SUPREME COURT OF QUEENSLAND

CITATION:	*MCA v State of Queensland* [2011] QSC 298
PARTIES:	**MCA** (Plaintiff) v **STATE OF QUEENSLAND** (Defendant)
FILE NO/S:	BS 13454 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2011
JUDGE:	Boddice J
ORDER:	**The application for leave to extend the time for commencement of these proceedings is refused.**
CATCHWORDS:	LIMITATION OF ACTIONS — EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS — EXTENSION OF TIME IN PERSONAL INJURIES MATTERS — KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER — KNOWLEDGE — GENERALLY — where the plaintiff commenced action against the defendant claiming damages for personal injuries and other loss and damage allegedly occasioned by the negligence of the defendant — where the plaintiff seeks, pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) an extension of time for the commencement of these legal proceedings — whether the material fact of a decisive character was within the plaintiff's means of knowledge before the date being 12 months prior to the issue of the claim — whether an extension ought to be granted in the exercise of the court's discretion *Limitation of Actions Act* 1974 (Qld) *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 *Healy v Femdale* Pty Ltd [1993] QCA 210 *HWC v Corporation for the Synod of the Diocese of Brisbane*

& Ors [2009] QCA 168

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

NF v State of Queensland [2005] QCA 110

Page v The Central Queensland University [2006] QCA 478

Raschke v Suncorp Metway Insurance Ltd [2005] QCA 161.

The State of Queensland v Stephenson [2006] 226 CLR 197

COUNSEL: Atkinson, DLK for the plaintiff

Morton, RC for the defendant

SOLICITORS: Murphy Schmidt Solicitors for the plaintiff

Crown Law for the defendant

[1] By claim and statement of claim filed 27 November 2009, the plaintiff claims damages for personal injuries and other loss and damage allegedly occasioned by the negligence of the defendant. The personal injuries and other loss or damage are alleged to have been caused by sexual abuse of the plaintiff by his teacher between 1982 and 1985. In its defence, the defendant pleaded, *inter-alia*, that the action is statute-barred.

[2] By application filed 28 June 2011 the plaintiff seeks, pursuant to s 31(2) of the *Limitation of Actions Act* 1974 (Qld) ("the Act"), an extension of time for the commencement of those legal proceedings. It is accepted the plaintiff has established a material fact of a decisive character, was not within his actual knowledge until after 27 November 2008 (being the date 12 months prior to the issue of the claim), and there is evidence to otherwise establish the cause of action. The issues for determination are whether the material fact of a decisive character was within the plaintiff's means of knowledge before that date, and whether an extension ought to be granted in the exercise of the court's discretion.

Background

[3] The plaintiff was born on 12 April 1973. In 1979, he attended Serviceton State School ("Serviceton"). He completed years one to seven at Serviceton. One of the teachers at this school, between 1982 and 1985, was Alain Francois ("Francois").

[4] In 1983 and 1984 Francois sexually abused the plaintiff. In July 1985, the plaintiff informed his parents of Francois's conduct. Later that month, the plaintiff made a statement to Queensland Police. Francois was subsequently charged with a number of offences. On 13 December 1985, Francois was found guilty of indecent dealing and sentenced to 18 months imprisonment.

The claim

[5] In his amended statement of claim, the plaintiff alleges:

(a) The defendant, as the owner and operator of State schools throughout Queensland, including Serviceton, employed Francois as a teacher at State schools other than Serviceton.

(b) Whilst Francois was employed as a teacher at schools prior to Serviceton, the defendant received allegations from parents of students that Francois had engaged in conduct towards students which amounted to sexual impropriety.

(c) Whilst the defendant investigated the alleged sexual impropriety, and was unable to substantiate or disprove the allegations, it knew or should have known that Francois might have a propensity to act in a sexually inappropriate way towards students.

(d) In those circumstances, the defendant owed the plaintiff a duty of care to take all reasonable precautions for the safety of the plaintiff whilst he was attending Serviceton as a student, and not to expose the plaintiff to any risk of damage or injury of which the defendant knew or ought to have known.

(e) The defendant breached that duty, and the plaintiff suffered personal injuries and other loss and damages as a consequence of that negligence.

[6] The particulars of negligence are as follows:

> "(a) failed to ensure that the conduct of Mr Francois was closely supervised whilst he worked at Serviceton;
>
> (b) failed to ensure that the conduct of Mr Francois was regularly reviewed whilst he worked at Serviceton;
>
> (c) failed to ensure that students were counselled as to appropriate contact with adults;
>
> (d) failed to ensure that Mr Francois did not meet with students outside school;
>
> (e) failed to otherwise ensure that vulnerable students at Serviceton were protected from predatory conduct."

Legislative regime

[7] Relevantly, s 31 of the Act provides:

> "**31 Ordinary actions**

> (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. …"

[8] By s 30(1)(c) of the Act, a material fact of a decisive character is not within a person's means of knowledge if the person does not know the fact at that time and, 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.

[9] In *NF v State of Queensland*,[1] Keane JA explained s 30(1)(c) as follows:

> "[29] It is to be emphasized that s 30(1)(c) does not contemplate a state of knowledge of material facts attainable in the abstract, either by the exercise of 'all reasonable steps', or by the efforts of a reasonable person. It speaks of a state of knowledge attainable by an actual person who has taken all reasonable steps. The actual person postulated by s 30(1)(c) as the person who has taken all reasonable steps, is the

[1] [2005] QCA 110 at [29].

> particular person who has suffered particular personal injuries. Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant. It seems to me that, if that person has taken all the reasonable steps that she is able to take to find out the fact, and has not found it out, that fact is not within her means of knowledge for the purpose of 30(1)(c) of the Act. This view is supported by the text of s 30(1)(c)(ii) which is, as I have said, in marked contrast to s 30(1)(b). The authorities do not afford conclusive support for this view;[2] but they do not foreclose its acceptance, and it may be noted that in *Young v The Commissioner of Fire Service*[3] Williams J, as his Honour then was, accepted that a psychiatric condition which prevents an applicant from appreciating the nature and significance of the injury he has suffered was relevant for the purposes of s 30(1)(c)(ii)…

[10] The requirement to take reasonable steps will not necessitate taking appropriate advice,[4] or asking appropriate questions if in all the circumstances it would not be reasonable to expect a person in the plaintiff's shoes to have done so.[5]

[11] If the requirements of s 31(2) are satisfied, the Court still has a discretion whether to grant an extension. In exercising that discretion, the Court should consider whether, in the interests of justice, an extension should be granted.[6] Relevant to that determination is whether there can be a fair trial of the issues in the proceeding. It is for the plaintiff to establish that a fair trial can be held in the circumstances.[7]

Plaintiff's submissions

[12] The plaintiff submits the material fact of a decisive character, namely, that when Francois commenced to teach at Serviceton, the defendant had reason to suspect that he may have recently engaged in sexual misconduct, was not within his means of knowledge until after 27 November 2008. He contends that until he had a

---

2 *Castlemaine Perkins Limited v McPhee* [1979] Qd R 469 at 472 - 473; *Randel v Brisbane City Council* [1984] 2 Qd R 276 at 285; *King v Queensland Corrective Services Commission* [2000] QSC 342; SC No 5521 of 1997, 5 October 2000, at [38]. *Pizer v Ansett Australia Ltd* [1998] QCA 298; Appeal No 6807 of 1998, 29 September 1998 at [15] - [16] seems to conflate the issues posed by s 30(1)(b) and s 30(1)(c)(ii).

3 [1997] QSC 43; SC No 2005 of 1991, 17 March 1997.

4 Section 30(2) of the Act.

5 *HWC v The Corporation for the Synod of the Diocese Brisbane & Ors* [2009] QCA 168 at [44], citing with approval *Healy v Femdale Pty Ltd* [1993] QCA 210; see also *Raschke v Suncorp MetwayInsurance Ltd* [2005] QCA 161.

6 *Limpus v State of Queensland* [2004] 2 Qd R 161; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 550.

7 *HWC* at [57]-[68] and [94].

conversation with his brother in December 2008, in which his brother advised him that Serviceton had notice of prior allegations involving Francois, the plaintiff had no reason to suspect that the defendant had left him alone with a teacher who was the subject of unresolved sexual abuse allegations and, accordingly, there was no reason for him to make enquiries in that regard.

[13] The plaintiff further submits that there can be a fair trial as there is available evidence in relation to prior complaints of sexual misconduct against Francois at schools before he commenced at Serviceton.

Defendant's submissions

[14] The defendant submits that knowledge of the material fact of a decisive character was within the plaintiff's means of knowledge before 27 November 2008, as the plaintiff always knew that the assaults had had a serious effect upon him as he ruminated on them daily, and as early as March 2008 he considered making a compensation claim. A reasonable person, in the plaintiff's position, would have sought legal advice before November 2008. Had he done so, it is likely that such advice would have led to the ascertainment of the material fact of a decisive character before 27 November 2008.

[15] The defendant further submits that a fair trial can no longer be had as investigations have revealed that a report prepared by the District Inspector who investigated the allegations cannot now be located, and it is likely to be the best evidence. Further, material witnesses have since died and there is now no realistic prospect that anyone could say what level of supervision was being provided to Francois. As such, there is no prospect for the defendant to answer the allegations of negligence made against it. Likewise, relevant evidence in respect of quantum has been lost such that the defendant is at the "mercy" of the plaintiff's allegations without any realistic prospect of challenging them.

Discussion

Was the material fact of a decisive character within the plaintiff's means of knowledge?

[16] For the material fact of a decisive character not to be within the means of knowledge of the plaintiff prior to 27 November 2008, the plaintiff must establish that not only did he not know of that fact at the time, but that so far as the fact was able to be found out by him, he had taken all reasonable steps to find out that fact.

[17] The plaintiff gave evidence that although he was aware Francois had been convicted of a number of charges of indecent dealing in December 1985, and sentenced to 18 months imprisonment, he did not consider suing the State as he was not aware Francois had committed similar offences against any other children or that the State might have been aware of previous allegations of abuse. He explained:

> "I did not consider suing the State because I reasoned that the State had not done anything wrong. It seemed to me that, given the secret way Mr Francois went about touching me, and given that I did not make a complaint until sometime later (as described above), the State had no way of knowing or suspecting that Mr Francois might be a paedophile. In short, I didn't think that the State was to blame for anything Mr Francois did to me."[8]

[18] The plaintiff's position in respect of the State changed when he received information from his brother, shortly before Christmas 2008, that "he had recently heard that Mr Francois had indecently assaulted children in North Queensland before he came to Serviceton, and that it was for this reason that he was transferred to Serviceton".[9] In late December 2008, the plaintiff also had a discussion with a woman called Mrs Jones, who had triplet boys who had attended Serviceton at the same time as the plaintiff. Mrs Jones explained that two of her triplets had recently told her that they had been touched by Francois sexually at Serviceton and that her enquiries had established the school knew before Francois came to it that complaints of sexual misconduct had been made against him.

[19] The plaintiff said he was shocked by this information, and that it made him "very angry" to think that the State had known about Francois being a possible danger but had allowed him to be left alone with him.[10] He decided to investigate a possible claim. Ultimately, he sought advice from his present solicitors on 7 May 2009.

[20] In cross-examination, the plaintiff accepted he had advised a doctor in March 2008 that he would like to make a compensation claim but said that referred to proceedings against Francois, not the defendant.[11] It did not occur to him that he could have an action against the defendant until the information came to his attention in December 2008.[12]

[21] The defendant submits that as the plaintiff had contemplated commencing proceedings as early as March 2008, a reasonable person in the plaintiff's position would have sought legal advice before 27 November 2008. Had he done so, the material fact of a decisive character would have come to his knowledge. It was therefore within his means of knowledge before 27 November 2008.

---

8 Affidavit of MCA, para 11.
9 Affidavit of MCA, para 14.
10 Affidavit of MCA, para 17.
11 T 1-9/10-25.
12 T 1-8/40-50.

[22] The plaintiff's evidence was that the reference to considering taking legal action in March 2008 was against Francois not the State. I accept that evidence. The plaintiff impressed me as a person whose focus was Francois's responsibility for what had occurred to him until receipt of information, in December 2008, that the defendant had prior knowledge of allegations of sexual misconduct against Francois.

[23] A reasonable person in the plaintiff's position would, understandably, focus on Francois's responsibility for his conduct. There would be no reason for that person to investigate any responsibility on the part of the defendant, particularly when Francois had acted secretively, including engaging in sexual activity away from the school. A reasonable person's position in respect of the defendant changes, however, when given information of prior knowledge of alleged sexual misconduct by Francois before his transfer to Serviceton. A reasonable person with that information is likely to seek legal advice in respect of the defendant's liability for Francois's actions. A reasonable person in the plaintiff's position would not have sought legal advice, or made other enquiries as to a claim against the defendant, until after December 2008.

[24] The plaintiff has satisfied me that the material fact of a decisive character was not within his means of knowledge before December 2008.

Should the plaintiff be granted an extension of time?

[25] The defendant submits the Court, in the exercise of its discretion, should decline to grant an extension of time as critical evidence is now lost, such that there can no longer be a fair trial of the plaintiff's claim against the defendant.

[26] In support of this submission the defendant relies on the results of enquiries by Peter Geraghty and others. Mr Geraghty undertook investigations at the defendant's request in April 2010. Those investigations revealed that Francois began his teaching career at Ayr State School, where he was employed between 27 January 1981 and 19 October 1981. He was transferred to Mundingburra State School for the last semester of 1981 before beginning at Lockhart River State School for the first semester of 1982. He was transferred to Serviceton on 19 April 1982.[13]

[27] Mr Geraghty's investigation ascertained that the then principal at Ayr State School, Graham Schultz, was still alive. Mr Schultz provided him with information regarding complaints against Francois early in term four of 1981. Mr Schultz had contacted the District Inspector of Schools, John Fahey, regarding those allegations. Mr Fahey carried out an investigation, after which Francois was transferred to Mundingburra State School in Townsville where Rex Davis was the Principal.

---

13 Affidavit of Peter Geraghty, para 11.

Mr Schultz believed Mr Fahey would have completed a written report as "he interviewed the parents and boys involved in the complaint against Mr Francois".[14] Mr Geraghty established that Rex Davis had passed away.

[28] Further investigations by Mr Geraghty located Mr Fahey, who remembered that parents had made a complaint in 1981 but refused to have the matter reported to the police or for their children to undergo any investigation. Mr Fahey wrote an Official Inspector's Report on the incident. He had no idea where that report now would be located. The Northern Region Office had been closed down. Mr Fahey further advised that he believed the principal of Lockhart River School in 1982 was probably deceased. Subsequent investigations by Mr Geraghty did not lead to the location of any available documents or protocols. The defendant undertook other enquiries.[15] They failed to locate any inspector's report concerning Francois or any other records concerning Francois.

[29] Mr Geraghty was cross-examined at the hearing. He accepted Mr Schultz had provided a statement, and appeared to have a clear recollection of the events.

[30] The plaintiff relied on an affidavit from his solicitor in respect of enquiries she had undertaken with Mr Schultz. That affidavit sets out details of the information provided by Mr Schultz, including a copy of the statement he forwarded to Mr Geraghty. Mr Schultz recalled he had met with a number of parents who alleged that Francois was interfering with their children. He arranged for Mr Fahey to attend the school in relation to those allegations. Mr Fahey conducted interviews. Francois denied the allegations. Mr Fahey reported his investigations to the Northern Regional Director of Education in Townsville. In accordance with the parents' wishes, the matter was not referred to police but Francois was removed from the school.

[31] Other material before me indicates the plaintiff's allegations concerning Francois were the subject of detailed investigations in 1985, ultimately resulting in a successful criminal prosecution of Francois for sexual offences against the plaintiff. As a result, substantial evidence in relation to those offences is available.

[32] Whilst the plaintiff submits the availability of that material means there can be a fair trial as to events concerning Francois's sexual misconduct, the central issues in these proceedings are materially different to the issues in the criminal proceedings. The central issue in dispute in these proceedings is not Francois' sexual misconduct. It is the defendant's alleged negligence as framed by the particulars of negligence. Those particulars rely on failures by the defendant to properly supervise Francois and take other actions in circumstances where the defendant had prior notice of allegations of sexual misconduct by Francois.

---

14 Affidavit of Peter Geraghty, para 17.

15 Affidavit of Clement Dunkley.

[33] Whilst Mr Schultz may have a clear recollection of complaints having been made against Francois, the defendant is placed at a severe disadvantage in seeking to respond to the allegations of negligence made against it. The District Inspector's report cannot now be found, despite extensive searches.[16] Other records in relation to Francois's time at Ayr State School and Serviceton also can not be located.[17] The principal of Mundingburra State School is dead.[18] The principal of Lockhart River State School is also probably deceased.[19] The then Regional Director of the Northern Region has no recollection about the case.[20] There is a dearth of material as to what instructions were given, or supervision of Francois undertaken, subsequent to his transfer from Ayr State School and, in particular, at Serviceton.

[34] The combined loss of relevant documentation and witnesses means there is a "significant possibility"[21] the defendant will be unable to lead any evidence as to the level of supervision provided in respect of Francois following the allegations at Ayr State School, or as to the frequency of reviews or other steps taken by it to monitor any inappropriate behaviour by Francois towards students, including ensuring that Francois did not meet with students outside of school. Any trial would involve invitations for witnesses to reconstruct their recollections, or to surmise. Such a trial would not be fair to either party.

[35] The loss of documentation and relevant witnesses places the defendant in a grossly unfair position in seeking to defend the allegations of negligence. This disadvantage is particularly significant where the plaintiff's allegations of sexual misconduct related both to activities at Serviceton, and outside the school, but the jury only returned verdicts of guilty in respect of conduct outside the school. Verdicts of not guilty were returned in respect of each count alleging sexual conduct on the school premises.

[36] Whilst the plaintiff's claim does not have as its focus a central conversation, as in *HWC*, the observations of Keane JA in *Page v The Central Queensland University*,[22] are apposite to the present case:

> "The appellant's case puts in issue the process of scrutiny and evaluation of his application by officers of the respondent. This process occurred 15 years ago. The appellant's case will inevitably involve, to some considerable extent, oral evidence of discussions involving the respondent's officers and other persons, including the appellant. The learned primary judge was entitled to conclude, by reason of these circumstances alone, that the prospects of a fair trial of the appellant's case lay in the realm of pious hope rather than reasonable expectation. While it is true to say that the court will be

---

16 Affidavit of Peter Geraghty, para 27; affidavit of Clement Dunkley, paras 3-8.
17 Affidavit of Clement Dunkley, para 5.
18 Affidavit of Peter Geraghty, para 15.
19 Affidavit of Peter Geraghty, para 22.
20 Affidavit of Peter Geraghty, para 25.
21 *HWC* at [62].
22 [2006] QCA 478 at [24]

> reluctant to deny a litigant with an arguable case the opportunity for a fair trial … it must be emphasised that the opportunity in question is the opportunity for a **fair** trial. The court is not in the business of preserving the opportunity to conduct solemn farces in which parties and witnesses are invited to attempt to reconstruct recollections which have long since disappeared. Such a trial would not be fair for either party."

[37] I am satisfied a trial of the plaintiff's allegations of negligence against the defendant would not be a fair trial. That Mr Schultz has a clear recollection of the complaints against Francois at Ayr State School, does not address the crucial issues in dispute which are what steps the defendant took, subsequent to Ayr State School, to properly supervise Francois and to ensure that any inappropriate behaviour by him towards students was identified and addressed so as to ensure the safety of students. Like *HWC*,[23] it is what is not available that is important, not what is available.

[38] In the exercise of my discretion, I decline to grant the plaintiff the requested extension of the limitation period.

[39] Having regard to this finding, it is unnecessary to consider in detail the defendant's complaints of unfairness concerning any trial as to quantum. These complaints were of considerably lesser significance, having regard to the nature of the injuries complained of, and would not in themselves have been sufficient to found a conclusion that the plaintiff had not been able to establish that there could still be a fair trial. The relevance of past medical complaints, when considering psychiatric injury, is of considerably less significance than, for example, multiple back injury events.[24]

Orders

[40] The application for leave to extend the time for commencement of these proceedings is refused.

[41] I shall hear the parties as to the form of orders and as to costs.

---

[23] [2009] QCA 168

[24] See, *Baillie v Creber* [2010] QSC 52.