SUPREME COURT OF QUEENSLAND

CITATION:	*Leigh v State of Queensland* [2010] QSC 227
PARTIES:	**LOUISE JANE LEIGH** **(plaintiff)** **v** **STATE OF QUEENSLAND** **(defendant)**
FILE NO:	BS6814 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application to extend the limitation period
DELIVERED ON:	29 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2010
JUDGE:	Mullins J
ORDER:	**The period of limitation for bringing this proceeding is extended to and including 10 March 2008.**
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 suffered severe psychiatric illness whilst employed by the defendant as a child protection officer which she claims was due to the defendant's negligence or breach of duty – where plaintiff's application for workers' compensation was rejected – where review to Q-Comp was unsuccessful – where plaintiff appealed to Industrial Magistrate – where after a strongly contested hearing the decision of the Industrial Magistrate was not given for over 12 months – where limitation period for personal injuries action commenced to expire whilst the decision was reserved – where notice of claim for damages then given under s 275 *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – where defendant claims plaintiff's action is statute-barred by s 11 *Limitation of Actions Act* 1974 (Qld) – where plaintiff applies for an extension of limitation period under s 31(2) *Limitation of Actions Act* 1974 (Qld) to a date which is one year prior to the giving of the notice of claim for damages – whether material fact of decisive nature was not within the means of knowledge of the plaintiff until after that relevant date – whether limitation period should be extended

Limitation of Actions Act 1974, s 11, s 30, s 31
Workers' Compensation and Rehabilitation Act 2003, s 32, s 237, s 256, s 275, s 302

Charlton v WorkCover Queensland [2007] 2 Qd R 421, considered
Hegarty v Queensland Ambulance Service [2007] QCA 366, considered
Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (in liq) [2009] QCA 352, considered
Nooteboom v Ernest Henry Mining Pty Ltd [2010] QSC 106, distinguished
State of Queensland v Stephenson (2006) 226 CLR 197, followed

COUNSEL: DB Fraser QC and J Harper for the plaintiff
MT O'Sullivan for the defendant

SOLICITORS: Maurice Blackburn for the plaintiff
GR Cooper Crown Solicitor for the defendant

[1] The plaintiff commenced this proceeding on 26 June 2009 claiming damages against the defendant as her employer for the severe psychiatric illness that she developed by early 2004 and which she claimed was caused, or contributed to, by the distressing nature of her work as a child protection officer with the Department of Children's Services (the Department) at the Pine Rivers Child Safety Centre. By its defence filed on 24 July 2009 the defendant alleges the proceeding is statute-barred pursuant to s 11 of the *Limitation of Actions Act* 1974 (the Act). The plaintiff therefore filed an application on 25 November 2009 that seeks an extension of time to 10 March 2008 for commencement of the proceeding pursuant to s 31(2) of the Act.

Summary of facts relied on by the plaintiff to claim damages

[2] The plaintiff graduated with a degree in social work in early 2002. The plaintiff was employed by the defendant between April 2002 and November 2004. Her work as a child protection officer required her to assist and deal with children and parents of families who had been separated as a result of protective action taken by the Department. The plaintiff particularises in her statement of claim a number of cases and events during her employment that she alleges were very distressing and stressful for her. The first case in this category was taken over by the plaintiff in May 2002. It concerned an 11 year old boy whose mother died of cancer and the boy had significant behavioural problems which deteriorated significantly while in the care of the Department and the plaintiff became too emotionally involved in his case. The case that caused the most distress for the plaintiff involved a paranoid schizophrenic man for whom the plaintiff was required to facilitate contact with his two young children. In December 2003 the man killed his partner and committed suicide which was ascertained after a youth worker attended with the children for a contact visit and there was no response from inside the house. The plaintiff had one session of counselling under the Employment Assistance Scheme. The plaintiff became upset and distressed and began to have bizarre thoughts and dreams about dead children and experienced paranoia about clients being dead when she could not

find them. The plaintiff took a temporary secondment to the Freedom of Information section of the Department in August 2004 to have a break from her duties as a child protection officer, but found it distressful to read the files that dealt with paedophiles and their victims. In October 2004 the plaintiff returned to her work as a child protection officer. There was a traumatic incident where a boy nearly stabbed her with a screwdriver and on another occasion a mother who was psychotic attended the office for the purpose of visiting her daughter but, in the plaintiff's presence, assaulted her daughter and the plaintiff found herself unable to respond.

[3] The plaintiff claims that from soon after she commenced work as a child protection officer she presented in an emotional state and complained that the work was very stressful to her supervisor, Mr Singh, whom she claims took no steps to address her distress. The plaintiff also claims that the manager of the Pine Rivers Child Safety Centre, Ms Edwards, formed the opinion she was too emotionally involved with her work, but did not take any steps to address such concerns.

[4] The plaintiff claims that her psychiatric injury was caused, or contributed to, by the distressing nature of her work and the particularised incidents and events.

[5] The plaintiff sets out particulars of the allegation that the defendant breached its duty of care to take reasonable care for the plaintiff's safety in paragraph 18 of the statement of claim:

> "The Defendant breached its duty of care to take reasonable care for the Plaintiff's safety in that it:
> (a) did not have in place during the Plaintiff's employment a system equivalent to the Priority 1 system introduced by the Defendant for the Queensland Ambulance Service in the early 1990's under which there is, inter alia, a peer support programme, education for staff on avoiding mental health problems, a unit to provide counselling and co-ordinate assistive services, and a policy of zero tolerance of aggression in the workplace;
> (b) did not introduce or fully introduce a system of the type described in (a) until after the Plaintiff ceased her employment;
> (c) by its servants, Mr Singh and Ms Edwards, failing to take steps to assist the Plaintiff, such as organising medical and psychological assistance, providing increased assistance with her work, reduction of her workload, advice as to the need for emotional detachment and how to achieve such detachment and, if necessary, redeployment to a less stressful position;
> (d) failing to provide any or any adequate training to Mr Singh and Ms Edwards as to how to deal with staff, who were experiencing mental distress;
> (e) failing to have in place a safe system of work."

[6] The plaintiff also makes an alternative claim that her psychiatric illness was caused, or contributed to, by the defendant's breach of s 28(1) of the *Workplace Health and Safety Act* 1995 by failing to ensure the workplace health and safety at work of the plaintiff.

[7] The plaintiff claims that she has been unable to return to employment, since she left her employment with the defendant on 22 November 2004. The plaintiff claims that

if the defendant had not breached its duty of care or statutory duty, her psychiatric illness would have been less severe and her prognosis would have been improved.

Steps taken by the plaintiff to pursue her claim for damages

[8] The plaintiff lodged an application for workers' compensation on 14 December 2004, claiming a psychological injury caused by stress in the workplace over a period of time. That application was rejected by letter from WorkCover Queensland (WorkCover) dated 1 March 2005. WorkCover accepted that the plaintiff was a worker under the *Workers' Compensation and Rehabilitation Act* 2003 (*WCRA*) and developed a psychological condition in respect of which the plaintiff's employment was a significant contributing factor. WorkCover considered, however, that the employment-related events which contributed to the plaintiff's condition were "reasonable management action taken in a reasonable way" within the meaning of s 32(5)(a) of the *WCRA* which meant that the plaintiff's condition fell within the exclusion from the definition of "injury" in s 32.

[9] The plaintiff applied unsuccessfully to Q-Comp for review of WorkCover's decision. The plaintiff initially contacted her current solicitors on 11 August 2005 concerning an appeal to the Industrial Magistrate and for advice on superannuation issues. The plaintiff met with one of the principals of her instructing solicitors and an employed solicitor, Ms Payne, on 28 November 2005. Her solicitors recommended that she appeal the rejection of her workers' compensation claim to the Industrial Magistrate and she was advised that her solicitors would consider whether she had prospects of making a common law claim for damages against the defendant after the decision of the Industrial Magistrate was given. The plaintiff took the advice and then appealed to the Industrial Magistrate. The hearing before the Industrial Magistrate took place on 22, 25 and 26 May 2006.

[10] The issue before the Industrial Magistrate was whether the exclusion from the definition of "injury" found in s 32(5) of the *WCRA* was applicable to the plaintiff's psychiatric disorder. The plaintiff has put into evidence in support of her application for an extension of the limitation period the decision of the Industrial Magistrate and the complete transcript of the hearing before the Industrial Magistrate (which comprised 229 pages). The plaintiff gave evidence for most of the first day of the hearing and for part of the morning of the second day of the hearing. The plaintiff's cross-examination was the lengthy part of her evidence. The plaintiff called psychologist Ms Yoxall, her treating psychiatrist Dr Isailovic and a co-worker at the Department, Ms Michael. Q-Comp called Mr Singh, Ms Edwards and two other child safety officers, Ms Smith and Ms Deckers and psychiatrist, Dr Harty. Subsequent to the hearing, counsel for each of the plaintiff and Q-Comp delivered extensive written submissions to the Industrial Magistrate. The Industrial Magistrate was called upon to decide disputed issues of medical opinion.

[11] There was a significant delay in the giving of the decision of the Industrial Magistrate which did not occur until 15 June 2007. The appeal was allowed which resulted in the acceptance of the plaintiff's workers' compensation claim. The Industrial Magistrate concluded that none of the management action that was relied upon by Q-Comp for the purpose of s 32(5) of the *WCRA* had any impact on the contraction of the plaintiff's post traumatic stress disorder (PTSD) which was an

injury in itself and the major depressive disorder was secondary to the PTSD and caused by the PTSD being untreated.

[12] Ms Payne had a discussion on 26 June 2007 with counsel who had appeared for the plaintiff before the Industrial Magistrate. He advised that he "thought it was definitely worth having a crack at common law," because of the potential quantum of the plaintiff's claim for loss of earning capacity.

[13] At that time Ms Payne had the mistaken view that the limitation period for the plaintiff's common law claim would not expire until one year after the giving of the decision by the Industrial Magistrate. Ms Payne was aware of the decision in *Charlton v WorkCover Queensland* [2007] 2 Qd R 421 (*Charlton*), but did not appreciate that s 237(1)(c) of the *WCRA* allows a worker who has lodged an application for compensation for an injury that is or has been the subject of a review or appeal under chapter 13 of the *WCRA* where the application has not been decided in or following the review or appeal to seek damages for that injury, which was not the position under the legislation that applied in *Charlton*.

[14] Ms Payne met with the plaintiff and her husband and brother on 28 August 2007. Ms Payne advised the plaintiff that she was not confident that the plaintiff had a strong claim in relation to liability, but recommended making a common law damages claim due to the potential quantum of her claim. On 4 September 2007 Ms Payne sent a letter to the plaintiff in which the advice on prospects was couched in different terms as Ms Payne advised that she thought that the plaintiff had "reasonable prospects of success" in her claim for damages against the defendant and that her firm was prepared to conduct the matter for the plaintiff on a "no win no charge" basis. At that stage Ms Payne thought that the further evidence that was required to support the plaintiff's case on liability was medical evidence to the effect that if medical treatment had been provided to the plaintiff, whilst she was suffering the distress, her condition may not have become as severe or as permanent as it did. Ms Payne did not consider whether there was a need for other expert evidence relevant to proving the defendant's negligence.

[15] WorkCover issued a notice of assessment to the plaintiff on 5 February 2008. On 18 February 2008 Ms Payne met again with the plaintiff and her husband and advised that she remained unconvinced as to the prospects of success of a common law claim for damages, but believed that a claim ought to be commenced to protect her interests. Ms Payne received instructions on that day from the plaintiff to commence a claim.

[16] On 10 March 2008 WorkCover received the plaintiff's notice of claim for damages dated 5 March 2008. The particulars of negligence set out in the notice of claim were:

> "(a) Failing to provide the Claimant with any or any adequate advice, counselling or training as to how to deal with the pressures of her work as a child safety officer, in circumstances where the Claimant was inexperienced and when the Respondent knew or ought to have known that child safety officers were vulnerable to psychiatric injury as a result of their work.

(b) Failing to have in place systems to assess the ability of child protection of (*sic*) workers to cope, emotionally and psychologically, with their work.

(c) Failing to provide the Claimant with any or any adequate counselling or psychological assistance in dealing with her work in circumstances where the Defendant knew or ought to have known that the Claimant was not coping with the pressures of her work.

(d) Providing an excessive workload in circumstances where the Respondent knew or ought to have known that child safety officers were vulnerable to psychiatric injury as a result of their work.

(e) Failing to have in place a system similar to the "Priority One" system developed by the Queensland Ambulance Service.

(f) In breach of s 28(1) of the WH&S Act 1995, failing to ensure the workplace health and safety of the Claimant.

(g) Failing to take reasonable care for the Claimant's safety."

[17] On 13 March 2008 WorkCover gave notice of intention to rely on the expiry of the limitation period on the basis that the plaintiff's claim became statute-barred by November 2007.

[18] In July 2008 the plaintiff and the defendant agreed to hold a compulsory conference on 22 September 2008. On 25 August 2008 counsel briefed for the plaintiff advised Ms Payne that it was necessary to obtain an expert's report concerning liability. That advice was confirmed on 4 September 2008 when counsel advised that evidence was required to distinguish the decision of *Hegarty v Queensland Ambulance Service* [2007] QCA 366 (*Hegarty*) by showing that the system of staff support was inadequate and that early psychological or psychiatric intervention would probably have made a difference to the plaintiff's psychiatric condition. The parties then agreed to defer the holding of a compulsory conference.

[19] After unsuccessfully retaining one expert, Ms Payne then retained Professor Lonne on 18 November 2008 to provide a report which was done on 14 January 2009. On the basis of this report Ms Payne formed the opinion that the plaintiff had reasonable prospects of success in showing that the defendant was negligent.

[20] A mediation of the plaintiff's claim was held on 7 May 2009, but the matter failed to settle.

Medical assessments and treatment

[21] By mid 2004 the plaintiff was experiencing severe chest pains which her general medical practitioner, Dr Anderson, diagnosed as stress. She sought treatment again from Dr Anderson commencing on 23 November 2004 and was prescribed antidepressant medication.

[22] WorkCover had the plaintiff assessed by psychologist, Ms Yoxall, on 10 January 2005. Ms Yoxall provided a report dated 14 January 2005. Ms Yoxall was of the opinion that the plaintiff's clinical symptoms were consistent with the diagnosis of major depressive disorder – single episode and PTSD and that the plaintiff had developed PTSD, but as that condition continued and worsened without diagnosis

and treatment, the major depression then developed with the PTSD. Ms Yoxall expressed the view that the plaintiff's employment with the Department was the significant contributing factor to her condition.

[23] WorkCover also referred the plaintiff to psychiatrist, Dr Angela Harty, who provided WorkCover with a report on 9 February 2005. Dr Harty described the plaintiff as presenting with a major depressive disorder in partial remission and with co-morbid features of PTSD, as a result of severe work-related stress.

[24] Dr Anderson referred the plaintiff to psychiatrist, Dr Isailovic, for treatment on 20 April 2005. Dr Isailovic prescribed a stronger antidepressant and the plaintiff commenced seeing Dr Isailovic on an almost weekly basis. At that stage Dr Isailovic thought that the plaintiff's condition was temporary and that, although she would be unable to resume work as a child protection officer, she should be able to resume work within two to three months in other employment. By June 2005 there had been a deterioration in the plaintiff's condition. (This deterioration was also referred to in the report of psychiatrist, Dr Roderick Apel, in the report dated 29 June 2005 for Q-Super.)

[25] The plaintiff was an inpatient of the New Farm Clinic between 18 July and 19 August 2005 and 14 September and 3 December 2005. Dr Isailovic in her report dated 21 December 2005 referred to the dramatic change in the plaintiff's condition and that she had received prolonged inpatient treatment with limited success. Dr Isailovic diagnosed a major depressive disorder, single episode – severe without psychotic features. Whilst an inpatient, a combination of a mood stabiliser and a course of electroconvulsive treatments was required to stop the plaintiff's deterioration. At the time of the report, the plaintiff was still receiving maintenance ECT on a weekly basis and intensive community support. At that stage Dr Isailovic described the plaintiff as totally incapacitated to work as a child protection officer and also incapable of performing any other duties.

[26] The plaintiff had further inpatient treatment at the New Farm Clinic between 5 January and 14 March 2006. Dr Isailovic expressed the opinion on 30 March 2006 that the plaintiff was suffering from treatment resistant depression which could be considered as a permanent disability.

[27] The plaintiff was an inpatient at the New Farm Clinic between 23 April and 2 August 2008 and from 20 August to 13 September 2008. Dr Isailovic provided an updated medical report on 27 August 2008 which confirmed that the plaintiff had received "every known" psychiatric treatment for depression and anxiety, with minimum effectiveness, but despite intensive treatment the plaintiff's condition remained largely unchanged. Dr Isailovic's diagnosis was major depressive disorder-chronic, severe and PTSD, chronic. The plaintiff spent further time as an inpatient at the New Farm Clinic between 20 October and 4 December 2008.

[28] The defendant organised for the plaintiff to be assessed by psychiatrist, Dr Jennifer Gunn, for the purpose of an independent psychiatric medico-legal report. Dr Gunn's report dated 28 August 2008 expressed an opinion about the plaintiff's condition that differed from the opinions of the plaintiff's treating psychiatrist and the other medical professionals who had assessed the plaintiff. Although it was revealed in other reports that the plaintiff had suffered a depressive episode in 1998 that coincided with a cancer diagnosis, Dr Gunn placed much greater significance

on that history and ascertained from Dr Anderson's records that the plaintiff was treated for depression and prescribed an antidepressant medication on 31 December 1998, 5 August and 23 November 1999 and 11 April 2001. Dr Gunn expressed her diagnosis as recurrent major depressive disorder, chronic and that the development of the recurrence of the major depressive disorder in 2004 was multi-factorial including work related stresses, both actual and "catastrophised" in a woman with personality vulnerabilities, family difficulties and the stress of the proceeding in the Industrial Magistrates Court.

[29] Dr Isailovic was provided with a copy of Dr Gunn's report on which Dr Isailovic recorded notes which indicate that she disagreed with some aspects of Dr Gunn's report. Dr Isailovic also provided a report dated 10 March 2009 which confirmed her previous diagnoses and that the plaintiff still presented with severe symptoms and signs of depressive disorder and PTSD. In this report Dr Isailovic expressed the opinion that the plaintiff had not lacked the capacity to understand her situation, but had lacked motivation to pursue her claim for negligence and had required her family to assist her in taking the necessary steps. Dr Isailovic commented that since she began treating the plaintiff in April 2005, she had observed that the plaintiff had problems with motivation, psychomotor retardation and diminished ability to think and concentrate. Dr Isailovic had recorded the plaintiff's gradual deterioration from April 2007 and noted that the plaintiff was offered admission to hospital several times during 2007, but managed to stay out of hospital only due to family support. Ultimately, the plaintiff was re-hospitalised in March 2008 because, according to Dr Isailovic, she had greatly deteriorated.

[30] During 2009, the plaintiff was hospitalised at the New Farm clinic between 14 January and 21 March, 13 April and 20 June and 2 October to 21 November 2009.

[31] The plaintiff's main affidavit in support of her application for the extension of the limitation period was sworn on 24 November 2009. Although the defendant did require the plaintiff for cross-examination at the hearing of the application, that request was not persisted with, when the plaintiff's counsel advised of their instructions that the plaintiff was unwell and unable to be cross-examined.

Professor Lonne's report

[32] Professor Lonne has extensive academic qualifications and experience in statutory child protection practice. He was provided with the plaintiff's statement dated 1 November 2008, WorkCover documents relating to the plaintiff including a transcript of the evidence of the plaintiff before the Industrial Magistrate and the medical reports from Ms Yoxall, Dr Harty, Dr Isailovic (given in 2005), Dr Apel and Dr Gunn. Professor Lonne was able to describe the limitations that he considered existed on the provision of support by the management of the Department for child safety officers during 2002 to 2004 and express an opinion about the unusual nature of the plaintiff's reaction to the traumatic events that she experienced in her employment, that such a reaction would not have gone unnoticed by her co-workers and supervisors, and that there was at that time a culture within the Department that was not conducive to staff receiving appropriate support and psychological assistance.

Issue

[33] The period of limitation for bringing a proceeding for damages for personal injury is altered by s 302 of the *WCRA*. The worker is permitted to bring a proceeding for damages for personal injury after the end of the period of limitation allowed for bringing a proceeding under the Act, if the worker complies with the conditions set out in s 302(1)(a) and (b). One of those conditions is that the worker must have given, or be taken to have given, a complying notice of claim before the end of the period of limitation. Section 275(1) of the *WCRA* specifies that, before starting a proceeding in a court for damages, a claimant must give notice under s 275 within the period of limitation for bringing a proceeding for the damages under the Act. That period of limitation may be the period that is extended under the Act: *Charlton* at [3], [42] and [51].

[34] In this matter the relevant date for applying the test that is set out in s 31(2) of the Act is therefore one year prior to the date on which the plaintiff gave the notice of claim for damages which was on 10 March 2008. That is why counsel for the plaintiff characterises s 302 of the *WCRA* as effectively stopping the time limit running from 10 March 2008. That will be the case only if the plaintiff obtains an extension of the limitation period to 10 March 2008.

[35] Section 31(2) of the Act provides:

> "(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."

[36] The definitions that are set out in s 30 of the Act affect the interpretation of s 31(2) of the Act. Section 30 of the Act provides:

> **"30 Interpretation**
>
> (1) For the purposes of this section and sections 31, 32, 33 and 34—
>
> (a) the material facts relating to a right of action include the following
>
> (i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
>
> (ii) the identity of the person against whom the right of action lies;
>
> (iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;
>
> (iv) the nature and extent of the personal injury so caused;
>
> (v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing—

(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and

(ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;

(c) a fact is not within the means of knowledge of a person at a particular time if, but only if—

(i) the person does not know the fact at that time; and

(ii) as far as the fact is able to be found out by the person—the person has taken all reasonable steps to find out the fact before that time.

(2) In this section—

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

[37] The issue therefore is whether a material fact of a decisive character relating to the right of action was not within the means of knowledge of the plaintiff until after 10 March 2007. It is not necessary for the plaintiff to show the specific date by which it can be said that the material fact of a decisive character was not within the means of her knowledge, as long as it was not before 10 March 2007.

Plaintiff's submissions

[38] It is argued on behalf of the plaintiff that at the relevant date all she knew, or believed, was that she was unwell, her problems were work related, she had concerns about her workload and lack of management support whilst in the employ of the defendant and that her claim for workers' compensation had been rejected initially and on review, and the decision on her appeal to the Industrial Magistrate had been pending since 26 May 2006. At that stage she had no knowledge of significant matters identified in Professor Lonne's report. It is submitted that any proceedings that could have been issued by the plaintiff on an urgent basis prior to the decision of the Industrial Magistrate would have been provisional and speculative and therefore not within the description found in s 30(1)(b)(i) of the Act. If the plaintiff had commenced her proceeding on an urgent basis, before the decision of the Industrial Magistrate was given, it would have been at the risk of having to discontinue the urgent proceeding under s 256 of the *WCRA*, if the decision of the Industrial Magistrate had not been in her favour.

[39] The plaintiff relies on the fact there has already been extensive investigation of her complaints in connection with her application for workers' compensation and that, if a notice of claim for damages had been lodged on an urgent basis when the plaintiff first consulted her solicitors, nothing would have occurred in any case until

after the decision of the Industrial Magistrate and the issuing of the notice of assessment by WorkCover.

Defendant's submissions

[40] The defendant points to the entitlement given to the plaintiff under s 237(1)(c) of the *WCRA* to lodge her notice of claim for damages (and therefore stop the limitation period running) from the time that she applied for review of WorkCover's decision to reject her claim for compensation. The defendant drew an analogy between the plaintiff's position and that of the applicant in *Nooteboom v Ernest Henry Mining Pty Ltd* [2010] QSC 106 (*Nooteboom*). The applicant in *Nooteboom* was unsuccessful in relying on the decision of the Industrial Magistrate (that held that the applicant's injury was not excluded by s 32(5) of the *WCRA*) as a material fact of a decisive character, on the basis that s 237(1)(c) of the *WCRA* and the predecessor provision enacted with effect from 1 July 2001 allowed the applicant to pursue his claim through pre-litigation procedures, without waiting for the decision of the Industrial Magistrate.

[41] The defendant relies on the fact that the plaintiff gave instructions to her solicitors to make a claim for damages in August 2007 and submits that the plaintiff was in possession of a critical mass of information supporting the conclusion that she had a worthwhile cause of action prior to the receipt of Professor Lonne's report. In any case, it is argued that Professor Lonne's report could have been obtained much earlier than it was. In addition, the plaintiff gave the notice of claim for damages in March 2008 which is inconsistent with the position that the plaintiff did not know that she had a worthwhile cause of action until the receipt of Professor Lonne's report. It is submitted on behalf of the defendant that the reliance by the plaintiff on the report of Professor Lonne is an attempt by her legal advisers to extricate the plaintiff and her lawyers from the mistake made on their part in not protecting her claim from a defence that it was statute-barred.

Should the limitation period be extended?

[42] It was held in *State of Queensland v Stephenson* (2006) 226 CLR 197 at [19] (*Stephenson*) that the phrase "material fact of a decisive character relating to a right of action" was a composite expression, each element of which must be within the means of knowledge of an applicant at any particular time. In their joint judgment, Gummow, Hayne and Crennan JJ stated at [29]:

> "The better view is that the means of knowledge (in the sense given by para (c) of s 30(1)) of a material fact is insufficient of itself to propel the applicant outside s 31(2)(a). For circumstances to run against the making of a successful extension application, the material fact must have 'a decisive character'. Whether the decisive character is achieved by the applicant becoming aware of some new material fact, or whether the circumstances develop such that facts already known acquire a decisive character, is immaterial. It is true to say, as the plaintiffs submit in their written submissions, that in a sense none of the material facts relating to the applicant's right of action is of a decisive character until a reasonable person 'knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing' the features described in sub-paras (i) and (ii)

> of s 30(1)(b). Whether that test has been satisfied *at a particular point in time* is a question for the court."

[43] The facts of *Stephenson* illustrate how known material facts may take on a decisive character in the light of subsequent events. Mr Stephenson was an undercover police officer who developed a psychiatric condition in mid-1997. He retired from the police force on medical grounds on 23 February 2001. He instituted an action for damages for personal injuries against his employer on 20 December 2001. Before the expiry of the limitation period in mid-2000, he was in possession of all the material facts for bringing a common law action, however, the commencement of an action might have put at risk his attempt to retire on medical grounds with consequent loss of significant retirement benefits and an earlier commencement of his action would have exacerbated his psychiatric disability. It was held that the material facts for bringing his common law action did not become of a decisive character until after his retirement.

[44] The joint judgment of Gummow, Hayne and Crennan JJ in *Stephenson* summarised at [30] the effect of the construction they had given to the expression "material fact of a decisive character":

> "The practical result of this construction is that an applicant always has at least one year to commence proceedings from the time when his or her knowledge of material facts (as defined in s 30(1)(a)) coincides with the circumstance that a reasonable person with the applicant's knowledge would regard the facts as justifying and mandating that an action be brought in the applicant's own interests (as in s 30(1)(b))."

[45] Another helpful summary of the conditions for determining whether a material fact relating to a right of action is of a decisive character is found in *Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (in liq)* [2009] QCA 352 at [73]-[74].

[46] The decision in *Charlton* was given in respect of a legislative scheme where there was no entitlement of a worker to pursue a claim for damages for personal injuries against the employer where the worker had lodged an application for workers' compensation for the injury that had been rejected and was the subject of review or appeal. The limitation period was therefore extended in that case to expire 12 months after the date of the decision of the Industrial Magistrate at validating the worker's application for compensation. Williams JA (with whom the other members of the court agreed on this point) stated [45]:

> "Sections 30 and 31 of the *Limitation of Actions Act* were not drafted with the intricacies of the Act (particularly s 253) in mind. There were not in 1974 many, if any, statutory provisions such as s 253 of the Act. In my view when one considers the provisions of s 253 in the context of s 30 and s 31 of the *Limitation of Actions Act* it must be a decisive consideration that for the first time a person has become entitled to seek damages for an injury sustained in the course of employment. As already noted, until the decision of the Industrial Magistrate the appellant had no entitlement to commence proceedings seeking damages for an injury allegedly sustained in the course of his employment. The decision of the Industrial Magistrate had the effect of clothing facts already known with a decisive

> character, namely the consequence that a reasonable person taking appropriate advice on those facts would conclude that it was only then appropriate to commence proceedings."

[47] Although the legislative scheme applying to the plaintiff can be used to distinguish the plaintiff's position from that which allowed the worker to succeed in *Charlton*, the fact that the plaintiff did not seek to rely on s 237(1)(c) of the *WCRA* to give her notice of claim for damages prior to the expiry of the limitation period which may have commenced as early as February 2007 (on the basis the injury was first sustained in February 2004) does not preclude her from seeking an extension of the limitation period. This point was not addressed in *Nooteboom* where the finding was made at [46] that the applicant had all the knowledge relating to his right of action at the time that he applied for review of the rejection of his compensation application. The fact that s 237(1)(c) is incorporated as one of the circumstances that gives a worker an entitlement to seek damages for an injury sustained as a worker does not deprive an unresolved appeal to the Industrial Magistrate in respect of a rejection of an application for workers' compensation of relevance to the consideration of whether the limitation period should be extended. The entitlement given by s 237(1)(c) must be, however, a relevant matter in determining what steps a reasonable person in the position of the plaintiff would have taken in her own interests before the expiry of the limitation period.

[48] In considering whether a material fact of a decisive character relating to the plaintiff's right of action was not within her means of knowledge until after 10 March 2007, it is relevant to take into account that the plaintiff's claim is for damages for a psychiatric injury and the difficulties associated in establishing the liability of an employer for such an injury. This is illustrated by the history of the litigation in *Hegarty* and the outcome in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

[49] The plaintiff's right to seek damages for personal injuries arising from her employment depends on her being able to show that she had suffered an "injury", as defined in s 32 of the *WCRA*: s 237(1) of the *WCRA*. The plaintiff has to prove that her injury was not excluded under s 32 of the *WCRA* which was the same issue that was litigated before the Industrial Magistrate that was seriously contested against the plaintiff. The uncertainty for the plaintiff about her prospects in pursuing a claim for damages for the injury until that proceeding was resolved was no doubt compounded by the length of time that the plaintiff waited before the Industrial Magistrate's decision was given.

[50] The course which the proceeding before the Industrial Magistrate took must have vindicated for the plaintiff her solicitors' early advice that they would consider whether or not she should make a claim for common law damages after the appeal to the Industrial Magistrate was decided.

[51] It is also relevant to take into account that throughout the entire period between the time that the plaintiff consulted her solicitors and when she gave the notice of claim for damages she was receiving intensive treatment for her severe depression and anxiety.

[52] In bringing her appeal before the Industrial Magistrate, the plaintiff's position was that her injury was of the nature that entitled her to compensation (and therefore

would also entitle her to bring a personal injuries action). Although she did not have the evidence at that stage in the nature of Professor Lonne's report, the plaintiff blamed her employer for lack of support and counselling that caused, or contributed to, the onset of her psychiatric injury and was in possession of a number of medical reports that linked her psychiatric injury with her work stresses. When the plaintiff ultimately succeeded before the Industrial Magistrate, the significant question mark over the plaintiff's claim that she had suffered an injury within the meaning of the *WCRA* was removed.

[53] The plaintiff's position whilst the Industrial Magistrate's decision was reserved was similar to that of Mr Stephenson in *Stephenson* before his retirement on medical grounds was approved. The material facts for the plaintiff's right of action were, arguably, known in broad terms to the plaintiff by the time that the hearing took place before the Industrial Magistrate, but they lacked the decisive character that would attract advice in relation to those facts that the plaintiff would have reasonable prospects of success in obtaining an award for damages, because of the uncertainty created by the contested hearing before the Industrial Magistrate and the pending decision. Would it have been reasonable for a person in the vulnerable state that the plaintiff was at that stage to speculate on the outcome of the Industrial Magistrate's decision and rely on the entitlement given by s 237(1)(c) to preserve an action for common law damages with the risk that those further steps would be wasted? In applying the tests for determining whether material facts are of a decisive character that are set out in s 30(1)(b) of the Act, the position has to be considered from the viewpoint of a reasonable person, but taking into account the circumstances of the plaintiff. I am not satisfied that, in the circumstances of this matter, it was in the plaintiff's own interests to pursue her claim while the Industrial Magistrate's decision was reserved.

[54] It was not until at least the giving of the Industrial Magistrate's decision in June 2007 that the material facts that had been known by the plaintiff at the time she pursued the appeal to the Industrial Magistrate then took on the decisive character that is required for the purpose of s 31(2) of the Act. To the extent that the plaintiff's case for an extension of the limitation period was also argued on the basis that Professor Lonne's report was the critical event for giving the facts known to the plaintiff the decisive character required to justify a common law action, it is not necessary to consider that argument, because of the conclusion that I have reached about the effect of the Industrial Magistrate's decision.

[55] As contended for by the plaintiff, there is no real prejudice caused to the defendant by the extension of the limitation period to a date which is calculated by reference to the date of the giving of the notice of claim for damages. Because of the delays caused by the rejection of the application for workers' compensation, the review and the appeal, the taking of steps to pursue the claim for damages prior to 10 March 2008 would not have resulted in any significantly different progression of the common law claim than occurred. The fact that the plaintiff's solicitors were in error about the time limit for commencing her personal injuries action is not a reason to exercise the discretion to extend the limitation period against the plaintiff.

Orders

[56] I therefore will extend the period of limitation for bringing this proceeding to and including 10 March 2008.

[57] The issue of costs of the application was canvassed briefly at the hearing of the substantive application. Mr Fraser QC who appeared with Mr Harper of counsel for the plaintiff foreshadowed the argument that the circumstances of this application justify the plaintiff being awarded her costs, if she were successful in obtaining the extension. I favour that view, but will consider any other submissions that the parties wish to make on the issue of costs, before making an order.