SUPREME COURT OF QUEENSLAND

CITATION:	*Clarke v Australian Asphalt (Qld) Pty Ltd* [2004] QSC 302
PARTIES:	**CRAIG JOHN CLARKE** **(plaintiff/applicant)** **v** **AUSTRALIAN ASPHALT (QLD) PTY LTD ACN 080 456 524** **(defendant/respondent)**
FILE NO:	S6111 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2004
JUDGE:	Mullins J
ORDER:	**1. Application for extension of the limitation period is adjourned to a date to be fixed.** **2. Application for a declaration that the defendant is estopped from pleading the proceeding is statute barred is 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 – worker sustained back injury in the course of employment as a plant operator and labourer – advised by neurosurgeon that he had a ruptured disc and the options were surgery or conservative treatment – worker underwent conservative treatment and returned to work – eventually unable to continue working – began proceeding for damages for personal injuries against employer after expiration of limitation period – application to extend limitation period under s 31(2) *Limitation of Actions Act* 1974 (*Q*) – whether the nature and extent of injury not within the means of knowledge of a reasonable person knowing what the worker knew and having taken the appropriate advice on those facts – application to extend limitation period adjourned WORKER'S COMPENSATION – ASSUMPTIONS ENTITLED TO BE MADE BY WORKER DEALING WITH WORKCOVER – worker sustained back injury in the course of employment as a plant operator and labourer –

lodged application for compensation – underwent conservative treatment and returned to work but eventually unable to continue working – lodged second application for compensation and gave approximate date of original injury – where WorkCover required to accept or reject second application – where WorkCover adopted approximate date of injury from second application in letter to worker – whether worker entitled to make assumption that WorkCover would correct any error as to date of original injury by reference to original file – whether worker entitled to make assumptions under s 342(3)(a) or (f) *WorkCover Queensland Act* 1996 (*Q*)

PROCEDURE – worker began proceeding for damages for personal injuries against employer after expiration of limitation period – no defence as yet filed – whether worker entitled to seek declaration that WorkCover estopped from relying on limitation period by its conduct in failing to correct the worker's error as to the date of original injury in application for compensation – not appropriate to determine whether to grant declaration before pleadings are closed and when factual basis upon which declaration is sought is in dispute

Limitation of Actions Act 1974
UCPR, r 483
WorkCover Queensland Act 1996

Byers v Capricorn Coal Management Pty Ltd [1990] 2 QdR 306
Pizer v Ansett Australia Limited [1998] QCA 298 (29 September 1998)

COUNSEL: GJ Cross for the plaintiff/applicant
MT O'Sullivan for the defendant/respondent

SOLICITORS: Shine Roche McGowan for the plaintiff/applicant
McInnes Wilson for the defendant/respondent

[1] **MULLINS J:** By claim and statement of claim filed on 3 July 2002 Mr Craig John Clarke ("the plaintiff") commenced this proceeding against Australian Asphalt (Qld) Pty Ltd ("the defendant") claiming damages in the sum of $616,939.78 for personal injuries and consequential loss arising as a result of the negligence, and/or breach of contract, and/or breach of statutory duty by the defendant, its servants or agents. The plaintiff alleges that he was injured in the course of his employment by the defendant on or about 18 June 1999. By application filed in this proceeding on 17 December 2003 the plaintiff applied for an extension of the period of limitation for his claim, so that it would expire at the end of 1 year after 3 July 2001 or, alternatively, a declaration in reliance on s 342 of the *WorkCover Queensland Act* 1996 ("*WQA*") or the doctrine of estoppel by conduct that the defendant, through its insurer WorkCover Queensland ("WorkCover") is estopped from pleading that the proceeding is statute barred by

reason of the *Limitation of Actions Act* 1974 ("the Act"). No defence has yet been filed on behalf of the defendant.

Facts

[2] The plaintiff was born in April 1970. He was employed by the defendant as a plant operator and labourer.

[3] On or about 18 June 1999 in the course of his employment by the defendant, the plaintiff was required to lift a compactor plate which weighed in excess of 50kgs over a kerb. The plaintiff claims that as a result of lifting the compactor plate, he suffered an injury to his back.

[4] The plaintiff completed the application for worker's compensation. Although it is shown as being signed by the plaintiff on 15 June 1999, that clearly could not be correct. I infer that it was signed on 15 July 1999. It is signed on behalf of the employer on 16 July 1999 with a statement that there was late lodgment due the employee's lack of response. It was not received by WorkCover until 19 July 1999.

[5] The explanation for how the injury happened that is contained in that application is as follows:

> "As part of my job as roller operator is to incorporate the use of vibrating compaction plates in tight areas where rollers cannot gain access. After using the vibrating plate I was attempting to remove the plate from the immediate area, I was working in with the roller. Whilst trying to lift the vibrating plate up and over the kerb surrounding the driveway, I felt a sharp and quite severe pain shoot across my lower back. Assistance was then given from a fellow workmate to complete the move, with the vibrating plate. I continued to work for the remainder of the day. Upon awaking the following morning I noticed my leg and lower back were extremely sore and stiff, lacking mobility. That was Saturday. By Monday morning the injury was no better and had in fact worsened, so I made a doctors appointment and have not returned to work since."

[6] The plaintiff attended upon his general medical practitioner on 21 and 25 June 1999. He was eventually referred to neurosurgeon Dr Leong Tan who examined him on 30 July 1999. By that stage the back pain had eased, but right leg pain continued to affect the plaintiff and he had noticed weakness affecting his right foot. The clinical findings and history suggested to Dr Tan that the plaintiff had a ruptured disc at the right L5-S1 region. Dr Tan sought approval from WorkCover (which was given) for the plaintiff to have an MRI scan.

[7] In late August 1999 Dr Tan saw the plaintiff after the scan. According to Dr Tan's report to the plaintiff's general medical practitioner, Dr Tan informed the plaintiff that the scan showed a moderately large right L5-S1 disc protrusion causing

significant compression adjacent to the right S1 nerve root and the plaintiff was advised by him that the options were surgery or conservative treatment and given some detailed information on the risks, success, failure, complications and outcome associated with surgery and the "pros and cons of the conservative treatment" and the long term outcome associated with it. Dr Tan also advised the general medical practitioner:

> "I have also explained to him that if he considers surgery it will be Microdiscectomy and actually it should be performed between 6 weeks to about 3 months, otherwise the success will also be reduced and this reflects the damage to the nerve root."

[8] Despite the description in Dr Tan's report to the plaintiff's general medical practitioner of the topics which Dr Tan had discussed with the plaintiff, all that is said about that consultation in the plaintiff's affidavit filed on 10 November 2003 in support of this application is:

> "13. I reattended upon Dr Tan in or around late August 1999 and Dr Tan advised me that an MRI showed I had a disc problem. Dr Tan told me surgery may be an option but he also suggested that it could be treated without surgery. Dr Tan also advised that there was some risk in relation to surgery. At that time I was hopeful surgery would not be required and I could undergo rehabilitation to fix any problems with my back."

[9] The plaintiff decided against surgery at that stage. When giving oral evidence on this application, the plaintiff stated that he did not want to contemplate surgery at that stage, because Dr Tan could only give him "a 70 percent success rate" and had also suggested the option of conservative treatment. The plaintiff did not expand in oral evidence on any prognosis that he was given by Dr Tan, if he were to opt for conservative treatment.

[10] The plaintiff underwent physiotherapy. He also attended the back program at Gregory Terrace Rehabilitation for two weeks from 18 October 1999. He then participated in a gymnasium rehabilitation program and continued with regular walking and swimming.

[11] Whilst attending at Gregory Terrace Rehabilitation, the plaintiff became aware of the limitation period of three years for bringing a claim for personal injuries against the defendant, as a result of a discussion he had with another injured worker who was also attending Gregory Terrace Rehabilitation and who was involved in litigation against his employer.

[12] The plaintiff was reviewed at Gregory Terrace Rehabilitation by an occupational therapist on 29 November 1999. He was still suffering continuous back pain and right leg pain that fluctuated in severity, but was assessed as suitable for a graduated return to work with modified duties which the plaintiff did from mid-December 1999.

[13] By late 1999 or early 2000 the plaintiff was back at work full-time with the defendant performing his usual duties as a plant operator. The plaintiff considered that initially on his return to work he coped well, although the pain had not completely gone. In his oral evidence on this application, the plaintiff confirmed that after 6 months back at work the pain in his lower back started to progress back to a "problem state". In his affidavit, the plaintiff stated that towards the end of 2001, the pain in his right leg increased. The plaintiff stated in oral evidence that from about September 2001 the defendant tried to give the plaintiff tasks that did not hurt his back as much. The pain in the right leg became so severe in the earlier part of 2002, that the plaintiff ceased work on 26 April 2002 and obtained a referral from his general medical practitioner to orthopaedic surgeon Professor Bruce McPhee.

[14] It was put to the plaintiff in cross-examination on the hearing of the application that from about June 2000, when he had returned to work and his back was getting worse, he knew that he had a serious condition that was compromising his ability to continue working as a plant operator. The plaintiff answered:

> "At the time I was seeing conservative treatment people, they were of the opinion that there was – that there was going to be no permanent injury. No doctors had told me there was any permanent injury. The rehabilitation mob had advised me to get back into as much physical work as possible, that there was no further damage it could do. I was of no – no belief that early on that there was a permanent injury at all."

The plaintiff explained that those who were the source of his belief were gym instructors, the occupational health and safety officer and the head physiotherapist at the pain clinic.

[15] Professor McPhee examined the plaintiff on 9 May 2002. At that stage the plaintiff was complaining of constant low back and right leg pain of equal intensity and some numbness in the foot. The plaintiff told Professor McPhee that he resumed normal work duties early in 2000, but pain had increased since that time. Professor McPhee considered that the plaintiff had the signs and symptoms consistent with right sciatica and that his current presentation had been "ongoing since July 1999". The plaintiff had informed Professor McPhee that he related the onset of his symptoms to a significant workplace injury on 21 July 1999. Professor McPhee accepted the information from the plaintiff, and expressed the opinion that as a result of the injury on 21 July 1999, the plaintiff had suffered a herniation of the lumbosacral disc, which caused his ongoing disability arising from low back pain and right sciatica.

[16] On 13 May 2002 the plaintiff attended at the Logan office of WorkCover and lodged an application for worker's compensation dated 13 May 2002 referring to an injury which occurred on "21/7/99 aprox (*sic*)". In that application the plaintiff gave dates consistent with the date of accident he gave of 21 July 1999 for the date on which he first saw a doctor (22 July 1999) and the date he stopped work because of the injury (21 July 1999). WorkCover opened statutory file S99BC066709, as a result of receiving this application. At the same time as

lodging the application, the plaintiff gave to WorkCover a letter in the following terms:

"Dear Sir Ref No 990555743

Whilst working for my employer Aust Asphalts on the 21/7/99 (approx) I was involved in a lifting accident at work, the said accident was due to the need for myself to lift a compaction plate over a kerb on the construction site we were working on.

Unfortunately this led to a ruptured disc in the L5 S1 region. Approx six months on WorkCover was needed at the time for recuperation. After completing several sessions with physios etc, I was eventually admitted to Pauline Rist's Pain Management course doing a intense two week program which was followed up by more back building exercises with a rehab trainer, doing walking, swimming and gym exercises.

After another month of doing this full time, I was deemed fit to return to work, after successfully completing a occupational health and safety officer's evaluation and doctor's clearance.

It has now been approx 28 months since the date and unfortunately I have suffered continuous ongoing pain and suffering (that being extreme back pain, and loss of mobility of the right leg due to the ruptured disc pressing on the nerve responsible for that leg).

During this time I have incurred substantial financial loss, due to the appointments needed with chiro, physio, acupuncture, deep muscle therapy, bio engineers, and doctors for pain killing injections and pharmaceutical costs.

As you can see over two years of conservative treatment have made little or no long term difference to the injury.

I therefore feel surgery is the only option left to me. I have spoken with Professor Bruce McPhee who is of the opinion the case needs to be reopened and up to date MRI scans be done, so comparing with the originals can be performed.

I have now tried unsuccessfully for the past 28 months to remain gainfully employed and now find myself in a position where this is no longer possible, so therefore I am requesting you to reopen the above mentioned case.

Ref No 990555743
Prior Case Manager - Carol Hepplewhite"

The reference number that was put at the top and the foot of this letter was a reference to WorkCover's statutory file 990555743 that was opened in respect of the plaintiff's original application for compensation lodged in July 1999.

[17] Both the letter and application for compensation that was given to WorkCover on 13 May 2002 identified the date of the original injury as approximately 21 July 1999. By the time the plaintiff lodged these documents (and saw Professor McPhee), he could not remember the exact date of his original injury. When he gave evidence on the hearing of this application, the plaintiff explained that he had found a group certificate which showed 21 July 1999 as the earliest date on which he had received worker's compensation, so that was the date he thought approximated the date of the injury.

[18] Ms Louise Martin who was employed by WorkCover at its Logan office and was the claims assessor who opened statutory file S99BC066709 took a statement from the plaintiff on 17 May 2002 to determine whether the application should be treated as the reopening of the original claim for compensation or a new claim. The statement taken by Ms Martin was as follows:

> "I am currently employed with Aust Asphalt as a plant operator/labourer and have been there for around 4-5 years. I have been having ongoing pain in my back since the original injury in 99. When I returned back to work in December 99 the first six months were pretty good, I continued having and doing rehabilitation. After that 6 month period my lower back became more severe, the pain being more constant. The main trouble I'm having is the pain down my right leg, my leg is weak and if I walk for long distances it becomes worse. Since the original injury I have been having physio, chiropractic and acupuncture treatment which I paid for myself to try and relieve the pain, without success. I have seen Dr McPhee on the 3/5/02 only because I've heard good comments by other people of him doing surgery. I did see Dr Tan originally for my back, he suggested surgery at that stage but because of the success rate and my personal circumstances at the time I chose to try other medical treatment. I have continued working, my employer has been great with trying to give me work that doesn't hurt my back too much. I have continued to seek medical treatment since the original injury, the reason why I had obtain a WorkCover certificate on the 26/4/02 was because my back was not getting any better and I wanted a referral to see Dr McPhee. I have been seeing Dr Rafiei ongoing since the original injury. I have had no new event to cause damage to my back, I have continuously suffered back pain since the original injury, which became worse six months after I returned to work. I wish to apply to re-open my claim for medical expenses and loss of wages."

[19] A report from the defendant was received by WorkCover's Logan office on 21 May 2002 in respect of the application for compensation by the plaintiff dated 13 May 2002. That report also showed the date of the injury as 21 July 1999.

[20] Ms Martin decided to refer the matter to a medical officer, before making the decision as to whether the application for compensation dated 13 May 2002 should be treated as a reopening of the prior claim that she understood from the plaintiff arose from an incident occurring on 21 July 1999 or a new claim. That review was

done by Dr Carlisle. The Medical Officer Referral Form that was completed by Ms Martin is on WorkCover's file S99BC066709. Ms Martin posed questions for the medical officer that reflect the information contained in the application for compensation lodged on 13 May 2002, the plaintiff's accompanying statement and the further statement taken by Ms Martin from the plaintiff on 17 May 2002 (with the additional information that Ms Martin had ascertained from Professor McPhee's rooms about Professor McPhee being overseas until 11 June 2002). Dr Carlisle expressed his opinion in writing on the Medical Officer Referral Form on 22 May 2002. Dr Carlisle diagnosed L5-S1 disc protrusion, originally on 21 July 1999, but that because the plaintiff returned to work full-time, recommended that "Claim is medically acceptable as an aggravation of 21/7/99 (unless there is other medical evidence to support re-opening)". The file notes that Ms Martin made in respect of the recommendation of Dr Carlisle noted that "both files" were reviewed by Dr Carlisle. It is not apparent from the content of the Medical Officer Referral Form completed by Dr Carlisle, that both files were reviewed. If they were, Dr Carlisle did not detect the error as to the date of injury. That is not surprising, as Dr Carlisle's opinion was sought on the issue of whether the application for compensation dated 13 May 2002 should be treated as an aggravation of the earlier injury or as a claim for further compensation in respect of the earlier file, ie a re-opening of that claim.

[21] Ms Martin sent the letter from WorkCover dated 23 May 2002 to the plaintiff. The subject matter of that letter is shown as "Your WorkCover Claim S99BC066709". The opening paragraphs state:

> "I am writing to let you know that WorkCover Queensland has accepted your application for compensation for L5/S1 disc protrusion sustained on 21 July 1999 as a work-related aggravation of a pre-existing condition. WorkCover Queensland has accepted your claim for workers' compensation benefits from 26/4/02.
>
> This means that you had an existing condition that was aggravated by your employment and you are entitled to compensation benefits for this aggravation only. WorkCover does not cover treatment to the pre-existing condition."

[22] As Ms Martin's role as a case assessor was to determine whether the application for compensation dated 13 May 2002 was accepted or rejected, her role was completed upon dispatching the letter dated 23 May 2002 to the plaintiff. According to Ms Martin's affidavit, she did not refer to WorkCover's file relating to the original application for compensation made by the plaintiff in order to carry out her role in respect of the application dated 13 May 2002.

[23] Ms Emma Finger, another employee of WorkCover at the Logan office, assumed management as a case manager of the file S99BC066709 upon the plaintiff having been sent the WorkCover letter dated 23 May 2002.

[24] The plaintiff stated in his affidavit filed by leave on 28 May 2004 that when he received the WorkCover letter dated 23 May 2002, he relied upon the date of the accident being recorded as 21 July 1999.

[25] The plaintiff first contacted his solicitors by telephone on 27 June 2002. He attended at their office on 1 July 2002 and provided instructions to bring a claim on his behalf. During that appointment the plaintiff provided to his solicitors the letter from WorkCover dated 23 May 2002. The plaintiff's solicitors sent a letter to WorkCover's Logan office dated 1 July 2002 by facsimile requesting a conditional damages certificate to enable a common law action to be commenced by the plaintiff. Upon Ms Finger receiving that letter, Ms Finger looked at the original statutory file and discovered that the only prior injury of the kind claimed by the plaintiff was that occurring on 18 June 1999. The conditional damages certificate that was issued to the plaintiff by WorkCover dated 2 July 2002 for herniation of the lumbosacral disc shows the date of injury as 18 June 1999.

[26] The plaintiff was examined by orthopaedic surgeon Dr James Curtis on 25 September 2002 for the purpose of a medico-legal report. Dr Curtis was provided with the MRI of the plaintiff's lumber spine dated 19 August 1999 and noted that apart from the finding of the L5-S1 disc herniation, there was also a small L4-L5 disc herniation and early degenerative joint change at the L4-L5 level. Dr Curtis considered that the plaintiff suffered an acute rupture of the lumbosacral disc in the incident of 18 June 1999 and that he was also suffering from degenerative disc process at that level and the L4-L5 level.

Issues

[27] As this proceeding for damages for personal injuries was commenced more than three years after the incident which gave rise to the injury, the proceeding is statute barred, if the defendant is able to rely on that defence and elects to do so. WorkCover which has the carriage of the defence of the proceeding on behalf of the defendant has indicated that it will rely on the limitation defence.

[28] The issues that were raised by and argued on this application were:

(a) whether the plaintiff is entitled to an extension of the limitation period, so that it expires one year after 3 July 2001;

(b) whether pursuant to s 342 of the *WQA* the plaintiff is entitled to rely on WorkCover's adoption in the letter dated 23 May 2002 of the date of the injury as 21 July 1999;

(c) whether the defendant is otherwise estopped from relying on the limitation defence, as a result of WorkCover's conduct in not correcting the plaintiff's error in nominating the original date of injury as approximately 21 July 1999 in the application for compensation dated 13 May 2002.

Extension of the limitation period

[29] The defendant concedes that the plaintiff has a right of action against the defendant, for the purpose of the application to extend the limitation period.

[30] It is common ground that the plaintiff bears the onus of showing that a material fact of a decisive character was not within his means of knowledge or within the means of knowledge of a reasonable person knowing what the plaintiff knew until after 3 July 2001. It is relevant to refer to what Thomas JA stated with respect to the requirements to discharge such an onus in paragraphs 15 and 16 of his reasons for judgment in *Pizer v Ansett Australia Limited* [1998] QCA 298 (29 September 1998) which was as follows (without footnotes):

> "15 The plaintiff had the onus of showing that a material fact of a decisive character relating to the right of action was not within her means of knowledge until some time after 24 April 1995. The material fact has been expressed in different ways and may be taken as the likelihood that she would be unable to cope with her employment as a result of the condition, or that the condition was one that was likely to produce serious economic loss. It may be accepted that she did not know that fact before the specified date. However she must also show that it was not within the means of knowledge of a reasonable person knowing what she knew. That issue is to be determined on the footing that such a person had before that time taken all reasonable steps to ascertain it. It makes little practical difference whether one approaches 'the reasonable steps' issue from the viewpoint of the plaintiff endowed with the qualities of a reasonable person or of a reasonable person endowed with the knowledge and experience of the plaintiff. Some of the cases deal with the issue in the firstmentioned way, although strictly speaking the secondmentioned way would seem to accord more literally with the statute.
>
> 16 The following proposition poses the test that is critical to the determination of this case. If a reasonable woman, knowing what the plaintiff must have known, and having taken appropriate advice on those facts would have regarded them as showing that a right of action would have reasonable prospects of success resulting in an award of damages sufficient to justify the bringing of the action and that she ought in her own interest to bring it, then the plaintiff fails to show 'that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant' prior to the necessary date."

[31] The material fact which the plaintiff relies on as not being within his knowledge until after 3 July 2001 was the nature and extent of the personal injury he had suffered in the sense that he was unaware of the economic consequences of the injury arising from his inability to work as a result of the injury.

[32] The continuing disability which resulted in the plaintiff ceasing work on 26 April 2002 was substantially caused by the ruptured lumbosacral disc that occurred in the incident on 18 June 1999. What is particularly relevant in this matter is that the diagnosis of that injury was made by Dr Tan in August 1999. The plaintiff's position can be distinguished from an applicant for an extension of the limitation period where the applicant suffers symptoms after an incident that subside, but at a much later time the true facts as to the underlying injury emerge. An example of this is the applicant in *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 QdR 306 who was told he had a muscular strain that would probably clear up and he therefore returned to his job with some periods off work, but over three years after the relevant incident he was told for the first time he would have to cease his highly paid employment as an underground miner and seek a lighter job.

[33] Notwithstanding the diagnosis of a lumbosacral disc protrusion for which surgery was raised as a possible treatment by Dr Tan, the plaintiff applied himself to the conservative treatment measures that were also offered by Dr Tan as an option and was able to return to work. The plaintiff was obviously encouraged by those who were assisting him in the rehabilitation process and showed determination in resuming his work and continuing with it, even though the pain commenced to become a problem again in June 2000, until he could no longer work by April 2002.

[34] It is therefore necessary to consider whether the plaintiff can discharge the onus in the subjective and objective sense that is required, as a result of the incorporation into s 31(2) of the Act of the interpretation provisions relating to when material facts are of a decisive character and are within the means of knowledge of a person at a particular time, that are set out in paragraphs (b) and (c) of s 30(1) of the Act.

[35] Subjectively, there is no doubt on the basis of the plaintiff's evidence that whatever Dr Tan told him about the nature of his injury and the outcomes associated with either surgery or conservative treatment did not inhibit the plaintiff from fully applying himself to rehabilitation and being receptive to what those involved in that process told him about being able to return to work.

[36] For the purpose of the application the plaintiff's solicitor, Mr Robert Cochrane, exhibited to his affidavit copies of all the medical reports obtained from the WorkCover files. This included Dr Tan's report to the plaintiff's general medical practitioner dated 25 August 1999 which suggests that Dr Tan gave the plaintiff advice on matters that are most relevant to determining, objectively, whether the fact that there would be economic consequences arising from the injury, because of the effect of the injury on his ability to work, was not within the means of knowledge of a reasonable person knowing what he knew.

[37] Dr Tan's report dated 25 August 1999 is unequivocal in conveying that Dr Tan had explained the MRI scan finding to the plaintiff. That is the finding which has continued to be the operative cause of the plaintiff's problems with his back and right leg. There was no attempt whatsoever by the plaintiff in his affidavit to set out in any detail what Dr Tan had actually told him in late August 1999. The

plaintiff has not endeavoured to deal with the content of the topics that Dr Tan has indicated in his report he discussed with the plaintiff. The plaintiff does not seek to contradict that he was advised that he had a moderately large right L5-S1 disc protrusion causing significant compression adjacent to the right S1 nerve root. I do not accept that the mere assertion in oral evidence by the plaintiff (without specifying the content of Dr Tan's advice) that no doctor ever told him there was any permanent injury can be treated as disposing of the issue that is raised by Dr Tan's report dated 25 August 1999 that the plaintiff was advised at that early stage to the effect that he had sustained a significant injury.

[38] During the hearing of this application, the questions raised by Dr Tan's report dated 25 August 1999 as to what facts the plaintiff actually knew were not apparent to me, so that I did not seek the assistance of Counsel on this issue at that time.

[39] The effect of the material that is before me is that I cannot decide the objective test of what a reasonable person knowing the facts that were known to the plaintiff and having taken appropriate advice on those facts would regard those facts as showing (other than by concluding that the plaintiff has failed to discharge the onus which he bears), because the plaintiff's material is deficient in showing what facts were known to the plaintiff. How the plaintiff's increase in pain from June 2000 onwards would be viewed by a reasonable person would also be affected by the terms in which the diagnosis and prognoses had been given by Dr Tan in late August 1999.

[40] Because of the critical nature of the application for an extension of the limitation period, I consider that the plaintiff should be given an opportunity to place before the Court the evidence as to what he was actually advised by Dr Tan in late August 1999. I therefore propose to adjourn the application to a date to be fixed.

Procedure

[41] Although no defence has been filed on behalf of the defendant, the application brought by the plaintiff for a declaration that the defendant is estopped from relying on the limitation defence assumes that defence would be pleaded by the defendant. No point was taken by the defendant during the hearing of this application about the appropriateness of the plaintiff seeking the declaration against the defendant in relation to the estoppel. It was implicit in the concurrence of Counsel to the course undertaken by the plaintiff that both parties considered that the two issues which were argued in relation to estoppel were suited for determination as a separate question.

[42] I have no difficulty with this course to the extent that the argument based on s 342 of the *WQA* raises a question of law in respect of which there is no dispute as to the facts. I do have a difficulty in dealing with the argument based on estoppel by conduct, when the submissions made by Counsel indicate that there are disputes between the parties as to the effect of the material that is before me.

Assumptions in respect of date of injury

[43] Relevantly, the *WQA* provides for a scheme for compensation for workers injured in their employment, regulates the access of workers to common law damages for such injuries and provides for the employers' obligation against liability for compensation and damages to be covered under a policy issued by WorkCover.

[44] When the plaintiff made his original application for compensation after being injured on 18 June 1999, it was a claim for compensation only and treated as such by WorkCover. The plaintiff did not seek to make a claim for common law damages at that stage. All his communications with WorkCover were directed to his receiving weekly benefits, having his medical expenses paid and having his rehabilitation program approved by WorkCover.

[45] It was clear from the plaintiff's letter lodged with his application for compensation dated 13 May 2002 that the plaintiff was again seeking payment of weekly compensation, as a result of ceasing work on 26 April 2002 and approval for an up-to-date MRI and expressly requested a re-opening of statutory file 990555743.

[46] The obligation of WorkCover under s 161 of the *WQA* was to make a decision whether to allow or reject the application for compensation dated 13 May 2002. Because it was apparent from the accompanying letter that there had been an earlier application which had been accepted by WorkCover in respect of the same injury, it was possible for WorkCover to treat the application lodged on 13 May 2002 as a re-opening of the earlier application or as a fresh application based on the aggravation of an earlier injury.

[47] In the circumstances of the plaintiff's original injury, the date on which the plaintiff had originally sustained the injury was an objectively ascertainable fact, even if by 13 May 2002 the plaintiff had forgotten the date and did not have immediate access to documents which would have reflected it. It can be inferred from the reference to the date of injury as being "approximately" 21 July 1999 in his letter lodged with WorkCover on 13 May 2002 that the plaintiff was uncertain about the exact date of the incident. The plaintiff did not expressly ask WorkCover to confirm that he had correctly identified the date of the incident.

[48] Although there is no doubt that WorkCover had the information available to it which would have enabled WorkCover to correct the error made by the plaintiff in nominating the date of injury as 21 July 1999, WorkCover did not necessarily need to verify the exact date of the original injury for the purpose of Ms Martin performing her role of deciding whether to allow the application for compensation dated 13 May 2002 as a fresh application or as a re-opening of the earlier application.

[49] It was submitted by Mr Cross of Counsel on behalf of the plaintiff that it was "indisputable" that WorkCover had to identify the correct date of the earlier injury.

[50] The purpose of the letter dated 23 May 2002 from WorkCover to the plaintiff was to inform the plaintiff of the decision made by WorkCover on the application dated 13 May 2002. The application had been made in respect of an inability to work from 26 April 2002, as a result of a ruptured disc in the L5-S1 region sustained on approximately 21 July 1999 and the letter of 23 May 2002 responded to that application by advising that the "application for compensation for L5/S1 disc protrusion sustained on 21 July 1999 as a work-related aggravation of a pre-existing condition" was accepted by WorkCover for compensation benefits from 26 April 2002.

[51] It is usual for an employee who sustains a significant injury in the course of employment who seeks compensation benefits to also pursue a common law claim for damages, if the injury were caused as a result of the negligence of the employer. There was nothing in the plaintiff's application dated 13 May 2002 and accompanying letter, however, which suggested that the plaintiff was seeking the assistance of WorkCover in helping him to identify the exact date of his injury for the purpose of a common law claim for damages.

[52] Section 342(1) of the *WQA* specifies that if a person has dealings with WorkCover, the person is entitled to make the assumptions mentioned in s 342(3) and, in a proceeding about the dealings, any assertion by WorkCover that the matters that the person is entitled to assume were incorrect must be disregarded.

[53] Of the matters listed in s 342(3) of the *WQA* as assumptions that a person is entitled to make, the only ones that could have any relevance to this matter are those set out in s 342(3)(a) and (f):

> "(a) that, at all relevant times, this Act has been complied with;
>
> …
>
> (f) that the directors, chief executive officer, employees and agents of WorkCover have properly performed their duties to WorkCover."

[54] I cannot find any basis for concluding that in performing its obligation to decide whether or not to accept the application for compensation dated 13 May 2002, there was any obligation whatsoever under the *WQA* on WorkCover to identify the correct date of the earlier injury. In the absence of an obligation for WorkCover to do so under the *WQA*, there is no basis for the plaintiff making the assumption that WorkCover in repeating the date of the injury which had been given to WorkCover by the plaintiff was confirming that was the correct date of the injury. Similarly, I cannot see any basis for concluding that Ms Martin was required in order to fulfil her duties as an employee owed to WorkCover to ascertain the correct date of the plaintiff's earlier injury, before deciding whether to accept or reject the application for compensation dated 13 May 2002.

[55] The plaintiff cannot succeed in establishing that a declaration should be made in his favour based on s 342(3) of the *WQA*.

Estoppel by conduct

[56] Only the plaintiff was required for cross examination on the hearing of the application. Although the defendant relied on affidavits from each of Ms Martin and Ms Finger, neither was required for cross examination. The written submissions made on behalf of the plaintiff make allegations that respective statements in each of Ms Martin's and Ms Finger's affidavits should not be accepted about when they exercised access to the original statutory file. It is not appropriate to determine the alternative relief claimed by the plaintiff based on estoppel by conduct, when the factual basis against which such declaration is sought is in dispute.

[57] In any case, it is inappropriate to determine the issue of estoppel by conduct, when there has not been a pleading of the precise facts relied on by the plaintiff to found the claim of estoppel by conduct. Leave is required for a separate question to be determined in a proceeding pursuant to r 483 of the *UCPR*. It is not appropriate to give that leave at this stage of the proceeding.

[58] Another matter which may need to be explored on this issue of estoppel by conduct is the effect of s 308 of the *WQA*. Neither party addressed any submissions on this provision. In view of the terms of s 308(1) and that the estoppel that is sought to be relied upon by the plaintiff would result in the proceeding for damages for personal injury being brought after the expiry of the limitation period, some consideration should at least be given to whether it does have any effect.

Orders

[59] It follows that the application for a declaration based on estoppel should be dismissed, insofar as it relates to s 342 of *WQA*, because the estoppel cannot arise, as a matter of law, and, insofar as it relates to estoppel by conduct, because it is not appropriate to dispose of that issue at this stage of the proceeding.

[60] The formal orders that I make are:

1. Application for extension of the limitation period is adjourned to a date to be fixed.
2. Application for a declaration that the defendant is estopped from pleading the proceeding is statute barred is dismissed.

[61] Subject to any submissions that the parties wish to make on costs, I propose that costs of the application for extension of the limitation period be reserved.