SUPREME COURT OF QUEENSLAND

CITATION:	*Wolverson v Todman; Wolverson v Lisle & Hooper & Ors* [2015] QCA 74
PARTIES:	**In Appeal No 4576 of 2014:** **JULIA KAY WOLVERSON** (appellant) **v** **DONALD HENRY TODMAN** (respondent) **In Appeal No 4577 of 2014** **JULIA KAY WOLVERSON** (appellant) **v** **DAVID ANTHONY LISLE** (first respondent) **TIMOTHY ROSS HOOPER** (second respondent) **PAUL THOMAS O'CONNELL** (third respondent) **JOHN CARLYLE MCGUIRE** (fourth respondent) **QUEENSLAND DIAGNOSTIC IMAGING PTY LTD** ACN 070 000 654 (fifth respondent)
FILE NO/S:	Appeal No 4576 of 2014 Appeal No 4577 of 2014 DC No 2770 of 2013 DC No 1552 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA Civil General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2014
JUDGES:	In Appeal No 4576 of 2014: Holmes and Gotterson JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

In Appeal No 4577 of 2014:
Separate reasons for judgment of each member of the Court, Holmes and Gotterson JJA concurring as to the orders made, McMeekin J dissenting

ORDERS:

In Appeal No 4576 of 2014:

1. **Leave to appeal granted.**
2. **Appeal allowed.**
3. **The orders made on 17 April 2014 in proceeding No 1552 of 2010 in the District Court be set aside and in lieu thereof, there be orders that:**
   (a) **The limitation period for the commencement of proceedings by the applicant Julia Kay Wolverson, against the respondent, Donald Henry Todman, be extended so that it expires at the time of closure of the Registry on 27 May 2010;**
   (b) **The costs of the application for extension of the limitation period be costs in the cause;**
   (c) **The application filed by the applicant on 21 January 2014 otherwise be dismissed;**
   (d) **The application filed by the respondent on 7 March be dismissed.**
4. **The respondent pay the appellant's costs of the application for leave to appeal and of the appeal on the standard basis.**

In Appeal No 4577 of 2014:

1. **Appeal dismissed.**
2. **The appellant pay the respondents' costs of the application for extension of the limitation period filed in proceeding No 2770 of 2013 in the District Court on the standard basis.**
3. **The appellant pay the respondents' costs of the appeal on the standard basis.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – where the appellant lodged an application and appeal against an order of the District Court dismissing two applications for an extension of the limitation period under s 31(2) of the *Limitation of Actions Act* 1974 in respect of separate proceedings for personal injury in the District Court – where the appellant claimed damages for negligence and/or breach of contract against the respondent – where the negligence and/or breach of contract arose in misdiagnosing the appellant's medical condition as multiple sclerosis, treating her for such a condition, failing to diagnose properly her condition as one caused by

a Chiari Type 1 malfunction, ignoring or misinterpreting MRI results which depicted the condition and failing to treat her actual condition appropriately – where, in a separate proceeding, the appellant also sued the first, second, third, fourth and fifth respondents and claimed damages against each of them in negligence and/or breach of contract arising out of an alleged failure to diagnose a Chiari Type 1 malformation which was depicted on MRI scans of her – whether the application and appeal against the order of the District Court should be allowed to extend the limitation period against, the respondent in the application, and, the first respondent, second respondent, third respondent, fourth respondent and fifth respondent in the appeal

District Court of Queensland Act 1967 (Qld), s 118(2)
Health Quality and Complaints Commission Act 2006, s 79
Limitation of Actions Act 1974 (Qld), s 11(1), s 29, s 30(1), s 30(1)(b), s 30(1)(c), s 30(1)(c)(ii), s 30(2), s 31, s 31(2), s 31(2)(a), s 31(2)(b)
Personal Injuries Proceedings Act 2002 (Qld), s 43
Uniform Civil Procedure Rules 1999 (Qld), r 280, r 280(1), r 280(2)

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Castlemaine Perkins Limited v McPhee [1979] Qd R 469, cited
Dick v University of Queensland [2000] 2 Qd R 476; [1999] QCA 474, considered
Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234; [1984] HCA 17, considered
EMI Australia Ltd v Bes [1970] 2 NSWR 238, considered
Fernandez v Tubemakers of Australia Ltd [1975] 2 NSWLR 190, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
Neilson v Peters Ship Repair Pty Ltd [1983] 2 Qd R 419, considered
NF v State of Queensland [2005] QCA 110, considered
Nicolia v Commissioner for Railways (NSW) (1970) 45 ALJR 465, cited
Ramsay v Watson (1961) 108 CLR 642; [1961] HCA 65, cited
Reeves v Thomas Borthwick & Sons (Australia) Pty Ltd [1995] QCA 339, considered
Tubemakers of Australia (Ltd) v Fernandez (1976) 50 ALJR 720; (1976) 10 ALR 303, considered
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431; [1993] QCA 114, considered

COUNSEL: K Fleming QC, with R King-Scott, for the appellant
G Diehm QC, with M Zerner, for the respondent in Appeal No 4576 of 2014 and for the second respondent in Appeal No 4577 of 2014
R Treston QC, with D Schneidewin, for the first, third, fourth and fifth respondents in Appeal No 4577 of 2014

SOLICITORS: Given Law for the appellant
Avant Law for the respondent in Appeal No 4576 of 2014 and for the second respondent in Appeal No 4577 of 2014
Minter Ellison for the first, third and fourth respondents in Appeal No 4577 of 2014
Holman Webb for the fifth respondent in Appeal No 4577 of 2014

[1] **HOLMES JA:** I have had the advantage of reading the judgment of Gotterson JA and agree with his reasons and the orders he proposes. In particular, in relation to CA No 4577/14, I should say that I agree with his reasons, and those of the trial judge, for concluding that the material fact which emerged from Dr Earwaker's supplementary report – the possible link between the surgery and the alleviation of the appellant's symptoms (implicating her misdiagnosed condition in those symptoms) – was within the appellant's means and knowledge by 31 July 2012, the critical date.

[2] There is no dispute that it is the means of knowledge of the appellant herself which is relevant, and the question is whether she had taken all reasonable steps to find out that connection before 31 July 2012. But it must be a question of fact in any given case whether to leave everything to a solicitor amounts to taking reasonable steps. The present case was not one like that of the worker in *Do Carmo v Ford Excavations Pty Ltd*[1], where the solicitors, in response to his enquiries about his rights, gave him no indication of what was necessary to his case: that an alternative system of work was available. Here, in contrast, the appellant was informed of what was needed. She knew of the Chiari Type 1 malformation; she had had surgery to relieve her symptoms in mid-2009, and was reporting by the end of that year that a number of her symptoms had resolved; and she knew that the opinion of an expert radiologist was needed and that legal aid was available to obtain it. This was at a time when the appellant was no longer a novice in the legal process; she had already obtained consent orders allowing her to commence proceedings against Dr Todman, conditional on steps which involved obtaining an independent specialist's report and applying for an extension of the limitation period.

[3] There was nothing standing in the way of the appellant's obtaining Dr Earwaker's opinion in 2010, other than the need for her solicitor to retrieve from the Health Quality and Complaints Commission the MRI scans which had been provided on 26 July 2010 on an undertaking to copy and return them. There is no reason to suppose that had the matter then been pressed, the scans could not have been retrieved and made available to Dr Earwaker. The existence of the complaint about Dr Todman in that body does not seem to explain the inaction. In 2010, the HQCC had not indicated that it would take any particular action in respect of him. At best, in any event, its process raised the mere possibility that Dr Todman might choose to "enter into a contract in settlement of the complaint"[2].

[4] I do not read the solicitor's evidence as suggesting, whatever her views, that she positively advised the appellant against seeking the radiologist's report. The deferral of its obtaining seems to have involved a mutually agreed inaction rather than any considered approach, as this part of the solicitor's cross-examination suggests:

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1 (1984) 154 CLR 234.

2 As s 79 of the *Health Quality and Complaints Commission Act* 2006 contemplates.

> "… So the only thing, having had all of those records in your possession by late October 2010, and having had the grant of legal aid to pay for a radiologist's, report, and having had the scans in your possession, and knowing that you could have got them back if you'd just merely asked, you made a decision not to proceed with the radiologist's report simply because of the HQCC process?---I probably didn't make a determined decision not to proceed. The matter proceeded that way. So I didn't sit and think, I'm not going to do this."

[5] The step reasonably to be expected of the appellant was that she should have obtained the radiologist's report for which she had legal aid in 2010. Had she done so, both Dr Earwaker's reports would have been provided and their contents made known to her well before July 2012.

[6] **GOTTERSON JA**: On 3 November 2014 this Court heard two matters concurrently. One of them, CA No 4576 of 2014, is an application for leave to appeal to this Court from a judgment of a judge of the District Court dated 17 April 2014.[3] The other, CA No 4577 of 2014, is an appeal against the same judgment.[4] Both the application and the notice of appeal were filed on 15 May 2014. Julia Kay Wolverson is both the applicant in the application for leave to appeal and the appellant in the appeal.

[7] The judgment under appeal is an order of the District Court made on 17 April 2014 dismissing two applications for an extension of the limitation period under s 31(2) of the *Limitation of Actions Act* 1974 (Qld) ("Limitations Act") in respect of separate proceedings for personal injury in the District Court.[5] Ms Wolverson is the applicant in both applications and is the plaintiff in both proceedings. Both applications for an extension of the limitation period were heard together on 13 March 2014. Reasons for judgment[6] were published on 17 April 2014. The determination of costs on both applications was left to abide further submissions.

[8] One of the applications for extension of the limitation period before the learned primary judge was made by an application filed in proceeding No 1552 of 2010 on 21 January 2014.[7] The other was made by an application filed in proceeding No 2770 of 2013 also on that date.[8]

[9] Proceeding No 1552 of 2010 was instituted before the date of commencement of an amendment to s 118(2) of the *District Court of Queensland Act* 1967 (Qld) to permit appeals to this Court against interlocutory judgments of the District Court without a requirement for leave. For proceedings commenced prior to that date, leave is required. The application for leave to appeal relates to the judgment in that proceeding. Proceeding No 2770 of 2013, however, was commenced after the commencement date. Hence, the appeal relating to the judgment in it does not require leave.

Proceeding No 1552 of 2010

[10] On 27 May 2010, consent orders[9] were made in a proceeding commenced by an originating application filed in the District Court by Ms Wolverson on 21 May

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3 AB744-746.
4 AB738-743.
5 AB736-7.
6 AB710-735.
7 AB655-656.
8 AB657-659.
9 AB636.

2010.[10] The consent orders gave Ms Wolverson leave pursuant to s 43 of the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA") to start a proceeding for damages for personal injury despite non-compliance with that Act (Order 1).

[11] Pursuant to Order 1, Ms Wolverson commenced proceeding No 1552 of 2010 on 27 May 2010 against Dr Donald Henry Todman, neurologist, who treated her in the period from April 1991 to April 2009. Ms Wolverson claimed damages for negligence and/or breach of contract.[11] The pleading alleged negligence and/or breach of contract in misdiagnosing Ms Wolverson's medical condition as multiple sclerosis, treating her for such a condition, failing to diagnose properly her condition as one caused by a Chiari Type 1 malfunction, ignoring or misinterpreting MRI results which depicted the condition, and failing to treat her actual condition appropriately.

[12] The grant of leave under Order 1 was conditional upon Ms Wolverson filing any application for an extension of the limitation period "within six months of receipt of an independent specialist's report" (Order 2(a)). Ms Wolverson undertook "to make all reasonable and genuine attempts to procure the report within six months following" the application (Order 3).

[13] As noted, the application for an extension of the limitation period for this proceeding was not filed until 21 January 2014. This application also sought an enlargement of the time set by the consent order until that date for filing of the application for extension of the limitation period, and orders for consolidation or, alternatively, concurrent hearing, of proceeding No 1552 of 2010 with proceeding No 2270 of 2013.

[14] The learned primary judge also had before him an application[12] filed by Dr Todman on 7 March 2014 which sought orders that Ms Wolverson's claim in this proceeding be dismissed pursuant to r 280 of the *Uniform Civil Procedure Rules* 1999 or, alternatively, in exercise of the court's inherent jurisdiction, for non-compliance with Orders 2(a) and/or 3 of the consent orders.

Proceeding No 2270 of 2013

[15] On 30 July 2013, orders[13] were made by a judge of the District Court in yet another proceeding commenced by an originating application filed in that court on the same day.[14] The order gave Ms Wolverson leave pursuant to s 43 PIPA to start a proceeding for damages for personal injury despite non-compliance with the provisions Chapter 2 thereof (Order 1). Ms Wolverson was required to make an application for an extension of the limitation period for this proceeding by 31 January 2014 (Order 4).

[16] Pursuant to the leave then given, on 31 July 2013, Ms Wolverson filed a claim and statement of claim[15] in the District Court which commenced proceeding No 2770 of 2013. In this proceeding, Ms Wolverson sued Dr David Anthony Lisle (first defendant), Dr Timothy Ross Hooper (second defendant), Dr Paul Thomas O'Connell (third defendant) and Dr John Carlisle McGuire (fourth defendant), each of whom is a radiologist and, at relevant times, was employed by the fifth defendant, Queensland Diagnostic Imaging Pty Ltd. Ms Wolverson claimed damages against each of the defendants in negligence and/or breach of contract arising out of an alleged failure to diagnose a Chiari Type 1 malformation which was depicted on MRI scans of her.

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10 AB633-635; proceeding No 1496 of 2010.
11 Claim and Statement of Claim: AB637-641.
12 Ab660-661.
13 AB645-646.
14 AB642-643; proceeding No 2645 of 2013.
15 AB647-654.

[17] The application for extension of the limitation period for this proceeding was made within the time required by Order 4. It also sought reciprocal relief with regard to consolidation or, alternatively, concurrent hearing.

Factual background

[18] Ms Wolverson alleges that Dr Todman diagnosed her as having multiple sclerosis on "definite clinical grounds" in 1994. Whilst that may be in issue, it is uncontroversial that Dr Todman had definitely made that diagnosis by early 2005. During the course of treating Ms Wolverson, Dr Todman had had regard to the following MRI scans which had been provided to him:

- MRI scans taken by Dr O'Connell on 16 May 2002
- MRI scans taken by Dr Lisle on 21 June 2004
- MRI scans taken by Dr Hooper on 30 May 2006
- MRI scans taken by Dr McGuire on 17 September 2007

It is also uncontroversial that a Chiari Type 1 malformation was apparent on each of the images produced by the scans and that each of the radiologists failed to identify its presence. Nor was it identified by Dr Todman.

[19] Ms Wolverson remained in Dr Todman's care until April 2009. On 7 April that year, a further MRI scan was conducted by Dr C Kua, radiologist, who reported to Dr Todman that a caudal protrusion of the cerebellar tonsil below the foramen magnum up to 1.2 cm raised the possibility of a Chiari Type 1 malformation.[16]

[20] Ms Wolverson then sought the opinion of other specialists including Dr Robert Campbell, consultant neurosurgeon, to whom she was referred by her general practitioner. Dr Campbell arranged for another MRI scan which confirmed the presence of the malformation. He advised the general practitioner on 28 May 2009 that Ms Wolverson was "really focused" on having the malfunction treated.[17] He said that he was "somewhat unconvinced" that it explained most of her symptoms and that he had advised her that "decompression of this lesion would not reverse any of her existing symptoms, but would only promise prevention of progression of Chiari manifestations".[18]

[21] On 26 June 2009, Ms Wolverson underwent surgery in the form of a craniotomy, brain stem compression and a C1 lamenectomy to restore cerebrospinal fluid flow. She suffered a confusional episode after the surgery. Five months later she reported to Dr Campbell that she felt that a lot of her symptoms had resolved since surgery, a notable exception being a vision impairment.[19]

[22] There was expert evidence before the learned primary judge that the diagnosis of multiple sclerosis made by Dr Todman was a misdiagnosis; that it was not made on the basis of adequate evidence; and that the treatment of her for multiple sclerosis was not justified. This evidence was contained in a report of Dr Ross Mellick, consultant neurologist, dated 26 August 2013.[20] This report also contained opinion evidence relevant to the causal link issue considered later in these reasons.

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16 AB136.
17 AB299.
18 AB299.
19 Report 5 March 2010: AB632.
20 AB193-209, especially at 207-209. This report was not received personally by Ms Wolverson until January 2014 because of difficulties in funding its cost: Reasons [62].

[23] As well, there was expert evidence that the Chiari Type 1 malformation was demonstrated on the imaging carried out by each of the four radiologist-defendants; that such a malformation was well described in the literature and the potential association of "coning" after lumbar puncture was well recognised; and that the failure by the radiologists to identify the malformation was a failure to meet an appropriate standard of care. This evidence was given in a report by Dr John Earwaker, radiologist, dated 23 July 2012.[21] Dr Earwaker supplied a supplementary report dated 4 November 2013[22] in which, as his Honour noted, the author "for the first time" linked the alleviation of the symptoms with the surgery.[23]

Proceedings commenced after expiration of respective limitation periods

[24] The learned primary judge noted that the limitation period for an action for negligence or breach of contractual duty causing personal injury is three years from the date on which the cause of action arose.[24] He observed that for a claim in tort, the cause of action is complete only when appreciable damage has occurred, and independently of whether the injured party is aware or not that the damage has occurred.[25] On the footing that, on Ms Wolverson's case, appreciable damage from a failure on Dr Todman's part to diagnose or treat the Chiari Type 1 malformation must have occurred by late 2005, his Honour reasoned that the limitation period for a proceeding against Dr Todman would have expired by the end of 2008.[26]

[25] His Honour also reasoned that appreciable damage from the alleged negligence or contractual breach of duty on the part of the radiologists would have occurred by the end of 2007 at the very latest.[27] Hence, the limitation period for the commencement of a proceeding against them would have expired by late 2010.

[26] Each proceeding was commenced after the limitation period applicable for it had expired. An extension of the limitation period was therefore necessary for each proceeding to continue.

Statutory extension of the limitation period

[27] Part 3 of the *Limitations Act* (ss 29-40) contains provisions for extension of the limitation period for certain actions. Section 31 applies to actions for personal injury including those based on negligence and on breach of duty in contract: s 31(1). Section 31(2) confers a jurisdiction on courts to extend the limitation period applicable to such actions. It provides as follows:

> "(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

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21 AB390-394, especially at 393-394. Dr Earwaker elaborated that "coning" is a phenomenon in which there is a downward herniation of the abnormal cerebellar tonsils and mid brain with impaction of the foremen magnum, and that Ms Wolverson had undergone lumbar punctures.

22 AB430-435.

23 Reasons [44].

24 *Limitations Act* s 11(1).

25 Reasons [9].

26 Reasons [10]. The reasoning implies, correctly, that the limitation period for the contractually-based claim would not have expired at a later date.

27 Reasons [11].

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."

[28] A number of the elements within the framework of s 31(2) are defined in s 30(1) as follows:

"(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."

[29] Section 30(2) defines the term "appropriate advice" in s 30(1)(b) to mean, in relation to facts, "the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts".

[30] An applicant for an extension of the limitation period bears the evidentiary and persuasive onus on the application. It was therefore necessary for Ms Wolverson to prove that a material fact of a decisive character was not within her means of knowledge until, in the case of proceeding No 1552 of 2010, a date after 29 May 2009, and, in the case of proceeding No 2270 of 2013, a date after 31 July 2012: s 31(2)(a). It was also necessary for her to adduce evidence sufficient to establish the right of action pursued by her in each proceeding.

The judgment under appeal

[31] Four arguments were advanced before the learned primary judge by the respondents to the applications for extension of the limitation period. They were, firstly, that the evidence available to Ms Wolverson was insufficient to establish a right of action in either proceeding; secondly, that there was insufficient evidence to establish a material factor of a decisive character as defined; thirdly, that the material facts relied upon by Ms Wolverson were within her knowledge, or means of knowledge, prior to the dates referred to in paragraph [30] above; and, fourthly, that the respondents would suffer prejudice if the applications were allowed. As well, arguments were advanced for Dr Todman in support of his application.

[32] His Honour accepted the first of the arguments for the respondents. He concluded that there was insufficient evidence to establish that Ms Wolverson had a right of action against Dr Todman or the radiologists and Queensland Diagnostic Imaging Pty Ltd. He reached that conclusion by a process in which he adopted as applicable, the following test propounded by Macrossan CJ in *Wood v Glaxo Australia Pty Ltd*;[28] a test which he accurately described as "not a demanding one":

> " … an applicant will meet the requirement imposed by s 31(2)(b) if he can point to the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his case."[29]

[33] The learned primary judge reviewed the evidence available to Ms Wolverson, including the reports of Dr Mellick and Dr Campbell. He was of the opinion that if left uncontradicted by other evidence, it would be capable of establishing that each of Dr Todman and the radiologists breached his duty of care to Ms Wolverson in failing to diagnose the malformation[30] and that a number of significant symptoms suffered by Ms Wolverson in the period up to April 2009 were significantly alleviated after her Chiari decompression surgery.[31] Such symptoms included left leg weakness, headache, nausea and vomiting.

[34] A live issue before the learned primary judge was whether there was a causal link between the surgery and the alleviation of symptoms reported by Ms Wolverson. His Honour observed that although the sequence where the surgery was followed by reported alleviation of symptoms raised a suspicion of a causal link, Ms Wolverson's medical experts put the existence of a link as no higher than a mere possibility.[32]

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28 [1994] 2 Qd R 431 at 434.
29 Reasons [22], [23].
30 Reasons [25].
31 Reasons [35].
32 Reasons [35].

[35] The paragraphs which follow set out his Honour's reasons for making that observation:

> "[36] In a report of 4 November 2013, Dr Earwaker expressed the following opinion:
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> "If the claimant has sustained clinical improvement following her decompressive surgery it *may* well be the case that this has been impeded due to the delay in making the correct diagnosis" (emphasis added)
>
> [37] In a report dated 26 August 2013 Dr Ross Mellick referring to the Chiari Malformation said:
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> "That malformation may have also contributed to intermittent symptoms in the ensuing years. However, the data at which the writer has seen is not sufficiently detailed to enable such a connection to be definitely made. It is noted that reference has been made to an improvement in symptoms since the decompression was performed. Some additional valuable information *may* following from a description of the specific symptoms which are reported to have improved since the decompression (again clinical detail is lacking)". (emphasis added)
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> At p 15 of the report Dr Mellick said:
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> "The application of a diagnosis with serious implications with relation to function and survival *may* result in secondary psychological problems because of the misdiagnosis." (emphasis added)
>
> [38] At p 16 he said:
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> "Symptoms arising from brainstem pathology may mimic symptoms due to MS and it is accordingly *possible* that Ms Wolverson had suffered symptoms, perhaps intermittent, for a considerable period of time because of the Arnold Chiari 1 Malformation. If that is so, an earlier diagnosis of decompression *might* have provided earlier benefit." (emphasis added)
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> [39] He added:
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> "Additional clinical detail *may* establish a causal connection between the symptoms and signs which were misdiagnosed as MS and those which might be explained by the Arnold Chiari Malformation, migraine or a secondary psychological/psychiatric disorder." (emphasis added)
>
> [40] This expert opinion evidence fails to prove that the Chiari Type 1 Malformation was more than a possible cause of the applicant's symptoms. It follows that there is no more than a possibility that an earlier diagnosis and decompression would have provided relief of the applicant's symptoms.

> [41] The caution expressed in these opinions provided subsequent to the surgery is consistent with the expectations of the medical practitioners prior to the surgery.
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> [42] Following Dr Kua's report of a possible Chiari diagnosis the applicant was first referred to Dr Stephen Read who opined:
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> "I have explained to her that [the Chiari malformation] is longstanding, does not appear to have changed significantly on imaging over the years, and is unlikely to have contributed to her symptoms."
>
> [43] Although the neurosurgeon, Dr Campbell, recommended surgery he did not anticipate it would relieve the pre-existing symptoms:
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> "Julia is now really focussed on having this treated surgically and although I am somewhat unconvinced that it explains most of her symptoms and I have advised Julia that decompression of this lesion would not reverse any of her existing symptoms, but would only promise prevention of progression of Chiari manifestations, she wishes to proceed.'
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> [44] In the supplementary report from Dr John Earwaker dated 4 November 2013 he expressed for the first time the opinion that if the applicant sustained clinical improvement following decompression surgery "it may well be the case that this has been impeded due to the delay in making the correct diagnosis". This opinion may be read in light of his initial advice dated 23 July 2012 that the procedure "is done with a variety of results in my experience with no improvement in the patient's symptoms".
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> [45] None of these opinions support a conclusion that alleviation of the symptoms by surgery was reasonably foreseeable before the procedure occurred." (Footnotes omitted.)

[36] Citing the decision of this Court in *Reeves v Thomas Borthwick & Sons (Australia) Pty Ltd*,[33] his Honour then stated that merely proving that the Chiari Type 1 malformation was a possible cause of Ms Wolverson's symptoms and that earlier diagnosis would have possibly allowed successful treatment of them, even in absence of evidence to the contrary, would not suffice to prove her case.[34] This insufficiency of proof, of itself, meant that the applications for extension of the limitation period could not succeed, in his Honour's view.[35]

[37] I pause here to note that the paragraphs which I have quoted appear to indicate that his Honour used the term "causal link" as a compendious reference to the factual issues of whether Ms Wolverson's symptoms were caused by the malformation, whether it was reasonably foreseeable that surgical correction of it would alleviate the symptoms and whether the surgery she underwent did alleviate them. However, he did then make the reservation that he found it unnecessary to determine an

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33 [1995] QCA 339 at [7]-[11].
34 Reasons [47].
35 Reasons [48].

alternative submission for certain of the respondents made on the assumption that the surgery did contribute to an improvement in the pre-existing symptoms. That submission contended that such improvement would not have been reasonably foreseeable and therefore those respondents could not be held liable for any resultant delay in alleviation of those symptoms.[36] This reservation can be reconciled with his Honour's observation at paragraph 45 with respect to reasonable foreseeability on the footing that it relates to alleviation of existing symptoms whereas the alternative submission proposed that all that was reasonably foreseeable was that surgery would prevent further deterioration of the symptoms.

[38] Notwithstanding that his conclusion on the first argument was sufficient to determine the fate of the applications, his Honour did consider most of the other arguments. He found, in effect, that if, contrary to his opinion, the medical evidence had established a sufficient degree of linkage between the surgery and the alleviation of Ms Wolverson's symptoms, then the existence of such a linkage was a material fact of a decisive character which was not known to her until either November 2013 or January 2014 when the relevant reports of Dr Earwaker and Dr Mellick became available.[37]

[39] Turning to an argument advanced for the radiologist-defendants, his Honour found on the evidence before him, that reports such as those prepared by Dr Mellick and Dr Earwaker in August 2013 and August 2012 respectively could reasonably have been obtained from them, or other similarly qualified specialists, in early 2011,[38] had she taken reasonable steps to ensure that her action progressed in a timely way.[39] Thus, the material fact of a decisive character in question was not one that was not within Ms Wolverson's means of knowledge until a date after 31 July 2012. Accordingly, in his Honour's view, the requirement in s 31(2)(a) would not have been satisfied with respect to proceeding No 2770 of 2013.

[40] The learned primary judge did not consider the prejudice argument given that the jurisdiction under s 31(2) had not been engaged by fulfilment of the requirements in paragraphs (a) and (b) thereof.[40] Finally, his Honour held that there had been compliance with Order 2(a) of the consent orders since the application for extension of time in proceeding No 1552 of 2010 had been filed within six months of the receipt of the report of Dr Mellick, the relevant independent specialist.[41] However, he did consider that Ms Wolverson had not complied with Order 3. Notwithstanding that he also thought that that non-compliance was failure to comply for the purposes of r 280(1), he made no order under that rule.

The grounds of appeal and contention

[41] The proposed notice of appeal[42] in CA No 4576 of 2014 ("the Neurology Application") and the notice of appeal[43] in CA No 4577 of 2014 ("the Radiology Appeal") contain nine and seven grounds of appeal respectively. A Notice of Contention[44] has been

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36 Reasons [50]-[52].
37 Reasons [54]-[62].
38 Reasons [71], [73].
39 Reasons [80].
40 Reasons [94].
41 Reasons [89].
42 AB776-781; Exhibit AMG-2 to the affidavit of A M Given sworn 15 May 2014 in support of the Application.
43 AB738-743.
44 AB790-791.

filed in the Neurology Application. Three Notices of Contention[45] have been filed in the Radiology Appeal, two by the individual respondents and the other by the corporate respondent.

[42] The Neurology Application and the Radiology Appeal were heard together. In oral submissions, counsel for the parties identified issues raised by the grounds of appeal and of contention and addressed them, rather than addressing each of the grounds individually. It is convenient to adopt a similar approach in these reasons.

The causal link issue

[43] It was submitted for Ms Wolverson that the learned primary judge erred in concluding that the evidence that would be adduced on her behalf at trial, if uncontradicted, was insufficient to prove the causal link. The submission argues that, in applying the *Glaxo* test, his Honour did not approach the task informed by authority on the question of what evidence is sufficient to allow findings to be made to the requisite standard with respect to a causal link where a plaintiff has reported the existence of symptoms and subsequently reports that surgical intervention has alleviated the symptoms. It also proposes that had his Honour approached the task consistently with that authority, he would have reached a contrary conclusion on the issue.

[44] I note at this point that the written submissions for Ms Wolverson contend that her evidence of improvement of symptoms following the surgery, of its own, would have been sufficient to prove that the surgery was the cause of the improvement. That contention, which concerns only one of the factual aspects of the causal link in the sense in which the learned primary judge used that term, was not pursued in oral submissions. At the hearing before this Court, the focus of submissions was on the medical evidence, particularly the reports of Doctors Earwaker and Mellick. Further, the submissions for all parties extended to all the factual aspects covered by his usage of the term.

[45] It is evident that the learned primary judge did reach the conclusion that he did with respect to causal link upon a consideration of the reports of Doctors Earwaker and Mellick and that he was influenced to reach it by words such as "may", "might" and "possible" which are emphasised in the passages from their reports quoted by his Honour. He regarded them as fatal to Ms Wolverson's case. Much of the criticism in argument for her was centred on that.

[46] The decision in *Reeves*, on which his Honour relied, is brief. There, the test in *Glaxo* was held not to have been satisfied. The Court considered that a medical opinion that it was possible that a work injury had had a lasting effect on the condition of the plaintiff's back would, of itself, have been insufficient to prove causation on the balance of probabilities. No reference was made to the observations made in *Fernandez v Tubemakers of Australia Ltd*,[46] to which counsel for Ms Wolverson referred the Court.

[47] In *Fernandez*, the plaintiff gave evidence that before his injury, his hand was normal and that after the injury, it grew progressively worse. The treating specialist testified that the condition experienced by the plaintiff could have been caused by an injury. The trial judge refused to direct the jury that there was no evidence that the condition was related to the injury and left the question of causation to the jury who found for the plaintiff. An appeal to the New South Wales Court of Appeal failed by majority.

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45 AB787-789; 793-794.

46 [1975] 2 NSWLR 190.

[48] Reynolds JA, who would have allowed the appeal, made the following observations of general application:

> "In cases, of which I think this is certainly one, where expert medical evidence is necessary to establish causal sequence, an expert may express an opinion that there is a relationship. He may express it firmly, he may express it in terms of probability or possibility, or he may expound or explain the aetiology and leave the tribunal of fact to infer the probable relationship on the whole of the facts. When a medical witness speaks of a probability of a causal relationship, he is himself drawing an inference based on medical knowledge and the facts as known to him.
>
> There is no doubt that, if a medical witness expressed a view that there is a connection, or that there is probably a connection, between the suggested cause and the result, a case is made out for consideration of the issue by the tribunal of fact. Difficulty arises when an expert witness speaks only in terms of possibility in circumstances where it can be seen that he declines to draw the inference which the lay tribunal is invited to draw. It seems to me that the answer to the question which is posed in such cases begins with an understanding of the real content of the medical opinion relied upon. An expression of opinion that a condition could be or might be related to a suggested cause will have different meanings in different contexts. If nothing is known as to the aetiology of a condition or disease, no cause can be excluded as a matter of logic, and so it might be said that any suggested cause might have or could have caused it. In such case the assertion is not in the full sense an expression of expert opinion and has no probative force.
>
> If very little is known of the relevant aetiology, a similar expression of opinion may mean that present scientific knowledge does not exclude the possibility of a causative relationship. If much is known and the knowledge is explained and expounded to the tribunal of fact, an expression of opinion which does not pass beyond possibility may be regarded as a precise and guarded scientific statement which leaves the ultimate question or probability to the tribunal to pronounce upon, having regard to all the facts."[47]

[49] Glass JA observed:

> "… The issue of causation involves a question of fact upon which opinion evidence, provided it is expert, is receivable. But a finding of causal connection may be open without any medical evidence at all to support it: *Nicolia v Commissioner for Railways (NSW)*,[48] or when the expert evidence does not rise above the opinion that a causal connection is possible: *EMI (Australia) Ltd v Bes*.[49] The evidence will be sufficient if, but only if, the materials offered justify an inference of probable connection. This is the only principle of law. Whether its requirements are met depends upon the evaluation of the evidence."[50]

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47 At 193-194.
48 (1970) 45 ALJR 465.
49 (1970) 2 NSWR 238; appeal dismissed (1970) 44 ALJR 360 (n).
50 At 197.

[50] The other member of the majority, Mahoney JA, said:

> "It is, in my respectful opinion, this kind of principle which was referred to by Herron CJ in *EMI (Australia) Ltd v Bes*,[51] when the Chief Justice said: 'Much of the same thesis is to be found in *Ramsay v Watson* in the High Court;[52] and I particularly refer to the passage in the joint judgment of their Honours.[53] It seems to me that that bears out what I have concluded is the correct principle to apply, namely, that it is not incumbent upon the applicant, upon whom the onus rests, to produce evidence from the medical witnesses which proves to demonstration that the applicant's contention is correct. Medical science may say in individual cases that there is no possible connexion between the events and the death, in which case, of course, if the facts stand outside the area in which common experience can be the touchstone, then the judge cannot act as if there were a connexion. But if medical science is prepared to say that it is a possible view, then, in my opinion, the judge after examining the lay evidence may decide that it is probable. It is only when medical evidence denies that there is any such connexion that the judge is not entitled in such a case to act on his own intuitive reasoning. It may be, and probably is, the case that medical science will find a possibility not good enough on which to base a scientific deduction, but courts are always concerned to reach a decision on probability and it is no answer, it seems to me that no medical witness states with certainty the very issue which the judge himself has to try.'
>
> See also the observations of Asprey JA.[54]
>
> I do not read the Chief Justice to mean that, given a possible cause, the reasoning to its being an actual cause is simply "intuitive" and subject to no limitations. In such a case as the present, the question would be whether the evidence showed the connection between the possible cause and the condition which occurred was sufficiently close to warrant a reasonable mind, faced with the problem of determining the question upon the evidence before it, concluding that the possible was the actual cause."[55]

[51] An appeal to the High Court of Australia, reported as *Tubemakers of Australia (Ltd) v Fernandez*[56], was dismissed without criticism of what had been said by the members of the Court of Appeal as to principle. Mason J (with whom Barwick CJ and Gibbs J agreed) outlined the scope of relevant evidence from which a conclusion as to causation might be drawn in the following observations:

> "The evidence given by Dr Sweeney was, in my opinion, capable of being understood by the jury as a statement by an expert that trauma in the form of a blow or blows to the hand, or in the form of manual work, was a cause of Dupuytren's contracture and that it was therefore

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51 [1970] 2 NSWR 238 at p 242.
52 (1961) 108 CLR 642.
53 (1961) 108 CLR 642 at p 645.
54 [1970] 2 NSWR 238 at p 243.
55 At 199-200.
56 (1976) 10 ALR 303.

> a cause of the respondent's disability. Dr Sweeney explicitly rejected the suggestion that there was no causal connection between trauma in the sense which I have explained and the onset of the contracture. Moreover, some of his answers to questions put in cross-examination, in particular the statement 'there have been cases of minimal trauma being a cause of Dupuytren's contracture', could well be understood by the jury as signifying that in some cases minimal trauma was the actual cause, or at least the probable cause, of the onset of the contracture.
>
> In my opinion, this evidence left it open to the jury to infer that on the probabilities the injury caused or materially contributed to the occurrence of the condition. In drawing such an inference the jury was entitled to have regard, in addition to the matters referred to by Dr Sweeney in his evidence, to other significant circumstances: (a) that before the accident the respondent had suffered no disability in his right hand; (b) that the condition made its appearance shortly after the accident; and (c) that no alternative cause was established or indeed suggested in evidence. The combination of these circumstances, taken together with Dr Sweeney's evidence, provided in my opinion a sufficient basis from which the jury could draw an inference favourable to the respondent."[57]

[52] From this line of authority, the correctness and applicability was not seriously challenged by the respondents here, one may conclude that an expression of medical opinion as to causation in terms of possibility is not conclusive against a plaintiff. Understood in context that evidence alone or in conjunction with other admissible evidence may be capable of justifying a finding of causation on the balance of probabilities.

[53] Counsel for Ms Wolverson identified a number of aspects of the reports of Doctors Earwaker and Mellick which, it was submitted, had not been referred to by the learned primary judge but which gave contextual meaning to aspects of their opinions. They included the following:

> (i) At paragraphs 36 and 44 of the reasons, his Honour quoted from the concluding paragraph of each of Doctor Earwaker's reports. The concluding paragraph in the supplementary report elaborates substantially upon that in the former and states:
>
> > "Chiari 1 malformation is sometimes associated with syringomyelia. Surgical decompression of the foramen magnum is sometimes carried out in order to halt the progress of the syrinx. The success of this procedure depends often on the removal of the associated arachnoid adhesions at the Foramen Magnum. This is done with a variety of results in my experience with no improvement in the patient's symptoms however success rates of 75% of clinical improvement have been reported in some large series. If the claimant has sustained clinical improvement following her decompressive surgery it may well be the case that this has been impeded due to the delay in making the correct diagnosis."[58]

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57 At 309-310.

58 AB435.

(The concluding paragraph in the first report consisted only of the first, second and fourth sentences, the last-mentioned without the important qualification concerning 75 per cent success rates of clinical improvement identified by studies. The qualification, which is not referred to in the reasons, and the third and fifth sentences are additions made by the supplementary report.)

(ii) The emphasis given to the word "may" in the fifth sentence, which is quoted at paragraph 36 of the reasons, is misplaced. It is part of the composite expression "may well be the case" which, in ordinary parlance, is often used to signify probability rather than mere possibility.

(iii) The passage at page 16 of Doctor Mellick's report quoted at paragraph 38 of the reasons is immediately preceded by the following two paragraphs:

> "It is noted on 26.6.09 a craniotomy was performed and a C1 laminectomy was done 'to restore the cerebral spinal fluid flow'. It is also noted that meningitis occurred but that since the operation, there has been recorded a significant improvement in her symptoms.
>
> That history would suggest that the operation has been beneficial and, further, that significant symptoms predated the decompression."[59]

(As was submitted, the three paragraphs read together are apt to suggest a degree of likelihood that the surgery alleviated the symptoms, of a higher order than mere possibility.)

[54] In my view, the criticisms made of the process by which the learned primary judge reached the conclusion on causal link are valid. It was reached by a process which was defective in that it proceeded on erroneous footings, firstly, that unless there is medical opinion evidence which puts the likelihood of a causal link as probable, a finding of a causal link could not be made, and, secondly, that an expression of possibility of a causal link in a medical opinion would necessarily be insufficient for a finding of a causal link (notwithstanding that the finding of such a link may be open on the totality of the relevant evidence); and it failed to have regard to aspects of the medical opinion evidence in context which are apt to indicate a likelihood of a causal link higher than mere possibility.

[55] The evidence at trial would include the evidence of Ms Wolverson herself as well as the medical evidence. When an approach consistent with *Fernandez* is taken, the conclusion appropriately reached, in my view, is that there is a sufficiency of evidence available to Ms Wolverson, if led at trial and uncontradicted, from which factual findings as to the cause of her symptoms, the reasonable foreseeability that they might be alleviated by the surgery she underwent in 2009 and the effect of that surgery on her symptoms could be made as would establish the causal link required for a cause of action. Taken with the other matters for which his Honour considered there was sufficient evidence, the causal link would complete the elements of

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59 AB453.

a cause of action for recovery of damages on a basis that Ms Wolverson endured symptoms over a long period of time as a result of a persistent misdiagnosis of her symptoms as those of Multiple Sclerosis and a recurrent failure to diagnose and recommend treatment for the Chiari 1 malformation.[60]

[56] For these reasons, I consider that the learned primary judge erred in concluding that Ms Wolverson had failed to establish a right of action at the level required by the test in *Glaxo*.

Means of knowledge issue

[57] The learned primary judge accepted that the availability of medical opinion such as could facilitate proof of the causal link was a material fact of a decisive character as that concept is defined in s 30(1) of the *Limitations Act*.[61] This aspect of the reasons is not challenged in the grounds of appeal or contention. His Honour also concluded that medical opinion of that description was not available to Ms Wolverson before November 2013 or January 2014 when Dr Earwaker's supplementary report and Dr Mellick's report respectively were to hand.[62]

[58] The point at issue here is one which the learned primary judge noted was raised on behalf of the respondent radiologists.[63] It arises from the requirement in s 31(2)(b) that the material fact be one that 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 limitation period for the action against those respondents and the qualification in s 30(1)(c) that a fact is not within a person's knowledge at a particular time only if the person did not know the fact at that time and that person has taken all reasonable steps to find it out before that time.

[59] After referring to relevant authorities and reviewing the chronology of events which preceded the obtaining of those two reports, his Honour concluded that Dr Earwaker's first report was received some 17 months after it could reasonably have been obtained and that a report from Dr Mellick or another specialist neurologist could have been obtained in early 2011.[64] Later, he made the following findings:

> "[80] While the test looks to the applicant's actual state of knowledge and what could reasonably be expected from an actual person in the circumstances, I consider that the applicant in this case failed to take reasonable steps to ensure her action progressed in a timely way.
>
> [81] Accordingly, in my view, had the applicant taken all reasonable steps the opinion of a specialist neurologist, whether Dr Mellick or another specialist, would have been able to be personally known to her by, at the latest, a date in early 2011.

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60 The opinion of Dr Mellick would also support a claim for recovery against Dr Todman on an additional or alternative basis, namely, for stress suffered as a result of being misinformed that she was suffering from Multiple Sclerosis and from undergoing unnecessary treatment for that condition. His opinion also established a material fact of a decisive character relevant to recovery on that basis, namely, the availability of expert medical opinion evidence that the diagnosis of, and treatment for, Multiple Sclerosis was negligent.

61 Reasons [60].

62 Reasons [61], [62].

63 Reasons [66].

64 Reasons [71], [73].

> [82] In order to succeed on the application for extension of the limitation period in the action against the radiologist the applicant must show a material fact of a decisive character was not within her means of knowledge until a date after 31 July 2012. The conclusion I have reached means the applicant would on this basis not succeed in that action.
>
> [83] These findings are not fatal to the claim against Dr Todman as the relevant date for that claim is 27 May 2009. …"[65]

[60] The dates nominated by his Honour, 31 July 2012 in the case of the radiologists and 27 May 2009 in the case of Dr Todman, each preceded, by one year exactly, the date on which the respective proceedings were commenced. Counsel for Ms Wolverson had submitted to his Honour they were the operative dates.[66] Presumably that submission was made having regard to the provision in s 31(2) that permits an extension of the limitation period for one year from the operative date and allowed for the circumstance that each proceeding had already been commenced. The correctness of that submission was not challenged before his Honour, nor has it been challenged on appeal.

[61] His Honour's findings imply that he was satisfied that up to 27 May 2009, Ms Wolverson had taken all reasonable steps to find out the material fact in question. Given that it was not until April 2009 that the malformation was detected, and the diagnosis of Multiple Sclerosis was put in doubt, that he was so satisfied is unremarkable.

[62] However, the submissions for Ms Wolverson invite this Court to hold that his Honour erred in finding that in the period before 31 July 2012, she had not taken all reasonable steps to ascertain the relevant material fact.

[63] Ms Wolverson engaged a solicitor to investigate the possibility of making a claim for damages in May 2010.[67] The solicitor continued to act for her during all material times. As was appropriate for him to do, his Honour analysed the events that ensued, mindful of two principles which had been articulated by McPherson J in *Neilson v Peters Ship Repair Pty Ltd*.[68] One is that, as a matter of statutory construction, where a solicitor is engaged, the person whose knowledge is relevant for s 31(2) purposes is the client, not the solicitor.[69] The other is one that offers practical guidance. It is that "[p]lacing the matter in the hands of apparently competent solicitors with adequate instructions including information relevant to the cause of action would ordinarily amount to taking all reasonable steps to ascertain the relevant facts, provided that the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action".[70]

[64] The material facts before the learned primary judge revealed the following sequence of key events. In May 2010, Ms Wolverson's solicitor submitted an application for legal aid to fund an independent radiologist's report. The application was granted in mid-June 2010.[71] In cross-examination, the solicitor accepted that by the end of October 2010, she had all the documents that she required for briefing a radiologist with one exception.[72]

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65 AB732.
66 AB75, Tr1-75 ll10-15.
67 AB119; Affidavit A M Given sworn 24 January 2014, paragraphs 6-9.
68 [1983] 2 Qd R 419.
69 At 430.
70 At 431. See also per Macrossan J at 425.
71 AB52; Tr1-52 l43 – AB53; Tr1-53 l8.
72 AB55; Tr1-55 ll5-9.

[65] The exception comprised original MRI scans which had been in her possession from May until July 2010.[73] The solicitor provided the scans to the Health Quality and Complaints Commission ("HQCC") on 26 July 2010.

[66] Ms Wolverson had lodged a written complaint about Dr Todman with HQCC on 21 May 2010.[74] It requested the MRI scans and they were provided to it on its undertaking to copy them and return them as soon as possible.[75] Notwithstanding the undertaking, the MRI scans were not returned promptly nor was their return pursued by the solicitor at that point.

[67] The HQCC complaint process is one that may lead to a conciliated settlement. Apparently in February 2011, HQCC indicated to the solicitor that it had resolved to conciliate the complaint.[76] In May 2011, Ms Wolverson instructed the solicitor to hold the proceeding against Dr Todman in abeyance while the conciliation was on-foot.[77] The conciliation process stalled and by late October 2011, it had been discontinued by HQCC. The original MRI scans were returned to the solicitor by HQCC on 31 May 2012.[78] Dr Earwaker was then briefed to prepare his report.

[68] Dr Earwaker's report dated 23 July 2012 expressed a clear opinion that the failure to detect the Chiari 1 malformation was a failure to meet an appropriate radiological standard of care. The concluding paragraph to the supplementary report which elaborated the concluding paragraph of its predecessor as outlined earlier in these reasons, was an answer to a question posed by the solicitor in a letter to Dr Earwaker dated 1 November 2013. The question asked him to provide comment based on the material briefed as to whether Ms Wolverson suffered a personal injury as a result of a failure to meet the appropriate standard of care. It was that answer which facilitated proof of the causal link (as did the report of Dr Mellick).

[69] The promptness with which Dr Earwaker supplied his reports, within less than two months of being briefed in the case of the first report and within a matter of several days of being asked for it in the case of the supplementary report, strongly suggests that had Dr Earwaker's opinion been sought at the end of October 2010 then, by early 2011, both the first report and the supplementary report would have been provided by him. I agree generally with the conclusion of the learned primary judge in this regard.

[70] According to the solicitor, the opinion of Dr Earwaker was not sought at that time (nor was the return of the original MRIs followed up then) because she and Ms Wolverson, after discussion of the potential benefits of the HQCC process, decided not to progress personal injury proceedings.[79]

[71] From this factual background, the issue for consideration is refined to whether Ms Wolverson had taken all reasonable steps in the period before 31 July 2012 to obtain Dr Earwaker's opinion in its supplemented form. The relevant frame of reference is what she knew and did.

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73 AB55; Tr1-55 ll1-2.
74 AB112; Affidavit of J K Wolverson sworn 24 January 2014, paragraph 37.
75 AB139; Exhibit AMEG-7.
76 AB27; Tr1-27 ll14-16.
77 AB28; Tr1-28 ll1-3.
78 AB122; Affidavit A M Given sworn 24 January 2014, paragraph 29.
79 AB55; Tr1-55 ll13-15.

[72] In April 2009, Ms Wolverson knew that Dr Kua had recently detected the possible Chiari 1 malformation, and by May 2009 she knew that its existence had been confirmed.[80] She also knew that she had undergone successive radiological examinations in the past and that the possibility of the existence of the malformation had not been reported to her at those times.

[73] At the time that legal aid was sought in 2010, Ms Wolverson knew that it was important that an independent radiologist be engaged to express an opinion about what was observable on the MRI scans that had previously been taken. She knew also that legal aid for such a report had been requested. She acknowledged that her solicitor kept her up-to-date with the outcome of such requests.[81]

[74] The decision to defer the radiological opinion for which funding had been approved was one in which Ms Wolverson participated. The reason given for the deferral does not withstand scrutiny. That proceeding concerned Dr Todman, the neurologist, only. It did not concern the radiologists who were potential defendants and whose professional work was to have been the subject of the opinion. It may be that the deferral was motivated by expediency on Ms Wolverson's part, namely, were the HQCC process to lead to a sufficiently satisfactory outcome for her, she might not wish to progress litigation against the radiologists. That, however, does not paint the decision to defer the opinion as reasonable. In circumstances where, to her knowledge, the opinion was required for a proceeding against the radiologists and funding for the opinion had been secured, judged objectively, it was not, in my view, reasonable for her to defer obtaining it.

[75] For these reasons, I consider that the learned primary judge was correct to conclude that Ms Wolverson had not taken all reasonable steps to ascertain the causal link by 31 July 2012. A consequence of a finding to that effect is that the causal link cannot be characterised as a material fact of a decisive character that was not within Ms Wolverson's means of knowledge at that date. Further, a consequence of that characterisation is that it cannot be relied upon by her to ground an application for an extension of time of the limitation period to 31 July 2013, the date on which proceeding against the radiologists was in fact commenced.

The learned primary judge was correct to refuse an extension of the limitation period for the commencement of proceedings against the radiologists individually and Queensland Diagnostic Imaging Pty Ltd, on this basis. It follows that the Radiology Appeal cannot succeed.

The compliance with consent orders issue

[76] The consent orders made on 27 May 2010 giving Ms Wolverson leave pursuant to s 43 of PIPA to commence proceedings against Dr Todman included the following:

> "2. Subject to any relaxation by the Court,
>
> (a) that leave be granted to issue urgent proceedings subject to and conditional upon the Applicant filing any Application for an extension of the limitation period so required in respect of the claim pursuant to section 31 of the *Limitation of Actions Act 1974* ("the Act") within six months of receipt of an independent specialist's report;

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80 AB110; Affidavit of J K Wolverson sworn 24 January 2014, paragraphs 25, 29.

81 AB16; Tr1-16 l39 – AB17; Tr1-17 l23.

(b) the proceeding be otherwise stayed pending compliance with part 1 of chapter 2 of the Act, or the proceeding is discontinued or otherwise ends.

3. The Applicant undertakes to make all reasonable and genuine attempts to procure the report within six months following this Application."[82]

[77] Ms Wolverson's application filed on 21 January 2014 in proceeding No 1552 of 2010[83] sought an enlargement until that day of the time allowed by consent order 2(a) for filing the application for an extension of the limitation period for proceedings against Dr Todman. This application also sought an order extending the limitation period and other orders. The enlargement of time was sought on the footing that it was necessary because Dr Earwaker's first report was received on 3 August 2012 yet the application for extension of the limitation period was not filed until some 18 months later, on 21 January 2014. Thus, it was thought, there had been non-compliance with consent order 2(a) and an enlargement of the time allowed under it was necessary.

[78] The learned primary judge was of the view that the independent specialist report relevant to a proceeding against Dr Todman was that of an independent specialist in Dr Todman's field of specialty, neurology.[84] I agree. The order necessarily comprehends an independent specialist's report as was capable of facilitating proof of negligence against Dr Todman should Ms Wolverson be able to procure one. I also agree with his Honour that since the application for extension of the limitation period was filed within six months of the receipt of the report of the independent neurology specialist, Dr Mellick, Ms Wolverson had complied with order 2(a) and therefore there was no need for enlargement of the time provided by it for making the application for extension.[85]

[79] His Honour also had before him the application filed by Dr Todman on 7 March 2014,[86] paragraph 1 of which sought the following order:

> "That pursuant to rule 280 of the *Uniform Civil Procedure Rules* 1999, or alternatively pursuant to the inherent jurisdiction of this Honourable Court, the Claim be dismissed on the grounds of the failure to comply with paragraph 2(a) and/or 3 of the Order of Judge Clare SC dated 17 May 2010."
>
> (This paragraph evidently meant to refer to the order dated 27 May 2010.)

[80] The learned primary judge did not make any order on this application. Quite probably he did not do so because the practical effect of his dismissal of the application for an extension of the limitation period was that the proceeding commenced against Dr Todman foundered. His Honour did, however, express the view that there had been a failure to comply with order 3 of the consent orders as would have enlivened the jurisdiction under r 280(1) of the UCPR to dismiss the proceeding.[87]

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82 AB636.
83 AB655.
84 Reasons [88].
85 Reasons [89].
86 AB660-1.
87 Reasons [92].

[81] Rule 280(1) provides:

> "If—
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> (a) the plaintiff or applicant is required to take a step required by these rules or comply with an order of the court within a stated time; and
>
> (b) the plaintiff or applicant does not do what is required within the time stated for doing the act;
>
> a defendant or respondent in the proceeding may apply to the court for an order dismissing the proceeding for want of prosecution."

In its own terms, this rule is applicable only in circumstances where a party has failed to take a step required by the rules or to comply with an order of the court within a stated time. Order 3 was an undertaking given by Ms Wolverson to make all reasonable and genuine attempts to procure the independent specialist's report within six months following the application on which the consent orders were made. Order 3 did not require her to do anything within a stated time. In particular, it did not require her to obtain the report within six months of the application. The jurisdiction under r 280(1) was therefore not engaged.

[82] Rule 280(2) captures the inherent jurisdiction of the court to dismiss a proceeding for want of prosecution. Before this Court, it was not submitted, orally or in writing, that an order dismissing the proceeding against Dr Todman ought to have been made in the exercise of the inherent jurisdiction. I would observe that in light of the fact that on 24 June 2010 and within one month of the making of the consent orders, a representation was made to HQCC on behalf of Dr Todman that while that avenue was pursued, Ms Wolverson should hold the PIPA proceedings in abeyance,[88] and, having regard to the absence of significant prejudice noted later in these reasons, in my view, such a submission would not have succeeded.

The prejudice issue

[83] The learned primary judge made no finding on this issue. However, it is raised by the Notices of Contention. Given that the Radiology Appeal cannot succeed for failure by Ms Wolverson on the means of knowledge issue, it is unnecessary to consider the prejudice issue in the context of the application for extension of the limitation period for commencement of proceedings against the radiologist parties.

[84] In reliance upon the decision of the High Court in *Brisbane South Regional Health Authority v Taylor*,[89] it is submitted for Dr Todman that Ms Wolverson did not establish that an extension of the limitation period would not result in significant prejudice to him. The submission is elaborated in writing as follows:

> "Dr Mellick made a number of observations about the absence of medical records in his report.
>
> At page 8, he referred to the Appellant developing increasing symptoms following a cerebrospinal leak after a lumbar puncture in 1989. Dr Mellick said, '*Regrettably, the writer is not able to identify any additional clinical detail related to the symptoms which followed the lumbar puncture'*. At that time the Appellant was consulting Dr Reimers, a neurologist.

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88 AB244; Letter from Avant Law Pty Ltd dated 24 June 2010.

89 (1996) 186 CLR 541.

> At page 11, he reported that the first detailed neurological examination of the Appellant was documented following a visit to the Emergency Department on 10 June 1997, some nine years after the Appellant says her symptoms commenced.
>
> At page 14, he noted the various reports he considered had a paucity of clinical detail regarding the specific findings, which were identified on physical examination. They include those by Dr Todman.
>
> Without this material, the Respondents are prejudiced. The Appellant reported symptoms and the clinical assessments of the Appellant prior to the misdiagnosis, compared to her claimed residual symptoms following surgical intervention, which cannot now clearly be established, or proven by reference to documented contemporaneous records.
>
> Further, the issue having been identified in the Appellant's own material, it was for the Appellant to prove that no prejudice would ensue. She did not attempt to do so.
>
> Due to the passage of time from the alleged diagnosis, the Appellant's delay in progressing the claim, and the limited clinical notes, it is likely that relevant interactions and conversations between Dr Todman and the Appellant will no longer be within their memory. This gives rise to a general presumption of prejudice." (Footnotes omitted.)

(These submissions were also made on behalf of one of the radiologist respondents.)

[85] The report by Dr Mellick to which these submissions is referenced is very detailed. It reveals that Dr Mellick had available to him correspondence from 1992 and thereafter between Dr Todman and others, including radiologists, concerning Ms Wolverson's condition. His report indicates that the relevant MRI scans are available. He also had reports of other medical practitioners who had examined Ms Wolverson at stays in hospital. To use his own words, there are "a very large volume of notes" available concerning her condition.[90] There is no reason to doubt that any of these records and documents would be available for a trial.

[86] The observation by Dr Mellick at p 14 of his report relied on in the written submissions is not to be read as implying that a clear record of Dr Todman's physical findings was in fact made but that it no longer exists or is not available. No evidence was adduced for Dr Todman to the effect that records that he had made of his findings no longer exist or that he would be prejudiced in proceedings in any significant respect.

[87] In summary, there is no evidential basis from which the learned primary judge ought to have inferred that there was a significant prejudice to Dr Todman in extending the limitation period which Ms Wolverson had failed to disprove. In my view, it would not have been appropriate for him to have dismissed the application for extension on the ground of significant prejudice to Dr Todman.

Disposition

[88] For these reasons, in the Neurology Application, leave to appeal should be granted and the appeal allowed with costs. In lieu of the order made by the learned primary judge, an order extending the limitation period should be made. Costs of the application

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90 AB451 (p14); AB454 (p17).

for that order should be costs in the cause. Ms Wolverson's application filed in proceeding No 1552 of 2010 on 24 January 2014 should otherwise be dismissed. Dr Todman's application filed in that proceeding on 7 March 2014 should also be dismissed.

[89] As explained earlier in these reasons, the Radiology Appeal cannot succeed for failure by Ms Wolverson on the means of knowledge issue. Therefore, that appeal should be dismissed with costs.

Orders

[90] I would propose the following orders:

In Application No 4576 of 2014,

1. Leave to appeal granted.
2. Appeal allowed.
3. The orders made on 17 April 2014 in proceeding No 1552 of 2010 in the District Court be set aside and in lieu thereof, there be orders that:
   (a) The limitation period for the commencement of proceedings by the applicant Julia Kay Wolverson, against the respondent, Donald Henry Todman, be extended so that it expires at the time of closure of the Registry on 27 May 2010;
   (b) The costs of the application for extension of the limitation period be costs in the cause;
   (c) The application filed by the applicant on 21 January 2014 otherwise be dismissed;
   (d) The application filed by the respondent on 7 March be dismissed.
4. The respondent pay the appellant's costs of the application for leave to appeal and of the appeal on the standard basis.

In Appeal No 4577 of 2014,

1. Appeal dismissed.
2. The appellant pay the respondents' costs of the application for extension of the limitation period filed in proceeding No 2770 of 2013 in the District Court on the standard basis.
3. The appellant pay the respondents' costs of the appeal on the standard basis.

[91] **McMEEKIN J:** I have read the reasons of Gotterson JA. I am indebted to his Honour for his thorough exposition of the relevant facts, law and issues. Save for one matter I respectfully agree with those reasons.

[92] The matter that concerns me is the finding that the material facts relied on in the case against the radiologists were within Ms Wolverson's means of knowledge prior to the critical date. The critical date was 31 July 2012, 12 months prior to the bringing of her proceedings on 31 July 2013.

[93] The material facts were that the radiologists had fallen below the standard required, and that failure had caused harm. Evidence supporting the first issue was obtained with the receipt of Dr Earwaker's report in early August 2012 and on the second issue with the receipt of Dr Earwaker's supplementary report in early November 2013.

[94] The radiologists' submissions depend on the validity of one of two premises.

[95] The first premise is that Ms Wolverson's actions should be assessed on the basis that having consulted a solicitor, the time within which she then had available to discover the "material facts of a decisive character" was limited to what might be a reasonable time for a competent solicitor to take.[91]

[96] Alternatively it must be assumed that despite receiving no advice that the time that was being taken was unreasonable and, indeed, receiving advice to the contrary she, acting reasonably, should have not have followed that advice but realised the necessity of first obtaining the expert opinion rather than delaying.

[97] In my opinion the first premise involves a mistaken view of the law. The second premise, to my mind, involves an unacceptable finding of fact on the crucial question: had Ms Wolverson "taken all reasonable steps to find out the fact" before the critical date? I respectfully disagree with my colleagues as to the answer.

[98] I turn first to the legal issue. The question of law concerns the proper construction of s 30(1)(c)(ii) of the *Limitation of Actions Act*. The misunderstanding of that construction underlies the radiologists' argument.

[99] The respondents' approach assumes that when an applicant consults a solicitor the applicant is to be penalised for the solicitor's defaults. That is not right. The legislation does not require the solicitor retained by an applicant to take all reasonable steps but rather that the applicant does so.

[100] The point was settled in *Do Carmo v Ford Excavations Pty Ltd.*[92] There Dawson J held in that it was an error to construe the NSW analogue of s 30(1)(c)(ii) of the Act as requiring an assumption that when advice was sought appropriate advice was received.[93] In that case the applicant consulted union solicitors who failed to advise him that there was a method of carrying out the work in question that would have safe guarded him from the injury suffered and that the method was one well known in the industry at the relevant time. Solicitors that he consulted later provided the necessary advice. According to Dawson J the worker was not to be penalised for the ignorance or incompetence of his original solicitors. Deane and Wilson JJ took the opposite view. Brennan J agreed with Dawson J. Murphy J's judgment, whilst not explicit, was consistent with Dawson J's reasons.

[101] This was the approach that Thomas JA took to the effect of *Do Carmo* in *Dick v University of Queensland*.[94] So far as I am aware the correctness of that analysis has not been challenged.

[102] Keane JA's analysis in *NF v State of Queensland*[95] is to the same effect as is evident in this passage[96] from his Honour's reasons:

> "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

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91 See submissions of Ms Treston QC at para 27-29.
92 [1984] HCA 17; (1984) 154 CLR 234.
93 (1984) 154 CLR 234, at p 259.
94 [2000] 2 Qd R 476 at [30]-[36].
95 [2005] QCA 110.
96 At [29].

> 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 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 s 30(1)(c) of the Act. ..."

[103] Ms Treston cited certain passages from the judgment of Thomas JA in *Dick v University of Queensland*[97] as authority for the proposition she advanced and particularly the following:[98]

> "In cases where a potential claimant lacks a material fact, and reasonably needs the help of a solicitor or someone else to obtain it, some further time may reasonably elapse before it should be held that such facts are within the claimant's means of knowledge. Such time will include the time which would reasonably elapse if the claimant, taking all reasonable steps to do so, consults solicitors or other persons, and those solicitors or those other persons undertake the necessary inquiries to ascertain the necessary additional facts to show whether or not there is a worthwhile cause of action."

[104] I do not accept that the passage is authority for the submission.

[105] When Thomas JA used the word "reasonably" in the phrase "some further time may reasonably elapse" he meant to judge reasonableness from the perspective of the applicant, not to apply the standard he would expect of a competent solicitor. That is clear given that his Honour had just concluded the analysis of *Do Carmo* that I have referred to. And his reference to the further time to be allowed for "those solicitors or those other persons [to] undertake the necessary inquiries to ascertain the necessary additional facts"[99] was in response to an argument that an applicant was "instantly be taken to have consulted with all necessary experts (including industrial safety experts and solicitors) and to be taken to know such information as those persons would have supplied to him"[100] upon the receipt of an expert report alerting him to the need to pursue further information. His was an observation suited to the facts of the case. It was not alleged that the solicitor had delayed for an inordinate period. His Honour was not endeavouring to lay down any principle guiding the approach to a case of a solicitor who, once properly instructed, does take an inordinate time to investigate. Nor was he dealing with a situation, as here, where the solicitor did delay for a lengthy period but had plausible reasons to delay.

[106] Before turning to the question of fact of assessing what could "reasonably be expected from the actual person in the circumstances of the applicant"[101], as Keane JA put the

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97 [2000] 2 Qd R 476 at [35]-[37].
98 At [36].
99 At [36].
100 At [35].
101 [2005] QCA 110, at [29].

relevant question, I summarise the actions that Ms Wolverson did take or that were taken on her behalf between the discovery of the Chiari Type 1 malformation in April 2009 and the critical date. In that period Ms Wolverson:

- took medical advice and had surgery;
- took time to recover from the surgery and found eventually that some of her significant symptoms had sufficiently improved that she felt well enough to consult solicitors;
- engaged solicitors (May 2010) who immediately sought legal aid to obtain an expert radiologist's report;
- lodged a written complaint with HQCC regarding Dr Todman (21 May 2010);
- obtained legal aid (mid June 2010);
- instructed her solicitors to obtain necessary information to brief the expert radiologist;
- provided original MRI scans to HQCC at their request on their undertaking to return them "as soon as possible" (26 July 2010);
- received advice from HQCC that it had resolved to conciliate the complaint made against Dr Todman (February 2011);
- determined to hold the litigation process in abeyance until the conciliation process was completed and so instructed her solicitors (May 2011);
- received advice from HQCC that the conciliation process was discontinued and would not be reopened (October 2011);
- received through her solicitors the return of the crucial original MRI scans from HQCC (31 May 2012);
- again through her solicitors, briefed the expert radiologist Dr Earwaker (4 July 2012);
- obtained the expert report (dated 23 July 2012 but date stamped received by the solicitors on 3 August 2012);
- was advised by her solicitors that she had reasonable prospects of success against the radiologists (6 August 2012);
- filed her Claim and Statement of Claim against the radiologists (31 July 2013);
- sought, again through her solicitors, a clarification of the expert's report (1 November 2013); and
- received a response from the expert providing the critical information on causation of harm (a week later).

[107] There are two periods of significant delay. The first period is the two year delay from the obtaining of legal aid in June 2010 to fund the obtaining of the expert report and the request for the report in July 2012. The second is the 14 month delay from the obtaining of the report in August 2012 and the seeking of the supplementary report in November 2013, bearing in mind that proceedings were filed in July 2013.

[108] The first period of delay came about largely because of Ms Wolverson's decision not to pursue the legal action against the radiologists while her complaint about Dr Todman was before the HQCC. Was that an unreasonable course to take?

[109] In my opinion three matters tilt the scales in favour of Ms Wolverson's decision to leave the proceedings in abeyance.

[110] The first is that a satisfactory resolution of her complaint against Dr Todman would mean that Ms Wolverson had no reason to pursue the radiologists. It needs to be borne in mind that if it was reasonable to pursue an expert report it presumably

follows that it was also reasonable to pursue the proceedings generally, assuming a favourable opinion was obtained. That would involve both expense – there is no necessary reason to expect that legal aid would fund the action generally[102], and in any case that fund should not be wasted – as well as the significant stress involved in any litigation.

[111] In judging Ms Wolverson's capacity to act and what might reasonably be expected of her it cannot be overlooked Ms Wolverson had over the years suffered from very significant symptoms. The symptoms over the period from 1988 have been described as including: severe migraines, reduced vision, loss of balance, facial neuralgia, slurred speech, short term memory loss, vertigo, nystagmus, vomiting, blacking out and collapsing, intermittent fevers, loss of vision or visual disturbance, ataxia, dysdiadochokinesis, intermittent pain in the left iliac fossa, "heaviness in her feet and occasional jerk", mobility problems including (L) leg weakness – to the extent of needing a wheelchair, incontinence, dysphagia with solids, worsening gait and falls, persistent bilateral leg and back pain, and generalised weakness.[103] I can well understand that a person who had been subjected to symptoms of that seriousness and degree over such a long period would not willingly incur unnecessary stress.

[112] On Ms Wolverson's report the symptoms have varied over time albeit that the surgery undertaken in June 2009 has relieved to some degree many of the symptoms. The continuing symptoms post-surgery included headaches, dizziness and visual disturbance.[104] Her continuing symptoms, post-surgery, were not insignificant.

[113] Nor should it be overlooked that the HQCC process involved that body in carrying out investigations.[105] There was thus the prospect that the HQCC might do the work, or some of the work, required to establish negligence. There was a potential advantage to Ms Wolverson in that.

[114] These advantages, and potential advantages, to Ms Wolverson in delaying are not irrelevant.

[115] The second factor is that it was to the advantage of the radiologists that Ms Wolverson pause and attempt to conciliate. I mention this, as a decision to delay that caused obvious detriment to the radiologists would be harder to justify, even for a lay person. I have no doubt whatever that if the radiologists had been asked in July 2010 whether they would prefer proceedings to be pursued vigorously against them or whether Ms Wolverson should see what she might gain from a conciliation attempt with Dr Todman – with the possible resolution of her complaints entirely – what their response would be. No medical practitioner likes to be sued for professional negligence. And there was no significant down side for them. This is not a case where the essential evidence on breach of duty had been or was likely to be lost – either the original scans show the malformation to a trained eye or they do not. So there was no obvious disadvantage to the radiologists in delay and a very considerable potential advantage.

[116] The third and crucial factor is that Ms Wolverson was at all times being guided by an apparently competent solicitor on what were essentially legal issues: the significance

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102 As it happens the Legal Aid Office declined to further fund the action against the neurologist demonstrating the point: AB429.

103 See AB203.

104 AB111 - affidavit of Ms Wolverson at [32].

105 AB55/30.

of time passing in the context of an existing order; and a potentially expired limitation period. While Ms Wolverson was involved in the decision not to pursue the evidence that might implicate the radiologists she reached that decision with the guidance of the solicitor. One thing that she was not told, or at least there is no suggestion she was told, is that she would jeopardise her rights to commence proceedings against the neurologists by delaying the procurement of the expert report.

[117] A crucial difference, I think, between my view and that of the majority is in the significance of the finding that Ms Wolverson "participated" in the decision to defer the obtaining of the expert radiological opinion.[106] The evidence relied on for the finding was given by the solicitor under cross examination.

> "Yes. But the issue about the HQCC process is different where a claim is already, prima facie, out of time, isn't it, Ms Given?---Well, in my view, I hadn't considered that. In my view I considered that, given the complications of this case, and after discussing with my client, if the HQCC process was going to be beneficial, then that's – then we were going to proceed with that. It wasn't my position – as I've written in correspondence, was that I considered that the proceeding – proceeding with obtaining any further medical evidence, or proceeding with the PIPA process wasn't something I was going to proceed with while the HQCC proceeding was on foot. Now, that may or may not be correct, but that was my position. That was how I considered the matter was proceeding. So it wouldn't have occurred – I – it wasn't something that I contemplated, that while the matter may go through HQCC that I would be obtaining an expert report and make this application to the court, because to me, that would be inappropriate use of legal aid funds. It would be just not---[107]"

[118] The solicitor's views were strongly put: The "PIPA process wasn't something that I was going to proceed with while the HQCC process was on foot;"[108] and it would be an "inappropriate use of legal aid funds" to pursue the expert report while the HQCC process continued.[109] Ms Wolverson's choices were fairly stark. The inference is that Ms Wolverson would have needed to seek other solicitors if she rejected that advice. On that point it is not irrelevant that Ms Wolverson had previously consulted three firms of solicitors before her instructions were eventually accepted. Ms Wolverson's participation in the decision was hardly on an equal footing with the solicitor. She was told what she ought to do and she did it. Nor was it a decision informed by advice consistent with what the majority have found was a reasonable course to take.

[119] In the normal course clients act just as Ms Wolverson has done here – they follow the advice their solicitors give them.

[120] As the respondents point out, through all this time Ms Wolverson kept in touch with her solicitors. In doing so she did all that can reasonably be expected.

[121] The argument that the respondents press therefore becomes this: a lay person, in the physical condition that I have described, unversed in the intricacies of these statutory

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106 See [75] above, the discussion at [71] and footnote 79.
107 AB55/11-24.
108 AB55/15.
109 AB55/23.

provisions, is said to act unreasonably in relying on the guidance provided by her apparently competent solicitors. That guidance - amounting to strong advice given the evidence of the solicitor - was not to presently incur potential expense and go to substantial trouble. The client was not given any compelling reason by her solicitor to proceed but was given reasons to accept the solicitor's advice and not to proceed, including that the proceedings might prove to be unnecessary and that the solicitors might withdraw causing further delay. I cannot accept this argument. No doubt one can imagine cases where no reasonable lay person could think that the advice they were receiving from their solicitors could be correct. But that is not the present case.

[122] Nor do I think it particularly relevant, for these purposes, that there were two proceedings, one against the neurologist and one against the radiologists. To the applicant's lay mind I could well understand the thinking being that her proceedings were for damages against "the doctors". Why mistakes were made (which is the assumption here) and who was responsible were matters that would be sorted out in the one trial.

[123] It is relevant too that the cases are obviously interrelated. The radiologists can only be liable if the failure to report the malformation impacted on the treatment offered. Dr Todman may seek to argue that his diagnosis was based, amongst other things, on the lack of any other apparent cause; that he could not be expected to see what several experienced radiologists missed; and that had he had the additional information of the existence of the malformation his approach would have been different. In other words it is the radiologists' fault. While the defences of the medical practitioners are still unknown it is a reasonable supposition that the radiologists may argue that it is the neurologist who has a complete view of the symptoms, symptoms usually only briefly summarised to them, and it is the neurologist who has the advantage. No one would think that there ought to be two separate trials of such inter-related proceedings. Why then accelerate the disposition of one side of the argument without the other? It would make little sense. Eventually there would need to be a delay of the accelerated proceedings to allow the other to catch up. I can well understand the decision to delay while the HQCC conciliation process was proceeding.

[124] In my view the same considerations apply to the period from May 2010 to the indication by HQCC (the following February) that it would proceed to conciliate. An apparently competent solicitor, cognisant of her duties, was guiding the process. To expect a lay person with no legal training or experience to appreciate what the solicitor did not is, in my respectful view, setting the bar far too high.

[125] That reasoning excuses the delay up and until the HQCC advised in October 2011 that the conciliation process was being discontinued. I am conscious that there had been an earlier indication in July of that decision but there was then an attempt to agitate to have the process re-opened by the applicant's solicitors explaining the further delay. I cannot see either that that was an unreasonable step to take or that Ms Wolverson acted unreasonably in following her solicitor's advice in taking it.

[126] What then of the further delay to August 2012 when Dr Earwaker's first opinion was obtained?

[127] What appears to have occurred is that the solicitors awaited the honouring by the HQCC of their undertaking to copy and return the MRI scans. Once the scans were returned the solicitors acted reasonably promptly. Nine weeks later they had the

necessary report. It might be said that the solicitors could and should have done more to get the MRI scans back. I am not convinced that is so but that is not the issue. Rather the issue is whether the applicant should have done more to accelerate the process.

[128] According to the solicitor she was not inactive. She swore in her affidavit that "steps were taken to retrieve this information", and that there was "various correspondence and communication with respect to now having to proceed under the Freedom of Information procedures."[110] Eventually the scans were given up.

[129] From Ms Wolverson's perspective what was she to do? Presumably any enquiry of the solicitors would have been met with the response that the solicitor gave in her affidavit and evidence. Why would Ms Wolverson think that she would be more successful pursuing the matter on her own or that other solicitors, if she could find some, would have more success?

[130] The foregoing analysis is in my view consistent with the approach the Court has taken over decades to applicants for an extension of the limitation period. Gotterson JA has referred to McPherson J's observation in *Neilson v Peters Ship Repair Pty Ltd*[111] as to the position of a layperson placing a matter in the hands of apparently competent solicitors. While that is an observation on what is a question of fact for each case the wisdom of that approach has recommended itself to others – see for example the remark of Lucas J quoted with approval by Connolly J in *Castlemaine Perkins Limited v McPhee*[112] and repeated by Thomas J in *Neilson*:[113] "The question is whether a man of that background can be expected to do anything more than consult a solicitor, keep in touch with him and act according to the advice which the solicitor gives him from time to time …"

[131] That in essence is what Ms Wolverson did.

[132] The second period of delay is not so critical. The proceedings were brought within 12 months of obtaining Dr Earwaker's first report and without the benefit of Dr Earwaker's supplementary opinion – the lack of evidence on the question of causation of harm seems to have gone unrecognised. Thus even if it be held that, acting reasonably, Ms Wolverson should have realised what her lawyers did not and sought an opinion on that crucial matter earlier than she did it makes no difference to the case.

[133] To return to the question posed by Keane JA in *NF v State of Queensland* - in my opinion no more could "reasonably be expected from the actual person in the circumstances of the applicant" than Ms Wolverson has demonstrated.

[134] The respondents argue that the primary judge applied the correct test, that his finding as to unreasonableness involved a finding of fact and that the considerations justifying an interference with a finding of fact as set out in *Fox v Percy*[114] are not satisfied.

[135] Here the facts are not contested. It is the inference from those facts and the judgment of what is or is not reasonable behaviour that is in issue. The relevant

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110 AB122 - affidavit at [29] and see her cross examination at AB46/30-45.
111 See [66] above.
112 [1979] Qd R 469 at 472.
113 [1983] 2 Qd R 419 at 440.
114 (2003) 214 CLR 118.

principle is summarised in this quote from the majority reasons in *Warren v Coombes*[115] repeated in *Fox v Percy*[116]:

> "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."

[136] While the primary judge referred to passages in *Neilson* he has not, with respect, mentioned any of the considerations that impacted on Ms Wolverson's behaviour and decisions nor dealt with the crucial question of why a lay person following legal advice is said to act unreasonably. The steps from the statement of the problem to his Honour's conclusion that the time taken was excessive are left unexplained. The deference due to the primary judge's opinion should not result here in appellate restraint.

Prejudice

[137] That leaves the question of prejudice to the radiologists – a matter not decided by the primary judge and not directly relevant to the majority view of the case.

[138] The argument advanced for the second respondent is the same as that advanced for Dr Todman. Gotterson JA has explained why the arguments should be rejected, albeit in Dr Todman's case. Unless there is some material difference between Dr Todman's position and that of the radiologists it follows that a fair trial can be had on relevant issues by the latter. As between the radiologists the only distinction is a temporal one. On Ms Wolverson's case the second respondent reported on MRI images on 30 May 2006. The third and first respondents had reported on scans earlier (16 May 2002 and 21 June 2004 respectively) and the fourth respondent later (14 September 2007). The case pleaded against each of the radiologists is precisely the same.

[139] In my view Gotterson JA's reasoning applies just as much to the radiologists as it does to Dr Todman. There is no material distinction that I can see between the various practitioners.

[140] There are five grounds argued by the first, third, fourth and fifth respondents. They each suffer from the same problem that Gotterson JA has identified – it is not evident how the respondents are disadvantaged on any relevant issue and why there cannot be a fair trial of the issues.

[141] First, it is said that there was a three year delay between the time that Ms Wolverson first knew that the respondents had failed to identify the Chiari type 1 malformation and her bringing suit. Presumptive prejudice is said to arise.

[142] Secondly, scans, referrals, requests and images have not been retained by the respondents.

[143] Thirdly, MRI scans and x-rays taken at the Ayr Hospital, the Townsville Hospital and the records of a Dr Reimers have been lost. These records pre-dated Ms Wolverson coming under Dr Todman's care in 1992.

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115 (1979) 142 CLR 531 at 551.

116 At [25].

[144] Fourthly, "relevant material and records" have been lost as noted by Dr Mellick.

[145] Fifthly, Ms Wolverson has memory problems and those problems "constitute a source of prejudice for the respondents", although precisely how is not explained.

[146] Gotterson JA has explained why the claim of significant prejudice should be rejected. I would add this: From the radiologist's perspective Dr Todman was the referring doctor. His notes are available. While Dr Mellick did assert that he could not find "any clear description of the physical findings by Dr Todman" that is not the same as an assertion that those findings are unable now to be established. Dr Mellick went on: "Perhaps those are present in the large volume of notes (3 folders) some of which are not clear or fully legible because of faulty copying and may have been overlooked."

[147] Where, as here, Dr Todman, who treated Ms Wolverson through the relevant period, is available to give evidence and has not sworn an affidavit to claim any prejudice from loss of records or faulty recollection - when it would be in his interests to do so if that were the fact - the Court is entitled to be sceptical of claims of any significant prejudice. Only Dr Todman knows the true situation and he notably did not go into evidence. An inference can be drawn from his silence. Nor did the radiologists call him in their case to make good the speculation in the submissions that the gaps in the records might have some significance. Nor did the radiologists go into evidence to assert that they had considered the voluminous records that were available and identify why, given the extensive evidence that is available, they were disadvantaged in meeting the damages claim.

[148] In my view the following passage from Kirby J's reasons in *Brisbane South Regional Health Authority v Taylor*[117] sums up the radiologist's position here:

> "If a defendant does not call evidence, or calls evidence which is unpersuasive or insignificant, provided it is reasonable to infer that some evidence was available to it in the circumstances the defendant cannot complain if the court concludes that no particular prejudice, over and beyond the generalities, could have been established by it. This is simply another way of saying that, because a prospective defendant has an interest in keeping the limitation bar in place and in resisting an extension that lifts it, it may be inferred that he or she would ordinarily place before a court evidence of specific prejudice pertinent to the exercise of the court's discretion. If the prospective defendant does not do so, he or she cannot justly complain if the court infers, and then holds, that the defendant has failed to demonstrate such prejudice. This is not to shift the burden in the application from the applicant to the defendant. It is simply to recognise that the burden of persuading a court on the particular issue of specific prejudice lies on the party making any such suggestion. This is what is meant by the 'evidentiary onus' resting on a proposed defendant in relation to such an issue."[118]

[149] While Kirby J was in dissent in the decision in *Taylor* the foregoing is not out of accord with the majority judgments and represents a common sense approach to the issue of prejudice and the evidence expected.

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117 (1996) 186 CLR 541.

118 At 566.

Conclusion

[150] In my view justice is best served by allowing the appeals to succeed against all respondents.

[151] I agree with the orders proposed by Gotterson JA in application 4576 of 2014.

[152] In appeal 4577 of 2014 I would allow the appeal, set aside the orders made below, and in lieu order that the limitation period for the commencement of proceedings by the applicant against the first, second, third, fourth and fifth respondents be extended to 31 July 2013, that the respondents pay the appellant's costs of the appeal, and that the costs below be the respective parties' costs in the cause.

Addendum

[153] I wish to add that subsequent to the hearing of these appeals I became aware of a potential conflict. I communicated with the parties concerning the issue. I did so with the knowledge and concurrence of my colleagues. I record that no party has raised any objection to my continuing in the matter.