which, had the respondent acted reasonably in response to any of them, she would have learned of the material fact found by his Honour well before 17 June 2015.

[53] First, it was submitted that, with the knowledge of Dr Barry's diagnosis of PTSD, the respondent ought to have sought advice as to whether her continuing symptoms were related to it and as to how they might worsen. That submission is, I think, comprehensively addressed by the following evidence given by the respondent in the Third Affidavit on which she was not cross-examined:

> "47. I refer to paragraphs 35 – 42 of [the First Affidavit] regarding my attendances upon Dr Barry. My consultations with Dr Barry were generally quite short. He appeared to be very busy and tended to move me in and out of his room quickly. Apart from the initial attendance on 3 March 2012 he did not discuss the concept of a "*Post Traumatic Stress Disorder*" with me in any detail. He did not tell me on any occasion:
>
> (i) That I could not, or should not be driving.
>
> (ii) That I was not capable of working or should not be working (other than a recommendation that I take some time off work following my very first attendance with Dr Barry).
>
> (iii) That at some stage in the future my PTSD could worsen so as to render me incapable of working.
>
> (iv) That I might suffer relapses of my PTSD.
>
> 48. After a few months post accident I stopped being teary. I was able to continue working and get on with my life, so I didn't

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35 Affidavit AS Wang sworn 17 August 2016, para 4: AB475.

36 AB15; Tr1-15 ll26-27.

> think it was necessary to make any further enquiry regarding the post traumatic stress I suffered."[37]

On these facts, it is difficult to see why the respondent, acting reasonably, ought to have sought the suggested advice.

[54] In reliance upon para 22 in the respondent's Fair Work Commission Affidavit, it was submitted that, armed with the knowledge that her driving routine was to be maintained and that she had been taken off anti-depressants, by mid-2014 the respondent ought to have reasoned that there may have been an aggravation of her PTSD at play and sought professional advice about that.

[55] The difficulty with this submission is that in para 22, the respondent stated that she was coping. Moreover, her concern was that she could not maintain the same degree of travel in her work. It is not apparent why the respondent ought to have reasoned in the manner suggested by the appellant.

[56] Likewise, for the appellant's reliance upon events in January 2015 as warranting that kind of reasoning on the respondent's part.[38] At that point, the respondent was being required to double her travel. It may be accepted that, as she said in para 38 of the Fair Work Commission Affidavit, when she visited the northern route clinics, she still felt affected by the accident in February 2012. However, there was no reason for her to have perceived that the distress caused to her by doubling her travel was also aggravating her PTSD or ought to have sought professional advice with respect to a possible causative relationship between them.

[57] In the Third Affidavit, the respondent gave the following evidence for why she did not seek such medical treatment or advice between August 2012 and June 2015:[39]

> "58 Between August 2012 and 24 June 2015:
>
> (i) I did not attend a General Practitioner, Psychologist or other treatment provider for anxiety or stress or psychological issues (other than to obtain prescriptions for antidepressant medication).
>
> (ii) I did not feel the need to seek any treatment in respect of psychological symptoms.
>
> Although I was still suffering some anxiety anticipating driving long distances, and whilst driving long distances, I had felt capable of controlling my symptoms.
>
> 59. It was only following the worsening of my psychological symptoms, and the onset of associated physical symptoms, over the period from April to June 2015, consequent upon (amongst other workplace stresses) the increased driving duties I had been given, that I felt the need to go to the GP and did go to the GP, who referred me for psychological counselling under a mental health plan."

This evidence, on which the respondent was not cross-examined, provides a plausible and reasonable basis for her acting as she did.

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37 AB248.
38 AT1-14 l41 – AT1-15 l28.
39 AB250.

[58] I mention that in reliance upon authorities such as *Castlemaine Perkins Ltd v McPhee*[40] to the effect that the reasonableness of conduct in this context is that to be expected of the actual person who is applying for the extension, the appellant referred to the fact that the respondent is university educated.[41] In effect, the appellant invited this Court to infer that a person with such an education would have done more to seek professional advice at an earlier stage. I am not prepared to draw a generalised inference of that kind, particularly in the absence of any evidence that specific aspects of the respondent's university training would have prepared her to have done that.

[59] The appellant's second proposition has also not been made out.

Disposition

[60] For these reasons, I am unpersuaded that the appellant has established error on the part of the learned primary judge warranting appellate intervention. In my view, none of the grounds for appeal has been established. The appeal must therefore be dismissed.

Orders

[61] I would propose the following orders:

1. Application for leave to appeal granted.
2. Appeal dismissed.

[62] Appellant to pay the respondent's costs of the appeal on the standard basis.

[63] **FLANAGAN JA:** I agree with the reasons and orders proposed by Gotterson JA.

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40 [1979] Qd R 469 per Connolly J at 472-473 (Wanstall CJ and Kelly J agreeing). See also *NF v State of Queensland* [2005] QCA 110 per Keane JA at [29] (Williams JA and Holmes J agreeing).

41 AT1-22 ll36-38.