SUPREME COURT OF QUEENSLAND

CITATION:	*Jamieson v Chiropractic Board of Australia* [2011] QCA 56
PARTIES:	**JOHN WILLIAM JAMIESON** (applicant) **v** **CHIROPRACTIC BOARD OF AUSTRALIA** **(in substitution of the CHIROPRACTORS BOARD OF QUEENSLAND)** (respondent)
FILE NO/S:	Appeal No 4593 of 2010 DC No 334 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	29 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2010
JUDGES:	Muir and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Grant the application for leave to appeal.**
2. **Allow the appeal with costs.**
3. **Set aside the orders made below and in lieu of those orders:**
   - **(i) Order that the appellant be granted an extension of time to file proceedings for defamation to 16 April 2010.**
   - **(ii) The costs below be costs in the cause.**
4. **The proceedings continue against the "Chiropractic Board of Australia".**
5. **Henceforth where the Chiropractic Board of Australia is named in the heading of court documents that name be followed by the words "replacing the Chiropractors Board of Queensland".**
6. **The application to admit further evidence is refused.**

CATCHWORDS: LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – OTHER CAUSES OF ACTION AND MATTERS – where the respondent published defamatory material on its website as to the outcome of a court case involving the applicant and respondent – where the time at which the applicant became aware of the defamatory material was in question – where the applicant applied under s 32A of the *Limitation of Actions Act* 1974 (Qld) for an extension of time within which to pursue an action for defamation – whether it was not reasonable in the circumstances for the applicant to have commenced an action within one year from the date of publication

Chiropractors Registration Act 2001 (Qld), s 9(1), s 121
Defamation Act 2005 (Qld)
District Court of Queensland Act 1967 (Qld), s 118(3)
Health Legislation (Health Practitioner Regulation National Law) Amendment Act 2010 (Qld), s 123
Health Practitioner Regulation National Law Act 2009 (Qld), s 23, s 25, s 295(1)(a) and (c)
Limitation of Actions Act 1974 (Qld), s 10AA, s 32A
Uniform Civil Procedure Rules 1999 (Qld), r 390

Al Amoudi v Brisard [2007] 1 WLR 113; [2006] EWHC 1062, cited
Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd [2008] QCA 100, cited
Brisbane City Council v Mainsel Investments Pty Ltd [1989] 2 Qd R 204, cited
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; (2005) 214 ALR 92; [2005] HCA 12, cited
Dow Jones & Company Inc v Gutnick (2002) 210 CLR 575; (2002) 194 ALR 433; [2002] HCA 56, cited
Hawkins v Pinder Bros Pty Ltd [1990] 1 Qd R 135, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Langdale v Danby [1982] 1 WLR 133; (1982) 74 Cr App Rep 242, cited
Lazarus v Deutsche Lufthansa AG (1985) 1 NSWLR 188, cited
Murphy v Lewis [2009] QDC 37, cited
Noonan v MacLellan [2010] 2 Qd R 537; [2010] QCA 50, considered
Pingel v Toowoomba Newspapers Pty Ltd [2010] QCA 175, considered
Robertson v Hollings, unreported, Dutney J, SC No 2263, 6 April 2009, cited
Sands v Channel Seven Adelaide (2009) 104 SASR 452; [2009] SASC 215, cited
Spencer v The Commonwealth (2010) 241 CLR 118; (2010) 269 ALR 233; [2010] HCA 28, cited

COUNSEL: J Walsh for the applicant
R Anderson for the respondent

SOLICITORS: Donnelly Lawyers for the applicant
Rodgers Barnes & Green Lawyers for the respondent

[1] **MUIR JA**: I agree that the application for leave to appeal should be granted and that the appeal should be allowed for the reasons given by White JA.

[2] **WHITE JA**: On 9 April 2010 a District Court Judge at Maroochydore dismissed an application brought pursuant to s 32A of the *Limitation of Actions Act* 1974 (Qld) for an order extending the limitation period to commence proceedings for defamation against the respondent Chiropractors Board of Queensland. The applicant seeks leave to appeal that decision pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). The court reserved the question of leave and heard submissions relating to the substance of the appeal. The discretion is at large but leave will, in the usual case, only be granted "where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected."[1]

Further evidence

[3] The applicant also filed an application on 23 July 2010 seeking leave to adduce further evidence. He had been represented by counsel and solicitors at hearings below but when he filed that application he was self-represented. He obtained new legal representation on the eve of the hearing of this application. At the commencement of the hearing Dr Walsh, for the applicant, sought to have admitted as further evidence:

- A statement in the form of an email from Ms Burkett, a witness below, who had sworn an affidavit but was not required for cross-examination and who sought to expand further upon her recollection of events and to explain her discussions with counsel for the respondent.
- The failure by the respondent Board to respond to requests from the applicant for material demonstrating the number of hits on its website containing the impugned material.
- Affidavits from individuals who had provided statements about the applicant's personal circumstances relative to the extension of time application but which were not admitted into evidence below because not in admissible form.
- Material obtained from the Legal Services Commission relating to the applicant's former legal advisers concerning the handling of the retainer and the brief.

After a short adjournment to consider this material, the court ruled that it would not receive Ms Burkett's further email with reasons to be given in the substantial reasons. The balance of the material was received, provisionally, as exhibit 1.

[4] After the decision was reserved the court received a further bundle of documents from the applicant relating to the ongoing presence on the internet of the defamatory

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1 *Arnold Electrical & Data Installations P/L v Logan Area group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 at [5].

material and his present circumstances. The status of this further evidence will be considered in the body of the reasons.

The identity of the respondent

[5] The Chiropractors Board of Queensland was established by the *Chiropractors Registration Act* 2001 (Qld)[2] and could sue and be sued in its own name.[3] That Act was repealed from 1 July 2010 by s 123 of the *Health Legislation (Health Practitioner Regulation National Law) Amendment Act* 2010. The *Health Practitioner Regulation National Law Act* 2009 establishes the Australian Health Practitioner Regulation Agency,[4] a body corporate which may sue and be sued and, unlike the Chiropractors Board, represents the State. It provides, *inter alia*, administrative assistance to support the National Boards[5] which are established under that Act for certain health professions. The Chiropractic Board of Australia is established for the "chiropractic" health profession.[6] The assets and liabilities of a local registration authority for a health profession in a participating jurisdiction, which would include the Chiropractors Board of Queensland, are taken to be the assets and liabilities of the National Agency.[7]

[6] Accordingly, the name of the respondent should be changed to the Chiropractic Board of Australia in lieu of Chiropractors Board of Queensland. Because of the nature of the claim and the circumstances giving rise to it, it is appropriate that it be clear in the title to the proceedings that the Chiropractors Board of Queensland was the original respondent.

The circumstances giving rise to the application

[7] The applicant was and is a chiropractor working with animals. On 21 September 2006 the Chiropractors Board of Queensland ("Chiropractors Board (Q)"or "the Board") issued a complaint and summons out of the Magistrates Court at Beenleigh alleging that the applicant had breached s 121 of the *Chiropractors Regulation Act* 2001 by using the words "chiropractor", "chiropractic" and "chiro" whilst not being a registrant under the Act. On 17 April 2007 the charges were tried in the Beenleigh Magistrates Court. On 4 May 2007 the applicant was found not guilty of all charges with an order that the complainant Chiropractors Board (Q) pay his costs fixed in the sum of $1,700. The Magistrate found that the relevant legislation was concerned only with the treatment of humans not animals.

[8] The Chiropractors Board (Q) posted a statement on its website bearing date 17 April 2007 under its name with a heading "STATEMENT RE John Jamieson". The text of the statement contained the following:

> "John Jamieson was today found guilty of breaching the law by using the restricted title of 'chiropractor' in his animal healing business.
>
> He was found guilty of contravening the *Chiropractors Registration Act 2001* which restricts use of the title 'chiropractor', 'chiro' and

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2 s 9(1).
3 s 9(2).
4 s 23.
5 s 25(a).
6 s 31(1).
7 s 295(1)(a) and (c).

> 'chiropractic' to people with qualifications from accredited Australian universities and overseas institutions. Mr Jamieson has undertaken no formal training in chiropractic."[8]

The statement continued attributing statements in quotation marks to the chairperson of the Chiropractors Board (Q) that the Board had reluctantly prosecuted because the applicant had been uncooperative and the Board existed to uphold standards and maintain public confidence. At the foot of the statement appears "Further information Joanne Keune, Manager (Communications), Medical Board of Queensland …" with contact telephone numbers.

[9] The statement was false and defamatory of the applicant. Any person seeking information about the applicant, relevantly looking for an animal chiropractor, would have been linked or directed to this site.

[10] The applicant was first told that there was defamatory material about him on the internet on 30 June 2007 by a former client, Ms Lorraine Burkett, but he was confident that he had been acquitted in the Magistrates Court of any breaches, distracted, and did nothing to follow it up. The complainant did not know how to use a computer. Ms Burkett printed a copy of the material (the statement and an online discussion forum Dogzonline) and posted it to him. However the applicant allowed his post to accumulate and did not open it. Another client, Ms Sharon Farrow, who was assisting the applicant to organise his affairs, did an internet search of the applicant's name and read the statement on the Office of the Health Practitioners Registration Board's website in October 2008. She printed the statement and showed it to the applicant who said he was unaware of it. As a consequence, Ms Farrow assisted him by typing letters to the Board seeking removal of the offending statement.

[11] The applicant had become very distressed after he was pursued by the Chiropractors Board (Q). After he was found not to be guilty of any offence he improved. However, from the time of the resolution of the court proceedings on 4 May 2007 the applicant had noticed a deterioration in his practice. After learning of the defamatory material, and, after his battles with the Chiropractors Board (Q) and other conflicts with the Greyhound Racing Authority, his health suffered.

[12] As mentioned, with the assistance of Ms Farrow the applicant wrote to the Board on 6 November 2008 requesting that the statement be removed from its website, an apology and compensation. He sent follow up letters. Finally, on 23 December 2008 he received a letter from the Chiropractors Board (Q)'s solicitors:

> "Our clients have considered the matters raised in your letters and emails of 6 November, 24 November and 26 November 2008."

The solicitors stated that their client had "caused the press release to be withdrawn from storage on the website of the Chiropractors Board of Queensland". The explanation offered was that the press release was a draft which was stored on the website by "inadvertence". On behalf of their clients they apologised and included a copy of a document headed "Apology and Correction" followed by Mr Jamieson's name. It stated that he had been found not guilty of any breach of the *Chiropractors Registration Act* and explained that it was a draft stored on the website by "inadvertence". The learned primary judge generously described the

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[8] AR 15.

Board's withdrawal of the statement as "promptly" made. The apology might, without challenge, be described as meagre, and there was no offer to contact well-known search engines to seek to have their administrators cooperate in removing the offending data.

[13] The applicant engaged in further correspondence with the Board seeking to resolve matters without success. Again with the assistance of Ms Farrow, from January 2009 he contacted some 24 legal firms and the Law Society seeking assistance in his dealings with the Board without success. He was struggling financially. From March 2009 he commenced communication with the solicitors who represented him below. In May 2009 they provided him with a letter of legal advice in which they told him that the limitation period of one year expired 12 months after the date of publication. The solicitors regarded this, arguably erroneously, as the date the statement was uploaded onto the Board's website on 17 April 2007. This was, perhaps, due to a mistaken understanding that uploaded material on to an internet website, accessible to members of the general public who seek access to that website, was akin to the factual inference of publication readily drawn in the case of a widely circulating newspaper or magazine. Cases such as *Dow Jones & Company Inc v Gutnick*[9], *Sands v Channel Seven Adelaide*[10] and *Al Amoudi v Brisard*[11] discuss the issue of publication raised by the internet.

[14] The applicant was informed by his then solicitors that, even though the time limit had expired, he could apply for an extension of time, the criterion being that it was not reasonable in the circumstances to have commenced within one year of the date of publication. The solicitors advised that the court could extend the period up to three years from the date of the publication. The applicant was advised that he should make his application as soon as possible but before 16 April 2010 after which no proceedings could be brought. On information provided by the applicant this should, in fact, have been October 2011. The applicant was advised that fees could range from $5,000 to $80,000.

[15] The applicant was suffering severe financial hardship at the time and decided that he could not then afford to commence proceedings. In September 2009 when he had received a loan of $20,000 from a client/friend to assist him with his legal fees[12], he instructed his solicitors to commence proceedings. On his initial instructions to his solicitors he was then still within the 12 month limitation period, even if unrealised by him or his solicitors.

[16] It is useful, at this point to have regard to the legislation which regulates proceedings for defamation and the limitation period assigned to those proceedings.

The legislation

[17] The limitation period for defamation proceedings was reduced from the previous six years to one year with the introduction of the *Defamation Act* 2005 (Qld) which commenced on 1 January 2006. It gave effect to an agreement on a uniform approach to defamation reached by State and Territory Attorneys-General. Amendments were also made to the *Limitation of Actions Act* 1974 (Qld). Section 10AA of the *Limitation of Actions Act* 1974 (Qld) provides:

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9 (2002) 210 CLR 575 at [26], 600; [2002] HCA 56.

10 [2009] SASC 215 at [389] – [391] per Bleby J.

11 [2007] 1 WLR 113 at 118-123; [2006] EWHC 1062 at [24]-[38].

12 The letter offering the loan was before the court below.

> "An action on a cause of action for defamation must not be brought after the end of 1 year from the date of the publication of the matter complained of."

[18] By s 32A a person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period even though the limitation period has already ended. A court may only order the extension of the limitation period for defamation in the circumstances specified in subsection 2.[13] It provides:

> "A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 10AA to a period of up to 3 years from the date of the publication."

[19] In *Noonan v MacLellan*[14] the several judges comprising the court[15] noted the unusual wording of s 32A requiring an applicant to prove a negative, namely, that it was "not reasonable in the circumstances to commence" an action during the one year period from the date of publication. Keane JA said:[16]

> "Section 32A(2) of the Act proceeds on the assumption that there may be circumstances where it will not be reasonable for a plaintiff to commence an action to vindicate his or her legal rights in accordance with the time limits provided by law. While s 32A(2) proceeds on this assumption, it is obvious that only in relatively unusual circumstances will a court be satisfied that it is not reasonable to seek to vindicate one's rights in accordance with the law."

Chesterman JA opined:[17]

> "The subsection is unusual … [i]t does not, as does other legislation allowing for an extension of a limitation period, permit the extension where it was reasonable, because of defined circumstances, to extend time. To obtain an extension an applicant must demonstrate that it would have been unreasonable for him in the particular circumstance to have commenced an action within the first year after publication. That is to say an applicant must demonstrate affirmatively that he would have acted unreasonably in suing within time."

[20] With respect to his Honour, I am not confident that "not reasonable … to have commenced" can be reconstituted as "it would have been unreasonable to commence", or "demonstrate affirmatively that he would have acted unreasonably." To my mind the different expressions carry different meanings of emphasis. Chesterman JA also noted[18] that the circumstances which might justify an extension are left at large:

> "Nevertheless they must be so compelling as to make it positively unreasonable for a person defamed not to exercise his legal rights to sue within the statutorily designated period."

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13 Section 32A(3).
14 [2010] QCA 50.
15 Keane, Holmes and Chesterman JJA.
16 At [15].
17 At [48].
18 At [51].

Later, his Honour summarised:[19]

> "To succeed in his application the respondent had to show that he should not have commenced proceedings in time. I do not mean to gloss the statute but I think that is the import of the statutory test: that it was not reasonable to commence an action within the year."

The observations of Hayne, Crennan, Kiefel and Bell JJ in *Spencer v The Commonwealth*[20], although discussing a quite different provision, are apt for any curial attempt to "explain" ordinary language in a statute:

> "No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content … . The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase … is to be avoided."[21]

[21] Keane JA noted in *Noonan* that, whilst there was no exhaustive list of the kinds of cases which might fall within s 32A(2), a plaintiff who was not able to establish the extent of the defamation or who was without the evidence necessary to establish a case during the year after publication, or where the costs would be disproportionate to the prospects of success or the quantum of damages and that stage might fall within the section.[22] To that may be added the failure to be aware of the publication of the defamatory material during the 12 months following publication. As Fryberg J observed in *Pingel v Toowoomba Newspapers Pty Ltd*:[23]

> "Obviously, it is not possible for a person to commence proceedings for defamation if [he] is unaware of the fact of publication …".

[22] In *Pingel*[24] Applegarth J summarised the propositions which may be drawn from *Noonan*:

> "1. The burden is on the applicant for an extension of time to point to circumstances which make it not reasonable in the circumstances to have commenced an action within one year from the date of the publication.
> 2. The circumstances that might give rise to an extension are left at large.
> 3. The test posed by s 32A(2) is an objective one. It is not satisfied by showing that the applicant believed that he or she had good reason not to sue.
> 4. If the court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one year period, then it must extend the limitation period. Unlike other extension of time provisions, there is no discretion whether or not to extend time. A discretion exists as to the length of the extension to be granted which, in any event, may not exceed three years from the date of the defamatory publication.

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19 At [58].
20 (2010) 269 ALR 233; [2010] HCA 28.
21 At [58].
22 At [16] – [17].
23 [2010] QCA 175 at [56].
24 At [87].

5. The section requires more of an applicant than to show that it would have been reasonable not to commence an action until after the one year period had expired: the court must be satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one year period.
6. The circumstances must be sufficiently compelling to satisfy the court that it was not reasonable in the circumstances to commence an action within the one year period the law ordinarily requires litigants to commence proceedings.
7. Section 32A of the Act proceeds on the assumption that there may be circumstances where it will not be reasonable for a plaintiff to commence an action to vindicate his or her legal rights in accordance with that time limit."

[23] Fraser JA, with whom Applegarth J agreed on this point[25] as reflected in his point 4 above, concluded that an appeal to this court made under s 32A(2) of the *Limitation of Actions Act* 1974 (Qld) is an appeal by way of rehearing and not a review of a discretion to which must be applied the principles enunciated in *House v The King*.[26]

Proceedings below

[24] The application, filed on 3 December 2009, first came on for hearing before Robertson DCJ in the District Court at Maroochydore on 18 December 2009 when the applicant was represented by counsel[27] and solicitors. Affidavits were filed from the applicant and from his solicitor exhibiting a draft statement of claim. The applicant's lawyers proceeded on the basis that the offending statement was "published" on the day it appeared on the Chiropractors Board (Q)'s website on 17 April 2007, akin to a newspaper publication as discussed above.[28] The draft statement of claim pleaded, unexceptionally, in paragraph 9:

> "The press release was published to numerous readers of the internet and in particular readers interested in animal chiropractic, including those who were or may have been interested in engaging the services of the Plaintiff."

The solicitor filed a second affidavit the day before the hearing deposing to the applicant's instructions that he suffered from stress and major depression which had affected his capacity to face his dispute with the Chiropractors Board (Q). She exhibited reports dated 11 December and 24 December 2008 from Dr Janet Clarkson, a general practitioner who had been treating the applicant for major depression and stress arising out of the accusation that he was not fit to treat animals. Those reports had been sent by facsimile to the Board's solicitors on 16 December 2009.

[25] At the commencement of the hearing, counsel for the Board contended that each publication to be relied on was required to be proved by the applicant.[29]

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25 Fryberg J not deciding.
26 (1936) 55 CLR 499 at 505.
27 Who, it seems, was appearing in lieu of counsel who had originally been briefed and who had prepared the outline of submissions.
28 At [13].
29 Referring to *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188 at 192-3 per Hunt J, a case about particulars.

Somewhat surprisingly, the applicant's counsel sought an adjournment to enable the applicant to obtain evidence of earlier publications than the publication to Ms Sharon Farrow in late October 2008 which he had deposed in his affidavit (and pleaded in the draft statement of claim) was when he first became aware of the defamatory statement. No material had been filed by the Board to contradict this.

[26] The application came on again for hearing on 7 April 2010[30] before a different judge with counsel who had originally been briefed appearing for the applicant. Counsel for the Board objected to much of the material exhibited to the applicant's second affidavit sworn 6 April 2009, generally on the ground that it ought to have been in affidavit form as required by the rules.[31] This material included statements from a Matt Green about pharmaceuticals purchased by the applicant (excluded), letters[32] from Dr Janet Clarkson who had treated the applicant from December 2008 (admitted) and Dr Barbara Reynolds-Hutchinson, a professional development counsellor (excluded). The learned primary judge explained that the matter had been adjourned since December 2009 and there was ample opportunity to present the evidence properly. The applicant was cross-examined briefly but only about his conversation with Ms Burkett on 30 June 2007 and not about his personal circumstances which, he swore, were the reason why he had commenced proceedings out of time.

The decision below

[27] The learned primary judge identified the two occasions when the evidence showed that the applicant was made aware of the publication of defamatory material about his professionalism as an animal chiropractor – 30 June 2007 (Ms Burkett) and late October 2008 (Ms Farrow) - and identified the 12 month period from each date as the period during which the applicant had to demonstrate that it was not reasonable to have commenced proceedings. His Honour summarised the evidence about the first period (which the applicant had only been able to identify after the adjournment in December 2009 after much searching and assistance from Ms Farrow):

> "… Ms Burkett deposed to her friendship with the applicant and to downloading [a] statement on 30 June 2007 at the same time she also downloaded material from a Dogzonline forum which contained comments about the applicant, references to the applicant and the court proceedings in the Magistrates Court. On the same date she telephoned the applicant. She told him what she had found and he told her that he had been found not guilty. He also told her he had a lot of other problems on his plate and sounded very stressed out. Ms Burkett was not cross examined about the content of her affidavit. However it was agreed between Counsel that what she was referring [to] in her affidavit when she said she told the applicant what she had found, was that she told him about the statement and about the internet blog (the Dogzonline material) being the two documents which she subsequently posted to him. She told him that the statement she had found on the internet said that he had been found guilty. She posted the documents to him on 30 June 2007."[33]

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30 It appears likely at the initiative of the court

31 *Uniform Civil Procedure Rules* 1999 (Qld), r 390.

32 These were the two reports exhibited to the solicitor's affidavit filed in December 2009.

33 Reasons at [11] AR 159-60.

His Honour noted that the applicant denied that Ms Burkett had mentioned the Chiropractors Board (Q) to him and had said only that she had found comments and "some stuff on the internet" that he should look at, and that he was found guilty. The "agreement" between counsel, which I discuss below, did not include that the applicant was told that the Chiropractors Board (Q) was responsible for posting the defamatory material.

[28] It is convenient to mention here the further evidence from Ms Burkett which the applicant seeks to have admitted on the appeal. In her email to the applicant dated 3 June 2010 Ms Burkett recalled that the day she telephoned him to tell him what she had found on the internet he was really "stressed out, so much so he would not listen to me at all, just to post it to him". She explained that he told her that he was at the time training the dogs and could not talk. There was no discussion about the matter at all. Ms Burkett also makes a passing reference to being spoken to by defence counsel in an interview room at the time of the hearing. The applicant complains about the agreement between counsel which apparently emanated from this conversation. Ms Burkett had been required by the respondent Board to attend court for the purpose of being cross-examined on her affidavit. That did not occur because of this agreement. Counsel for the Board read out paragraph 7 (in part) of her affidavit "I telephoned the Applicant on or about 30 June and told him what I had found". Counsel then told his Honour, "her evidence is that she told him about the statement and about the internet log [sic] which are the two documents that she subsequently sent … And further that she told him that the statement said that he'd been found guilty."[34] Counsel said that "upon the basis of reading her affidavit in those terms, she's not required for cross-examination".[35] The applicant contends that the agreement ought not to have been made by his counsel because this was not Ms Burkett's complete evidence and she ought to have been cross-examined if the Board wanted to test it.

[29] The further evidence from Ms Burkett about the conversation on 30 June ought not be received into evidence. There must be finality in litigation. The hearing below is not a dress rehearsal for some other final hearing. Her further evidence could not come within the first criterion for the receipt of further evidence mentioned in *Langdale v Danby*[36], namely, that the evidence could not have been obtained with reasonable diligence for the original hearing.[37] As for the complaint about the agreement, the applicant was represented by counsel and solicitors. Discretion reposes in them as to how a trial should be run. The system would break down if the various decisions taken in the course of a trial could be challenged on appeal.[38] That is further reason for not permitting the evidence to be received.

[30] Returning to the decision below his Honour identified the second period from late October 2008 to late October 2009 after Ms Farrow had opened the post from Ms Burkett and drawn the contents of the internet statement to the applicant's attention.

[31] In his recital of the evidence his Honour noted the applicant's evidence that he had been in good mental health until the Board had begun to pursue him, culminating in

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34 Transcript of proceedings 1-20, AR 68.

35 Transcript of proceedings 1-21, AR 69.

36 [1982] 1 WLR 1123.

37 Regularly followed in this jurisdiction, see *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408; *Brisbane City Council v Mainsel Investments Pty Ltd* [1989] 2 Qd R 204 at 215; and *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 136.

38 See discussion in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

the prosecution. The applicant consulted his then general practitioner, a Dr Drew, (by the time of the hearing she had died) in early 2007 and was provided, he swore, with sleeping tablets, anti-depressant medication and analgesics. His Honour noted that Dr Drew's medical records were unable to be obtained despite appropriate steps being taken on the applicant's behalf by Ms Farrow[39] to obtain them. His Honour recorded that the applicant was suffering from stress and anxiety prior to the finalisation of the Magistrates Court proceedings. After the decision the stress lifted and he felt "relieved, positive and confident he could successfully move on although he avoided thoughts and topics associated with the trauma of the prosecution."[40] What the applicant swore was:

> "The pre-judgment trauma I suffered mentally and emotionally, as a direct result of the Respondents action against me until receiving my Not Guilty verdict, included suffering from symptoms of stress, fatigue, exhaustion, anxiety, nightmares, trembling, fear, disturbed sleep patterns and I was medicated for depression. This was the result of threats by the Respondent of a large fine and, or jail time, if I was found guilty.
>
> I learnt what triggered emotional relapse, to my pre-judgement state of mind and thus made a conscious effort to avoid same. I received a lot of mail which I was unable to deal with. I inadvertently placed a lot of unopened mail aside that did not require immediate attention such as electricity bills. I even sometimes did not deal with bills straight away and I defaulted in payment frequently as I did not have the funds due to the demise in my business following the court case."[41]

His Honour noted that Ms Farrow began to help the applicant opening and sorting mail and dealing with business matters around September 2008.

[32] The learned primary judge recorded that the applicant consulted Dr Reynolds-Hutchinson, a counsellor, in late 2008 after the statement had been brought to his attention and he had experienced an emotional relapse. She referred him to a general practitioner, Dr Janet Clarkson, whom he saw from 11 December 2008. His Honour noted Dr Clarkson's patient records exhibited to the applicant's second affidavit which mentioned a prolonged court case, depression and prescription of "Avanza" tablets. There was a six month gap in the records and reference to contact on 14 June 2009 and of being in limbo until he "finds a solicitor to handle his case"; valium was prescribed. The applicant deposed that the reason why there was no evidence of anti-depressants in his history during 2007 was because Dr Drew

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39 This search, deposed to by Ms Farrow, demonstrates the real difficulties experienced by the applicant, a person of very limited means, in assembling necessary information. Ms Farrow, on advice, contacted the AMA in Canberra, the Queensland branch of the AMA and the College of General Practitioners in Brisbane about the possible location of the records of the late Dr Drew with no response. She contacted them again and this time the responses were negative. She contacted the Public Trustee in case Dr Drew's estate was being administered by that office. She placed an advertisement in the Albert and Logan News urgently seeking the medical records. She received a response from a former employee of the practice who agreed to send the records if she received a release form from the applicant's current general practitioner and money to cover the postage. This occurred and the registered letter was collected from the post office apparently by the addressee but the records were not received despite follow-up.

40 AR 159. Reasons at [10].

41 AR 86.

supplied him with sample packs from her surgery stock.[42] This is not mentioned in his Honour's reasons. There was objection to receipt of a statement by a Dr Lynn Freeman evidencing that this was a standard practice in cases of financial hardship which was upheld.

[33] His Honour did admit Dr Clarkson's two letters exhibited to the applicant's second affidavit, over objection. Dr Clarkson wrote:

> "The prolonged personal and financial assaults have taken a great toll, and it is to this that I attribute his depression."[43]

And in a letter to the Chiropractor's Board (Q) dated 24 December 2008:

> "I am concerned about John's mental and emotional health. In my opinion he is suffering from a moderately severe clinical depression (although in the recent past it was clearly very severe.) I have prescribed anti-depressant medication …[He] has no previous history of depression…".[44]

[34] His Honour described the applicant being in other stressful events in 2007 and 2008 as the subject of an inquiry by the Greyhound Racing Authority, which had the potential to effect his income earning; and the deterioration of his relationship with his pregnant partner throughout 2007 and after the Magistrates Court proceedings. Other circumstances mentioned in the affidavit and not mentioned by his Honour were that the applicant's "beloved dog" had died under "suspicious circumstances at the time" and relocating back to Brisbane having left, as the applicant saw it, due to pressure from officers of the Board. The applicant was also under financial disadvantage due to the dropping away of his income which he attributes to the defamatory material. His Honour noted that in November 2008 the applicant began communicating with the Minister and Shadow Minister for Health for support in getting an apology from the Board. The eventual response had been to the effect that since the Board had placed the matters in its solicitor's hands it would be inappropriate to respond. The applicant contacted the Ombudsman. He then attempted from the beginning of January 2009 to find a legal firm who would assist him.

[35] The applicant had obtained an affidavit from Dr Charmaine Daly a registered psychologist. Counsel for the Board had urged upon his Honour that because of the tensions between what Dr Daly deposed in her affidavit and what she wrote in her report his Honour should not receive the affidavit or, at least. give it little weight. Of this, his Honour said:[45]

> "An affidavit by one Charmaine Daly sworn 7 April 2010 was relied upon in the application. Ms Daly is a registered psychologist. Exhibited to her affidavit is a report dated 6 April 2010. It revealed she understood that the applicant was referred to her by a medical practitioner for the purposes of stabilising symptoms of stress. She first saw him on 11 March 2010 and on 2 subsequent occasions – 17 March and 23 March 2010. On that last occasion she was asked by the applicant to provide a report for the purposes of the application. She made it clear to him that any such report would not be done

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42 AR 87.
43 AR 94.
44 AR 95.
45 Reasons at [14] AR 161.

> under expert witness conditions, but that she would provide a brief summary of sessions to date. She made it very clear she could not and would not express opinions about the presence or absence of psychiatric or psychological disorders and levels of incapacity or otherwise at any time prior or subsequent to the first session she had with the applicant on 11 March 2010. In her affidavit, she deposed that based upon the information supplied to her by the applicant, and the deep level of his rumination about the loss of his business, it was likely he had been depressed and anxious since his business activities began to suffer from his interaction with the respondent which she understood to be following the court proceedings in April 2007."

His Honour made no further comment about Dr Daly's evidence and what, if any, weight he gave to her opinion.

[36] The learned primary judge concluded[46]:

> "The period from 30 June 2007 to 20 [sic] June 2008 was a period in which the applicant had been told of material on the internet which said he had been found guilty and the statement and blog on the internet had been printed and posted to him. During the whole of that period, the material on the internet was available to him, either by him looking at it himself or by reading what had been posted to him. The evidence simply does not establish that the applicant was under such disadvantage that his ability to ascertain and comply with the applicable time limit, was impeded to adapt what Keane JA (as he then was) said in *Noonan* at [23]. The evidence tendered about his mental state at various times before and after the Magistrate's Court proceeding is a long way short of showing that between June 2007 and June 2008, his mental state was such that it was objectively not reasonable in the circumstances for him to commence an action for defamation."

[37] The applicant complains that the learned primary judge disregarded his uncontradicted sworn evidence that he was computer illiterate and, that as a consequence of his fragile mental state consequent upon numerous stressors, including dealing with the Board, he did not deal with his post. This state of affairs was confirmed by Ms Farrow who was not cross-examined. She deposed:

> "I witnessed the Applicant avoiding issues that would remind him of the Respondents legal action. The behavioural indicators I noticed of the Applicant were I witnessed him refusing to answer his phone about expressed fears about being bothered. I also saw unopened mail in his home. The Applicant told me that he could not bring himself to open his mail. I offered to assist him and in about September 2008 the Applicant allowed me to help him with his paperwork and returning emails and general office administration. Part of this process involved opening and sorting mail which had been unopened in some cases for over a year, which was piled up in his office."[47]

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46 Reasons at [18], AR 161.

47 AR 120.

For what it was worth, this evidence was supported by Dr Daly. It was also supported by the applicant's treating doctor.

[38] There is a sense which permeates the hearing below, that in order for the applicant to succeed the court needed evidence from a psychiatric expert about the applicant's mental health during the relevant periods. That may be necessary where an explanation offered is challenged. Here it was not. The applicant gave evidence about his state of mind and mental robustness which was supported by Ms Farrow, Dr Daly and Dr Clarkson. His Honour accepted that the applicant had consulted with Dr Drew over a lengthy period for stress and anxiety prior to the Magistrates Court decision and that he again resorted to professional assistance for similar symptoms in late 2008. The applicant did not appreciate that he had been defamed by the Chiropractors' Board (Q) even though Ms Burkett had mentioned the material. As his Honour accepted, the applicant had forgotten about that conversation, confident in his acquittal. In the circumstances, it was not reasonable, in my view, for the applicant to have commenced proceedings in this period.

[39] The learned primary judge considered the second period from late October 2008 to late October 2009:

> "The evidence shows the applicant consulted solicitors within that 12 month period, was informed about the limitation period, that an extension of the limitation period may be applied for, and did not pursue the matter any further at that point in time. The evidence also shows that he instructed his solicitors to take the matter further in September 2009, which was still within the 12 month period, but that was not done. It cannot be concluded that it was not reasonable in the circumstances for him to commence an action within that 12 month period."[48]

[40] The applicant proceeded promptly to protect his rights as soon as he was made aware of the statement by attempted negotiation with the Board for the removal of the statement, an apology and some compensation. In December he approached public officials when he made little progress with the representatives of the Board. From the beginning of January 2009 he approached 24 law firms and the Law Society for assistance. He then obtained legal advice from solicitors which he was entitled to expect to be correct. He had no funds to proceed further but as soon as he obtained a loan he instructed that proceedings be commenced (still within time). The case was not a complex one as the draft statement of claim reveals. The defamatory nature of the publication and any imputations were straightforward. Proceedings proper could have been commenced immediately.

[41] As to the earlier period from 30 June 2007, there was sufficient evidence before the court to come to the conclusion that the applicant's mental state and all the other circumstances meant that it was not reasonable to commence proceedings for that 12 month period. These circumstances are far different from those considered in *Murphy v Lewis*[49], *Robertson v Hollings*[50], *Noonan v MacLellan*[51] and *Pingel v Toowoomba Newspapers Pty Ltd*.[52]

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48 Reasons at [19] AR 162.
49 [2009] QDC 37.
50 *Robertson v Hollings*, unreported, Dutney J, SC No 2263, 6 April 2009.
51 [2010] QCA 50.
52 [2010] QCA 175.

[42] Adducing appropriate facts to discharge the onus imposed by the expression "not reasonable in the circumstances… to have commenced an action" carries the difficulties inherent in that task, but I am persuaded that, on balance, the applicant has done so. In my view his Honour fell into error in not giving proper weight to the unchallenged evidence of the applicant supported by other accepted evidence about his mental state and other circumstances. Together they adequately demonstrated why it was not reasonable to commence proceedings within the limitation period whether from 30 June 2007 or October 2008, or both. The matter is important to the applicant. There is no prejudice to the Board. It is in the interests of justice that the applicant be given an extension of time.

[43] In view of that conclusion it is unnecessary to rule on the other further evidence save to observe that the material relating to the retainer and the handling of the brief are not immediately relevant to these proceedings and there is no basis for admitting affidavits from persons who had provided statements below. The number of "hits" on the Board's website will be a matter for disclosure.

[44] I would grant the application and allow the appeal and in lieu of the orders made below order that the time for commencing proceedings against the respondent be extended to 16 April 2010, the date the statement of claim was filed. I would further order that the proceedings be continued against the "Chiropractic Board of Australia" and the further words "replacing the Chiropractors Board of Queensland" appear next to the name of the defendant in all headings to court documents.

[45] The appeal has been successful and costs should follow the event. The costs below should abide the outcome of the proceedings.

Orders

[46] I would make the following orders:

1. Grant the application for leave to appeal.

2. Allow the appeal with costs.

3. Set aside the orders made below and in lieu of those orders:

   (i) Order that the appellant be granted an extension of time to file proceedings for defamation to 16 April 2010.

   (ii) The costs below be costs in the cause.

4. The proceedings continue against the "Chiropractic Board of Australia".

5. Henceforth where the Chiropractic Board of Australia is named in the heading of court documents that name be followed by the words "replacing the Chiropractors Board of Queensland".

[47] **PHILIPPIDES J**: I agree for the reasons stated by White JA, that the application for leave to appeal should be granted and the appeal allowed. I agree with the other orders proposed by her Honour.