SUPREME COURT OF QUEENSLAND

CITATION:	*Thompson v WorkCover Queensland* [2011] QSC 197
PARTIES:	**SHAUN MICHAEL THOMPSON** (Applicant) v **WORKCOVER QUEENSLAND** **ABN 40 577 162 756** (First Respondent) and **KQ OPERATIONS PTY LTD** **ABN 57 113 087 782** (Second Respondent)
FILE NO/S:	BS 866 of 2010
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2011
JUDGE:	McMurdo J
ORDER:	**The limitation period for the applicant's cause of action, the subject of his Notice of Claim dated 25 February 2009, be extended until 2 September 2010.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – GENERALLY – where WorkCover waived compliance of the applicant's Notice of Claim on various conditions – where the applicant agreed to WorkCover's conditions once the limitation period had expired – where the applicant contracted Q-fever at work – where most patients recover from Q-fever within two years – where the applicant's Q-fever is a permanent condition – whether the court should order that the limitation period be extended – whether the applicant had a reasonable prospect of success to justify the bringing of an action under s 30(1)(b)(i) of the *Limitation of Actions Act 1974* (Qld)

Limitation of Actions Act 1974 (Qld), s 31
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 275, s 276, s 302

Castillon v P&O Ports Ltd (No 2) [2008] 2 Qd R 219, considered
Handover v Consolidated Meat Group Pty Ltd [2009] QSC 41, cited
Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (In Liquidation) & Anor [2009] QCA 352, cited
The Commonwealth v Mewett (1997) 191 CLR 471, cited

COUNSEL: D Fraser QC with R Trotter, J Francis and RP Bridgman for the applicant.
K Holyoak for the respondent.

SOLICITORS: Gall Stanfield & Smith for the applicant.
Corrs Chambers Westgarth for the respondent.

[1] The applicant seeks an extension of the limitation period for his proposed action for damages for personal injuries against his employer, which is the second respondent. In that employment, he was exposed to raw meat products but was given no protective clothing or masks and he was not immunised against Q-fever. He contracted Q-fever and his symptoms began on about 24 February 2006. He first sought medical attention on 2 March 2006 and it is common ground that the limitation period of three years began to run on that date.

[2] The applicant's proposed action is subject to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('the Compensation Act'). Section s 275(1) required him to give notice of his claim within the limitation period. But by s 276, WorkCover was entitled to waive compliance with the requirements of s 275. Section 276 provides:

> "276 Noncompliance with s 275 and urgent proceedings
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> (1) The purpose of this section is to enable a claimant to avoid the need to bring an application under section 298.
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> (2) Without limiting section 297 or 298, if the claimant alleges an urgent need to start a proceeding for damages despite noncompliance with section 275, the claimant must, in the claimant's notice of claim-
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> (a) state the reasons for the urgency and the need to start the proceeding; and
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> (b) ask the insurer to waive compliance with the requirements of section 275.

(3) The claimant's lawyer may sign the notice of claim on the claimant's behalf if it is not reasonably practicable for the claimant to do so.

(4) The claimant's notice of claim may be given by fax in the way provided for under a regulation.

(5) The insurer must, before the end of 3 business days after receiving the notice of claim, advise the claimant that the insurer agrees or does not agree that there is an urgent need to start a proceeding for damages.

(6) If the insurer agrees that there is an urgent need to start a proceeding for damages, the insurer may, in the advice to the claimant under subsection (5), impose the conditions the insurer considers necessary or appropriate to satisfy the insurer to waive compliance under section 278(2)(b).

(7) The claimant must comply with the conditions within a reasonable time that is agreed between the insurer and the claimant.

(8) The claimant's agreement to comply with the conditions is taken to satisfy section 302(1)(a)(ii)."

[3] Section 302 of the Compensation Act provides, in part, as follows:

"302 Alteration of period of limitation

(1) A claimant may bring a proceeding for damages for personal injury after the end of the period of limitation allowed for bringing a proceeding for damages for personal injury under the *Limitation of Actions Act 1974* only if –

(a) before the end of the period of limitation –

(i) the claimant gives, or is taken to have given, a complying notice of claim; or

(ii) the claimant gives a notice of claim for which the insurer waives compliance with the requirements of section 275 with or without conditions;

…"

[4] On 25 February 2009, the applicant's then solicitors delivered a Notice of Claim. On 2 March 2009, WorkCover faxed a letter back, advising that it was "willing to waive compliance on the claimant's agreement to satisfy [various conditions]". But it was not until 6 March 2009 that a copy of that letter, signed by the applicant as his "confirmation of terms", was faxed back to WorkCover. On 12 March 2009, WorkCover wrote to the applicant's solicitors, acknowledging receipt of his agreement to its conditions and effectively calling for his compliance with them. However, some three months later, on 11 June 2009, the applicant's solicitors received a letter from solicitors for WorkCover advising that:

> "The claimant's agreement to WorkCover's conditions was not received by WorkCover until 6 March 2009… The decision in *Handover v Consolidated Meat Group P/L* [2009] QSC 41 makes it clear that the waiver is not effective until the claimant's agreement to conditions is actually communicated to WorkCover… The claim is prima facie statute barred."

[5] In *Handover v Consolidated Meat Group Pty Ltd*[1] it was held that s 302(1)(a)(ii) is satisfied only where the insurer's waiver of compliance with the requirements of s 275 occurs within the (original) limitation period. That conclusion was not challenged here. But for s 276(8), it might have been said that WorkCover had waived compliance with the requirements of s 275, within the limitation period, when it faxed its letter of 2 March 2009. However, s 276(8) provides that in the case of a conditional waiver, s 302(1)(a)(ii) is satisfied upon the claimant's agreement to comply with the conditions. Clearly, that did not occur here until 6 March 2009. Because this limitation period affects the applicant's remedy and not his right of action, the expiry of the limitation period was fatal to the proceedings only if WorkCover took the point.[2] WorkCover's response at first was, on one view at least, inconsistent with an intention to rely upon the expiry of the limitation period. Still, the limitation point was later taken by WorkCover, through its solicitors, and the applicant's argument accepts that he must obtain an extension of the limitation period until at least 6 March 2009.

[6] He applies pursuant to s 31 of the *Limitation of Actions Act 1974* (Qld) ('the Limitation Act'), of which s 31(2) provides:

> "(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court-
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> (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

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1 [2009] QSC 41 at [24].

2 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534 per Gummow and Kirby JJ.

(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."

Section 30 of the Limitation Act provides:

"30 Interpretation

(1) For the purposes of this section and sections 31, 32, 33 and 34-

(a) the material facts relating to a right of action include the following-

(i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;

(ii) the identity of the person against whom the right of action lies;

(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;

(iv) the nature and extent of the personal injury so caused;

(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

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

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

bringing of an action on the right of action; and

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

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

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

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

(2) In this section-

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

[7] As is common ground here, what is described in these cases as the "critical date" is 2 March 2008. Ultimately, the applicant's case seemed to be put in the alternative. According to the case within his affidavit evidence, a material fact of a decisive character was that his Q-fever is a permanent condition. He became aware of that fact only when receiving WorkCover's letter of 2 September 2009, which advised that the Medical Assessment Tribunal had assessed him as having a permanent impairment of 8% for the Q-fever and a permanent impairment of 10% for a psychiatric injury, his depression, which has developed as a consequence of the Q-fever. Alternatively, it was argued that, within the period of one year from the critical date, he became aware of sufficient facts to make it worthwhile to sue, although he did not then know that his condition was permanent. That case is based principally upon evidence of an independent solicitor, Mr Schultz.

[8] Each of those arguments is disputed by the respondents, upon the basis that enough was known to make it worthwhile to bring a case before the critical date. There is no submission that the respondents would be relevantly prejudiced by the extension which is sought and nor is it argued that the applicant does not have a cause of action against his employer.

[9] By the critical date, the applicant had been suffering his Q-fever symptoms for two years and from associated symptoms of depression from about June 2006. Q-fever was diagnosed in April 2006. Initially he had some time off work, receiving

workers' compensation, before returning to his employment but on less than a full time basis.

[10] He came under the care of Dr Jones, a specialist in treating Q-fever. It is a condition from which most patients recover. Dr Jones considered that the applicant would recover and would return to full time work. That was the effect of Dr Jones' opinion from about September 2006 until beyond the critical date. In August 2007, Dr Jones had written that the applicant was "finally really improving". In a letter dated 29 April 2008 to WorkCover, Dr Jones wrote that it was reasonable to assume that the applicant's treatment could be completed at a point two years from its commencement (September 2006), "though there have of course been described cases of relapse". He then wrote that he had "no expectations that [the applicant] will require any further treatment and the risk of any relapse would be low".

[11] On 18 October 2007, Dr Pearson, a psychiatrist, reported that the applicant was suffering a major depressive disorder which was in partial remission. He wrote that his mental illness was a consequence of his physical illness. He was then showing improvement and "from the psychological point of view he is fit for preinjury duties". He concluded:

> "Mr Thompson's prognosis will largely be dictated by the course of his medical illness. It is likely that depressive symptoms will continue as long as the Q fever remains active. A gradual improvement over the next six to twelve months should be in keeping with this."

Upon the basis of that report, WorkCover wrote to the applicant accepting that his depression was related to his Q-fever and was a work-related injury.

[12] On 18 February 2008, just prior to the critical date, the applicant saw another specialist, Dr Dwyer. The unchallenged evidence of the applicant is that Dr Dwyer then said that he did not think that the applicant was suffering from Q-fever of any form and that he "just needed to get on with my life and get back to work". In effect he was told by Dr Dwyer that there was nothing wrong with him. That is consistent with the report from Dr Dwyer dated 12 March 2008, in which he wrote that the applicant was not then suffering from Q-fever of any form and was now past his infection. The encounter with Dr Dwyer could hardly have encouraged him to bring proceedings.

[13] I should note that the applicant was also seen by a Dr McCartney, a general practitioner engaged by WorkCover, in October 2007. But the applicant's unchallenged evidence was that he saw no report from Dr McCartney nor received any advice from him as to his prognosis. Dr McCartney saw him again on 11 March 2008 and wrote a report of that date. It was in the applicant's favour because Dr McCartney thought that the applicant was likely to have a permanent disability assessed at 15%. But again this was not made known to the applicant.

[14] The applicant's position as at the critical date was then relevantly as follows. He was continuing to suffer from unresolved Q-fever with associated depression. Although most Q-fever sufferers recover, as he was expected to do, it was uncertain that he would recover and it was expected that he would continue to receive treatment until that two year point in September 2008. With the reduction in his working hours, his income had dropped from about $1,070 per week to about $690 a week. He was still working for the second respondent but there was some uncertainty as to how long that could continue. The reduction in his income had caused him particular stress, causing him to sell the family home. He had complained to his general practitioner in October 2006 of occasional suicidal thoughts. Prior to these illnesses, he had lost the sight of one eye and he was being constantly monitored for potential damage to his good eye from the Q-fever. As to his right of action, the negligence of his employer was apparent and his potential case was not affected by any likely contest on the questions of the defendant's negligence or its causative effect. There was no apparent basis for a finding of contributory negligence. In short, he had an apparently good case on liability but his likely award of damages was affected by the likelihood that, like most Q-fever sufferers, he would fully recover.

[15] The applicant called Mr Schultz to say that in those circumstances he would not have advised the applicant to then sue. The respondents called another independent solicitor, Mr Heath, to say that he would have advised the applicant that he had a claim worth pursuing as early as September 2006, which was when Dr Jones reported that the Q-fever had become a chronic condition. But in that same report, Dr Jones had written that the applicant would eventually overcome his illness albeit improving on a "two steps forward, one step back" basis.

[16] For the respondents it was submitted that even upon a conservative view, an award of damages in excess of $100,000 might have been expected as at the critical date. In particular, it was said that an expected award would have been at least as follows:

Pain, suffering and loss of amenities	$30,000
Interest on half of that component at 2% for 2 years	$600
Past economic loss	$20,000
Past lost superannuation at 9%	$1,800
Future economic loss	$50,000
Future lost superannuation	$4,500
Future and recurrent expenses	$5,000

[17] In my view, that does not represent what would have been a conservative estimate as at the critical date. Most importantly, the apparent likelihood was that the applicant would make a complete recovery. His own specialist expected that he would make a complete recovery. Another specialist had said that he had already fully recovered. The reasonable view of his case as at the critical date would have

been upon the premise that, more likely than not, he would recover. Had he commenced proceedings but then made a complete recovery by the time his damages were assessed, the only prospect of any allowance for future economic loss would have been from the low likelihood of some relapse. Conceivably he may have received some component of future economic loss upon that basis but that would have been far from certain. His claim for future and recurrent expenses would also have been effectively precluded by a recovery by the time of the assessment. As at the critical date he had not recovered so that his economic loss was effectively accruing. But in real terms this was at the rate of about $1,000 per month.

[18] The likelihood of a complete recovery would have affected his award for pain, suffering and loss of amenities. Upon the premise that he would fully recover, his likely award would have been in the range of $40,000 to $60,000.

[19] An award within that range would not have been sufficient to justify the bringing of an action. That is mainly because s 316 of the Compensation Act provides that in a case involving a worker with an RWI of less than 20%, the only costs which can be ordered in the worker's favour are costs on the standard basis from the day of the written final offer, which is the day of the compulsory conference required by s 292 of the Compensation Act. To reach that point, a worker's case must be effectively ready for trial. The likely costs of reaching that point, according to Mr Schultz, would have been in the range of $25,000 to $35,000. I accept that evidence which I did not understand to be challenged. Secondly, there was the circumstance that the applicant had remained in the second respondent's employment. This was a good reason not to bring a claim which, after costs, was likely to be worth less to the applicant than $40,000 and perhaps worth less than $10,000. Of course there was a possibility that his condition would persist. But one matter which must exist for a collection of facts to be material facts of a decisive character is that a reasonable person, with appropriate advice, would regard those facts as showing that an action would have "…a *reasonable prospect* … of resulting in an award of damages sufficient to justify the bringing of an action".[3] As at the critical date, on the basis of the medical opinion known to the applicant, the prospect of obtaining such an award was not reasonable.

[20] In February 2009, the applicant gave notice of a proposed claim for damages in the amount of $500,000. According to his oral evidence, he was then advised by his solicitors that his damages would be of that order and it was upon the basis of that advice that this Notice of Claim was given.[4] The respondents seem to rely upon that evidence, together with the giving of the notice of claim itself, in two ways. Firstly, it is said to be inconsistent with the applicant's case that it was not until September 2009 that he believed that he had a worthwhile case, a submission strongly reliant upon what was said by Keane JA in *Castillon v P&O Ports Ltd (No 2)*.[5] Secondly, it is submitted that there was no material change between the critical date and the giving of the Notice of Claim, thereby indicating that the applicant had a worthwhile case by the critical date.

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3 s 30(1)(b)(i) of the Limitation Act.

4 T 1-19 and 1-20.

5 [2008] 2 Qd R 219.

[21] Mr Schultz said that although there was not a worthwhile case at the critical date, there was comfortably a worthwhile case a year later. What occurred within that year? Because the physical illness and the associated psychiatric illness persisted, the prospect that the applicant would fully recover became somewhat smaller. Further, in September 2008 the applicant completed the period of two years of treatment which Dr Jones had recommended. It was submitted for the applicant that passing this point was particularly significant, in that it indicated that the applicant's Q-fever was exceptional. Dr Jones wrote on 19 November 2008 that the applicant's symptoms were largely unchanged and suggested that the existing medication be continued. But at the same time, he thought that the applicant would recover concluding as follows:

> "I have asked Shaun to come back in late February/early March with repeat of his blood tests, because we are simply going to have to follow this serology to give us some guidance as to when we might be recommending he stop therapy."

Dr Jones did not report again until 4 March 2009. He then wrote that the applicant was "progressively getting better" and was encouraged by Dr Jones to continue to increase his work load towards a 40 hour week, which he said he hoped the applicant would be able to reach "within the next few months". This indicates at least that his symptoms had not become worse. Within this period of one year from the critical date there were some other incidents, indicating the stress of these illnesses upon his personal life.

[22] Most relevantly, the difference between his position at the end of February 2009 and that as at the critical date was that after yet a further year, he had not recovered. From this, it could be said that his prospect of obtaining an award, which would have justified bringing an action, was somewhat higher. But if he was advised by his then solicitors that he could expect to obtain an award in the vicinity of $500,000, that advice was overly optimistic. He had no medical opinion available to him to the effect that his condition would be permanent and the available opinion was to the contrary. He had suffered some further loss of income, of course, over that year; but by then his award for past economic loss would have been only about $30,000. By that stage, he was more likely to receive some component for future economic loss, not of the order which was implicit within his Notice of Claim, but at least something which recognised a real possibility that he would not get better.

[23] Although his case was, if anything, stronger by February 2009, there was still not a reasonable prospect of obtaining an award which would justify an action. The position remained that he was likely to recover fully, and if this occurred prior to an assessment or even a compulsory conference, he was unlikely to receive significantly more than what was the probable range a year earlier.

[24] In *Castillon v P&O Ports Ltd*, the primary judge had ordered in 2007 that the limitation period be extended to the date upon which the plaintiff had commenced his action in 2003. Part of the basis for this extension was the content of documents which had not been available to the plaintiff by the critical date or indeed by the date of commencement of the action. The plaintiff's employment by the defendant

had been terminated in 2004, i.e. after the commencement of the action. The primary judge regarded that new circumstance, the termination of his employment, as important. In deciding to extend time, the primary judge disagreed with the reasoning of Rackemann DCJ, who had dismissed an earlier application by the plaintiff for an extension. Upon an appeal, the extension was set aside. The principal judgment was given by Keane JA, who wrote:

> "[39] That the plaintiff had decided to commence, and actually commenced, proceedings are circumstances which serve to highlight the difficulty involved in the learned primary judge's conclusion that Rackemann DCJ erred in his crucial finding because he was not aware of the documents lately disclosed by the defendant which show a degree of equivocation on the part of the defendant as to its willingness and ability to continue the plaintiff's employment. In concluding that Rackemann DCJ erred in his assessment that the plaintiff had the means of knowledge of sufficient facts to justify an action for damages as worthwhile, the learned primary judge seems to have assumed that the recently disclosed information would have led to a reasonable assessment, prior to 27 November 2001, that an action was not worthwhile. That assumption by the learned primary judge is not self-evidently true. It was not supported by analysis demonstrating that the plaintiff's inability to continue as a crane operator and the defendant's undisclosed equivocation over its willingness and ability to continue to employ the plaintiff in other duties meant that the economic loss component of an action for damages would reasonably be regarded as insufficient to justify bringing an action.
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> [40] Her Honour's assumption is, in truth, counter-intuitive: the facts that the plaintiff had decided in June 2001 to commence an action, and had actually commenced an action before the final termination of his employment, serve to emphasise, at a practical level, the real difficulty in the way of the conclusion that the plaintiff did not know that he had a worthwhile cause of action until his employment was finally terminated. The plaintiff and his legal advisers apparently made an assessment that an action for damages was worthwhile having regard to the facts of which they were aware, including the facts relating to the impairment to the plaintiff's earning capacity and his vulnerability in the employment market, whether or not the plaintiff continued in employment with the defendant. It may be said that, on an objective view, they were in error in their assessment; but that error is not demonstrated by treating the termination of the plaintiff's employment as a material fact because, even if it is regarded as a material fact, it was not of a decisive character."[6]

[25] In reliance upon that passage, the respondents argue that the fact that a Notice of Claim was given within the limitation period shows that by then the applicant had decided to commence an action, emphasising "at a practical level, the real difficulty

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6 *Castillon v P&O Ports Ltd (No 2)* [2008] 2 Qd R 219.

in the way of the conclusion that the plaintiff did not know that he had a worthwhile cause of action". But care must be taken in adapting what was said in another factual context to the present case, as P Lyons J (with whom Fraser JA agreed) observed about *Castillon* in *Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (in liquidation) & Anor*.[7] Here, the timing of the Notice of Claim indicates that it was given in a last minute attempt to avoid the expiry of the limitation period, rather than upon a considered assessment that there was a case then worth prosecuting. That impression has support in the applicant's affidavit evidence which, it may be noted, was prepared by the same solicitors who gave the Notice of Claim. In his affidavit filed on 29 January 2010, the applicant gave this evidence:

> "68. In late February 2009, out of an abundance of caution, I gave instructions to my solicitors, Anderssen & Company, to lodge a Notice of Claim for Damages for my Q-fever and psychiatric problems. I was concerned about losing my job if I commenced an action but I wanted to protect my family if I didn't get better.
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> 69. At that time of late February 2009 I was still of the view that I would fully recover, that being the advice that I had continued to receive from Dr Jones and Dr Beecham.
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> 70. I thought that it would not be worthwhile to follow through a Common Law claim due to my belief that I would fully recover.
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> …
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> 113. As a result of receiving news that I have a permanent impairment, I am now concerned that my losses in the future will be considerable.
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> …"

[26] Against that evidence is the applicant's evidence, in cross-examination, that by February 2009 he had been advised that his "damages were in the vicinity of $500,000" and upon the basis of that advice his Notice of Claim was given. I have some difficulty in accepting that oral evidence. Although the point was not explored in re-examination, I doubt whether the applicant had a proper understanding of what was being put to him. I say that, not only because of the inconsistency of that evidence with his affidavit evidence, but also because of the improbability that by February 2009 he had been advised that he was likely to recover something of the order of $500,000. Ultimately, however, it is unnecessary to resolve this question because the question is not what the applicant then believed or had been advised, but what a reasonable person with appropriate advice would have thought. If there was not a worthwhile cause of action in the relevant sense until September 2009, the applicant's belief and the content of his legal advice as at February 2009 does not matter.

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7 [2009] QCA 352 at [91].

[27] The applicant requires an extension only until 6 March 2009. It is sufficient for his purposes if he establishes that it was not until after 6 March 2008 that he knew enough about his case to reach a reasonable view, with appropriate advice, that an action would result in an award sufficient to justify it. I have concluded that that was not the case as at the critical date, but that this remained the position a year later and that it was not until September 2009, and the disclosure of medical opinion that his condition was permanent, that he knew of the material facts of a decisive character.

[28] He has established his case for an extension of time. It will be ordered that the period of limitation for the applicant's cause of action, the subject of his Notice of Claim dated 25 February 2009, be extended until 2 September 2010.