SUPREME COURT OF QUEENSLAND

CITATION:	*Lang v McArthur & Ors* [2019] QSC 119
PARTIES:	**PETA DEANN LANG** (Applicant) **v** **DR ARCHIBALD MCARTHUR** (First Respondent) AND **DR TERENCE MCGUIRE** (Second Respondent) AND **THE MATER MISERICORDIAE LTD ABN 83 096 708 922** (Third Respondent)
FILE NO/S:	BS No 10426 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2019
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. The application pursuant to s 31 of the *Limitation of Actions Act 1974* (Qld) is dismissed.** **2. Unless submissions are made to the contrary and provided to me within seven days, the applicant pay the respondents' costs of the application.** **3. Any submissions as to any further consequential relief required be provided to me within seven days.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF

DECISIVE CHARACTER – where the applicant has suffered from physical and cosmetic issues in respect of her left leg since she was a child – where the applicant seeks to pursue a cause of action for damages against the respondents arising out of what are alleged to be personal injuries from treatment allegedly received from the first respondent and second respondent when the applicant was a child – where in its ordinary course the limitation period in respect of such an action would have expired on or about 16 December 1996 – where the facts relied on by the applicant as material are the identification of the first respondent, an appreciation of the condition of her leg and the location of a staple in her left foot – whether the facts relied upon by the applicant are material facts of a decisive character relating to the right of action and were not within her means of knowledge until after the critical date of 19 October 2017 – whether the applicant took all reasonable steps to ascertain the facts

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – EVIDENCE TO ESTABLISH RIGHT OF ACTION – whether the applicant can point to the existence of evidence which it can reasonably be expected will be available at trial and which will if unopposed by the other evidence be sufficient to prove her case against the respondents

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – PRINCIPLES UPON WHICH DISCRETION EXERCISED – where the events said to constitute the right of action took place some forty years ago – where the recollections of witnesses have faded – where there are no contemporaneous medical records in existence – whether even if the preconditions in s 31(2) of the *Limitation of Actions Act 1974* (Qld) were satisfied there could in the circumstances be a fair trial – whether the Court should exercise its discretion to refuse to make an order in favour of the extension

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

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, applied
Carlowe v Frigmobile Pty Ltd [1999] QCA 527, cited
Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton & Ors [2001] QCA 335, followed
Dwan v Farquhar [1988] 1 Qd R 234, followed
Hargans v Kemenes & Anor [2011] QCA 251 at [26], cited
Healy v Femdale Pty Ltd [1993] QCA 210, applied

Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (in liq) & Anor [2009] QCA 352, applied
HWC v The Corporation of the Synod of the Diocese of Brisbane [2009] QCA 168, cited
Limpus v The State of Queensland [2004] 2 Qd R 16, cited
Moriarty v Sunbeam Corporation Ltd [1988] 2 Qd R 325, cited
NF v State of Queensland [2005] QCA 110, applied
Pizer v Ansett Australia Ltd [1998] QCA 298, applied
Suncorp Metway Insurance Limited v Norris [2012] QCA 101, distinguished
The State of Queensland v Stephenson (2006) 226 CLR 197, followed
Wood v Glaxo Australia Ltd (1994) 2 Qd R 431 at 434-435, applied

COUNSEL:	RD Green for the applicant DLK Atkinson for the first respondent D De Jersey for the second and third respondents
SOLICITORS:	CMC Lawyers for the applicant Avant Law for the first respondent Barry Nilsson Lawyers for the second and third respondents

[1] The applicant, Ms Lang, has suffered from physical and cosmetic issues in respect of her left leg, including left leg palsy, since she was a very young child. She seeks to pursue a cause of action for damages against the first, second and third respondents arising out of what are alleged to be personal injuries from treatment allegedly received from the first respondent and second respondent.

[2] Dr McArthur, a general practitioner, is said to have given Ms Lang intramuscular injections of penicillin in the buttocks when she was three months old, which are said to have damaged the left sciatic nerve. It is said that Ms Lang's parents were negligently advised in relation to two of a series of some 16 operations carried out by the second respondent, Dr McGuire, on Ms Lang's left leg between 1978 and 1991. Dr McGuire was employed by the third respondent, the Mater.

[3] Ms Lang was 42 years of age at the time of the application and seeks an extension of time under s 31 of the *Limitation of Actions Act 1974* (Qld) ("the Act") to a period of one year from 19 October 2017 ("the critical date").[1]

[4] The respondents dispute that Ms Lang has satisfied any of the preconditions under s 31 of the Act justifying an extension of time. The Court must therefore determine whether Ms Lang has established that:

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[1] Although proceedings were issued on 27 April 2018.

(a) There is a material fact of a decisive character relating to the right of action which was not within the means of knowledge of Ms Lang until after the critical date. In particular, whether the identification of the first respondent, an appreciation of the condition of Ms Lang's left leg and the location of a staple in her left foot are material facts of a decisive character that were not within the means of knowledge of Ms Lang until after the limitation period;

(b) There is evidence of a *prima facie* right of action in respect of each of the respondents aside from a defence founded on the expiration of a limitation period; and

(c) There can be a fair trial, even if the other preconditions for the granting of the extension in s 31 are satisfied, such that the Court should exercise its discretion to grant the extension notwithstanding that the respondents may suffer prejudice in defending the action.

[5] The injuries were said to have occurred while Ms Lang was a baby and a child. The limitation period in its ordinary course would have expired when Ms Lang was 21, on or about 16 December 1996.

The Legislation

[6] Section 31 of the Act provides:

> "**31 Ordinary Actions**
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> (1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.
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> (2) 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.

(3) This section applies to an action whether or not the period of limitation for the action has expired—

(a) before the commencement of this Act; or

(b) before an application is made under this section in respect of the right of action."

[7] Section 30 of the Act defines the expressions "material facts relating to a right of action", "of a decisive character" and "means of knowledge" as follows:

"**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;

(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—

(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

(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;

(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.

(2) In this section—

appropriate advice, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts."

Material fact of a decisive character

[8] The High Court has held in *The State of Queensland v Stephenson*[2] that the phrase "material fact of a decisive character relating to the right of action" is to be interpreted as a composite phrase.

[9] In *Stephenson*, the majority of the High Court stated that:[3]

> "The better view is that the means of knowledge (in the sense given by para (c) of s 30(1)) of a material fact is insufficient of itself to propel the applicant outside s 31(2)(a). For circumstances to run against the making of a successful extension application, the material fact must have "a decisive character". Whether the decisive character is achieved by the applicant becoming aware of some new material fact, or whether the circumstances develop such that facts already known acquire a decisive character, is immaterial. It is true to say… that in a sense none of the material facts relating to an applicant's right of action is of a decisive character until a reasonable person 'knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing' the features described in sub-paras (i) and (ii) of s 30(1)(b). Whether that test has been satisfied *at a particular point in time* is a question for the court.
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> The practical result of this construction is that an applicant always has at least one year to commence proceedings from the time when his or her knowledge of material facts (as defined in s 30(1)(a)) coincides with the circumstance that a reasonable person with the applicant's knowledge would regard the facts as justifying and mandating that an action be brought in the applicant's own interests (as in s 30(1)(b)). …"

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2 (2006) 226 CLR 197.

3 At [29]-[30] per Gummow, Hayne and Crennan JJ.

[10] There are, according to the majority, two criteria to be considered in relation to s 31(2)(a). The first criterion looks at whether there are material facts relating to a right of action to which s 30(1)(a) is relevant. The second criterion to be considered, in determining whether a material fact is "decisive", looks to the response of the actor.[4] The Court is to consider the response of a reasonable person. In looking at this criterion, s 30(1)(b) is relevant. Section 30(1)(c) is relevant to determining when a fact is within the means of knowledge of the applicant at a particular time. What must not have been within the means of knowledge of the applicant until the critical date is a material fact of a decisive character.[5]

[11] The test is one which has both subjective and objective elements.[6] A material fact of a decisive character under s 30(1)(b) of the Act was said by P Lyons J in *Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (in liq) & Anor*[7] to be a fact that firstly "would be regarded as showing that an action would, but for a defence based on the *Limitation Act*, have a reasonable prospect of success, and of resulting in an award of damages sufficient to justify the bringing of the action", and secondly would along with other facts known to the potential claimant "be regarded as showing that the potential claimant should, in the person's own interest and taking that person's circumstances into account, bring an action on the right of action".[8] His Honour further noted that "[e]ach condition is to be regarded from the point of view of a reasonable person; and that person is taken to be a person who has taken 'the appropriate advice on those facts'".[9]

[12] In determining whether a material fact of a decisive character was not within the means of knowledge of a person prior to the critical date, the person must not have then known the fact, and so far as the fact was able to be found out by the person, the person must have taken all reasonable steps to find it out. That can only be answered by reference to what can reasonably expected from the actual person in the circumstances of the applicant.[10] In *Pizer v Ansett Australia Ltd*,[11] which was referred to by Keane JA with approval in *HWC v The Corporation of the Synod of the Diocese of Brisbane*,[12] Thomas JA referred to earlier observations of the Court in *Healy v Femdale Pty Ltd*[13] as follows:

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4 *The State of Queensland v Stephenson* (2006) 226 CLR 197 at [25].

5 *The State of Queensland v Stephenson* (2006) 226 CLR 197 at [21].

6 *Carlowe v Frigmobile Pty Ltd* [1999] QCA 527 at [39] per Thomas JA and Atkinson J.

7 [2009] QCA 352, with whom Fraser JA agreed.

8 [2009] QCA 352 at [73].

9 [2009] QCA 352 at [73].

10 *NF v State of Queensland* [2005] QCA 110.

11 [1998] QCA 298.

12 [2009] QCA 168 at [44].

13 [1993] QCA 210 at [18].

"The question whether such a person has taken all reasonable steps to ascertain the nature and extent of the injury

> '… depends very much on the warning signs of the injury itself and the extent to which it or any other facts might be thought to call for prudent enquiry to protect one's health and legal rights. It is difficult to say that a person who finds herself able to get on with her life, and returns to employment without significant pain or disability fails the test merely because she fails to ask for opinions from her doctor about the prospect of future disability of effect upon her working capacity'.

There is no requirement, actual or notional, to take 'appropriate advice' or to ask appropriate questions if in all the circumstances it would not be reasonable to expect a reasonable person in the shoes of the plaintiff to have done so. The answer to this then depends upon the primary facts concerning the level of seriousness of the plaintiff's symptoms and of the warning signs which she undoubtedly had."

The evidence

[13] Ms Lang has left leg palsy in addition to complications related to foot drop of the left leg, arthritis and loss of sensation and is said to have "vulnerabilities" associated with those conditions. According to Ms Lang's submissions, the conditions are attributable to inflammation of the sciatic nerve related to injections of penicillin given to her in the buttocks as a baby by Dr McArthur. Ms Lang contends that the material facts of a decisive character, which she did not know, are that:

(a) On 19 October 2017, Ms Lang met with her general practitioner and saw a radiology report that said that she had a deformity of her left leg, a fact which she states she had not previously known. Further, on that date she was advised that she had extensive arthritis of both legs, feet and hips which may have certain consequences in the future because her condition was poor and deteriorating quickly including that she may potentially be wheelchair bound in five to 10 years;

(b) She observed a 'V' shaped staple in her foot in radiology imaging which she had been unaware of; and

(c) Discovering the identity of the general practitioner who was said to have given her injections in her left buttocks when she was a baby.

[14] Ms Lang accepted in evidence that she was told prior to when she was 16 that the problems with her left leg were caused by a damaged sciatic nerve from injections given to her as a baby.

[15] Ms Lang's mother, Ms Olive, gave evidence that when Ms Lang was approximately 12 weeks old, she was diagnosed by the first respondent, Dr McArthur, as having pneumonia and required injections of penicillin twice per day for at least one week. According to Ms Olive, she

took Ms Lang to Dr McArthur to have those injections over that week. She could recall her crying when the injections were given and bruising. She could not remember any other specifics in relation to the treatment given.

[16] In approximately 1978, Ms Lang became sick with loss of breath and Ms Olive took her to the Mater Hospital. In the course of discussions with the doctors and describing other symptoms of Ms Lang, Ms Olive told the doctors that Ms Lang's leg dropped and her foot rolled inwards. This was something Ms Olive had observed after Ms Lang started to walk. As a result of the attendance at the Mater, Ms Olive took Ms Lang to see the second respondent, Dr McGuire, an orthopaedic surgeon. He arranged for exploratory surgery into Ms Lang's buttocks to ascertain her condition. According to Ms Olive, as a result of that surgery into Ms Lang's left buttock, Ms Olive was told by Dr McGuire that Ms Lang's left sciatic nerve was the thickness of a pencil when it should have been as fine as a strand of hair. She stated she was told by another doctor at the hospital, who she could not describe in her evidence, that the reason that the sciatic nerve was so inflamed could only have been massive doses of penicillin injections into Ms Lang's buttocks. She was also told by Mr McGuire that was the cause of Ms Lang's problems, as opposed to a young boy he introduced her to who had been born with the condition. According to Ms Olive, the only injections of penicillin that Ms Lang had were those given by Dr McArthur into her buttocks when she was 12 weeks old.

[17] According to Ms Olive, prior to the exploratory surgery, she was not told why they were doing the surgery or the complications or risks associated with such surgery. Ms Olive stated she was not aware that they were going to cut into Ms Lang's buttocks in a way that left so large a scar. Ms Lang then had multiple operations up until when she was 12 years of age. Ms Lang estimated that she was operated on 16 times. Ms Olive recalled in relation to one surgery that Ms Lang's left calf muscle was apparently cut away and it was to be transplanted into her left foot. She stated that she was not aware until after the surgery that it would involve cutting away the entire calf, nor was she told about the extent of the surgery or what might be the further possible risks associated with the surgery. She did recall that she was told the surgery was purely experimental. Ms Olive stated that Ms Lang also had surgery which pinned her ankle to prevent the left foot from dropping, but she was unaware and was not informed that a 'V' like staple would be inserted into Ms Lang's foot.

[18] Ms Olive stated that she was not informed of all the risks associated with the surgeries nor was it explained what the surgeries were in fact about. She believed if it was explained "in layman's terms", she would have made further enquiries or at least sought a second opinion.

[19] According to Ms Olive, Ms Lang suffered a pelvis fracture during the birth of her son as a result of her original injuries. Ms Olive clarified in cross-examination that she was referring to when the injections were administered and all the operations. She stated that she had told Ms Lang by the time of her giving birth about the injections in her buttocks and what had happened at the hospital.[14] Ms Olive referred to Ms Lang developing a swing in her hip while walking which compensated for the leg discrepancy.

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[14] T1-40 – T1-41.

[20] Ms Olive was not cross-examined in relation to what she was told by Dr McGuire or other medical staff at the hospital.

[21] According to Ms Olive, she noticed after Ms Lang had started to walk that she was throwing her leg out. She estimated Ms Lang would have been at least three when she first noticed something unusual about the way she walked.[15] Mr Lang, Ms Lang's father, gave similar evidence. Ms Olive said that Ms Lang might have gone to childcare between three months and three years of age as she was working at the time.

[22] Ms Olive stated she always went to Dr McArthur as she had gone there before she was married and he was the family doctor. She had seen him prior to him giving Ms Lang injections "lots of times".[16] She stated Ms Lang had asked her about Dr McArthur's identity prior to November 2017 and she had "just said he was a doctor"[17] but that when pressed in November 2017 for his name, she told her.

[23] According to Ms Lang, she had always been told by her parents that she had been given the penicillin injections in her buttocks by a doctor when she had pneumonia, and that was said to have caused the inflamed sciatic nerve. She stated that she is aware that the extensive scarring over her left leg, calf, foot, stomach and buttocks as well as muscle removal from the left calf and muscle wasting in the leg were related to all of the surgeries performed at the Mater Hospital by Dr McGuire. According to Ms Lang, as a result of her left leg issues, she had developed a significant limp and due to weight bearing differently on each leg, her right leg had developed a structural deformity. That was not the subject of the medical opinion of Dr Ulahannan which was admitted in evidence in support of Ms Lang's application. Ms Lang stated that she had always maintained a belief that ultimately there was nothing that the Mater Hospital could do about her left leg and foot other than trusting in the medical opinion of Dr McGuire, that belief being informed by her parents. She stated that up until October 2017, she had always had the belief there was nothing that could be done in relation to her left leg in terms of difficulties and cosmetic deformity.

[24] Ms Lang stated that she is now of the view that the Mater Hospital did nothing in terms of educating her about her left leg and foot, nor was she made aware of the fact she had a deformity until she met with her current general practitioner in October 2017. She stated that it was only when she was advised in a GP consultation on 19 October 2017 that there was a deformity of her leg and that she may be need to be in a wheelchair in the future due to a diagnosis of severe arthritis which affected both legs that she thought seriously about her condition, why it had occurred and that she should do something about it. As stated above, she identifies three things of importance regarding her growing consideration of such matters, namely:

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[15] T1-41.

[16] T1-37.

[17] T1-37.

(a) That when she viewed radiology imaging of her foot, she had a large 'V' shaped staple that had been placed in the foot to pin the bones, which she was not aware had been surgically inserted and that she had never observed previously on radiology imaging. Her evidence in that regard was she was told by a nurse on or about 23 October 2017 when she had the x-rays that the nurse "can't believe they would use things like this" and "they don't use these types of staples anymore, its [sic] just wrong";

(b) The advice she received as to the existence of extensive arthritis through both of her legs, feet and hips; and

(c) The advice that she may be limited to mobilising in a wheelchair at some time in the future as a result of the severe arthritic condition.

[25] According to Ms Lang, it was not until all of those facts came to her knowledge that she thought critically about her situation and that she needed to do something about her situation, as it became apparent to her for the first time that her condition was poor and that it was deteriorating quickly. According to Ms Lang, prior to this time she had never really understood the severity of her left leg or foot condition because she had lived her life simply accepting it for what it was. She stated that she had lived with the condition for so long that she was used to it and had learned to live with it without critically thinking about it and had made adjustments to conceal the effect of the condition. She also stated she was never told by her parents that there was any basis upon which there may have been a right to seek some redress in relation to the condition that she had suffered.

[26] Ms Lang stated she has worked out ways of dressing and limiting her activities including how she sits and moves to conceal the effect of her condition. She stated people in the street have asked her what is wrong with her leg at times in her life. She stated she only wears closed in shoes as a result. She does not wear heels as she is unable to flex her ankle or extend her foot. She wears clothing to cover her leg.

[27] In February 2016, Ms Lang was found to have a tumour behind her leg. That was surgically removed in July 2016. While Ms Lang believes it is connected with the injuries she suffered as a child there is no medical evidence supporting that. Ms Lang subsequently suffered a worsening of her foot drop in 2016, for which she received an ankle-foot orthosis. In March 2017, Ms Lang was advised the tumour had returned. Dissatisfied with her treatment from RBWH, she went to see Dr Peter Steadman for a second opinion. He thoroughly examined her leg in April 2017 during which he said "I am sure your parents sued for medical negligence". Ms Lang said she was angry and upset as it had never occurred to her that there was medical negligence. She stated she did not do anything about it because she thought any possible chance of a claim had lapsed. She stated she was consumed by what Dr Steadman told her compared to what her parents had told her and was unable to think about the substance of what was said.

[28] In 2017, Ms Lang developed cellulitis which became quite severe. She had a chance encounter with her now solicitor at her home on approximately 15 October 2017, who discovered her crying on the stairs. The solicitor found Ms Lang in a distraught state because of her cellulitis. After Ms Lang told the solicitor about her left leg, the solicitor said she wanted to help her and

suggested that Ms Lang get more information from her mother and find out who the GP was that performed the original injections and who had performed the surgeries. Following her attendance with her general practitioner on 16 October 2017 for her cellulitis, Ms Lang was referred for a full bone scan. On 19 October 2017, she had a consultation with her GP to discuss the results of the bone scan and other results and, "at that point it really 'hit home' in terms of my understanding as to how bad my foot was and how poor my condition had become". According to Ms Lang, her GP told her she might not be able to walk in the next five to 10 years. She was referred to RBWH. According to Ms Lang, "[a]ll the doctors I attended upon told me that both feet were 'riddled with arthritis'". She states that until a report was read out to her by her GP, referring to her "deformity", she was not aware her leg would be classified or described as a deformity. According to Ms Lang, she knew that there was a cosmetic issue with her foot, but she was unaware of other structural and deformity issues with it. She states she did nothing about any possible negligence claim because she felt overwhelmed by issues and still "had no idea there was any entitlement to pursue a claim". She was referred to RBWH on 23 October 2017 at which time she saw the scan of her foot with the staple in it. She was dissatisfied with her treatment at RBWH and subsequently attended her GP in November 2017 and obtained a referral to a podiatrist who referred her to the High-Risk Foot Clinic at the Prince Charles Hospital.

[29] Ms Lang stated she subsequently made enquiries about the doctor who performed the initial injections on her as a baby after 18 October 2017. After a number of attempts at asking her mother, her mother told her that it was Dr McArthur at Inala in November 2017. She then joined a Facebook page asking if anyone had heard of Dr McArthur. Someone on Facebook said the name of the general practitioner was Archie McArthur. She gave that information to her solicitor on 13 November 2017. On 14 November 2017, the solicitor, Ms Tully, conducted a Medical Board Registry search on the name Dr McArthur and found a GP by the name of Dr Archibald McArthur.

[30] Ms Lang subsequently met with legal representatives including counsel and on 6 December 2017 provided formal instructions to commence a personal injury claim.

[31] In cross-examination, Ms Lang made the following concessions:

(a) She had always known of the link between her left leg condition and her visit to the general practitioner when she was three months old where she was given injections in the left buttock;[18]

(b) She understood even at the age of 16 that there was a link between the injections by the GP and the surgeries carried out by Dr McGuire;[19]

(c) She experienced the loss of control over her left leg and foot from a very young age and could recall that experience from the age of four, she was aware her foot dropped and

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[18] T1-14/24-26.

[19] T1-14/24-35.

that it would catch on things by flinging out to the side as she walked and that problem has continued save that the foot no longer drops because it is pinned in place;[20]

(d) The scarring and wasting that is evident in the photographs of her leg annexed to her affidavit had been apparent since she was 16;[21]

(e) In her childhood she experienced motor dysfunction, severe wasting of the left calf muscle, an inability to walk without tripping over her left foot, an inability to move her toes up and down and an inability to move her foot up and down and she was very uncoordinated and unable to participate in sport, which continues to be the case;[22]

(f) She gave instructions to her solicitor to claim past economic loss as she had always felt that the nature of the injury that had occurred held her back in every aspect of her life, including her career;[23]

(g) She has experienced other restrictions every day of her life in opening her wardrobe and selecting the clothes that she has to wear to avoid the injury being obvious and has been aware of this being the case for as long as she could remember;[24]

(h) She knew from the age of 16 that there was wasting such that her legs were not symmetrical;[25]

(i) She knew that there were functions that her left leg could not carry out since the age of 16;[26]

(j) She knew that her left leg was shorter by the time she was 18 and that it had levels of dysfunction and cosmetic issues that other people did not have;[27]

(k) She knew that her leg was holding her back in every aspect of her life;[28]

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[20] T1-14 to T1-15.

[21] T1-17/3-14.

[22] T1-17/41-47 - T1-18/1-3.

[23] T1-19/1-10.

[24] T1-19/35-44.

[25] T1-20/37-38.

[26] T1-20/40-41.

[27] T1-21/4-6.

[28] T1-21/9.

(l) She understood that the injury had occurred through procedural misadventure by a general practitioner and the only thing that she did not know was the general practitioner's name;[29]

(m) She could have asked her mother at any time for the name of the general practitioner;[30]

(n) Prior to her consulting with Ms Tully, she had never asked a lawyer any questions about the issue;[31]

(o) She had suffered complications with childbirth in 2008 because of her left leg, which gave her problems with her hip and pelvis;[32]

(p) Dr Steadman, an orthopaedic professor, had, after seeing her on 18 April 2017, told her that he was surprised that her parents had never made a claim for personal injuries;[33] and

(q) For as long as she could recall there has never been any feeling in her foot.[34]

[32] In the course of cross-examination, Ms Lang rejected the proposition that she had always known that she had a deformity since she was a young girl and said that her leg had never been referred to a deformity until she saw the report provided to Dr Palmer.[35] She however agreed that by the age of 16:

(a) There was so much wasting that her legs were not symmetrical;

(b) There were functions her left leg could not carry out;

(c) She knew she had levels of dysfunction and cosmetic issues other people did not have and it was holding her back in every aspect of her life.[36]

[33] Ms Lang disagreed with a reference in a letter from her general practitioner to a podiatrist referring to her having a "neuropathy from a congenital left lower limb palsy".[37] She similarly

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[29] T1-21/10-16.

[30] T1-22/31-32.

[31] T1-23/14-18.

[32] T1-24/9-12.

[33] T1-27/34-39.

[34] T1-32/15-27.

[35] T1-20/23-27.

[36] T1-20/30-45 and T1-21/1-9.

[37] T1-25/29-41.

rejected the same reference in a letter from the podiatrist.[38] Dr Palmer was not called to give evidence. Nor was Ms Bright, the podiatrist.

[34] Ms Lang rejected the proposition put to her in her cross-examination that she had had a discussion with Dr Steadman about his comment after he had said to her that he was sure her parents would have sued for medical negligence, which comment she understood to be referring to the condition in her leg.[39] This was notwithstanding that in her affidavit she stated that seeing Dr Steadman was the first time that any medical practitioner had taken such time to review her condition properly. Ms Lang said her focus at that point was knowing whether or not she had cancer growing in her leg again.[40] She denied that she had said to Dr Steadman that she had an accident when she was young and had a sciatic nerve injection in her left leg even though it was recorded in his letter of 18 April 2017.[41] She initially said that she could not recall whether she had used the word "injury" but then later said that she was 100 per cent sure that she had not referred to it as an injury.[42] According to Ms Lang, after Dr Steadman had made that comment, she stated that her parents had not done so, but she did not ask him for further details as to what he meant.

Submissions of the parties

[35] The originating application seeks an extension of one year from 19 October 2017 and Ms Lang relies on facts on or after 19 October 2017, which are said to be decisive because they gave rise to Ms Lang appreciating she had a cause of action that would result in a substantial award of damages for the purpose of grounding relief in the application.

[36] Ms Lang's counsel submits that the identification of the first respondent and an appreciation of the seriousness of the condition of the Ms Lang's leg constitute material facts of a decisive character in relation to the first respondent. This appreciation related to the cluster of events that post-dated 19 October 2017.

[37] In relation to the second and third respondents, the material facts of a decisive character are less clear but appear to be the identification of the staple in the foot and also appreciation of the seriousness of the condition of her leg.

[38] It is submitted on behalf of Ms Lang that the thought process leading to the provision of instructions to pursue a claim demonstrates a series of events that suggest a logical, timely and responsible approach, which matured ultimately from when the first respondent was identified, though in a more rudimentary way from 19 October 2017 in the context of the general practitioner consultation.

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[38] T1-26/21.

[39] T1-30/41-45.

[40] T1-31/14-16.

[41] T1-28/5-7.

[42] T1-28/17-32.

[39] According to Ms Lang's submissions, while Ms Lang was well aware of the consequences arising out of the condition of her leg and foot, her mindset was that there was nothing that she could do, which was contributed to by what she had been told by her parents, and this was an operative barrier to her making inquiries. It was not until after her leg was referred to as deformed that her mindset began to change.

[40] Ms Lang submits that the emotional response to what she was told by the general practitioner in October 2017 was consistent with her mindset having been a barrier. Her counsel submitted that it is one thing to be conscious of certain aspects of limitations or restrictions in your life, but it is another thing to be labelled by someone in the medical profession as having a deformity. According to Ms Lang's counsel, the reference to a deformity is objective in nature and of a very different quality to Ms Lang's appreciation of her condition that existed prior to that consultation. It is submitted that Ms Lang's emotional response connotes the degree of seriousness with which her appreciation developed following that consultation and stands in stark contrast to her former view, where she accepted her condition for what it was without any indication for stress or concern.

[41] Ms Lang submits that she did not appreciate that there was any question as to the quality of the care and treatment she had undergone until 2017. As a result, there was no reason to consider investigating the condition, particularly because she was led to believe nothing could be done for her. It is submitted that the information known to Ms Lang or within her means of knowledge prior to mid-November 2017 was not such as to cause a right-thinking person to believe that they had a valid cause of action to pursue. That position had been instilled in her by her parents. Ms Lang found the contrary position very upsetting and it took time for her to process. That process, Ms Lang submits, matured ultimately when the first respondent was identified and she thought for the first time she might have a chance of redress. Ms Lang submits that it was only when she was advised as to possible restrictions the condition presented for the future in October 2017 that she had a significant change in thinking. Ms Lang contends any of the facts asserted by her as the basis for the relief claimed fall within the rubric of materiality in terms of appreciation of the cause of action. The decisiveness of the facts arising after 19 October 2017 can be seen by reference to what she says of her condition at that time in comparison with what might be typified as her former acceptance of her condition and limitations. In the circumstances of Ms Lang, it is submitted that it was reasonable for her not to make any inquiries until she did and they were not facts which she ought to have known.

[42] In terms of the identity of the first respondent, the only way Ms Lang could discover the identity of the first respondent was through other people, particularly her mother. Ms Lang submits that until she appreciated the seriousness of her condition there was no reason for her to make such an enquiry.

[43] Counsel for the first respondent contends of Ms Lang being told "you've got a deformity" that the two key issues in assessing whether something amounts to a deformity[43] are functionality and appearance. The first respondent submits that it was quite clear from the concessions made by Ms Lang that she was aware that she had a deformity prior to October 2017. As such, asserting that there was some revelation on 19 October 2017 of a deformity could not be a circumstance that caused her to become aware of a material fact of a decisive nature because she knew of the underlying matters that gave rise to the label of "deformity" in relation to her leg. As to her contention that she had not appreciated until that time how serious the consequences of her condition were, the first respondent contends that should not be accepted because Ms Lang knew from the time that she was as least 18 of the problems that she was suffering including, according to her evidence, that it had limited her career. In that regard, a claim was made in the statement of claim on her instructions for past economic loss. Ms Lang had also given evidence that she had been held back in her career by the condition. The first respondent contends that once a person is aware of the fact that they have a functional deficit which causes restrictions they know of material facts of a decisive character. The first respondent contends that Ms Lang knew of the devastation caused to her life by the limitations of her left leg. Based on what she knew prior to October 2017, Ms Lang or a reasonable person in her position would have known that she had an action that was substantial enough that a reasonable person would pursue it.

[44] Further, the first respondent contends that the evidence shows that the identity of the first respondent was always within her means of knowledge given she knew that her mother knew of the GP's identity.

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[43] Deformity is defined to mean "[a] deformed part, especially of the body; a malformation" or "[t]he state of being deformed or misshapen": Australian Oxford Dictionary, online.

[45] The second and third respondents also contend that the material facts of a decisive character relating to the alleged right of action against the second and third respondents were already within Ms Lang's knowledge or means of knowledge prior to October 2017. This is on the basis that:

(a) Ms Lang had always been self-conscious of her leg to the point where she felt compelled to work out ways to conceal from public recognition the effect of her condition;

(b) It was necessary for her left ankle to be surgically fused, which resulted in Ms Lang being unable to wear high heels, flex or extend her ankle;

(c) Ms Lang , for as long as she could remember, had a left foot drop which worsened after removal of a tumour, to the point it was necessary to see her general practitioner on 22 July 2016;

(d) She was told by Dr Steadman on 18 April 2017 following an examination of her left leg "I am sure your parents sued for medical negligence";

(e) Ms Lang's cellulitis of her foot which was diagnosed on 25 September 2017 was so acute it was necessary for her to visit Dr Palmer; and

(f) She gave evidence that she has always suffered numbness in the foot, for as long as she could remember.

[46] In relation to the matters in (a), (b), (c) and (e), the second and third respondents submit that Ms Lang identifies no other explanation for the injections and subsequent surgery to her leg. The second and third respondents contend that from the viewpoint of a reasonable person endowed with Ms Lang's knowledge and experience, Ms Lang did not take all reasonable steps to ascertain the nature and extent of her condition. The facts which were known to Ms Lang or within her means of knowledge ought to have motivated her either to take further action or to commence the relevant action prior to the critical date. In that regard, the second and third respondents state the suggestion that she was constrained by her mindset and only started thinking about things as a whole after the visit to her GP on 19 October 2017 is undermined by the fact that she had sought further opinions when a scan revealed a tumour had returned on 9 March 2017, which resulted in her going to see Dr Steadman. She also was dissatisfied with her treatment for cellulitis at the RBWH emergency department and obtained a referral to a private podiatrist. They submit that shows Ms Lang would seek further opinions if she was not satisfied she had received a correct diagnosis and her failure to do so was not caused by any mindset.

Consideration

[47] I find that Ms Lang was aware or understood prior to the relevant date that her left leg:

(a) Had been affected cosmetically such that she sought to conceal it from the public eye, which had been the case since she was at least 18;

(b) Had functional issues, there was scarring and wasting of the muscle that had occurred and there was asymmetry between her legs which had been the case since she was at least 18;

(c) Was shorter than her right leg, which had been the case since she was at least 18;

(d) Would fling out to the side due to a loss of control;

(e) Had given her problems with her hip and pelvis which she understood had given rise to complications for her when giving birth to her son in 2008; and

(f) Had caused her not to pursue a career in law, which she claims caused her economic loss.

[48] I also find that in relation to Ms Lang's left foot:

(a) She had experienced numbness in her foot for as long as she could remember;

(b) She had to have fusion of her ankle which affected its flexion;

(c) She had left foot drop for as long as she could remember, which worsened after she had an operation in July 2016 to remove a tumour as a result of which she was fitted with a custom solid ankle–foot orthosis.

[49] Based on the above, the physical issues and functional issues in relation to her leg had been something which, while she had learned to live with them, she had been well aware of since she was at least 18 years of age and most probably from the age of 16. The physical label of "deformity" which was used to describe her leg in her meeting with the GP was something that was apparent to her throughout her life and which she had taken active steps to conceal, despite her emotional response to the use of the term.

[50] Ms Lang, however, contends that her mindset was such that prior to being told her leg was deformed she had become accustomed to her leg and was essentially unaware her leg was different, having accepted it for what it was and got on with her life. In those circumstances it is said that without the newly learned fact she would not, even with the benefit of appropriate advice, have previously have thought that she had a worthwhile action to pursue and should in her own interests have pursued it.[44] I do not accept that to be the case, nor do I accept that Ms Lang took all reasonable steps to find out the facts relied upon prior to the critical date.

[51] Whether that fact was within her means of knowledge depends on whether Ms Lang had taken all reasonable steps to find out the fact. Whether Ms Lang had taken all reasonable steps to ascertain the nature and extent of the injuries "depends very much on the warning signs of the injury itself and the extent to which it or any other facts might be thought to call for prudent enquiry to protect one's health and legal rights".[45] Ms Lang contends that given her mindset she had made all reasonable inquiries. Obviously, any assessment of whether Ms Lang took all reasonable steps must be judged from the position of Ms Lang herself. If a person has a

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[44] *Moriarty v Sunbeam Corporation Ltd* [1988] 2 Qd R 325 at 333.

[45] *Hargans v Kemenes & Anor* [2011] QCA 251 at [26], referring to *Healy v Femdale Pty Ltd* [1993] QCA 210 at 5.

characteristically stoic nature and is less inclined to complain than to just get on with it that is a matter which must be taken into account by the Court.[46]

[52] While I accept that Ms Lang got on with her life notwithstanding the condition and limitations caused by her leg, I do not accept that she became so accustomed to her leg that she was unaware that her leg was different and that her mindset caused her not to question the condition. She had dressed and moved in a way that concealed her condition from the general public and had found herself exposed to public stares and enquiries about what had happened to her leg if she did not. She suffered significant physical difficulties. She could not participate in sport like her peers. Ms Lang had no reprieve from her condition. In cross–examination her evidence was as follows:[47]

> "I don't want to put you through unnecessary pain, but you've already explained some of the problems – some of the issues with your left leg. Do you think there's anything else by way of a restriction or limitation that's part of your issue?---It restricts me from every day in my life in opening my wardrobe and selecting what clothes I'm going to wear that day, because I can wear nothing but pants and have to cover up my injury so that I'm not walking down the street having people stare at me. So it affects every waking moment of my life." (emphasis added)

And further:[48]

> "You knew that it was holding you back in every aspect of your life?---Yes, I did.
>
> You knew that the way it had come back, as you understood it, was through surgical misadventure by a general practitioner?---Yes, I did.
>
> Or a procedural misadventure, I should say?---Yes.
>
> The only thing you didn't know was Dr McArthur's name. You say now that he was the doctor?---Yeah, I – I never knew his name."

And:[49]

> "You used – I know you're a teacher. I'm not going to correct you, but you used the past tense then, but am I right to understand that it's a problem that's continued to the present date?---It continues every single day of my life. ……
>
> Could I ask you to go back to paragraph E? And it says there that:

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[46] *Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (in liq) & Anor* [2009] QCA 352 at [100].

[47] T1-19/35-41.

[48] T1-21/7-16

[49] T1-18/5-7; T1-18/41-46 – T1-19/1-10.

> *The plaintiff is restricted in her ability to gain work or to otherwise exploit her income earning potential.*
>
> And you'll see D and C and B are in like manner, explaining that the problems with your left leg have held you back. You see that? Did you give instructions to make that claim?---I have always felt that the nature of the injury that occurred to me as a child has held me back in every aspect of my life.
>
> Right?---I wanted to be a lawyer, but how could I get up here in a skirt and a pair of high heels, when I can't even walk in a pair of high heels.
>
> All right. So in terms of employment since you were 18, you have constantly held the view that it's held you back in things you might have done?---Yes, I have."

[53] In a similar vein, when asked about the statement by Dr Steadman that "I am sure your parents sued for medical negligence", Ms Lang stated that she had explained to Dr Steadman that "the injections into my bottom caused a sciatic nerve injury." According to her affidavit, she did not take action because she was angry and upset with her parents and also because she "thought any possible chance of a claim would have lapsed". The latter statement sits uneasily with her statement that she had never considered that her condition was the result of negligence, as it suggests she had considered the possibility. This is consistent with the fact that her evidence was that she had always been told that the condition of her left leg was the result of procedural misadventure in which injections were given in her buttocks as a baby.

[54] She also considered that her leg had caused complications in childbirth in 2008 and in 2016 the foot drop had worsened requiring further treatment, after she had been operated upon to remove a growth behind her knee.

[55] Ms Lang presented as an intelligent woman. While I consider her evidence was generally candid there are some matters in relation to which I do not accept her evidence. I do consider that she exaggerated her response to being told that she had a deformity in her leg and I do not consider the reference to it having a deformity was a revelation of something that she had never previously appreciated such that it caused the fact to be "decisive".

[56] I do not consider that the use of the term "deformity" does, in the context of this case, constitute a material fact of a decisive character relating to a right of action, given that the matters which constitute the deformity were known by her prior to the relevant date. Sadly for her, Ms Lang was only too well aware of the effect that her leg condition has had on her everyday life physically and mentally, including by impacting upon her career, and was so aware well prior to October 2017. I do not accept that the use of the term "deformity" caused her to have such an emotional response that it was only at that point she started to appreciate the nature of the injury and consider that she should seek appropriate advice and ascertain the nature and extent of her injury.

[57] I also consider that her evidence that she did not make any further enquiries of Dr Steadman and had not ever considered that her condition was due to negligence lacked credibility. I accept she was focussed on the nature of the growth in her leg, given how her leg had affected her life, as she had clearly described what had happened to her leg to Dr Steadman in that

consultation. While she says she did not describe what occurred to Dr Steadman as an "accident" or "injury", her description of what occurred was sufficient for him to raise medical negligence. Her evidence was that she had explained to him that the injections caused a sciatic nerve injury. I do not consider it is likely that she would not have asked Dr Steadman further questions about why he made such a comment or considered whether she had any cause of action. It is inconsistent with Ms Lang's evidence as to what she had suffered. Ms Lang on her own evidence had suffered considerably in different aspects of her life as a result of the condition of her left leg and knew from at least 18 years of age that the condition was attributed to procedural misadventure from the injections and had endured multiple operations to attempt to improve the condition.

[58] I do not find that Ms Lang's evidence supports that her mindset was to accept her condition without question. She knew her condition was attributed to procedural misadventure from the injections. She described in evidence the constant difficulties she had suffered every day of her life; her view that the leg condition had prevented her from pursuing a career in law which caused her economic loss; that she had suffered problems in 2008 with childbirth as a result of her left leg; that her foot drop worsened in July 2016 and she had to be fitted with a custom solid ankle-foot orthosis; and what she was told by Dr Steadman in April 2017. She knew she could not flex her foot which had been pinned. Her state of mind was such that she stated that she disagreed with her GP's description of her condition in the referral to Northside Podiatry dated 16 October 2017, in which it was stated that "[s]he has neuropathy from a congenital left lower limb palsy". In the circumstances she might reasonably be expected to have made further inquiries prior to October 2017, as she did in October and November 2017.

[59] Ms Lang's appreciation of the state of her leg and the cause and degree of her affliction were such that she could be reasonably expected to have made further inquiries to find out the fact that her leg was deformed prior to October 2017 and as to whether she had a legal claim. I do not find she had a mindset which served as a barrier to making further reasonable inquiries. I find that up until October 2017 she had not taken all reasonable steps to find out the nature and extent of her injury. That is further supported by the fact that she had been proactive in obtaining further opinions when dissatisfied with treatment both when she saw Dr Steadman and when she obtained a referral to a private podiatrist on or about 16 October 2017.

[60] I further consider that her knowledge by the time she was 18 of the nature and extent of her injury, of which she was aware, were such that there was a requirement to take appropriate advice and ask appropriate questions which, in all the circumstances, it would be reasonable to expect a reasonable person in Ms Lang's shoes to have done. Based on her knowledge of her injury and an appreciation of its cause from the injections given by the first respondent and the level of scarring from her operation a reasonable person would have considered that she had reasonable prospects of success and in her circumstances have instituted proceedings in her own interests.

[61] Even if I accepted her mindset created a barrier such that she had taken all reasonable steps, that could not be maintained after 18 April 2017 at the latest.

[62] After her consultation with Dr Steadman, a reasonable person would have taken appropriate advice and would have regarded the facts within Ms Lang's knowledge prior to April 2017 together with Dr Steadman's opinion as showing that an action on her right of action would

(apart from the effect of the expiration of a period of limitation) have had a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action, which she ought in her own interests have brought. On Ms Lang's own evidence, her failure to do so was in part because she considered the time for such action had lapsed, not because she did not believe she had a claim at all.

[63] I do not consider that the fact that her leg was referred to as being deformed was a material fact relating to a right of action of a decisive character. In any event, given the severity of the symptoms she had suffered, the fact her leg was regarded as deformed was within her means of knowledge prior to 19 October 2017.

[64] Ms Lang also relies upon as a relevant fact that she was told on 19 October 2017 that she may be wheelchair bound on the basis she suffers arthritis in both legs. She contends that her condition in the near future is a material fact of a decisive character relating to a right of action. It was not until this point that she is said to have been advised of the prospect of being limited to a wheelchair or the need for further treatment. This was said to be further impacted by needing to attend the High-Risk Foot Clinic for treatment.

[65] There is a threshold question as to whether it constitutes a material fact relating to a right of action. The advice may be characterised as potentially relating to the nature and extent of the injury. There is, however, no medical evidence to suggest that the arthritis is linked to the damaged left sciatic nerve. The hearsay evidence of Ms Lang as to what she was told by her GP does not establish that the arthritis is causatively linked to the damaged left sciatic nerve, particularly since according to Ms Lang she was told she had extensive arthritis throughout both of her legs, feet and hips.

[66] However, assuming it is a material fact of a decisive character relating to a right of action insofar as it relates to the nature and extent of the injury, the question is whether it was within Ms Lang's knowledge prior to the relevant date. There is no evidence to suggest that it is a fact of which she was aware prior to the relevant date.

[67] The question that must be considered is whether it was within her means of knowledge prior to the relevant date. What is therefore relevant is the means of knowledge of Ms Lang herself and not some hypothetical character.

[68] Thomas JA in *Pizer v Ansett Australia Limited* [1998] QCA 298 noted that where a material fact concerns the nature and extent of a personal injury, questions of degree are necessarily involved.[50]

[69] The present case is not, on the evidence of Ms Lang, one on the lower end of the spectrum described by Thomas JA, where the symptoms were of an apparently trivial injury and were followed by the eventual discovery of a serious condition.[51] On the basis of Ms Lang's evidence, I consider she had suffered the symptoms and physical and functional issues for a considerable period of time and they had remained constant at a level which required her to

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[50] At [20].

[51] *Pizer v Ansett Australia Limited* [1998] QCA 298 at [20].

make further inquiries to ascertain the nature and extent of her condition. While I accept that she did not know that her injury was of such severity that it had caused severe arthritis and as a result she may be wheelchair bound in the near future, the facts of which she was aware should have caused her to take all reasonable steps and make further inquiries to find out the facts before this time, for the reasons I have set out above. I find that it was a matter within her means of knowledge.

[70] Even if I assume that the level of arthritis was not discoverable prior to the bone scan being carried out in October 2017, had reasonable steps been taken, as I have found above, Ms Lang already knew facts or had facts within her means of knowledge as to the nature and extent of her injury and its link to the injections given and subsequent surgery. That would have caused a reasonable person to take appropriate advice and a reasonable person would have regarded those facts as showing that an action on her right of action would (apart from the effect of the expiration of the period of limitation) have had a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action, which she ought in her own interests have brought.

[71] In my view, Ms Lang's case is towards the other end of the spectrum described by Thomas JA, namely "cases of patently serious orthopaedic injury productive of observable economic loss followed by belated realisation that the consequences are likely to be worse than had been contemplated" which, as his Honour stated, will not justify an extension.[52] His Honour noted that between the two extremes there are "a range of cases where different minds might reasonably form different assessments of the level of the plaintiff's knowledge and as to whether the reasonable person contemplated by s.30(b), endowed with such knowledge and having taken appropriate advice, would have brought proceedings".[53] In this case, it is evident that Ms Lang's affliction had caused her difficulty every day of her life, during childbirth and also, according to her own evidence, caused her to suffer economic loss, given she did not pursue a legal career.

[72] In relation to the presence of the staple in her foot, the evidence does not establish that it is a material fact of a decisive character relating to a right of action, there being no evidence showing that the use of a staple at the time it was used has any relevance to a right of action against the second and third respondents. The fact that a nurse made a comment that such staples are not used any more does not indicate that it was negligent to use them at the time. Ms Lang did know that in the series of operations that had occurred between 1978 and 1991 her foot had been pinned to stop the foot dropping. In any event, for the reasons outlined above, I do not consider Ms Lang took all reasonable steps to find out that fact before October 2017.

[73] Ms Lang further relies on the discovery of Dr McArthur's identity as being a material fact relating to a right of action which was decisive. Pursuant to s 30(1)(a), the identity of the person against whom the right of action lies is a material fact. It discovery could also be regarded as decisive.

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[52] *Pizer v Ansett Australia Limited* [1998] QCA 298 at [20].

[53] *Pizer v Ansett Australia Limited* [1998] QCA 298 at [20].

[74] I accept that Ms Lang did not know of Dr McArthur's identity prior to November 2017. The real question in relation to Dr McArthur's identity is whether it was within Ms Lang's means of knowledge prior to November 2017.

[75] Ms Lang was aware before she was 18 that the damage said to have been caused to the sciatic nerve was attributable to injections given to her in the buttocks for pneumonia when she was a baby by the family general practitioner.

[76] As to the identity of Dr McArthur, the evidence shows that her mother always knew the identity of the GP who was alleged to have given Ms Lang injections in her buttocks which caused the damage to the sciatic nerve and where he practised. While I accept that her mother had been reluctant to identify Dr McArthur when asked by Ms Lang and had deflected Ms Lang's enquiries, when pressed by Ms Lang she did provide the name of the GP. Once Ms Lang had found the name of the GP and the location of his practice at Inala, it can be inferred that it would have been quickly discoverable from what in fact occurred. It was a simple process to identify the GP, given that her solicitor acting on behalf of Ms Lang was able to do so within a few days of Ms Lang informing her of the name and location of the first respondent. While Ms Lang did use Facebook to make enquiries as to whether anyone knew of Dr McArthur,[54] it is evident that the key facts that needed to be known were the GP's name and that he practised in Inala. The search by the solicitor of the Medical Board Registry produced only four names, two of whom were women. Dr Archibald McArthur was the only one who worked at a practice in Inala. Ms Lang agreed in cross-examination that she could have pressed her mother for the identity of Dr McArthur at any time over the previous forty years. Thus, while Ms Lang may not have known the identity of the first respondent prior to mid-November 2017, she did have the means of knowledge of identifying the GP.

[77] Given Ms Lang understood by the time she was 18 that the way her leg condition had come about was through surgical misadventure by a GP and given the limitations and physical and functional issues she had suffered with her left leg from at least that age, and further that she knew her mother knew the identity of the GP, I find that Ms Lang did not take all reasonable steps prior to November 2017 to ascertain Dr McArthur's identity. I find that if she had pressed her mother in relation to the GP's identity she would have given her the name. As she had asked her mother the GP's identity on earlier occasions, I do not accept that it was reasonable with her level of knowledge not to have persisted with the enquiries until she obtained his identity, nor do I accept her mindset provides an explanation of her failure to do so.

[78] Ms Lang submits that she was in a similar position to that of Ms Norris, which was considered in *Suncorp Metway Insurance Limited v Norris*.[55] However, that case is distinguishable from the present. In that case, Ms Norris was told by police that no one was able to identify the vehicle from which a box had fallen in front of her car causing her to lose control, as a result of which she was hit and injured. A police officer had given her a card with a reference number and said they would attempt to identify the vehicle. Ms Norris did make a subsequent enquiry of the police to see if the car had been identified. She was told that it had not been and it may take some time before they could do so. The police officer concerned said the police would contact

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[54] Facebook was available prior to this date.

[55] [2012] QCA 101.

her once they knew the identity of the vehicle. She contacted the police again a month later and was told it may take months or years for them to identify the vehicle. Again she was told they would notify her if they did. They did not. Unbeknownst to Ms Norris, the police did identify the car. That was discovered some years later when a solicitor carried out a search of a police traffic incident report.

[79] Daubney J (with whom McMurdo P and Muir JA agreed) found that given the respondent did not know of the ability to make inquiries in the manner which her solicitor did and she could not have known that what she was told by the policeman was incorrect, it was not unreasonable for her to accept the information given to her by that policeman and not take further steps. In the present case, Ms Lang's mother did not say she did not know who the doctor was or that she had forgotten, even though she had been reluctant to provide that information to Ms Lang. When pressed, her mother provided her with the name. In these circumstances, it was unreasonable for Ms Lang not to have made further enquiries as to the identity of Dr McArthur prior to the relevant date.

[80] In reaching the conclusion above, I considered whether all of the facts relied upon looked at cumulatively changed my conclusion, but it did not. I do not consider that either of these facts considered separately or together were material facts of a decisive character which came within the means of knowledge of Ms Lang on or after 19 October 2017.

[81] In the circumstances, I find that none of the facts identified by Ms Lang were material facts of a decisive nature or that they were not within her means of knowledge prior to 19 October 2017.

[82] Applying the test in s 31(2)(a) of the Act, the plaintiff has not established that a material fact of decisive character was not within her means of knowledge until a date after 19 October 2017. The application must therefore be refused.

[83] As I would in any event have exercised my discretion not to grant the application, I will outline my findings in that regard. I will briefly address the question of whether s 31(2)(b) was satisfied by Ms Lang.

Right of action

[84] All of the respondents submit that Ms Lang has not produced evidence which establishes a right of action which could satisfy s 31(2)(b) of the Act. Given my findings above it is not necessary for me to consider this matter in any detail.

[85] Ms Lang does not in order to establish a right of action have to produce the actual evidence to be adduced at trial or in an admissible form. Hearsay evidence may be used. The evidence must, however, be sufficient for the Court to not be required to imagine circumstances or put together evidence which is not justified by evidence or apparent evidence.[56] Macrossan CJ in *Wood v Glaxo Australia Ltd*[57] stated that "it is probably accurate enough to say that an

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[56] *Dwan v Farquhar* [1988] 1 Qd R 234.

[57] (1994) 2 Qd R 431 at 434-435; adopted by Gotterson JA in *Wolverson v Todman* (2015) 2 Qd R 106 at [32].

applicant will meet the requirement imposed by s. 31(2)(b) if he can point to the existence of evidence which it can reasonably be expected will be available at the trial and will, if unopposed by other evidence, be sufficient to prove his case".

[86] The first respondent contends that the evidence called on behalf of Ms Lang, namely the medical opinion provided by Dr Ulahannan, who provided a very preliminary opinion, could not, even if accepted, establish a right of action. In that regard it firstly points to the fact that he did not practise as a GP and was an endocrinologist and therefore did not have the relevant specialty to advance an opinion for the purposes of this application. Dr Ulahannan did however give evidence that he had done a number of intramuscular injections, although not of the nature that were said to have been provided in this case, and that the general principles were the same. The second aspect was that he was not practising in 1975. That is true; Dr Ulahannan was only a student at that stage. At its highest, his evidence was that he considered that the practice in relation to intramuscular injections had been longstanding and continued. He stated that there was a standard technique, particularly with respect to the sciatic nerve, and he considered it would have been known in 1975 as the anatomy of the sciatic nerve was well-known.[58] That is supported by Dr McArthur's own evidence, in which he described the fact that he was well aware of the dangers of injecting near the sciatic nerve and adopted the technique which he had been trained to use. The third was to the extent that Dr Ulahannan had practised, he had not done so in Brisbane. I do not regard the above matters as rendering Dr Ulahannan's evidence of no weight.

[87] More significantly, however, is the first respondent's submission that the opinion from Dr Ulahannan did not provide any evidence or give an opinion that the injection given to Ms Lang was in fact given in a way that could be said to deviate from what he described as a standard technique, such that there was negligence. Nor was there any factual evidence from which it could be inferred that was what had occurred. Dr Ulahannan's evidence at best indicated that damage to a sciatic nerve can be caused by an inadvertent placement of an intramuscular injection into the sciatic nerve, and if that was so, then it would fail to meet an appropriate standard of care. He could not say, however that that was the case in relation to Ms Lang, concluding that "it would follow that if such an injection had occurred then it is feasible and reasonable to assume that the claimant's injuries follow from this". Nor could he discount the possibility that the damage was congenital on the basis of the evidence put before him. In my view, Dr Ulahannan's evidence falls well short of establishing that the way in which the injection was provided could be said to breach a duty of care by Dr McArthur, or of providing evidence that there was negligence.

[88] However, Ms Lang only needs to be able to point to the existence of evidence which it can reasonably be expected will be available at trial and which will, if unopposed by the other evidence, be sufficient to prove her case.[59] In this regard, however, even on the evidence of Ms Olive it is not clear what was done by Dr McArthur. Ms Olive did not give any evidence about the placement of the injections other than the fact it was in Ms Lang's buttocks. At best, she stated that she was informed by an unknown doctor and perhaps Dr McGuire that the

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[58] T1-50/21-25.

[59] *NF v State of Queensland* [2005] QCA 110 at [36], referring to *Wood v Glaxo Australia Pty Ltd* [1993] QCA 114 at [7].

damage to the left sciatic nerve had occurred from the intramuscular injections of penicillin given to Ms Lang. The factual basis of that assertion however is unknown and the evidence does not support the placement of the injection as the specific cause.

[89] Taking their evidence at its highest, Ms Olive was told the injections of penicillin caused the damage to the sciatic nerve and Dr Ulahannan's evidence is that the wrong placement of the injection could result in such damage. Those two matters are only just sufficient to infer that the injections in the buttocks may have been given negligently and caused damage to the left sciatic nerve.

[90] It should be said that Dr McArthur denies having given an intramuscular injection to Ms Lang at all based on his practice at the time.

[91] The second and third respondents submit there is no *prima facie* case raised against them. In that regard, Dr Ulahannan did not give any evidence that was relevant to what was done by the Mater or Dr McGuire.

[92] In relation to the evidence relevant to the liability of the second and third respondents two matters are relied upon. The first is that Ms Lang did not know that there was a staple in her left foot before 23 October 2017 and the second is that Ms Olive was not properly informed of the extent of the surgery that was to be carried out.

[93] As to the staple, Ms Lang's counsel stated that there was no evidence as to the way in which the prosthesis should be viewed as an appropriate procedure and it was more the individual's recollection. Ms Lang's counsel fairly conceded that the evidence did not go so far as to say it was an inappropriate procedure.[60]

[94] There is no evidence that the use of the staple was below the standard of care of the medical profession that one would expect to be carried out by a reasonable surgeon at the time.

[95] There is also no evidence that there was negligence by the second or third respondents in terms of the advice Ms Olive was given or in relation to any of the matters of which Ms Olive said she was not advised, nor of how it caused any damage.

[96] While there was a reference by Dr Steadman to the fact he may have considered negligence had occurred giving rise to the condition of Ms Lang's left leg, the basis of that negligence is not in evidence, although no adverse inference is open in that regard.

[97] Even with the reasonably low threshold required to establish a cause of action for the purposes of s 31(2)(b), the evidence provided on behalf of Ms Lang does not establish a right of action against the second and third respondents for personal injuries. The statement of claim that has been served on behalf of Ms Lang does not shed any further light on the particulars of the second respondent's negligence other than to contain matters of breach, which in these proceedings are unsupported by any evidence.

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[60] T1-75/35-46 - T1-76/1-2.

[98] I do not consider that Ms Lang has established a cause of action against the second and third respondents and accordingly s 31(2)(b) of the Act is not satisfied.

Should the Court's discretion be exercised in favour of granting an extension?

[99] Even if I assumed that Ms Lang was able to establish that there was a material fact of a decisive character which was not within her means of knowledge prior to October 2017, and, *prima facie*, she has a case of causative liability against the respondents apart from the defence founded upon the expiration of the limitation period, I would in the circumstances of the present case refuse to make an order in favour of the extension in the exercise of my discretion.

[100] If the preconditions for the extension were satisfied by Ms Lang, she must then show that there can be a fair trial. There is, however, an evidential onus on the respondents to show actual prejudice of which they are aware such that they can no longer fairly defend the proceedings aside from presumptive prejudice arising out of delay.[61] The relevant question is whether the delay has made the chances of a fair trial unlikely.[62]

[101] In the present case, both the first respondent and second and third respondents have provided evidence in relation to the question of prejudice. They rely on actual prejudice and the presumptive prejudice that arises from the fact that the events in question occurred some 40 years ago.

[102] Dr McArthur denied the allegations against him because he did not have a practice of giving injections to babies in the buttocks and would refer them to hospital. His evidence further was that:

(a) He has no recollection now of ever meeting Ms Lang or her mother;

(b) He closed his Inala practice in 1991 and the records from that time are no longer available;

(c) He is unable to ascertain the identity of his professional indemnity insurer in 1971;

(d) He has not otherwise set aside any monies to meet the claim and estimates his net worth is less than $200,000;

(e) There are no records in relation to what occurred in 1975, including as to whether Ms Lang presented herself to Dr McArthur, whether she was injected in the buttocks with penicillin, what technique was used and the amounts of penicillin used; and

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[61] *Limpus v The State of Queensland* [2004] 2 Qd R 16 at [19], referring to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 555, per McHugh J.

[62] *NF v State of Queensland* [2005] QCA 110 at [53], referring to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 550, per Toohey and Gummow JJ. See also *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 555, per McHugh J.

(f) Dr McArthur has incurable prostate cancer with only a 50 per cent chance of survival in the next 12 months and is likely to suffer from brain fog as a result of the intervening treatment.

[103] Dr McArthur was not cross-examined and I accept his evidence.

[104] Dr McArthur's counsel also pointed to the fact that the symptoms apparently manifested themselves in about 1978, some three years after the injections, such that it is no longer possible to ascertain what the events were that occurred in the intervening period between 1975 and 1978. Ms Lang was not of an age where she could accurately recall the events of the relevant period and her mother was working at the time. Ms Olive understandably has difficulty remembering things such as whether or not Ms Lang attended day care.

[105] Ms Olive could not give any evidence as to the placement of the injections other than in the most general of terms, namely in the buttocks, nor could she recall the name of the doctor who told her that there was a possibility of sciatic nerve damage caused by the injections of penicillin, nor could she describe the doctor. Ms Lang's father worked very long hours and as such could not give any firsthand evidence of what occurred in terms of medical treatment.

[106] In terms of the second and third respondents, they have provided evidence, which was not disputed and which I accept, that after carrying out investigations there are no records still in existence in relation to Ms Lang's attendance at the Mater Hospital since 1992 and her medical records were destroyed in their entirety in December 2015, in accordance with the requisite Health Record retention period.[63] There are therefore no contemporaneous medical records in existence, which is of some importance when surgery occurred on multiple occasions. According to Ms Lang, she was operated on some 16 times between 1978 and 1991. In that regard, the records are of considerable importance given that Ms Lang's counsel stated that the case against the second and third respondents is based on true consent not having been obtained from her parents for the operations carried out, which resulted in damage to the calf muscle and to the buttocks, and proper advice not having been given as to the nature and extent of the operation.[64]

[107] The prejudice to all of the respondents is compounded by the fact 40 years have passed which will affect the recollections of any potential witnesses as to what conversations occurred, as was apparent in relation to Ms Olive and Dr McArthur.

[108] Further relevant witnesses, such as the doctor at the Mater referred to by Ms Olive, are unlikely to be able to be identified given the loss of records.

[109] None of the respondents had prior notice of the potential that such a complaint would be made. No possibility of a claim was foreshadowed in relation to any of the respondents on behalf of Ms Lang prior to their being served with the claim in 2018.

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[63] The Health Sector (Clinical Records) Retention and Disposal Schedule - Queensland Disposal Authority No. 683; The Mater Health Record Policy.

[64] T1-75/10-33.

[110] Ms Lang submits that the prejudice that would be suffered by the respondents would be the same for her insofar as no medical evidence will be able to be gathered in support of any claim that she might bring, unless the consequences and effects of the procedures about which she might wish to complain are patently obvious on an investigation now. To adopt that approach, however, is to ask the wrong question.[65]

[111] The respondents have produced evidence of actual prejudice, which I accept.

[112] In the present case I consider that there is a significant chance that all of the respondents will not be able to fairly defend themselves.

[113] The relevant events took place over 40 years ago. Dr McArthur had no recollection of Ms Lang or her mother, nor any records upon which he could even ascertain whether she was in fact his patient. He stated his practice was to refer all seriously ill babies to the hospital and he considered a three month old baby with pneumonia would have fallen into that category. He said he was trained to administer injections and was aware of the correct procedure and always followed it. Further, he said he would not have given two penicillin injections a day and would have injected on alternate sides. Given this, the lack of records to assist him to ascertain what in truth occurred in relation to Ms Lang is significant. Assuming he did treat Ms Lang with injections the placement of those injections and the number given will be significant. There is no available evidence identifying those matters now. Ms Olive's evidence does not assist in that regard.

[114] There was also a three year gap between the injections and when Ms Lang's parents noticed Ms Lang's manner of walking did not appear normal and their subsequent attendance on the Mater Hospital, which raised the possibility that the cause of Ms Lang's affliction is congenital. Given the Mater has no records either, there is no documentary evidence which can shed light on what occurred.

[115] Dr Ulahannan was not able to state on the basis of the documentation that had been made available to him whether or not there had been an inadvertent placement of an intramuscular injection into the sciatic nerve, nor whether Ms Lang had in fact suffered injuries as a result of such placement. Dr Ulahannan agreed that there were two possibilities in relation to Ms Lang's left foot condition. Firstly, that the problems she has with the sciatic nerve are congenital and secondly that it was caused by some medical misadventure.[66] He indicated that if the symptoms and signs had developed after the injections being given, it would be more likely due to that. He stated that if there was a three year gap between the injections and when there appeared to have been symptoms, he would need to be aware of what she had been doing in the interim period.[67] That is significant because Ms Olive's and Mr Lang's evidence was that they noticed Ms Lang's foot curling and Ms Lang throwing her left leg after

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[65] *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton & Ors* [2001] QCA 335 at [19], per McPherson J, referring to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 549, per Toohey and Gummow JJ.

[66] T1-49/27-30.

[67] T1-49/41-44.

she ahd started walking from when she was at least three. Ms Olive could not recall if Ms Lang had been at childcare between 1975 and 1978 although she recalls she was working at the time. The history of Ms Lang's condition in that period is again largely a matter of speculation.

[116] The medical evidence, such as it is, from Dr Ulahannan does not suggest that injections were not given at all in terms of intramuscular injections, but rather, that from his knowledge that the injections were to be made with careful placement as to avoid inadvertent damage to the sciatic nerve.[68] The question of what was in fact done in terms of the placement of the injection is therefore very significant. There are no witnesses or records which can shed light on that fact.

[117] Further, there is evidence that the treatment Dr McArthur has to undergo may impair his cognitive ability. As he has now been diagnosed with a terminal condition and he and his wife are unable to identify any professional insurance policy he may have carried at the time, he has little in terms of resources to defend or meet the claim.

[118] The second and third respondents do not have any records in relation to the consultations and surgery that took place, what was explained to Ms Lang's parents in relation to the operation, the consent obtained or where the events occurred 40 years ago, in circumstances where the evidence of Ms Lang and Ms Olive quite understandably shows that recollections have faded. Ms Lang of course can only relay what she understood she was being told. The lack of records is significant in the present case where some 16 surgeries were carried out.

[119] In the case of the second and third respondents, the lack of records is prejudice of a significant kind. While the second respondent has not provided an affidavit stating that he has no recollection of the events in question, the lack of records and presumptive prejudice arising from the passing of time would clearly affect any recollection of events, in circumstances where what was relayed to Ms Olive and Mr Lang about the operations to be undertaken and what had occurred is critical to the case against the second and third respondents. The last surgery took place approximately 26 years ago. Ms Lang's case in relation to the second and third respondents will inevitably involve oral evidence relating to discussions Ms Olive had with medical staff and with the second respondent in terms of what she was advised. There is now no documentary evidence to assist in investigations by identifying other relevant witnesses or what occurred. In the circumstances, this is a case like that described by Keane JA in *Page v The Central Queensland University,*[69] where his Honour found that the trial judge had not erred in finding that evidence of historical conversations was going to be of considerable importance and, by reason of those circumstances alone, the prospects of a fair trial lay in the realm of pious hope rather than reasonable expectation.[70]

[120] In the circumstances, I consider that the prejudice that would be suffered by all the respondents is of a significant kind and there is a significant chance that the respondents

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[68] Although his knowledge is not based on general practice in 1975 as he was not in medical practice in 1975.

[69] [2006] QCA 478.

[70] At [24].

would be deprived of the opportunity of a fair trial.[71] There is clear actual prejudice as evidence of the relevant facts at the time is no longer available, nor is it likely to be discovered by any further search or inquiry. That is compounded by the lapse of time which has occurred in this case.

Conclusion

[121] Accordingly, I order that Ms Lang's application pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) should be dismissed. Given the applicant has not been successful, there is no evident reason that costs should not follow the event.

[122] If any other consequential relief is required or further submissions are required as to the issue of costs, I will make provision for further submissions in that regard.

Orders

[123] I order that:

1. The applicant's application pursuant to s 31 of the *Limitation of Actions Act 1974* (Qld) is dismissed.

2. Unless submissions are made to the contrary and provided to me within seven days the applicant pay the respondents' costs of the application.

3. Any submissions as to any further consequential relief required be provided to me within seven days.

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[71] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553, 555.