SUPREME COURT OF QUEENSLAND

CITATION:	*Stephenson v State of Queensland* [2004] QSC 226
PARTIES:	**PETER ROBERT STEPHENSON** (plaintiff) v **STATE OF QUEENSLAND** (defendant)
FILE NO/S:	S 11521 of 2001
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	1, 2 June 2004
JUDGE:	McMurdo J
ORDER:	**1. The plaintiff's application is dismissed** **2. Judgment for the defendant against the plaintiff** **3. The plaintiff is ordered to pay the defendant its costs of the proceedings to be assessed**
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 plaintiff was member of Queensland Police Service – where plaintiff suffered Post Traumatic Stress Disorder and substance abuse and dependency as a result of his experiences as a covert police officer – where action against former employer is time-barred – where application by defendant for summary judgment – where cross-application for extension of limitation period – where material facts known to plaintiff prior to critical date – where however in the plaintiff's circumstances, it was not in his interests to bring action prior to the critical date – where change of circumstances after critical date – whether change of circumstances renders material facts decisive having regard to s 31(2) – whether material facts of a decisive character were not known prior to critical date – whether limitation period should be extended *Limitation of Actions Act* 1974 (Qld), s 30, s 30(1)(b), s 30(1)(b)(ii), s 31, s 31(2)(a)

Castlemaine Perkins Ltd v McPhee [1979] Qd R 469, cited
Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234, applied
Royal North Shore Hospital v Henderson (1986) 7 NSWLR 283, distinguished
Re Sihvola [1979] Qd R 458, cited
Tiernan v Tiernan, unreported, Byrne J, No 39 of 1992, 22 April 1993, distinguished
Watters v Queensland Rail [2001]1 Qd R 448, applied

COUNSEL: D B Fraser QC, with G R Mullins, for the plaintiff
R J Douglas SC, with D J Campbell, for the defendant

SOLICITORS: Gilshenan & Luton for the plaintiff
Crown Solicitor for the defendant

[1] **McMURDO J:** Section 31 of the *Limitation of Actions Act* 1974 (Qld) permits the Court to extend a period of limitation in actions for damages for personal injury. An essential condition for the exercise of that power is that "a material fact of a decisive character relating to the right of action" was not within the plaintiff's means of knowledge until a date after the commencement of the last year of the limitation period.[1] The Court may extend the limitation period so that it expires a year after that date or, as it is often described, the "critical date".

[2] This case was commenced outside the limitation period. The plaintiff applies to have the period extended so that it would expire on the day on which he sued, which is 20 December 2001. Accordingly, the critical date becomes 20 December 2000, and the plaintiff must establish that it was not until after then that some material fact, of a decisive character, relating to his right of action came within his means of knowledge.

[3] According to my findings, by the critical date, the plaintiff knew sufficient of the material facts relating to his right of action to show a reasonable person, appropriately advised, that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify that action (s 30(1)(b)(i)). But I find also that it was not until after the critical date, that the plaintiff's interests and circumstances would have showed that he ought to bring an action (s 30(1)(b)(ii)). I have therefore found that the material facts which were within the plaintiff's means of knowledge at the critical date were not, at that date, of a 'decisive character'.

[4] In the plaintiff's principal submission, upon those findings, he need prove no more to establish what is required by s 31(2)(a), and in particular, he need not establish that any further material fact relating to his right of action became known after the critical date. Alternatively, it is argued that there was a new material fact, which considered with the previously known facts, and in the context of his (changed) interests and circumstances, was decisive.

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1 Section 31(2)(a)

[5] The defendant concedes that there is evidence to establish the right of action apart from the limitation period defence (s 31(2)(b)). Further, the defendant does not oppose the application on the ground that it will be relevantly prejudiced by the extension of the period. On the way the case was argued, the outcome depends upon whether the plaintiff can prove the matter required by s 31(2)(a).

[6] The defendant applies for summary judgment on the ground that the case is time barred. The plaintiff agrees that it is, unless his application for an extension of the limitation period succeeds.

The plaintiff's right of action

[7] The plaintiff is a former police officer employed by the defendant. He is now aged 34. He joined the Queensland Police Service ("QPS") in May 1992. In 1993 he asked to be assigned to perform covert duties. He worked as a covert police officer throughout 1994 and 1995. The work brought him into contact with dangerous criminals and illegal drugs. He became a heavy user of cannabis and alcohol. He experienced a number of traumatic events and was often in fear for his life.

[8] He returned to work as a uniformed officer in December 1995. He then experienced anxiety attacks when having to perform his duties. He often vomited as he prepared to go to work. His sleep was poor and his heavy use of cannabis continued.

[9] In March 1996 he went on sick leave, telling his superior officer that he would not return. After eight weeks leave, his symptoms improved and he went back to work. But his drug and heavy alcohol use continued, as did his sense of antagonism towards the QPS. He again had difficulties performing his work.

[10] At the end of 1998, he successfully applied for work with the National Crime Authority. But his life remained in disarray. In February 2000, he was photographed whilst driving (off duty) at 187 kph in an 80 kph zone at 3 o'clock in the morning. In May 2000 he was told that his position with the NCA was terminated forthwith and he was ordered to return to uniformed duties. On that day he had something of a breakdown and his general practitioner then certified him as unfit for work for two months. He went on sick leave, where he remained until he left the force in February 2001.

[11] In July 2000 he was assessed by two psychiatrists (engaged by the QPS and WorkCover) each of whom thought it was then too early to determine whether he was permanently incapacitated for police work. But in October 2000, the plaintiff's treating psychiatrist, Dr Holm, recommended that he should retire on medical grounds because, in his view, the plaintiff was permanently incapacitated. The plaintiff lodged his application to retire in November 2000 (although the application is dated 26 October 2000). I accept that when he submitted this application the plaintiff was unsure whether he would be allowed to retire on medical grounds. On 6 November 2000 Dr Holm completed a questionnaire in support of the plaintiff's application, which was then sent to the QPS. Dr Holm there said that the plaintiff

suffered from a chronic Post Traumatic Stress Disorder, which totally incapacitated him from performing any police duties such that Dr Holm did not think that he would ever be able to return to work. He referred to a previous report by him (apparently that dated 22 July 2000 addressed to the QPS) in which he had expressed the same opinions.

[12] As the plaintiff's submissions accept, the plaintiff knew by the end of November 2000 that he was permanently incapacitated for police work. From that he knew, or should have known, that he would have to leave the QPS, whether by being allowed to retire on medical grounds or by simply resigning.[2] It was by then clear that the loss of his police career would result in a substantial loss whether he so retired or he resigned. He did not then appreciate the impact of his condition upon his ability to perform other equally remunerative work, but the plaintiff's submissions accept that this information was then available to him had he inquired. Accordingly, by the end of November 2000, the facts of his condition and its impact upon his earning capacity were within his means of knowledge, as were the facts of the defendant's (alleged) negligence and its causal effect. By then, the material facts relating to the right of action which were within his means of knowledge would have shown that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify it.

[13] However, there were then two further matters which were relevant to whether the plaintiff should bring this action. The first was the plaintiff's mental health. The second was whether the commencement of litigation against his employer could lead to disciplinary action or some other response by the QPS which would prejudice his application to retire on medical grounds.

[14] As to the first of those matters, the plaintiff described his then condition as follows:

> "My life was very tumultuous at this time. I was seeing psychiatrists and psychologists and having to relate to them the events going back to my worst experiences as a CPO. I felt very depressed, I had no energy and I found I could not concentrate. I was worried about what would happen to my police career as I informed each of the medical practitioners that I saw on request from the QPS or WorkCover that I had a drug problem. I was concerned that I might be raided and charged with possession of cannabis. My life felt as though it was "spinning out of control". I was tearful and upset and I was concerned about whether the QPS would engage in retribution against me for relating the problems experienced by the CPO's with drug abuse.
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> I was feeling numb over this 6 month period to the beginning of 2001. I couldn't cope and I was a very different person. I knew I wanted to remain as a police offer but I did not see how I could do it. I was continuing to take prescribed medication and receiving

[2] By three months' notice or notice of a shorter period approved by the Commissioner: *Police Service Administration Regulation* 1990

> treatment from Dr Holm and also from a psychologist, Anita Cochrane. Her treatment included providing me with avoidance techniques to seek to minimise the triggers which might set off my drug addiction problem or my binge drinking.
>
> Over this period a lot of my life is simply a blur. I was drinking very heavily and essentially I was just looking for survival on a day-to-day basis and just responding as best I could to things as they occurred. My only real focus was my children who I was determined to have a relationship with."

I accept this evidence, as I do the balance of his affidavit evidence (paragraphs 122-154) of the symptoms which he was experiencing in the latter half of 2000. Dr Holm says that the plaintiff's evidence accurately records the symptoms for which he was then treating him.

[15] The plaintiff's evidence of difficulties in instructing solicitors is described in paragraphs 145-154 of his affidavit. It includes the following:

> "After I went on sick leave I was unable to make decisions about what I should do about the loss of my career with the QPS as I started to appreciate that I may not continue as police officer. I did not have any discussions with my solicitor about instituting any common law action. I could not bring myself to discuss my life as a CPO because I knew that simply brought it all back and added to my stresses. I was still trying to deal with my drug habit and the treatment I was receiving from Miss Cochrane was directed to trying to get me free of my dependence and psychological problems.

As to that evidence, Dr Holm said that "it is entirely consistent with the medical condition of the plaintiff that he would be unable to make the necessary decisions".

[16] I am unpersuaded that during this period, that is the second half of 2000, the plaintiff was unable to give instructions to bring an action. Accepting as I do the substance of his description of his symptoms, it is another thing to say that he was incapable of deciding to sue. He was able to decide that he should apply to retire from the police force. And he was also able to then consult the solicitors who eventually brought these proceedings on his behalf. He consulted them in July 2000 concerning his dealings with WorkCover, and the potential ramifications of his disclosure to it of his drug use. In August 2000 he consulted them about his driving offence and the related investigation by the internal affairs unit of the QPS.

[17] But Dr Holm's evidence raises a further consideration as to whether the plaintiff could be expected to have sued in 2000. In Dr Holm's view the commencement of an action at this time would have made the plaintiff's condition even worse. In his view:

> "Part of the problem for the Plaintiff in being able to address his legal rights is the circumstance that his treatment was directed to shielding him from the triggers associated with his past history as a covert police operative. For the Plaintiff, the very problems which gave rise to his illness, if they needed to be canvassed and instructions given about them to his solicitors, would exacerbate and perpetuate his condition and by the latter part of 2000, the treatment which the Plaintiff was receiving was directed very much against that occurring."

[18] I accept that opinion. The likelihood that the steps necessary for the commencement of an action would have exacerbated his problems was a circumstance relevant to whether he ought then to have sued.

[19] There was also to be considered whether the commencement of litigation against the QPS would have prejudiced his attempt to then retire on medical grounds. The difference between that means of leaving the force, and his simply resigning, was worth $267,000**,** which was the amount he received on his being retired as medically unfit in February 2001. If the commencement of litigation had a real prospect of delaying and perhaps defeating his retirement application, then the application would have been an important consideration for a decision as to whether he should then sue.

[20] Would the commencement of proceedings have put at risk his retirement? Part of the process of the consideration by QPS of an application for retirement was a "vetting" of the application, to determine whether the officer was then the subject of any outstanding investigation or complaint. Had the plaintiff's illegal use of drugs, which was continuing, come to the attention of a police officer, it appears that the officer would have been obliged to report the matter to the Commissioner of Police and the (then) Criminal Justice Commission, pursuant to s 7.2(1) of the *Police Service Administration Act* 1990 (Qld). Had the plaintiff been disciplined for his drug use, there was some prospect of demotion[3] with a consequent diminution in his retirement benefit.

[21] The plaintiff's drug use was already known to at least some of the plaintiff's superiors. The QPS had obtained a report (from Dr Whiteford, psychiatrist, dated 12 July 2000), which recorded some of the plaintiff's history of experimentation with heroin, amphetamines and ecstasy whilst in the covert operations unit. The report did not suggest that the plaintiff was still using drugs and that, in particular, he was a regular user of cannabis. But in his report to the QPS of 22 July 2000, Dr Holm said:

> "Compounding Post Traumatic Stress Disorder and depression Peter Stephenson was forced as part of his covert undercover work to participate in illicit drug usage in particular the smoking of marihuana. Since that time he has become psychologically and physically dependent on marihuana. His dependence has continued

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[3] Section 7.4(3) of the *Police Service Administration Act* 1990

> despite him making very strenuous efforts to rid himself of this dependence."

A section of the QPS was therefore well aware of his drug use, and the application for retirement and the consequent likely need for further medical assessment of the plaintiff, made it inevitable that those officers who had to consider his application would know of his drug use. Although some members of the QPS already knew of his drug habit, the bringing of an action could well have caused the QPS to take a less sympathetic approach to the plaintiff's circumstances and his attempt to retire. The pleading of a case for a substantial damages award for the alleged negligence of the QPS could have caused the QPS to take an adversarial approach to his retirement application.

[22] In my view, had the plaintiff sought advice in late 2000, as to the potential effect on his retirement application from the bringing of an action against the QPS for negligence, the appropriate advice would have been that the plaintiff should await the outcome of his application before suing. The limitation period (unless extended) had expired by at least mid 2000, that being three years from the development of the plaintiff's paranoid reaction and the symptoms of increasingly severe depression.[4] The financial benefit of retiring on medical grounds was substantial, especially if the plaintiff was not demoted. If the possible effect on his retirement application had been considered with the likely adverse effect on his health, the material facts within his means of knowledge would not have shown to a person in his position that he should *then* sue.

Events after the critical date

[23] On 15 January 2001, the plaintiff was assessed by Dr Rodney, psychiatrist, who was engaged by the QPS to consider his eligibility for retirement. The plaintiff gained the impression that Dr Rodney would support his application. His evidence[5] was that he "was, by this time, at the stage of realising that [his] police career would be over and [he] should do something about the loss of [his] career". But Dr Holm had told him in the previous October that he should retire, and the plaintiff had accepted that advice by applying for retirement. In my view the plaintiff knew or should have known that his police career was over before the critical date.

[24] Dr Rodney reported to the QPS on 17 January 2001 that the plaintiff was permanently incapacitated from performing police work. The plaintiff was not provided with a copy of that report at the time. On 1 February 2000 the plaintiff cancelled an appointment with his solicitors because he says that he could not bring himself to "focus sufficiently on the matter". But he consulted his solicitors on 8 February 2001 in a meeting lasting more than five hours. He says he then instructed his solicitors to "act for [him] in relation to a common law claim about the loss of [his] career".

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4 Statement of claim, paragraph 25

5 Plaintiff's affidavit, para 150

[25] On 16 February 2001, the plaintiff was informed that his application for retirement was successful. His retirement took effect on 23 February 2001.

[26] By 5 March 2001,[6] Ms Cochrane, psychologist, reported to WorkCover that some of the plaintiff's symptoms had improved and that his avoidance symptoms were not considered to be clinically significant. On 10 August 2001, he was assessed by a WorkCover Medical Assessment Tribunal as suffering a 35 per cent permanent impairment.

[27] For reasons which do not fully appear, he did not bring this action until 20 December 2001. Had he sued within a year from Dr Holm's advice that he was permanently disabled for police work (October 2000), he would have had a much clearer case for an extension of time.

The legislation

[28] Section 31(2) provides as follows:

> "31 Ordinary actions
> …
>
> (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
> >
> > (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.

[29] As mentioned, the defendant concedes that paragraph (b) is satisfied, and that if paragraph (a) is also satisfied, there is no significant discretionary consideration for which the application should be refused.

[30] The meaning of "a material fact of a decisive character relating to a right of action" is according to s 30 which provides:

> "30 Interpretation

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6 The psychologist's report is incorrectly dated 5 February 2001

(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."

[31] As I have found, the material facts of knowledge at the critical date were sufficient to show that he had a worthwhile case according to s 31(1)(b)(i), but they would not have shown a reasonable person in the plaintiff's circumstances that he ought to then sue. It follows the material facts relating to the right of action which were

within the plaintiff's means of knowledge prior to the critical date were not *then* of a "decisive character".

[32] The plaintiff argues that this finding is sufficient to prove the matter required by s 31(2)(a). If what relevantly occurred after the critical date was a change to the plaintiff's circumstances, by which it then became appropriate to sue on the basis of the already known material facts relating to the right of action, it is said that the same material facts then took on a decisive character, and that they then came within the plaintiff's knowledge as facts of that character. After the critical date, the plaintiff's circumstances changed in two respects. His health improved and he was retired on medical grounds. It is argued that with these new circumstances, the material facts became decisive.

[33] The plaintiff's alternative argument is that his retirement was a new and material fact relating to the right of action, to which I shall return. The present issue is whether these events, as changes in the plaintiff's circumstances, satisfy the requirements of s 31(2)(a).

[34] In my view, this first argument must be rejected. Section 31(2)(a) requires some material fact relating to the right of action to come within the applicant's means of knowledge after the critical date. The date upon which a material fact of a decisive character comes within the applicant's means of knowledge is critical to the operation of s 31 in two ways. First, the section does not apply unless that date is after the commencement of the last year of the period of limitation. Secondly, the period may be extended "so that it expires at the end of 1 year after that date". An essential inquiry for the Court hearing an application under this section is to ascertain the date on which, or at least by which, the relevant fact came within the applicant's means of knowledge. A fact of which the applicant was already aware but which was not of a decisive character, does not come within the applicant's means of knowledge at a subsequent point when, having regard to the applicant's then interests and circumstances, it can be said to be decisive. There is but one point when a fact comes within the applicant's means of knowledge.

[35] The evident purpose of s 31 is to permit in certain circumstances a person to sue out of time where the delay in bringing an action comes from the plaintiff's ignorance of some fact which, when ascertained, would convert "such a person's claim from one that was not worth bringing into one that was".[7] Had the legislature intended to provide a remedy for persons who learn of no new material fact which affects the likely outcome of an action, but whose interests and circumstances become more suited to litigation, the terms of s 31 would be quite different.

[36] This is not to deny the effect of paragraph 30(1)(b)(ii). The decisiveness of the new fact must be tested by reference to whether the other known material facts themselves warranted an action. The newly discovered fact could be decisive only if, absent that fact, a person would not consider that he ought to sue. The individual

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7 *Watters v Queensland Rail* [2001] 1 Qd R 448 at 454 per Thomas JA

circumstances of the applicant are thereby relevant for the characterisation, as decisive or otherwise, of the newly ascertained fact.

[37] The plaintiff's argument relied upon certain passages from the judgments in the New South Wales Court of Appeal in *Royal North Shore Hospital v Henderson* (1986) 7 NSWLR 283 and the judgment of Byrne J in *Tiernan v Tiernan* (Unreported, Supreme Court of Queensland No 39 of 1992; 22 April 1993). In each of those cases, the applicant's circumstances prior to the critical date were of particular relevance to the assessment of the decisiveness or otherwise of the facts then known. But in each case, the limitation period was extended in consequence of a finding that a certain material fact had become known to the applicant only after the critical date. In the *Royal North Shore Hospital* case, the plaintiff had received an over-dose of radiation which resulted in a very serious disease which manifested several years later. As Mahoney JA said,[8] it was not until after the critical date that the plaintiff knew the relevant material fact, which was that the excess radiation was the result of a lack of proper care. In *Tiernan v Tiernan*, time was extended to permit proceedings claiming damages for the psychiatric effects of sexual abuse by the applicant's father some twenty years earlier. Byrne J held that it was not until after the critical date that the applicant knew of a possible causal relationship between her problems and the abuse. In my view, neither case provides support for the plaintiff's argument.

[38] The plaintiff's alternative argument is that there was at least one material fact arising after the critical date, which was that the plaintiff's employment ceased. It is argued that this was not only a relevant circumstance for a decision whether to sue, but it was a material fact relating to the right of action and of a decisive character. That character did not come from an impact upon the plaintiff's prospects of success or the amount of any likely award of damages. Instead, it is argued that it is necessarily of a decisive character because absent that fact, the material facts were not of decisive character, whereas with that fact, a reasonable person would sue.

[39] The phrase "material facts relating to a right of action" can include "factors beyond those which comprise the bare and essential ingredients of a given cause of action": *Re Sihvola* [1979] Qd R 458; *Castlemaine Perkins Limited v McPhee* [1979] Qd R 469 at 471. The term is defined within s 30(1)(a), but as Thomas JA noted in *Watters v Queensland Rail* at 456, the definition is inclusive only, and the words "relating to" are broad. Although I do not see the fact of the termination of the plaintiff's employment as being within any of sub-paragraphs (i) to (v), I would accept that this fact is a material fact relating to the right of action. It is relevant for the calculation of the plaintiff's claim for past economic loss. The question is whether such a fact was of a decisive character.

[40] According to s 30(1)(b), facts have a decisive character only if they show two things, being those respectively described in sub-paragraphs (i) and (ii). Accordingly, a material fact relating to a right of action must be a fact which is relevant to whether the action has a reasonable prospect of success or will result in a sufficient award of damages. It must be a fact which is relevant to the likely

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8 At 297

outcome of an action. Amongst the material facts relating to a right of action, there is a more limited category of facts which are those of a decisive character.

[41] The decisive character of a fact results from its being one of a combination of material facts which are "those facts" which would show each of matters in sub-paragraphs (i) and (ii) of s 30(1)(b). It is decisive because, absent that fact as within the applicant's means of knowledge, the other material facts would not demonstrate those matters, including that the prospects are reasonable and the likely award is sufficient. The material fact within s 31(2) is one which is decisive by its impact on the right of action, and consequently by its importance for the likely outcome of an action and for the question of whether the applicant ought to sue. It is by what the material facts of a decisive character would show to be the likely outcome of an action that "those facts" might also show whether a person ought to bring an action.

[42] It follows that if the newly discovered fact is one which does not affect the prospect of success of an action or the likely award of damages, it is not of a decisive character. In the present case, the termination of employment had a relevance for a decision to sue. But if it was in any sense a decisive event, it was because it affected the plaintiff's circumstances and not because of any impact on his right of action. It was not a fact having a decisive character *qua* a material fact relating to a right of action.

[43] The result is, in my view, consistent with the policy of s 31 as Deane J described it in *Do Carmo v Ford Excavations Pty* Ltd (1984) 154 CLR 234 at 250-251:

> "The legislative policy underlining the sections is plain enough. It is that the limitation period should be extended only in favour of a person who was, without fault on his part, unaware that he had a worthwhile cause of action until not more than 12 months before the commencement of proceedings."

It is what is learnt of the cause of action which was previously unknown which provides the basis for the extension of the limitation period. Where the new fact has no bearing on the cause of action by substantially affecting the likely outcome, the apparent purpose of s 31 would not be served by denying a limitation period defence simply from a change in the plaintiff's circumstances.

[44] I conclude therefore that the plaintiff has failed to prove the matter required by s 31(2)(a). His application must be dismissed. It also follows that the defendant is entitled to judgment and, subject to any further submission, the plaintiff must be ordered to pay the defendant its costs of the proceedings to be assessed.