SUPREME COURT OF QUEENSLAND

CITATION:	*Cross v Moreton Bay Regional Shire Council and Ors* [2011] QSC 92
PARTIES:	**PETER JOHN CROSS** (Applicant/Plaintiff) v **MORETON BAY REGIONAL SHIRE COUNCIL (FORMERLY CABOOLTURE SHIRE COUNCIL)** (First Defendant) and **GARRY CRICK'S (NAMBOUR) PTY LTD (ACN 069 267 081) (FORMERLY NAMED RAY GRACE MOTOR GROUP PTY LIMITED)** (Second Defendant) and **ROBERT WILLIAM PAULGER AND WENDY ANNE PAULGER** (Third Defendant)
FILE NO/S:	BS 10036 of 2010
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	29 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2011
JUDGE:	Boddice J
ORDER:	**1. The application against the second defendant is dismissed.** **2. The application against the third defendant is allowed.** **3. The limitation period for the bringing of the action by the plaintiff against the third defendant is extended to 18 September 2010.** **4. Pursuant to s 18(1)(c)(i) of the *Personal Injuries***

***Proceedings Act 2002*, the plaintiff's notice of claim part 1 dated 3 September 2010 as against the third defendant is a compliant notice of claim.**

5. **The plaintiff pay the second defendant's costs of and incidental to the application to be agreed, or failing agreement, to be assessed on a standard basis.**

6. **The plaintiff pay the second defendant's costs of and incidental to the application for leave to proceed under s 43 of the *Personal Injuries Proceedings Act 2002* filed 14 September 2010 (BS9873/10) to be agreed, or failing agreement to be assessed on a standard basis.**

7. **The plaintiff have leave to discontinue its claim against the second defendant.**

8. **The costs of and incidental to the application as against the third defendant be each of the plaintiff and third defendant's costs in the proceeding.**

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 brings an action against the first defendant for injuries suffered in the course of employment and the second and third defendants for the supply and manufacture of equipment used in connection with that employment – where the second and third defendants plead plaintiff has failed to identify a material fact of a decisive character within the requisite period – whether the limitation period for the proceeding should be extended

Limitation of Actions Act 1974 (Qld)

Personal Injuries Proceedings Act 2002 (Qld)

Workers Compensation and Rehabilitation Act 2003 (Qld)

Baillie v Creber and Anor [2010] QSC 52

Brease v State of Queensland [2007] QSC 43

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541

Dick v University of Queensland [2000] 2 Qd R 476

Honour v Faminco Mining Services Pty Ltd [2009] QCA 352

Limpus v State of Queensland [2004] 2 Qd R 161

Newberry v Suncorp Metway Insurance Limited [2006] 1 Qd R 519

NF v State of Queensland [2005] QCA 110

Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431

COUNSEL: ME Eliadis for the applicant/plaintiff

C McIver for the second defendant/respondent

D Atkinson for the third defendant/respondent

SOLICITORS: Mullins Lawyers for the applicant/plaintiff

Carter Newell for the second defendant/respondent

Barry Nilsson for the third defendant/respondent

[1] The plaintiff claims damages for personal injuries suffered on 26 June 2006. He alleges these injuries were sustained in the course of his employment with the first defendant when he dismounted from the tray of a truck used in that employment.

[2] On 12 December 2008, a notice of claim for damages under the *Workers Compensation and Rehabilitation Act* 2003 (Qld) was given to the first defendant.

[3] On 17 September 2010, this Court granted the plaintiff leave to commence proceedings against the second and third defendants under s 43 of the *Personal Injuries Proceedings Act 2002* ("PIPA").

[4] By application filed 17 March 2011 the plaintiff applies for orders:

1. Pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) ("LAA"), that the plaintiff's period of limitation for his claim for personal injuries against the second and third defendants be extended.
2. Pursuant to s 18(1)(c)(i) of PIPA, that the plaintiff's Notices of Claim, Part 1 dated 3 September 2010 against the second and third defendants comply with PIPA.
3. Alternatively, that the plaintiff be authorised to proceed further with his claims against the second and third defendants pursuant to s 18(1)(c)(ii) of PIPA, despite the non-compliance.

Statement of claim

[5] Relevantly, the plaintiff alleges in his statement of claim filed 17 September 2010:

> "6. At all material times:
>
> (a) the plaintiff was employed by the first defendant;
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> (b) the plaintiff was employed by the first defendant as a Ganger/Leading Hand;
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> (c) the first defendant provided the plaintiff with a work truck;
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> (d) the second defendant supplied the first defendant with the work truck, a Mitsubishi Cantor FE649 WSRFAA, pursuant to an offer dated 28 May 2004;

(e) the third defendant was contracted by the second defendant to fabricate, manufacture, and fit the tray and body to the work truck.

7. At all material times, the second defendant and/or third defendant knew that the first defendant was acquiring the work truck for use in its work operations, that the first defendant's employees would be required to use the work truck in the course of their usual work activities, that the first defendant's employees would carry out work activities on the tray of the work truck, and that the first defendant's employees would need a safe means of access to and from the tray of the work truck.

8. The work truck supplied to the first defendant by the second defendant, and manufactured for the second defendant by the third defendant, did not have adequate or appropriate means of mounting and dismounting from the tray of the work truck in that:

(a) the work truck did not have a dedicated hand hold;

(b) the existing step did not provide an appropriate means of mounting and dismounting in that three points of contact could not be maintained and a dedicated hand hold was not provided;

(c) the existing step was not large enough to accommodate two feet;

(d) the existing step had a radius which in itself contributed to slipping;

(e) the existing step did not incorporate any non-slip surfacing.

9. At all material times the second defendant owed a duty of care to the plaintiff to supply a truck to the first defendant which included a safe and appropriate means of mounting and dismounting from the vehicle tray.

10. At all material times the third defendant owed a duty of care to the plaintiff to ensure that it fabricated, manufactured and fitted the tray and body to the work truck in such a manner that it included safe and appropriate means of mounting and dismounting from the vehicle tray.

…

13. At or about 8:00am on 26 June 2006 at Bellthorpe Range Road, Woodford in the State of Queensland:

(a) in the ordinary course of his usual work duties, the plaintiff was carrying out work duties on the tray of the truck;

(b) in the course of dismounting from the tray of the truck, the plaintiff placed his left foot on the existing step, slipped off the step, and fell heavily onto the ground ('the incident').

14. As a result of the incident the plaintiff suffered personal injuries as follows:

(a) right L5/S1 disc herniation with right S1 radiculopathy;

(b) adjustment disorder with depressed mood.

…

16. Further, or in the alternative, the incident and the plaintiff's injuries were caused by the negligence of the second defendant in supplying a work truck to the first defendant:

(a) which had inappropriate and unsafe means of dismounting and dismounting from the vehicle tray;

(b) when the existing step did not provide an appropriate and safe means of mounting and dismounting in that three points of contact could not be maintained and a dedicated hand hold was not provided;

(c) the existing step was not large enough to accommodate two feet;

(d) the existing steps had a radius which in itself contributed to slipping;

(e) the step did not incorporate any non-slip surfacing.

17. Further, or in the alternative, the incident and the plaintiff's injuries were caused by the negligence of the third defendant in fabricating, manufacturing, and fitting a tray and body to the work truck:

(a) which included inappropriate and unsafe means of mounting and dismounting from the vehicle tray;

(b) the existing step of which did not provide an appropriate means of mounting and dismounting in that three points of contact could not be maintained and a dedicated hand hold was not provided;

(c) the existing step was not large enough to accommodate two feet;

(d) the existing step also had a radius which in itself contributed to slipping;

(e) the existing step did not incorporate any non-slip surfacing."

The application

Extension of the limitation period

[6] Section 31 of the LAA provides:

"(1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.

(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."

[7] A material fact relating to a right of action includes the nature and extent of the personal injury so caused.[1] It is of a decisive character if, and 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

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1 *Limitation of Actions Act* 1974 (Qld), s 30(1)(a)(iv).

of damages as sufficient to justify the bringing of an action on the right of action; and

(ii) That the person whose means and knowledge is in question ought in the person's own interest and taking the person's circumstances into account to bring an action on the right of action."[2]

[8] Each of these conditions is to be regarded from the point of view of a reasonable person, being a person who has taken "the appropriate advice on those facts".[3] Both conditions must be satisfied if the material fact is to have a decisive character.[4] Appropriate advice means advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.[5]

[9] The material fact is not of a decisive character if, before knowing that fact, a reasonable person would know facts that that person would regard (having taken appropriate advice) as showing that an action would (ignoring the effect of limitation period) 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 that the potential claimant ought in that person's own interests and taking that person's circumstances into account, bring an action on the right of action. However, if, without knowledge of that fact, a reasonable person, having taken the appropriate advice, would not regard the facts known to that person as showing that an action would (ignoring the effect of the limitation period) have a reasonable prospect of success, and of resulting in an award of damages sufficient to justify the bringing of an action, then the fact is of a decisive character.[6]

[10] Whether an applicant satisfies the requirements of s 31 of the LAA requires a step by step approach, namely:

(a) To inquire whether the facts of which the applicant was unaware were material facts;
(b) If they were, to ascertain whether they were of a decisive character;
(c) If so, whether those facts were within the means of knowledge of the applicant before the specified date.[7]

[11] If the applicant establishes a material fact of a decisive character relating to the right of action was not within her means of knowledge before the requisite date, the applicant must then establish there is a prima facie case of causative liability against the respondent, and that the discretion ought to be exercised in her favour.

[12] In exercising that discretion, consideration must be given to any prejudice to the respondent.[8] In *NF v State of Queensland*,[9] Keane JA, with whom Williams JA and Holmes J agreed, said at [44]:

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2 *Limitation of Actions Act* 1974 (Qld), s 30(1)(b).
3 *Honour v Faminco Mining Services Pty Ltd* [2009] QCA 352 at [73].
4 *Honour v Faminco Mining Services Pty Ltd* [2009] QCA 352 at [73].
5 *Limitation of Actions Act* 1974 (Qld), s 30(2).
6 *Honour v Faminco Mining Services Pty Ltd* [2009] QCA 352 at [74].
7 *Dick v University of Queensland* [2000] 2 Qd R 476 at [26].
8 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 547.
9 [2005] QCA 110.

"The *Brisbane South* decision is concerned to ensure that an extension of time under the Act should not become the occasion for a trial which is unfair to the defendant. It is authority for the following propositions:

(a) The onus is upon the applicant who has satisfied the conditions in s 31(2) of the Act to show good reason for the exercise in his or her favour of the discretion vested in the court by that provision;

(b) The principal consideration which guides the exercise of that discretion is the concern whether a claim, which is prima facie out of time, may yet be fairly litigated;

(c) If a fair trial is unlikely, the discretion conferred by s 31(2) should not be exercised in the applicant's favour."

[13] The plaintiff claims the following material facts of a decisive character relating to the rights of action against the second defendant and the third defendant were not within his means of knowledge until 18 September 2009, being a date not more than 12 months before the commencement of proceedings:

"8.1 18 September 2009 (Affidavit of CL Young, Doc No 4, Ex 'CLY-1', p. 35) – Plaintiff's solicitors given copy of Contribution Notice pursuant to s.278A of the WCRA from first defendant alleging negligence on the part of the second defendant; (second defendant);

8.2 29 September 2009 (Affidavit of CL Young, Doc No 4, Ex 'CLY-1, pp. 32-33) – '... *Ray Grace (the second defendant) was the successful tenderer. Ray Grace supplied the truck and engaged Paulger Engineering of Yandina (the third defendant) to fabricate the body to be fitted to the truck with the truck at the time of delivery. The tray was fitted to the truck at the point of purchase. A representative from Council's Roads and Drainage Department (the first defendant) liaised with Paulger concerning the measurements and constructions of the tray for the truck ... Council (the first defendant) relied upon the experience and expertise of Paulger Engineering (the third defendant) to fabricate and fit a tray and truck to the body including things such as steps to meet current Australian design rules* .....' (third defendant);

8.3 12 May 2010 (Affidavit of CL Young, Doc No 4, Ex 'CLY-1, p.57) – '*Paulger Engineering (the third defendant) was engaged to fabricate and construct the tray back the subject of the claim and we consider they are clearly a relevant party to this claim. Given Kylie Harrap, an employee of the ... Council (the first defendant) asserts at paragraph 8 of her statement ... that a Council representative liaised directly with Paulger Engineering (the third defendant) in relation to the design and*

construction of the tray back we are of the view that your client (the first defendant) has grounds to issue a Contribution Notice upon Paulger Engineering (the third defendant).

8.4 14 May 2010 (Affidavit of CL Young, Doc No 4, Ex 'CLY-1', p.60) – Plaintiff's solicitors given copy of Contribution Notice pursuant to s.278A of the WRCA from by the first defendant alleging negligence on the part of the third defendant - (third defendant)."

[14] The plaintiff submits that each of these facts was material and of a decisive character as each pertains to the occurrence of negligence by the second and third defendants. A material fact relating to a right of action includes the fact of the occurrence of negligence or breach of duty on which the right of action is founded.[10]

[15] The plaintiff asserts the fact of the occurrence of negligence or breach of duty on which the right of action against the second and third defendants is founded did not come within his means of knowledge until 18 September 2009 because prior to 18 September 2009 the plaintiff had no reason to think that the negligence of the supplier of the vehicle, and the manufacturer of the tray of the truck, as distinct from his employer, may have been responsible for his injuries, and there was no reason for him to enquire whether this was the case.

[16] The plaintiff also contends that a right of action against the second and third defendants includes an unrestricted right on the part of the plaintiff to claim damages for gratuitous/paid care and services provided to/required by him as a consequence of his injuries, and costs. [11] These are damages he is not entitled to recover in an action against the first defendant.

[17] The second defendant contends the plaintiff has failed to identify a material fact of a decisive character which was not within his means of knowledge within the requisite period as by 9 July 2009 his solicitor knew:

"• that the second defendant had sold the subject truck to the first defendant;

• that at the time of the sale, the truck had the subject tray and step installed;

• that the tray and step had been manufactured by the third defendant; and

• that the truck, tray and step had particular characteristics that made it (in the plaintiff's mind) unsafe."[12]

[18] The third defendant similarly contends the plaintiff has failed to establish a material fact of a decisive character was not within his means of knowledge within the requisite period as:

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10 LAA, s 30(1)(a)(i).

11 See *Newberry v Suncorp Metway Insurance Limited* [2006] 1 Qd R 519.

12 Outline of argument of second defendant, para 8.

> "(a) the tray was clearly marked (on both sides) with branding to the effect that it was manufactured from the third defendant;
>
> (b) the plaintiff does not suggest that he thought someone else manufactured the tray or that he was in any doubt as to the manufacturer;
>
> (c) the plaintiff concedes that he was aware, prior to 16 September 2009, that the third defendant was the manufacturer of the tray."[13]

Further, the plaintiff's solicitors were aware from the contents of a liability adjuster's report dated 22 June 2009 that the tray of the truck was manufactured by the third defendant and that the tray included the subject step and/or any guard rails. The plaintiff therefore knew, or should have known, that the trucks were manufactured to specifications provided by the first defendant and that as a consequence the third defendant might have had a role in the design of the step and/or the hand holds for the truck.[14] The third defendant points to the following statements in the liability adjustor's report of 22 June 2009:

> "Council did not make any specific requests of the supply company (Ray Grace Motors of Nambour) in relation to steps and hand holds required to be fitted to the subject truck at the time of delivery;"
>
> and
>
> "Council maintained that there is an expectation on the supplier that they would provide trucks fitted with steps that would meet any legislative requirements, standards or Australian design rules;"
>
> and
>
> "The subject tray, including the steps and/or handholds were constructed by Paulger Engineering of Yandina."[15]

[19] Finally, the third defendant contends a statement from Ms Harrap in a liability adjustor's report cannot be relied upon for the identification of the so-called material fact as a fact as it contains a broad assertion without any basis for that assertion, whereas the solicitor for the third defendant has deposed the third defendant did not have a role in design, but was instructed to comply with specifications or replicate existing Council vehicles.

[20] Whilst the plaintiff proffered four matters as material facts of a decisive character in his outline of submissions, the essential material fact relied upon is that until 18 September 2009 he was not aware of negligence on the part of the second or third defendants, and there was no reason for him to make enquiries in relation thereto prior to service of the first defendant's contribution notice on 18 September 2009.

[21] Prior to 18 September 2009, the following state of affairs existed:

(a) The applicant had issued a notice of claim against the first defendant, his employer, in respect of injuries sustained in the course of his employment.

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13 Outline of argument of the third defendant, para 10.

14 Outline of argument of the third defendant, para 17

15 Outline of argument of the third defendant, para 18(b)

(b) As part of that action, his solicitors had been provided with a liability adjustor's report. That report identified:
   (i) The truck was supplied by the second defendant.;
   (ii) The tray of the truck, including the steps and/or hand holds were constructed by the third defendant;
   (iii) The first defendant did not make any specific request of the second defendant in relation to the steps and hand holds required to be fitted to the subject truck;
   (iv) The first defendant expected the second defendant would provide trucks fitted with steps that would meet any legislative requirements, standards or Australian designs.

[22] A reasonable person knowing those facts, who had taken appropriate advice, would not regard those facts as showing that an action against the second and/or third defendant would have reasonable prospects of success resulting in an award of damage sufficient to justify the bringing of an action. The plaintiff was suing his employer, the first defendant, who had provided the truck as part of the equipment to be used by him in his employment. There was no suggestion at that time that the first defendant had relied upon the experience and/or expertise of the second and/or third defendants in relation to the appropriateness of that vehicle and, in particular, its tray. Against that background, a reasonable person, who had taken appropriate advice, would not draw a conclusion that proceedings should be commenced against the second and third defendants.

[23] On 18 September 2009, the plaintiff's solicitors were provided with a copy of the first defendant's notice of contribution to the second defendant.[16] This was the first occasion the plaintiff became aware the first defendant was contending negligence on the part of the second defendant. However, a perusal of that notice of contribution indicates that the first defendant was relying upon the supply of the truck by the second defendant, in circumstances where the truck was not appropriate for the first defendant's needs, as the basis for negligence. There was no contention in that notice that the first defendant had relied upon any particular experience or expertise of the second defendant.

[24] On 29 September 2009, the plaintiff's solicitors received a copy of a statement of Kylie Harrap, an employee of the first defendant. In that statement Ms Harrap said, in relation to the purchase of the subject truck:

> "7. Prior to purchase, Council liaised with the Maintenance and Roads and Drains crews and came up with a design plan for the try of the truck as well as general technical specifications for the truck itself. Council then called upon tenders from Ray Grace and Brisbane Isuzu for the supply of a truck and body per the specifications put forward by Council.
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> 8. Ray Grace was the successful tenderer. Ray Grace supplied the truck and engaged Paulger Engineering of Yandina to fabricate the body to be fitted with the truck at the time of delivery. The tray was fitted to the truck at the point of purchase. A representative from Council's Roads and

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16 Affidavit of C L Young filed 17 March 2011, p. 60

> Drainage department liaised with Paulger concerning the measurements and construction of the tray for the truck.
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> 9. Paulger Engineering provided a quote to Ray Grace Truck Centre for the fabrication of the tray and body of the truck. The specifications in their quotation included steps on both sides of the truck. However, Council did not provide any specific information in relation to the type of steps needed or whether there was any requirement for grab rails to be fitted to the truck.
>
> 10. Rather, Council relied upon the experience and expertise of Paulger Engineering to fabricate and fit a tray and body of the truck, including things such as steps to meet current Australian Design Rules. There was some liaison between Roads and Drainage Supervisors and Paulger concerning the construction of the tray and equipment box etc. However, there was no liaison concerning issues such as steps and grab rails.
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> 11. The only representation made by Ray Grace Motors was that the truck would be fabricated with steps to the front of the tray on both sides. They did not specify any type of step or hand rail and to my knowledge Council did not request any specific type of step or handrail."[17]

[25] The plaintiff relies on the notice of contribution, and the assertion that the second defendant engaged the third defendant to support the contention a material of a decisive character was not within the plaintiff's means of knowledge until 18 September 2009.[18] However, that additional material relied upon by the plaintiff has been within his knowledge or means of knowledge prior to 18 September 2010. Prior to that date, the plaintiff was aware, through his solicitors, that the second defendant had supplied the truck to the first defendant and had arranged for the tray to be manufactured by the third defendant.

[26] After 18 September 2009, the plaintiff learned, for the first time, that the first defendant relied upon the experience and expertise of the third defendant in the manufacture of the tray fitted to the truck. That fact came to the plaintiff's knowledge upon receipt of the statement from Ms Harrap. Whilst the earlier liability adjustor's report of 22 June 2009[19] had stated the first defendant did not make specific requests of the second defendant in relation to steps and hand holds, and maintained there was an expectation the second defendant would provide a truck fitted with steps that complied with Australian Design Rules, an assertion the first defendant had not provided any particular specifications is a different contention to the contention contained in Ms Harrap's statement, namely, reliance on the experience and expertise of the third defendant in the manufacture of the tray. That is a material fact of a decisive character. It goes to the occurrence of negligence by the third defendant in the manufacture of the tray to be fitted to the truck.

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17 Affidavit of C L Young filed 17 March 2011, pp. 32-33

18 Affidavit of C L Young filed 17 March 2011, paras 6, 14.

19 Affidavit of C L Young filed 17 March 2011, pp. 3-9

[27] A reasonable person, knowing the material fact that the first defendant relied upon the experience and expertise of the third defendant for the manufacture of the truck's tray and having taken appropriate advice, would regard the facts known to that person as showing that an action against the third defendant would have a reasonable prospect of success and result in an award of damages sufficient to justify the bringing of an action.

[28] The third defendant contends that even if the plaintiff has established a material fact of a decisive character was not within his means of knowledge, he has failed to establish he otherwise has a right of action. The basis for this submission is that the third defendant's solicitor has sworn that the third defendant was not involved in the design of the tray and the accompanying steps and hand holds.

[29] In order to satisfy the test that there is otherwise a right of action, an applicant must be able to point to the existence of evidence which, it can reasonably be expected, will be available at trial and will, if unopposed by other evidence, be sufficient to prove the applicant's case.[20] That test is undemanding.[21] Whilst the third defendant's solicitor may have sworn that the third defendant was not involved in the design of the tray, the first defendant contends it relied upon the third defendants experience and expertise in relation to the supply of a safe tray for use in its work vehicle. The plaintiff relies upon that allegation, and the evidence of the first defendant in relation thereto. It cannot be said that that evidence will, if unopposed by other evidence, be insufficient to prove his case. The observations of Moynihan J in *Brease v State of Queensland*[22] are apposite:

> "Broadly speaking, there is evidence which if accepted at trial, is capable of founding a conclusion or causal links between alleged breach of duty, consequent injury and damage …"

[30] That the plaintiff has established a material fact of a decisive character in relation to a right of action against the third defendant was not within his means of knowledge prior to 18 September 2009, does not mean he is entitled to an extension of the limitation period. There is still a discretion to be exercised.

[31] The onus is upon the plaintiff to show good reason for the exercise of the discretion in his favour. A principal consideration is whether the plaintiff can demonstrate a fair trial can be had in the circumstances of this case. In considering that onus, any specific matters of prejudice must be taken into account.[23] The third defendant does not identify any specific matters of prejudice. It does not identify the unavailability of any evidence.

[32] Having considered all of the material I am satisfied the plaintiff has shown good reason for the exercise of the discretion in his favour in relation to the third defendant. There is no reason why a trial of those issues would not be fair. They are issues the subject of a contribution notice from the first defendant. I am satisfied the claim against the third defendant may be fairly litigated, and that a fair trial is likely.

PIPA proceeding

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20 *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 at 434-435.
21 *Baillie v Creber and Anor* [2010] QSC 52 at [21].
22 [2007] QSC 43 at 20.
23 *Limpus v State of Queensland* [2004] 2 Qd R 161

[33] The plaintiff's explanation for the delay in commencing the PIPA claim against the third defendant is that he hoped to settle his claim against the first defendant to avoid the expense and complication of joining the third defendant. Whilst the plaintiff delayed almost 12 months from obtaining knowledge of the right of action against the third defendant before issuing a notice of claim under PIPA, the explanation provided is reasonable in the circumstances. If the plaintiff's action against the first defendant had resolved, there would have been no need to institute proceedings against the third defendant. Further, no prejudice has been identified by the third defendant by reason of the delay.

Conclusion

[34] The plaintiff has not satisfied me that the requirements of s 31 of the LAA have been met in relation to the second defendant. However, I am satisfied the plaintiff has demonstrated the requirements of s 31 of LAA are met in relation to the third defendant, and that the limitation period for the proceeding against the third defendant should be extended to 18 September 2010.

[35] I am satisfied the explanation given by the plaintiff amounts to a reasonable excuse for the failure to comply with the statutory requirements of PIPA.