SUPREME COURT OF QUEENSLAND

CITATION:	*Bougoure v State of Queensland* [2004] QSC 178
PARTIES:	**PAUL GERARD BOUGOURE** (applicant/plaintiff) **v** **STATE OF QUEENSLAND** (respondent/defendant)
FILE NO:	SC No 10372 of 1998
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	16 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2004
JUDGE:	Atkinson J
ORDER:	1. **Application allowed** 2. **The period of limitation for bringing proceedings extended to 6 November 1997** 3. **Respondent's Application for summary judgment dismissed**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF A DECISIVE CHARACTER – where applicant was member of Queensland Police Service – where applicant suffered psychological injuries and drug dependency injuries – whether applicant knew of the nature and extent of his injuries – whether applicant had taken all reasonable steps to ascertain nature and extent of his injuries – where conflicting diagnosis and prognosis – whether worthwhile action to pursue *Limitation of Actions Act* 1974 (Qld), s 11, s 30, s 31 *Buckton v BHP Coal Pty Ltd* [2001] QCA 35, cited *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306, cited *Dick v University of Queensland* [2000] 2 Qd R 476, applied *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697, cited *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234,

applied
King v Queensland Corrective Services Commission [2000] QSC 342, cited
McManamny v Hadley [1975] VR 705, cited
Mills v Comalco Aluminium Limited [1991] FC 145; Appeal No 64 of 1991, 6 November 1991, cited
Pizer v Ansett [1998] QCA 298, cited
Russell v State of Queensland [2004] QSC 97, applied
Taggart v The Workers' Compensation Board of Qld [1983] 2 Qd R 19, cited
Watters v Queensland Rail [2000] QCA 51, cited

COUNSEL: D Fraser QC with G Mullins for the applicant
R J Douglas QC with D J Campbell for the respondent

SOLICITORS: Gilshenan and Luton for the applicant
Crown Law for the respondent

[1] The applicant/plaintiff, Paul Gerard Bougoure, has applied for an extension of time in which to commence proceedings for personal injury. The application is opposed but the respondent/defendant did not contend that the applicant does not have a cause of action apart from the defence founded on the expiration of the limitation period. Nor did the respondent contend that it is prejudiced by any delay. Rather the respondent asserted that the applicant cannot pass the test found in s 31 of the *Limitation of Actions Act* 1974 (Qld) (the "Limitations Act") that a material fact of a decisive character was not known to him or within his means of knowledge prior to 6 November 1997, which is one year before the commencement of these proceedings. If the application for extension of time were to be unsuccessful, the respondent sought summary judgment against the applicant.

[2] Mr Bougoure was sworn in to the Queensland Police Service ("QPS") on 4 August 1986 at the age of 19. According to his affidavit filed in this matter, he performed general duties in Townsville followed by a period at the Police Communications Centre at Police Headquarters in Brisbane. From about February 1991, he was attached to the Undercover and Surveillance Squad where he undertook undercover duties throughout Queensland. As a Covert Police Operative ("CPO"), his objective was to infiltrate crime syndicates and gather evidence to place offenders before the courts.

[3] Mr Bougoure's evidence was that, as a CPO, he was obliged to change his appearance so that he looked less like a police officer and more like a person who fitted in with the criminal underworld. He was given a false identity and advised to keep his association with his family and friends to a minimum. He was taken to safe alternative premises ("SAP") used by himself and other CPOs. At the SAP he was trained by fellow officers in the use of illegal drugs. He was told by senior police officers that he was only allowed to simulate drug use but in fact he was shown how to smoke marijuana as he was told that there was no effective way of simulating drug use. He says he was also shown how to shoot up heroin. He was told that he might need to use drugs to protect himself from being exposed as a police officer thereby putting his life at risk. At the SAP he was, he said,

encouraged to use marijuana to become accustomed to the procedures for its use and to also build up a tolerance.

[4] Mr Bougoure then commenced undercover duties with the Licensing Branch which concentrated on SP bookmaking activities where he was required to frequent hotels whilst on duty. He began drinking alcohol on a regular basis.

[5] In May 1991, Mr Bougoure began undercover work in an operation for the Major Crime Squad in relation to break and enter and property offences in North Queensland. He could not tell his family where he was going. During that operation, he spent a night in the cells to gather evidence in relation to a murder investigation. In July 1991, he attended a course in Brisbane against the wishes of his superiors. When he returned, he was told by his criminal associates that his main target had committed rape and had left town. As a result of this and the exposé of Mr Bougoure's informant the operation was closed down. He returned to Brisbane in August 1991.

[6] From September to November 1991, he was involved in undercover, surveillance and intelligence operations as well as a murder investigation.

[7] In December 1991, Mr Bougoure commenced another undercover operation relating to property offences, Operation Mac/Duel, where he was required to work and, for a time, live with an informant who had Hepatitis B, was a heroin addict and a petty criminal. By that time the SAP had been closed by the police service, so he was required to store the paper work and evidence obtained during the course of the operation in a briefcase in the boot of his vehicle. Detectives visited him at the unit where he was living to pick up exhibits and running sheets. He was also required to drive his undercover police vehicle to attend Police Headquarters from time to time. He said it was common for offenders to sit outside Police Headquarters to see what type of vehicles undercover police officers drove. These matters caused him grave concern. On one particular occasion, an employee in the cafeteria at Police Headquarters who was visiting her boyfriend, who was an armed robber in jail, identified Mr Bougoure from his visits to Police Headquarters. This led to Mr Bougoure being exposed in the circles where he had been placed as a CPO and put in such fear that he slept with a gun under his pillow.

[8] In late 1991, Mr Bougoure became a user of illegal drugs. In January 1992, he began to experience feelings of nausea, irritability, loneliness, anxiety, nervousness, sleep disturbance, nightmares and stress. Early in 1992, he developed a drug dependence (the "initial injuries"). By mid 1992, he was suffering from regular panic attacks and had developed symptoms consistent with generalised sleep disorder.

[9] In July 1992, the operation was terminated with the arrest of 50 offenders on over 400 criminal charges. He was required to confront several of these offenders and identify himself as a police officer. Many of them were charged with serious criminal offences including trafficking in heroin. He had trouble dealing not only with the abuse he received from them but also his feeling that he had betrayed them, given that he befriended them and they had trusted him.

[10] While he was undercover, Mr Bougoure was involved in a fatal car accident when he was driving a vehicle with his targets in the following vehicle. They were witnesses to the accidents and all were required to give evidence at the coronial enquiry into the death. He was concerned for his safety as they had been arrested, were on bail, knew his identity and were unhappy about his identification of them.

[11] In March 1993, he was transferred from undercover work to uniform duties at Maroochydore Police Station. Unsurprisingly he found extremely difficult the transition from two years of looking, acting, dressing and living like a member of the criminal subculture, to being a clean cut officer wearing a police uniform and name tag. He often had to attend situations where he was the senior officer but was unfamiliar with the law or the required procedure. At times he would go home and break down and cry. On his days off he would drink excessively and consume marijuana to cope with everyday tasks. He suffered from sleepless nights, cold sweats, migraines and feelings of nausea. On 28 August 1993, Mr Bougoure applied for leave which was granted until 15 October 1993.

[12] By 1994, Mr Bougoure had developed symptoms consistent with generalised anxiety disorder and major depressive disorder (the "later injuries"). In March 1994, he took 55 days of accrued recreation leave and travelled to the United States.

[13] In December 1994, Mr Bougoure and his police partner arrested a man on a number of traffic offences. That man made a complaint to the Criminal Justice Commission ("CJC"). Mr Bougoure and his partner were interviewed by the CJC in January 1995.

[14] An acquaintance, who was a nurse, suggested he seek treatment from Dr Malcolm Foxcroft, a psychiatrist, for his heavy drinking and heavy marijuana use. Mr Bougoure was by then suffering from what he now understands to be symptoms of post traumatic stress disorder ("PTSD"). However, he believed at the time, with some justification, that his problems were caused by his drug and, to a lesser extent, his alcohol addiction. His general practitioner, Dr David Noble, arranged for a referral to Dr Foxcroft. Dr Foxcroft saw him but did not believe he was best suited to treat Mr Bougoure and referred him to another psychiatrist, Dr Greg Apel. Mr Bougoure commenced seeing Dr Apel in February 1995. Dr Apel has particular expertise in the area of drug dependency. He was reasonably optimistic about Mr Bougoure's future if he was able to change his immediate environment. There was no suggestion made that Mr Bougoure should or would have to leave the police service. Dr Apel encouraged him to remain in policing but change the environmental factors which affected his condition.

[15] On 24 February 1995, on Dr Apel's recommendation, Mr Bougoure applied for a lateral transfer from Maroochydore to Brisbane. Dr Apel at this time thought his prognosis was good. On 14 August 1995, Mr Bougoure's application for a transfer was refused.

[16] During 1995, Mr Bougoure's police partner arrested a high ranking commissioned officer for drink driving. Although Mr Bougoure was not involved in the arrest, the

rumours and innuendo that followed caused him distress. In December 1995, that officer pleaded guilty to drink driving.

[17] On the following day, 22 December 1995, Mr Bougoure and his police partner were charged with official misconduct in relation to an arrest they made in December 1994, and were stood down from duty and required to hand in their guns and badges. This exacerbated Mr Bougoure's symptoms. After consulting his general practitioner, Dr Noble, Mr Bougoure commenced a period of sick leave until July 1996.

[18] Mr Bougoure saw Dr Apel again in early 1996 and discussed the difficulties he was experiencing. Neither Dr Apel nor Dr Foxcroft had suggested to Mr Bougoure that he would need to give consideration to leaving the police service because of his condition. Dr Apel discussed his symptoms with him and after receiving treatment, Mr Bougoure showed some improvement in his condition. Mr Bougoure believed that his treatment from Dr Apel was improving his symptoms. He realised that if his use of marijuana was discovered, he might face disciplinary action; but he felt able to control his drug usage and that it would not have any long term effect on his employment.

[19] On 5 March 1996, Dr Pokarier, a general practitioner who examined Mr Bougoure on behalf of the QPS, advised that Mr Bougoure "has a good prognosis…able to return to work from 1 April 1996".

[20] In June 1996, the charges against Mr Bougoure were dismissed by the Misconduct Tribunal of the CJC, his suspension was revoked and he was permitted to return to duty. He was advised by a superior officer that the CJC did not recommend any further disciplinary action.

[21] Following his return to work he continued to suffer from sleepless nights, cold sweats, migraines and feelings of nausea. He also continued to use alcohol and marijuana and to experience difficulties in performing his police duties. The applicant requested work in enquiries or the watch house. He was allocated to watch house duties for the next few months. On 6 August 1996, Mr Bougoure made an application for workers' compensation for "work stress" which was rejected by WorkCover on 1 October 1996.

[22] Towards the end of 1996, he was interviewed by a commissioned officer in relation to an incident involving a prisoner who made an unfounded complaint against him. After his return to general duties, he found himself unable to cope due to his anxiety and depression. He was very concerned about wearing a gun.

[23] In October 1996, Dr Apel recorded how unhappy the applicant was and noted "time to leave police". In oral evidence Dr Apel said that, as best he could remember, that note recorded his thought rather than recording what was said to him by Mr Bougoure. Dr Apel gave evidence that he did not give Mr Bougoure any formal advice that his underlying condition was such as to require him to leave the police

service. Dr Apel said that he had not formed a medical diagnosis to that effect at that time.

[24] On 9 April 1997, Mr Bougoure commenced sick leave. He also consulted Dr Alan Freed, a psychiatrist, who prescribed anti-depressants and commenced treatment to reduce his alcohol and cannabis consumption. He was able to reduce his alcohol and cannabis consumption and began to experience a gradual improvement in his condition. He felt he was obtaining assistance from the treatment and continued to see Dr Freed at least monthly during 1997. On 21 April 1997, he completed and submitted a WorkCover application relating to his anxiety and depression. On 13 June 1997, in response to a request from WorkCover, he provided a statement of some 10 pages setting out the full details of his work history and his claim.

[25] In June 1997, Mr Bougoure was named at the Carter inquiry in relation to covert officers who were alleged to have consumed marijuana. Dr Freed advised him that his police career was in jeopardy and suggested that he should consider retiring from the QPS. Mr Bougoure said that this "really did not sink in" and he believed that once he had addressed his anxiety symptoms he would be able to resume duties with the QPS as he wished to do. However he followed Dr Freed's advice and obtained the necessary paperwork for an application to retire from the QPS on medical grounds. He was diagnosed in July 1997 as having chronic post traumatic stress disorder with suicidal ideation and substance abuse disorder (the "latest injuries").

[26] Dr Freed prepared reports on 6 and 27 August 1997, the latter being in support of Mr Bougoure's application for retirement from the QPS. Dr Freed said that Mr Bougoure would not return to the QPS and that he no longer identified himself with the police service. He thought he was no longer suitable to be a police officer. Dr Freed did not, however, as he made clear under cross-examination, recommend to Mr Bougoure that he retire. Mr Bougoure completed his application to retire on 28 August 1997 which was supported by his superior officers and Dr Freed prepared another report on 8 October 1997 which said that Mr Bougoure had PTSD caused by his employment.

[27] Mr Bougoure said that at this time he did not appreciate the future ramifications that his condition would have on his life and ability to work. He believed that the stress and anxiety he was experiencing and his panic attacks were caused by his having to attend to his police duties. He was unaware, and no doctors had informed him, of the ramifications his condition would have for him outside the police service. He believed that once he was removed from the police service his condition would resolve itself and he would be able to obtain alternate work. That was an entirely reasonable belief. It was only after his retirement that he realised he was unable to work outside of the police service due to the continuing nature of his condition. And it was clear from his oral evidence that, between August and December 1997, he still nursed the hope, even the expectation, that he would be able to remain with the QPS. However, he was concerned because of the persistence of his symptoms that his career was in peril.

[28] On 10 October 1997, Mr Bougoure was assessed at WorkCover's request by Dr Brian Hutchinson, whose opinion was that Mr Bougoure had suffered from an adjustment disorder with depressed and anxious moods from which he had recovered and was fit to return to work as a police officer. Dr Apel has reviewed this opinion and in evidence explained that, in his experience, the condition that Mr Bougoure suffered from was one of a fluctuating nature in terms of presentation and severity of symptoms and such considerations made the forming of a diagnosis and expressing a prognosis difficult. This may explain Dr Hutchison's diagnosis which differed from that of Dr Freed.

[29] Mr Bougoure received a letter from WorkCover on 21 October 1997 rejecting his application for WorkCover and advising him that his injury did not prevent him from performing his normal duties. Mr Bougoure spoke to a representative of WorkCover who told him that Dr Freed's advice was that Mr Bougoure was fit to return to uniform duties.

[30] On 26 October 1997, Mr Bougoure was assessed by Dr Foxcroft at the request of the QPS. On 5 November 1997, Mr Bougoure saw Dr Freed about his diagnosis and future employment prospects. Dr Freed said he could not find anything in his notes to show that he had told WorkCover that Mr Bougoure was fit to return to uniform duties in spite of what WorkCover had told Mr Bougoure. Dr Freed opined that this unsatisfactory and confusing situation must have made Mr Bougoure "question… his own sanity".

[31] On 6 November 1997 Mr Bougoure requested a review of WorkCover's decision to reject his claim. That date, 6 November 1997, is the relevant date for this application as proceedings were commenced a year later on 6 November 1998. At that stage, there were two procedures going hand in hand. First was the application for WorkCover, and secondly, was the application for termination from the QPS.

[32] On 12 November 1997, Dr Foxcroft prepared a report which supported Dr Freed's assessment. Dr Foxcroft diagnosed Mr Bougoure as suffering from generalised anxiety disorder, post traumatic stress disorder and major depressive disorder. The major cause was said to be his work as an undercover police officer and subsequent experiences in the police service. Dr Foxcroft said his prognosis was poor and that his incapacity rendered him permanently unfit and incapable of discharging efficiently the duties of police officer. This was very significant both as a diagnosis and as a prognosis of his condition.

[33] On 17 December 1997, WorkCover rejected Mr Bougoure's application for review advising him, wrongly, that his application was not supported by either Dr Freed or Dr Hutchinson.

[34] However on 19 January 1998, Mr Bougoure was advised by Q Super that he was permanently unable to carry out the duties of his position, as part of the process of termination from the QPS. It was only then that he knew that his condition rendered him permanently unfit and incapable of discharging the duties of a police officer. On 29 January 1998, he was advised he was to be retired on medical grounds. Mr Bougoure accepted that direction and on 6 February 1998, Mr Bougoure officially

retired from the QPS. The Separation Certificate issued on that day noted that he had above average work performance and that his conduct was good.

[35] Unfortunately, after his retirement, Mr Bougoure's symptoms continued and he then realised that he would not easily be able to work in alternative employment.

[36] Mr Bougoure commenced proceedings on 6 November 1998, for damages for negligence, breach of contract and breach of statutory duty against his employer, the State of Queensland, in respect of his employment as a police officer with Queensland Police Service. A Statement of Claim was filed but the terms in which that Statement of Claim was drafted were subsequently entirely abandoned by the solicitors who are now acting for the applicant and an amended Statement of Claim was filed on 9 April 2002.

[37] In paragraph 41.4 of the Defence filed on 11 September 2002, the respondent alleges that the proceeding was brought more than three years after the last day upon which the applicant has suffered injury and is thereby barred pursuant to s 11 of the Limitations Act. The case was transferred to the supervised case list and orders have been made for various interlocutory steps to be taken. The parties sought to have the question, of whether the action was statute barred, determined prior to the matter proceeding any further.

[38] Some relaxation from the requirement to commence proceedings within three years from the date of injury is found in s 31 of the Limitations Act which relevantly provides:

> "(1) This section applies to actions for damages for negligence…or breach of duty…where the damages claimed by the plaintiff for the negligence…or breach of duty consist of or include damages in respect of personal injury to any person ...
>
> (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 -
>
> (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;
>
> 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."

[39] The interpretation of s 31 is governed by s 30 of the Limitations Act, which provides:

"(1) For the purposes of this section and sections 31…

(a) the material facts relating to a right of action include the following-

…

(iv) the nature and extent of the personal injury so caused;

…

(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 circumstance 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 the 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."

[40] The respondent has conceded for the purposes of this application that there is evidence to establish that the applicant has a right of action apart from the defence founded on the expiration of the limitation period. Further, as previously noted, the respondent does not oppose the application on the ground of prejudice. The application is opposed on the basis that there was no material fact of a decisive character which was not within the applicant's knowledge or means of knowledge until after the relevant date for the purposes of s 31 of the Limitations Act, 6 November 1997.

[41] The question to be determined in this case, stripped of its double negatives, is whether a material fact of a decisive character was known to or within in the means of knowledge of the applicant prior to 6 November 1997. The onus of proof is on the applicant who applies for an extension of time.[1] The approach to be taken by the court was set out in the judgment of Dawson J in *Do Carmo v Ford Excavations Pty Ltd* [2] quoted with respect to the relevant Queensland legislation by Thomas JA in *Dick v University of Queensland:* [3]

> "The form of the legislation requires, I think, a step-by-step approach. The first step is to inquire whether the facts of which the appellant was unaware were material facts: s 57(1)(b) [Qld s 30(1)(a)]. If they were, the next step is to ascertain whether they were of a decisive character: s 57(1)(c) [Qld s 30(1)(b)]. If so, then it must be ascertained whether these facts were within the means of knowledge of the appellant before the specified date: s 52(2) [Qld s 30(1)(c)]."

Material fact

[42] The fact which is alleged to be material in this case is the nature and extent of the personal injury caused by the negligence of the respondent. Mr Bougoure submits that he was unaware of the nature and extent of his personal injury until he was advised by Q Super on 19 January 1998 that he was permanently unfit and incapable of discharging his duties as a police officer. It was submitted that there were four components to this: first, Mr Bougoure's inability to remain as a police officer was not known to him or within his means of knowledge until Dr Freed's diagnosis was confirmed by Dr Foxcroft, because until that time, there were competing views about what was wrong with him; secondly, the diagnosis of PTSD was disputed by Dr Hutchinson but confirmed by Dr Foxcroft; thirdly, the necessary causal connection was not established until Dr Foxcroft's opinion was given

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1 *Mills v Comalco Aluminium Limited* [1991] FC 145; Appeal No 64 of 1991, 6 November 1991 per Thomas J at [5].

2 (1984) 154 CLR 234 at 256.

3 [2000] 2 Qd R 476 at [26].

because there had been a number of events which might have caused his symptoms, such as a fatal car accident in which he had been involved and the investigation of various complaints made against him; and fourthly, it was said that it would not have been in his interests to commence an action when his treating doctor and the WorkCover specialist disagreed about his diagnosis and prognosis.

[43] The material fact in this case was the diagnosis of his condition and its prognosis given by Dr Foxcroft on 12 November 1997 which led to the advice from Q Super. The economic consequences of that material fact may be such as to give it a decisive character.[4]

Decisive Character

[44] The applicant submits that the information from Q Super received on 9 and 29 January 1998, that he was classed as permanently and partially disabled, was decisive because until then the information he had received from WorkCover was that he did not have a claim for WorkCover because he did not have the injury and was fit to return to work. It was the report from Dr Foxcroft which led to that decision by Q Super.

[45] A material fact will be of a decisive character if, but only if, firstly under sub-section 30(1)(b)(i) of the Limitations Act, a reasonable person knowing those facts and having taken appropriate advice on those facts would regard those facts as showing that an action on the right of action would 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 secondly, pursuant to sub-section 30(1)(b)(ii) of the Limitations Act, 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. Appropriate advice means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.

[46] As the Full Court of the Supreme Court of Victoria observed in *McManamny v Hadley,*[5] questions of degree and significance are involved.[6]

[47] As Dr Apel observed, there were difficulties in accurately diagnosing Mr Bougoure's condition as can be seen from Dr Hutchinson's report. Until Dr Foxcroft's report there was considerable uncertainty as to the correct diagnosis of Mr Bougoure's condition and as to his future employability, whether in the police service or elsewhere. On 17 December 1997, WorkCover had rejected his claim for statutory compensation on the basis that his application was not supported by Dr Hutchinson or Dr Freed. In those circumstances, a reasonable person in Mr Bougoure's position was entitled to form the view that the prospects of success and the quantum of damages in an action for damages for workplace injury would not

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4 *Watters v Queensland Rail* [2001] Qd R 448.

5 [1975] VR 705 at 713.

6 See also Thomas JA in *Pizer v Ansett* [1998] QCA 298.

have been sufficient to justify the expense and uncertainty of litigation.[7] As Kirby P held in *Ditchburn v Seltsam Ltd*:[8]

> "The test…is not one of zealous vigilance to assert and protect legal rights by immediate resort to litigation".

[48] The test must be considered in light of the personal circumstances of the applicant which are discussed further below. As counsel for the applicant submitted of the circumstances prior to 6 November 1997:

> "The litigation in prospect would have been daunting to say the least. The nature of the issues and the extent of irrecoverable solicitor and own client costs involved given the complexity of the case and the involvement of intervening events including unfounded [CJC] charges and contrary medical opinions entailed that, unless the [applicant] was able to establish that he was unable to work in the police service, there would simply be no point in instituting proceedings."

[49] The material fact was of a decisive character because Mr Bougoure then knew that he would not be able to work in the future in his chosen career as a police officer. The prospects of success and the enlargement of damages changed his claim from one that was not worth bringing to one that was.

Within the applicant's knowledge or means of knowledge

[50] In this case, a material fact of a decisive character relating to the right of action must not have been within the means of knowledge of the applicant until 6 November 1997, being one year before the commencement of the action. It would not have been within his means of knowledge if he did not know the fact at the time and, so far as the fact was able to be found, he had taken all reasonable steps to find out the fact before that time.

[51] Had Mr Bougoure taken all reasonable steps to find out that material fact? He had sought and obtained medical advice and had taken all possible steps to receive WorkCover. His WorkCover application had been rejected and Mr Bougoure was faced with conflicting medical opinion as to the aetiology and seriousness of his condition. WorkCover had purported to reject his claim because it was not supported by any medical opinion. It appears in these circumstances that he had taken all reasonable steps to ascertain the seriousness of his injury.[9]

[52] In considering what a reasonable person endowed with the knowledge and experience of the applicant should have done in these uncertain circumstances,[10] it is useful to refer to the medical opinion given by Dr Apel as to the advisability of

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7 See *Taggart v The Workers' Compensation Board of Qld* [1983] 2 Qd R 19 at 24; *Watters v Queensland Rail* [2000] QCA 51 at [11], [23]; *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306; *King v Queensland Corrective Services Commission* [2000] QSC 342; *Buckton v BHP Coal Pty Ltd* [2001] QCA 35 at [35].

8 (1989) 17 NSWLR 697 at 704.

9 Cf *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697 at 705-706.

10 *Pizer v Ansett* [1998] QCA 298 at [15].

Mr Bougoure's commencing proceedings earlier than when he did. Dr Apel says in paragraph 17 of his affidavit:

> "Firstly, from my experience with patients who have been serving Police Officers, it would be undoubtedly against the [applicant]'s interests to institute proceedings at a time if there was still a prospect of remaining a serving Police Officer. That would entail the stress of having to cope with the adverse workplace response which could reasonably be anticipated. Secondly, the [applicant] was already under stress because of his PTSD and his addiction to cannabis and the conflict that that generated with his role as a Police Officer. To seek to add to that stress by exposure of that addiction and to require the [applicant] to provide detailed instructions, in effect reliving the traumatic events which underlay the development of his condition would be very much against the [applicant]'s own interests. Indeed, while it is plain that the [applicant] had desired to remain as a police officer in the end a circumstance which led to his leaving the force on the grounds of ill health was a concern about being prosecuted over use of cannabis in consequence of being publicly named in relation to illicit drug use as recorded in my second report. At a conscious level it can be seen that this would influence the [applicant]'s response to his circumstances but in my opinion, the real difficulty for the [applicant] in remaining a police officer was his underlying condition and the associations which his employment had for that condition."

His condition did therefore have some effect on Mr Bougoure's capacity to make a claim.

[53] Dr Freed disagreed with Dr Apel's assessment as to whether or not he could provide instructions without detriment to his health but Dr Apel's opinion about the adverse effects of making a claim while still a serving police officer when such a claim would have revealed the extent of his illegal drug use was unchallenged and is clearly correct. Added to the difficulties caused by his psychological injury was the contrary diagnosis of Dr Hutchinson and WorkCover's response of denying his claim. Dr Freed said that:

> "A person who is suffering from PTSD has difficulty at the best of times ascertaining what that person should do in response to the symptoms that the [applicant] is suffering. To receive a contrary diagnosis complicates the position further."

Mr Bougoure's own evidence as to this was that prior to receiving the advice from Q Super, he "was fearing anything from being sacked, to losing my job, to possibly going to gaol." Once he was no longer a police officer, he was no longer open to disciplinary proceedings even if the full extent of his drug use was revealed.

[54] With regard to the utility and advisability of commencing an action prior to 6 November 1997 I would respectfully apply to this case the observations made by Chesterman J in *Russell v State of Queensland* [2004] QSC 97 at [33] relating to a similar application:

> "The difficulties in such an action were considerable. The likely award of damages was small. The facts which would be disclosed in the proceedings would expose the [applicant] to dismissal and prosecution. The equation changed with the knowledge that his career was lost, together with his earning capacity. The game was then worth the candle. I am therefore satisfied that a material fact of a decisive character was not known to the [applicant] until after [the relevant date]."

Conclusion

[55] I am satisfied that there was a material fact of a decisive nature relating to the cause of action which was not within the applicant's knowledge or means of knowledge until after 6 November 1997. There being no discretionary reason to refuse the application, it is appropriate to grant the orders sought in the applicant's application. The period of limitation for bringing proceedings should be extended to 6 November 1997. The respondent's application for summary judgment should therefore be dismissed.