SUPREME COURT OF QUEENSLAND

CITATION:	*Hargans v Kemenes & anor* [2011] QSC 15
PARTIES:	**ELIZABETH ROSE HARGANS** (plaintiff) **v** **ANTHOMY KEMENES** (first defendant) and **SUNCORP METWAY INSURANCE LIMITED** (second defendant)
FILE NO/S:	10890/10
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2011
JUDGE:	Ann Lyons J
ORDER:	**1. The application is dismissed**
CATCHWORDS:	LIMITATIONS OF ACTIONS – EXTENSION OF PERIOD – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF A DECISIVE CHARACTER – where applicant injured in a motor vehicle accident on 5 June 2004 – where the limitation period to make a claim for damages in respect of her injuries expired on 9 April 2009 – where a claim was filed on 10 October 2010 – where the applicant argues she only became aware that her injuries would obstruct her in her chosen career around 15 October 2009 – whether the applicant had knowledge of the material fact of a decisive character before the limitation period expired – whether an extension of the period for commencing legal proceedings pursuant to s 31(2) of the *Limitation of Actions Act* 1974 (Qld) should be granted *Limitation of Actions Act 1974* (Qld) ss 30, 31. *Healy v Femdale Pty Ltd* [1993] QCA 210 *Russell v State of Queensland* [2004] QCA 370 *Spain v Dipompo Jacs Constructions P/L & anor* [2009] QCA 323

	Stephenson v State of Queensland (2006) 226 CLR 197
COUNSEL:	D Atkinson for the applicant (plaintiff) S Farrell for the respondents (first and second defendants)
SOLICITORS:	Murphy Schmidt Solicitors for the applicant Bray Lawyers for the respondents

ANN LYONS J:

[1] The applicant seeks, by an application filed on 20 December 2010, an extension of the period for commencing legal proceedings pursuant to s 31(2) of the *Limitation of Actions Act* 1974 (Qld).

[2] The plaintiff filed a claim for damages for negligence in the sum of $738,301.25 on 7 October 2010.

Background

[3] The applicant will shortly turn 23 years of age having been born in April 1988. On 5 June 2004 when she was 16 years old she was injured in a motor vehicle accident whilst she was in year 11 at Somerville House. She was a passenger in a vehicle driven by her previous boyfriend Anthony Kemenes when the vehicle collided with some parked cars. She had been attending a party at Graceville when a number of people decided to go to a bottle shop to buy some alcohol. The applicant was sitting in the back middle seat of the car and was only restrained by a lap seatbelt and not a full lap sash seatbelt. The applicant sustained personal injuries in the accident which included the following:

(a) a burst fracture at the L4 spine;

(b) fracture of the L4 spinous process;

(c) fracture of the left L3 and L4 transverse processes;

(d) ruptured secum requiring laparotomy surgery;

(e) loss of a significant portion of bowel; and

(f) scarring.

[4] The applicant required hospitalisation for between 2 to 3 weeks and was then required to wear a body cast called a “hip speaker cast” for a period of 3 months.

[5] The first respondent was subsequently charged with dangerous driving. No one else sustained serious injuries in the accident.

The applicant’s circumstances at the time of the accident.

[6] There is no doubt that the applicant’s circumstances following the accident were difficult. Not only had she been hospitalised for almost three weeks and also required to wear the ‘hip cast’ for three months but her relationship with both her parents deteriorated significantly after the accident. The applicant’s parents had separated when she was in year 8 and she was living with her father at the time of

the accident. She had little contact with her mother at the time. After the applicant was discharged from hospital her relationship with both her parents was so strained that she went to live with another family. She was subsequently expelled from Somerville House. She then went back to live with her mother at Carindale in early 2005 and she unsuccessfully attempted to repeat year 11 at Cavendish Road State High. She ultimately moved in with her mother at Pullenvale and impressively successfully completed year 12 at Kenmore State High School with an OP 4.

[7] The applicant states in her affidavit that after she returned to school she did not consider that her injuries would restrict her in anyway. On discharge the medical certificate given to her stated "Elizabeth is able to return to school and perform usual activities as tolerated."

[8] The applicant's recollection is that the treating doctor at the PA Hospital had a conference with her mother and herself just before she was discharged and she was told that she might expect some bad pain from time to time. When she told the doctor that when she finished her studies she was considering being a personal trainer his response to her was "I would consider a desk job". The applicant states that she was not told she could not play sport or that she could not engage in any other vigorous activities like dancing or running. She stated in her evidence that "It wasn't a strict, 'you cannot do this' statement that he was making."[1]

[9] In her affidavit the applicant states "The job of being a personal trainer is particularly taxing because you are expected to lead by example with your clients and I certainly understood that he was advising against that and other strenuous full-time jobs. He did not go into any further details, and nor was he emphatic in his tone. I believed that I would be able to lead a normal life but should be cautious about choosing a full-time job". The applicant however conceded that she was specifically told that she "would not be able to do that and other full-time strenuous jobs"

[10] After the accident the applicant was able to go to the gym and was able to work as a supervisor in after school care activities at a local primary school. Whilst studying at Kenmore High the applicant took speech and drama as an elective subject and then decided to study drama at QUT Kelvin Grove. The applicant enrolled in the QUT drama course in 2007. The applicant was fully involved in that course for the following 3 years and that involved performances of physical theatre. She was required to undertake performance subjects and was fully engaged in these activities which involved rehearsing twice a week.

[11] The applicant says that it was not until the second semester of the third year in 2009 that she began to experience significant back pain and physical limitations as a result of the increased physical intensity of rehearsals which were required for a non verbal interpretation of a novel called "The Story of the Eye". The applicant states that for the first time she experienced shooting pains down her leg during the extensive rehearsals for that production which sometimes lasted 20 hours a week. The applicant stated that in the six years prior to seeing the orthopaedic surgeon in June 2010 she had only experienced constant and significant pain in the period since

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1 Transcript day 1 p 14 ll 36-37.

the rehearsals commenced in October 2009 because it was more physical and featured a lot of "static posturing and rolling around on the ground".[2]

This Application

[12] The period of limitation in relation to the applicant's claim expired on her 21st birthday on 9 April 2009. The applicant lodged this claim on 7 October 2010. The applicant therefore applies to extend the limitation period pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld).

> "31(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."

[13] Section 30(1)(a)(iv) provides that the material facts will include "the nature and extent of the injuries so caused".

[14] Section 30(1)(b) provides when a material fact is of a decisive character.

> "30(1)(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;"

> "30(1)(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."

[15] The applicant asserts that the relevant "material fact of a decisive character" was the realisation that her injuries "were going to prevent [her] from carrying out a wide range of activities, sporting or otherwise in my life" following the onset of back pain and discomfort on 15 October 2009 when she was rehearsing for a theatrical

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[2] Transcript day 1 p 10 l 58.

production and she experienced the significant pain. She was involved in a production of the play on 2 November 2009 and first consulted her solicitors on 29 November 2009. The applicant advised in her oral evidence to the court that she knew however that there a potential to bring a claim for damages if she wanted to as early as September of October 2004 when her father showed her a letter that indicated she could bring a claim if she wanted to.

[16] It is clear that material facts will be of a decisive character if a reasonable person knowing those facts and taking appropriate advice would regard the facts as showing that the right of action has a reasonable prospect of success resulting in an award of damages sufficient to justify the action and that the person ought to bring such an action. In *Stephenson v State of Queensland*[3] the High Court emphasised the two-fold test in s 30(b). Accordingly time will run because material facts of a decisive nature are known to the applicant when (a) the claimant knows facts showing that a right of action has a reasonable prospect of success and would result in an award of damages sufficient to justify bringing an action and (b) the claimant ought in the persons own best interests and taking a persons circumstances into account bring an action. The High Court endorsed the view of Davies JA where his Honour stated;

> "Thus the question is not when all material facts came within the means of knowledge of the applicant. It is when all material facts of a decisive character relating to the right of action came within his means of knowledge.
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> ...The correct question in construing s 31(2) (a) is: when did all material facts (which were then) of a decisive character come within the means of knowledge of the applicant. One cannot have the means of knowledge of material of a decisive character at a time when those material facts do not have that character."

[17] The critical question therefore is when did all the material facts which were then of a decisive character come within the means of knowledge of the applicant. It is then clearly a question of whether it was reasonable for the applicant not to sue.

[18] Section 30(d) provides that a fact is not within the means of knowledge of the person if, but only if, the person does not know the fact and so far as the fact is capable of being ascertained by the person the applicant has taken reasonable steps to do so. The issue in s 30(d) therefore revolves around reasonableness.

[19] In *Russell v State of Queensland*[4] Williams JA referred to the earlier Court of Appeal decision of *Healy v Femdale Pty Ltd*[5] where the court held;

> "It is difficult to say that a person who finds herself able to get on with her life and returns to employment without significant pain or disability fails a test merely because she *fails to ask for opinions from doctors about the prospect of future disability or affect on her working capacity*. There is no requirement to take 'appropriate advice' or to ask appropriate questions if

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3 (2006) 226 CLR 197.
4 [2004] QCA 370.
5 [1993] QCA 210.

in all of the circumstances it would not be reasonable to expect the plaintiff to have done so." (my emphasis)

[20] Counsel for the applicant argues that what the applicant did in this case was simply to get on with her life. Significantly he submits that she got on with her life and did not experience any significant pain or restriction in her activities because her evidence was that she worked part time in various casual jobs such as an after school carer, as a waitress and as a shop assistant in a bakery without difficulty.

[21] The applicant argues that she discovered a material fact of a decisive nature on or about 15 October 2009. It was around that date that she became aware that those injuries were likely to inhibit her earning capacity and that they were likely to inhibit her earning capacity in her chosen career. The applicant argues that prior to that date she was entitled to consider that any legal action may not have been worth the trouble and may have been beset by difficulties because the bowel problems had had no further sequelae, her spinal injuries healed without surgery and her spinal injuries did not require further treatment and she was told she could perform further activities "as tolerated". Up until that time the applicant argues she had had no difficulties with the activities she undertook.

[22] The applicant therefore submits that material facts of a decisive nature only came into her knowledge after the critical date which is 7 October 2009 which is 12 months prior to the institution of the claim. The applicant argues that she only became aware after that date that her injuries would obstruct her in her chosen career and in a wide variety of careers.

[23] Furthermore the applicant argues that it was only after that date that her injuries became worse. She argues that she was therefore not aware of the particular fact before 15 October 2009 and that to the extent that that fact was capable of being ascertained she had taken all reasonable steps to ascertain the fact. She states that prior to 15 October 2009 she did not expect her injuries would have any significant effect on her.

[24] I accept that the applicant had a tumultuous personal life until at least 2007 when she commenced her studies at QUT. However she did not turn 21 and the limitation period did not expire until April 2009 some 2 years later.

[25] The applicant can only succeed in this application if the material fact was not known to her until after 7 October 2009 (1 year before she commenced this action) or if known to her before then the reasonable person having taken appropriate advice would not have then regarded the fact as justifying the commencement of the proceedings.

[26] The basis upon which the applicant seeks an extension of the limitation period is that she did not begin to experience specific symptoms until 15 October 2009 and she realised that this would prevent her from carrying out a wide range of activities.

[27] In my view having considered both the applicant's affidavit and her statutory declaration dated 3 December 2010 I consider that the applicant knew at least from the time of her discharge from the hospital that her injuries were going to prevent her from carrying out a wide range of activities given the doctor's specific advice that she should consider a "desk job". It is significant that the applicant was

hospitalised for almost three weeks and that she wore a body cast for three months. The applicant obviously had significant injuries. According to her statutory declaration she had "lost her physical fitness" and felt her back "was still weak". She therefore felt she "was not physically capable of returning to play competitive netball at that time."

[28] In my view the applicant must have been aware that her injuries precluded physical careers given that specific advice about needing to consider a desk job. This is not a case where she the applicant has "*failed to ask for opinions from doctors about the prospect of future disability or affect on her working capacity*" but rather she specifically knew the prospect of future disability in certain careers and that it could affect her working capacity because she was told in blunt terms to "consider a desk job".

[29] In my view the onset of the symptoms in October 2009 could not be characterised as decisive as she already knew of the very real possibility of the restriction on her employment prospects to "desk jobs". She obviously knew that her employment prospects were significantly restricted and that she had to preclude anything that was physically demanding. I consider that the symptoms in October 2009 were in fact the realisation of the prediction that had been made to her in 2004 that she could not undertake unduly strenuous and physical activities.

[30] Furthermore it would seem clear that the applicant had knowledge of the economic impact of her injury prior to the expiration of the limitation period because she states that she did not pursue a career as a personal trainer because of the advice she had been given.

[31] In terms of the reasonableness of her actions the applicant's affidavit indicates that she had considered whether to institute proceedings because she was aware of the fact that no one else in the car had taken legal action. Furthermore she states;

> "I did not know whether I would recover monies if I sue or if the amount I recovered might be so small that it was followed up by lawyers' fees or retained by my father. To some extent, I was concerned that if I sued, Anthony Kemenes would have to personally pay."

[32] The difficulty is that a lot of questions clearly arose in the applicants mind about the utility of pursuing legal action. The applicant however took no step to have any of those questions answered for a period of over five years. The applicant knew she had suffered a serious injury even if further surgery was not required. She knew the first respondent was at fault and liability would not be in issue as she was a passenger. It would also have been obvious to the applicant that she should have completed senior in late 2005 but in fact was unable to do so until late 2006 due no doubt to missing significant periods of school in grade 11 due to her hospitalisation and the impact of her injuries which included wearing a body cast for three months. She clearly knew therefore that the accident had already had an economic impact on her given that her working life had been delayed by a year. She also knew she had been told in specific terms to consider undertaking a desk job given her back injuries. In my view the decision of Keane JA, as he then was, in *Spain v Dipompo Jacs Constructions P/L & anor*[6] is particularly apposite: saddened

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6 [2009] QCA 323.

> [60] Even though Mr Spain may well have decided on a career change in mid-2006 with a view to bettering himself economically, the account recorded by his sister is undeniably an acknowledgment of a firm appreciation on his part that his back problems were such as to limit the range of work open to him and to place him in a situation of real risk in the labour market. This diminution in prospects in the labour market is compensable.
> [61] Whether or not the limitation on Mr Spain's earning capacity was likely to be immediately productive of economic loss, a reasonable person in Mr Spain's position would have appreciated that he was in a situation of vulnerability in the labour market. This limitation of his earning capacity, together with the pain and suffering and loss of amenities referred to in the President's reasons, would have been regarded by a reasonable person who took appropriate advice as showing that an award of damages by way of compensation would be sufficient to justify the bringing of an action at that time. Reasonable advice in mid-2006 would have been that a successful action would result in an award of substantial damages sufficient to justify commencing proceedings at that time.

[33] Whilst I accept that the applicant may have been unsure whether it would be worthwhile to sue she took no steps to seek legal advice or to obtain a further medical opinion for over five years. She in fact did nothing about it until she undertook the strenuous activities which she had been advised against five years earlier.

[34] In my view given all the knowledge that the applicant had it was not reasonable for her to take no further action or seek further advice given the state of her knowledge from at least early 2007. I can see no basis therefore why the application should be allowed and accordingly the application should be dismissed.

[35] I will hear from the parties as to costs.