SUPREME COURT OF QUEENSLAND

CITATION:	*Russell v State of Qld* [2004] QCA 370
PARTIES:	**MATTHEW LANSDOWNE RUSSELL** (plaintiff/respondent) **v** **STATE OF QUEENSLAND** (defendant/appellant)
FILE NO/S:	Appeal No 4264 of 2004 SC No 4770 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2004
JUDGES:	Williams JA and Cullinane and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal only to the extent of varying paragraph 1 of the order of 20 April 2004 so that it reads: "The time for commencing proceedings in respect of the cause of action which accrued in 1992 to recover damages for the injuries alleged in paragraph 18 of the amended statement of claim be extended so that it expires on 11 June 1996."** **2. The costs of the appeal of each party as assessed be that party's costs in the proceeding**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF DECISIVE CHARACTER – where respondent commenced proceedings in 1996 against appellant seeking damages for personal injury – where injuries concerned were psychiatric injuries which were sustained as a result of undercover police work and consumption of illegal drugs in the course of that work which the respondent had performed as employee of respondent up until 1991 – where respondent first diagnosed with psychiatric disorder in 1995 – where learned primary judge found that a material fact of a decisive character was

not within respondent's knowledge until 1995 and so extended limitation period – whether learned primary judge erred in finding that respondent did not have actual or deemed knowledge of material fact of a decisive character before 1995

Limitation of Actions Act 1974 (Qld), s 30, s 31, s 33

Healy v Femdale Pty Ltd [1993] QCA 210; Appeal No 37 of 1992, 9 June 1993, considered
Mills v Comalco Aluminium Ltd Qld Full Court, Appeal No 64 of 1991, 6 November 1991, cited
Muir v Franklins Ltd [2001] QCA 173; Appeal No 9504 of 2000, 11 May 2001, cited
Pizer v Ansett Australia Ltd [1998] QCA 298; Appeal No 6807 of 1998, 29 September 1998, considered

COUNSEL: R J Douglas SC, with D J Campbell, for the appellant
D B Fraser QC, with G A Mullins, for the respondent

SOLICITORS: Crown Law for the appellant
Gilshenan & Luton for the respondent

[1] **WILLIAMS JA:** The respondent commenced proceedings by causing a writ to be issued on 11 June 1996 naming the appellant as defendant and seeking damages for personal injury. A statement of claim was delivered on 6 July 1998 and amended on 2 August 2000. In its defence the appellant pleaded the Statute of Limitations contending the cause of action (or causes of action) accrued more than three years prior to the commencement of the proceedings. Thereafter by application filed by 1 October 2003 the respondent invoked s 30, s 31 and s 33 of the *Limitation of Actions Act* 1974 to obtain an order that the relevant limitation period be extended on the basis that a material fact of a decisive character relating to his right of action was not within his means of knowledge until after 11 June 1995. The appellant countered that application by applying either for judgment pursuant to Rule 293 of the *Uniform Civil Procedure Rules* or for an order that the claim and statement of claim be struck out on the basis that the action was brought after the expiration of three years from the date on which the cause of action arose. After hearing both applications the learned judge at first instance ordered in favour of the respondent on his application and dismissed the appellant's application. The appellant has appealed against each of those orders.

[2] The litigation was commenced against the background of the following facts. The respondent, who was born on 14 January 1967, completed Year 12 of secondary schooling in 1984 and thereafter immediately entered the Police Academy. He was sworn in as a constable on 4 July 1986. Thereafter his career was successful until he joined the Drug Squad on 9 January 1989. He served in that squad until he returned to general duties in about May 1991. He was promoted to Constable First Class in July 1991 and served principally at Maroochydore and Noosa before transferring to Mareeba early in 1995 as Sergeant in charge of Prosecutions. He had earlier qualified as a prosecutor and much of his work at Maroochydore and Noosa was in that capacity. For reasons hereinafter canvassed he applied on 16 November 1995 for medical retirement, and his employment with the Police Service was terminated on 23 February 1996.

[3] From the amended statement of claim, the respondent's affidavit in support of his application for an extension of the limitation period, and his oral evidence on the hearing of that application the following picture is painted with respect to his service in the police force after January 1989. There was no psychological assessment prior to his appointment to the Drug Squad. During his period with that squad he was required to work undercover with a false identity. That involved socialising with drug users and suppliers. He was instructed by superior officers how to roll "joints" and, apart from some minor experimentation whilst at high school, that was his first experience with cannabis. As an undercover operative from 1989 to 1991 he was supplied with money to buy large quantities of drugs in an attempt to identify sources of supply. In order to maintain his false identity he was obliged to use drugs when in the company of drug users and suppliers. He was given no training or instruction as to how to cope with such a lifestyle. It is alleged that the appellant ought to have known of his likely drug use and the risk of dependence or psychiatric illness developing.

[4] In the statement of claim it is alleged that he became a user of cannabis in 1989 and developed a dependence on that drug in about 1990. In paragraph 15 of the amended statement of claim the use of illegal drugs from 1989 and the drug dependence from about 1990 were referred to as "the initial injuries".

[5] The respondent contends that he was given no counselling, nor submitted to any assessment, prior to his return to general duties in about May 1991. He asserts that in May 1991 he was optimistic about the future and believed he would be able to overcome his drug use. However, whilst at Maroochydore he found it extremely difficult to assimilate to mainstream police duties. That was exacerbated by the fact that, particularly in his role as a police prosecutor, he was exposed to persons who had been his former targets whilst working undercover. However he maintains that over the 12 month period after resuming general duties he used illegal drugs only occasionally.

[6] The material indicates that he consulted a psychologist (Kerr) on one occasion in August 1991. His level of stress on his account increased after December 1991 and by March 1992 he was finding it difficult to cope with his work. Paragraph 18 of the amended statement of claim is in these terms:

> "By about 1992:-
> (a) the Plaintiff had developed a stress disorder and had become depressed ...;
> (b) the Plaintiff commenced to use his accumulated recreation leave in an attempt to recuperate; and
> (c) the Plaintiff consulted Ms Leah Dique, a psychologist employed by and acting on behalf of the QPS, and advised her of, inter alia, his drug use whilst engaged in the operations ... ."

The stress disorder and depression therein pleaded were called "the later injuries".

[7] The respondent had accrued quite an amount of recreation leave, and between March 1992 and August 1993 utilised it in his attempts to recuperate.

[8] Because of statements made in about March 1992 by the then Police Commissioner, the respondent became concerned that if the police service became aware of his

drug use his employment would be terminated. That increased his level of stress, but he believed he would be able "to kick the habit".

[9] By July 1993 the respondent was experiencing an increased level of stress and anxiety and was again finding it difficult to cope with his work. He consulted a psychologist (Craig) on some five occasions between August and October 1993. That was said in the amended statement of claim to be "for his symptoms of stress, depression and suicidal ideation." On 13 September 1993 he consulted his general practitioner (Dr Fitzgerald) for "symptoms of stress and depression" and was given five days sick leave. According to the respondent during the period of that treatment he made progress and reduced his use of cannabis. In his report Dr Fitzgerald spoke of "work-related stress" but made "no precise diagnosis". The respondent then took recreation leave from 27 September to 15 October 1993 and thereafter returned to work. Dr Fitzgerald did not then consider that the respondent's career was at risk.

[10] In about April-May 1994 the respondent saw Dr Fitzgerald for unrelated medical conditions, but had some discussions with the doctor about how he was coping with his work. He indicated he was still experiencing some difficulties but not to the same degree they had been in late 1993. In about May 1994 Dr Fitzgerald provided the respondent with a referral to a psychiatrist (Dr Hutchinson) but the respondent did not make an appointment to see that doctor until 21 February 1995. In the meantime from about July 1994 the respondent took 10 weeks recreational leave and went on an overseas trip. He had resumed smoking cannabis prior to going overseas, but used the trip as an opportunity to address his drug usage. He significantly reduced his use whilst travelling, but on his return stress symptoms re-developed and he recommenced regular cannabis use.

[11] As already noted the respondent saw Dr Hutchinson on 21 February 1995. Contrary to usual medical practice Dr Hutchinson made no report to Dr Fitzgerald, the referring doctor. Dr Hutchinson is no longer in practice and could not be located; no notes of the consultation were available. In his affidavit the respondent said:

> "I did not develop a rapport with Dr Hutchinson as he did not appear to be very interested in what I was saying. I cannot recall whether Dr Hutchinson advised me of any diagnosis for my condition. However I do recall that at no time did Dr Hutchinson advise me that my future in the police service would be limited. I also recall that Dr Hutchinson made no recommendation that I receive further treatment from him and no further appointments with Dr Hutchinson were arranged."

[12] The move to Mareeba early in 1995 was motivated by the respondent's thought that work in the country would be less stressful. In fact it turned out to be the opposite. His condition worsened, he became frustrated, developed cramps and headaches, and used cannabis each day before going to work. His condition was exacerbated by his feeling of guilt about his drug use. During a temporary return visit to Noosa in May 1995 he again consulted Dr Fitzgerald and discussed his continued drug use. On that occasion detox was mentioned.

[13] Matters came to a head in July 1995 when a female friend found a bong the respondent had been using. She persuaded him that he had a serious problem and needed professional help. On 26 July 1995 he consulted Dr Fitzgerald who advised

that he take a period off work. Dr Fitzgerald said of that consultation in his affidavit:

> "I advised the [respondent] that he should consider taking a period of time off work in order to recuperate and obtain treatment. I arranged to review the [respondent] the next day and also raised with the [respondent] that he may wish to consider a period of anti-depressant medication and Zoloft was prescribed for him."

On the consultation the following day Dr Fitzgerald concluded that the respondent "required a period of time away from the workplace"; he gave a medical certificate for six weeks leave and also gave a referral to a consultant psychiatrist (Dr Seabridge). At that time Dr Fitzgerald made a diagnosis that the respondent was suffering "from an adjustment disorder with affective features". The doctor went on in his affidavit to say:

> "15. At this time there began to be an emerging indication that the [respondent] may not be able to return to his police duties, however there was the prospect that with appropriate treatment the [respondent's] condition would improve such that he could return to policing duties. The [respondent] expressed a wish to remain a police officer.
>
> 16. Over the following three months the [respondent's] condition did not improve sufficiently for him to return to his policing duties and I continued to certify him as unfit for work duties.
>
> 17. On 3 October 1995 the possibility that he would terminate his employment with the Queensland Police Service was discussed by me with the [respondent]."

In his affidavit the respondent states that on 27 July 1995 Dr Fitzgerald informed him that he was suffering "from a reactive depression".

[14] Paragraph 24 of the Amended Statement of Claim is as follows:

> "By about July 1995 ... the [respondent] had developed:-
>
> 1. a chronic adjustment reaction with emotional disturbance and suicidal thoughts; and
> 2. a chronic depressive disorder ... ."

Those injuries were classified as "the latest injuries".

[15] On 2 August 1995 the respondent first consulted Dr Seabridge. In his report of 3 November 1995 he stated that the respondent was "suffering from a chronic adjustment reaction with emotional disturbance, resulting from work-based stress and his condition, in my considered opinion, renders him unfit on psychiatric grounds to resume work in the Police Force." Over the ensuing months the respondent saw Drs Fitzgerald and Seabridge on numerous occasions. As already noted by 3 October 1995 Dr Fitzgerald considered that it was unlikely he would return to work in the police force. That opinion was supported by Dr Seabridge.

[16] The final paragraphs of the respondent's affidavit are in the following terms:

> "97. Whilst I had engaged in a short period of treatment with Mirte [sic] Craig and Dr John Fitzgerald in or about late 1993, my symptoms had significantly improved and I had significantly reduced my drug usage and had had a

> successful period of abstinence. I believed that I would be able to continue with my police career and continue to address my symptoms and make further recovery.
>
> 98. However over the following 18 months my conditions gradually declined. Throughout this time I still did not appreciate that my conditions may affect my future police career. I was committed to my service in the police force and was eager to continue in my new role as a sergeant. I had received a promotion and did not feel that my conditions were affecting my work in a detrimental way. It was not until July 1995 when Dr Fitzgerald informed me that I required a period of time out of the workforce that I came to appreciate that my conditions were serious and may have an effect on my future in the Queensland Police Service. However at this time I believed that with the appropriate treatment I would get back to work. It was not until in or about October 1995 that I came to the realisation that my police career may be over and resolved to leave the service. It was following this time that I instructed solicitors to issue these proceedings."

[17] Reports after July 1995 by psychiatrists Dr Seabridge, Dr Unwin, and Dr Bell all concluded that by then the respondent's condition had become "chronic". The learned judge at first instance concluded:

> "It is possible to discern in Dr Bell's report the suggestion that the course of the [respondent's] adjustment disorder and depression was progressive, increasing in severity from its onset in 1992 or 1993 until it became chronic in 1995 and sufficiently severe to be disabling."

[18] The amended statement of claim pleads that the appellant owed a duty of care to the respondent to take reasonable steps to avoid or minimise the risks associated with exposing the respondent to drug-taking activities. As already noted it is therein alleged that the respondent was not given any adequate training or instruction as to how to deal with those issues. Then it is alleged that it was reasonably foreseeable that the failure to provide such services placed the respondent at risk of suffering psychiatric illness or drug dependence. Those matters were said to give rise to "the initial injuries".

[19] The amended statement of claim then goes on to allege that the failure of the appellant to assess the respondent on his return to general duties and to provide him with adequate counselling and rehabilitation "placed him at risk of suffering psychiatric illness and/or a drug dependence". The pleaded failures of the appellant were said then to have occasioned "the later injuries".

[20] It is then alleged that the continued failure after 1992-3 on the part of the appellant to provide "adequate counselling, rehabilitation, supervision and training" put the respondent at further risk of "suffering psychiatric illness and/or a drug dependence".

[21] All of the foregoing matters were then alleged to have caused the respondent to be incapable of continuing his career as a police officer and to have been the cause of "the latest injuries".

[22] That all is then said to support the respondent's ultimate claim for damages for negligence and/or breach of contract and/or breach of statutory duty involving damages for pain, suffering, and loss of enjoyment of the amenities of life, damages for past economic loss, damages for future economic loss, and damages for future treatment and medication.

[23] The defence of the appellant challenges many of the facts set out above in outlining the respondent's case; it is not necessary to detail all of the factual matters put in dispute. However, it should be noted that the defence expressly alleges that the respondent was appropriately assessed, received counselling, and provided with adequate services to ensure his mental health was not put in jeopardy by his undercover work. For purposes of the application now under consideration one should assume that at trial the respondent will prove the matters of fact hereinbefore set out.

[24] It is now necessary to return to the reasoning of the learned judge at first instance. He noted in his reasons that the appellant "argued that there is no difference between the stress disorder which the [respondent] pleads developed in 1992 and the chronic adjustment reaction and depression which came on three years later." In other words the appellant's case at first instance, reiterated on the hearing of the appeal, is that there was "but one cause of action to which particulars may be added". The learned judge at first instance observed that the respondent's "pleaded drug dependence which he acquired in 1990 is not an injury, separate from the psychiatric disorder, for which damages can be awarded."

[25] Many of the issues canvassed at first instance and on appeal can only ultimately be resolved after a trial. Indeed, as was noted in the reasons below it "may turn out that the [respondent's] chronic adjustment reaction and depression only developed in July 1995"; if that be so then no extension of time would be necessary. But the respondent's argument at first instance (as noted in the reasons) and on appeal proceeded on the basis that the psychiatric injury for which damages were claimed had its onset in 1992; because that was more than three years before 11 June 1996 an extension of the limitation period was necessary to validate the proceedings. On that basis the learned judge at first instance was correct in concluding that the "question for determination is whether a material fact of a decisive character relating to the [respondent's] right of action was not within his means of knowledge until after 11 June 1995."

[26] After referring to submissions by counsel as to what constituted the "material fact" the learned judge at first instance concluded, in my view correctly, that:

> "If there be a material fact of decisive character it is, I think, that the [respondent] was suffering from a psychiatric disorder which was chronic and disabling. This fact became actually known to the [respondent] in July 1995."

[27] The following extract from his reasoning amply illustrates why the learned judge at first instance decided in favour of the respondent:

"In my opinion the diagnosis of a psychiatric disorder in the second half of 1995 was a material fact of a decisive character. ... Prior to that time the [respondent] experienced significant symptoms of stress for which he sought relief by the consumption of cannabis as well as more conventional treatment. He attributed the stress and his drug consumption to the [appellant's] failure to provide rehabilitative services at the conclusion of his covert career, but prior to the 1995 diagnosis any action to recover damages would have been beset by difficulty and would have yielded little profit. ...

In addition the [respondent] was unaware that he had contracted a psychiatric injury prior to July 1995. As far as the material goes none of the doctors or psychologists whom the [respondent] consulted diagnosed such a condition. ...

The knowledge that he had a recognised psychiatric injury which was disabling and jeopardised his career meant that an action if successful would produce a substantial monetary result. ...

… the [respondent's] real point … is that he believed the symptoms were of 'stress' which he could and would overcome, and so remain a police officer. He sought treatment for stress and for his drug dependence which was a concomitant part of his symptomology. He had successfully evaded detection for several years and not unreasonably believed he could continue until he overcame the problem. It was not until July 1995 that he was confronted with the reality that he had a chronic psychiatric disorder which disabled him from working.

For those reasons I do not think it right that the [respondent] should have commenced an action before the 1995 diagnosis. ... I am therefore satisfied that a material fact of a decisive character was not known to the [respondent] until after 11 June 1995.

...

The question in particular is whether the [respondent] took all reasonable steps, prior to June 1995, to ascertain whether he had a psychiatric illness. ...

…

… I have, however, concluded that the [respondent] had taken all reasonable steps to ascertain the material fact prior to 11 June 1995. The background and situation of the [respondent] are relevant to the determination of whether he had taken all reasonable steps to ascertain the material fact. The reality is that the [respondent] was seeking medical assistance for symptoms of stress and cannabis dependence which, however distressing, had not precluded him from performing his employment. He had been treated by his general practitioner and a psychologist neither of whom, prior to June 1995,

> had diagnosed any psychiatric disorder or suggested his employability was in question. ... I do not think it can be said that in not seeking further psychiatric opinion about a condition which his general practitioner and psychologist did not advise existed, the [respondent] failed to take all reasonable steps to ascertain the material fact."

[28] The principal submission of senior counsel for the appellant was that the learned judge at first instance failed to apply the appropriate onus of proof in evaluating whether the respondent had actual or deemed knowledge of the material facts necessary to his cause of action. There is no doubt that both the evidentiary onus and the ultimate onus is on the respondent in this case of establishing circumstances justifying the conclusion that a material fact of a decisive character relating to the respondent's right of action was not within his means of knowledge until after 11 June 1995. If support is needed for that proposition reference can be made to observations of Thomas J in delivering the judgment of the Full Court in *Mills v Comalco Aluminium Ltd* (unreported, Appeal No 64 of 1991, delivered 6 November 1991), and observations of both Thomas JA and Mullins J in *Muir v Franklins Ltd* [2001] QCA 173. Ultimately I have come to the conclusion that there was no failure by the learned judge at first instance to apply the correct test with respect to onus of proof. When the submissions of senior counsel for the appellant are carefully analysed they come down essentially to the proposition that the learned judge at first instance failed to draw inferences from primary facts found, which inferences would have been favourable to the appellant.

[29] There is no doubt the respondent on his case developed a cannabis dependency in about 1990, and that dependency was manifest throughout the period 1990 to 1995. On the respondent's case that dependency resulted from the appellant's failure to provide him with adequate counselling, rehabilitation, supervision and training subsequent to his exposure to illicit drugs whilst a member of the Drug Squad. The respondent also knew throughout the period 1990 to 1995 that if the Police Service became aware of his drug dependency his employment was likely to be terminated.

[30] On the appellant's submission those matters afforded the respondent actual knowledge of all necessary facts vesting in him a cause of action for damages for breach of duty which would have accrued in 1990. However the learned judge at first instance held that mere drug dependence did not constitute an injury sufficient to found a cause of action.

[31] It was then submitted on behalf of the appellant that anything which occurred subsequently was but a further particularisation of the cause of action based on the drug dependency.

[32] From 1992 until July 1995 those treating the respondent (principally Craig, Fitzgerald and Hutchinson) considered that he was suffering cannabis dependency and work related stress and treated him for those conditions. The respondent was not advised prior to July 1995 that he had a psychiatric condition, let alone a chronic one, which was disabling. The learned judge at first instance concluded that the chronic and disabling psychiatric disorder diagnosed in July 1995 significantly added to the conditions (drug dependency and stress) from which the respondent had earlier been suffering, and which were accepted by either side as giving rise to a cause of action in 1992 when first diagnosed. In my view such a conclusion was

open on the evidence. Once that conclusion is reached then it cannot be said that the respondent had actual knowledge prior to July 1995 of a circumstance which was a fact of a decisive character so far as his right of action was concerned.

[33] The consideration that subsequently to July 1995 Dr Unwin indicated in a report that "Substance Dependence (mixed)" was a "Clinical Disorder" does not alter the position.

[34] The more significant attack mounted by senior counsel for the appellant on the judgment below was directed at the findings with respect to "deemed knowledge". It was submitted that, particularly once the respondent had been referred to Dr Hutchinson, a reasonable person in his position would have made more inquiries of medical practitioners about his condition first diagnosed in 1992. However, that contention must be considered in the light of the fact that throughout the period 1990 to 1995 the respondent continued in his employment with the Police Service, and there was no concrete evidence that his employer was dissatisfied with his performance. True the respondent suffered stress, and had difficulty in coping with his work, but those matters were largely overcome by using accrued periods of recreational leave to recuperate and address the problems. It seems clear that up until July 1995 the respondent held the belief that he would be able to overcome his drug dependency, and if he did that he would be better able to cope with his work.

[35] Counsel for the appellant made much of the fact that the referral to Dr Hutchinson was in May 1994 but no appointment was made until 21 February 1995. The respondent indicated that he had difficulty in obtaining an appointment prior to going overseas in July 1994, and that trip was used as a means of breaking his dependency on cannabis. The failure to arrange a consultation with Dr Hutchinson until 21 February 1995 is not decisive. Of greater significance, in my view, is the fact that Dr Hutchinson did not communicate either to the respondent or the referring general practitioner a diagnosis of a psychiatric condition at that time.

[36] In the course of argument each side referred to a passage from the judgment of the Court of Appeal in *Healy v Femdale Pty Ltd* [1993] QCA 210:

> "It is difficult to say that a person who finds herself able to get on with her life, and returns to employment without significant pain or disability fails the test merely because she fails to ask for opinions from her doctor about the prospect of future disability or effect upon her working capacity. There is no requirement to take 'appropriate advice' or to ask appropriate questions if in all the circumstances it would not be reasonable to expect the plaintiff to have done so."

[37] One can agree with the submission of counsel for the appellant that the respondent here was not in as strong a position as the plaintiff in that case, but nevertheless the fact is that here the respondent was consulting medical practitioners prior to July 1995 and was never advised that he had either a psychiatric illness or an injury which was likely to be disabling. The respondent reasonably acted on the advice and treatment he was given and believed that he would be able to overcome his dependency and in due course reduce the stress associated with his work. He was still working, albeit using up his accrued recreational leave, and outwardly the Police Service was not concerned about his continued employment.

[38] In all of the circumstances it was, in my view, open on the evidence for the learned judge at first instance to conclude that it would not be reasonable to expect the respondent to have asked more questions about his condition. As Thomas JA opined in *Pizer v Ansett Australia Limited* [1998] QCA 298 in dealing with a similar issue: "there is a range of cases where different minds might reasonably form different assessments of the level of the plaintiff's knowledge and as to whether the reasonable person contemplated by s.30(b), endowed with such knowledge and having taken appropriate advice, would have bought proceedings. … In such a situation the appeal court is not free to decide the question according to its own preference. Unless the judgment reveals that the conclusion is affected by some error of law or fact, or the ultimate discretion can otherwise be seen to have miscarried, there is no basis for appellate interference."

[39] As the learned judge at first instance in this matter noted he did not find "the decision easy". Critically, in my view, his conclusion was open on the evidence before him. There was a significant body of evidence which supported the finding that the diagnosis of a chronic and disabling psychiatric disorder in the second half of 1995 was a material fact of a decisive character which became actually known to the respondent in July 1995. That enabled him to sue for damages with respect to the cause of action which accrued in 1992. It was not reasonable for the respondent to have done more than he did prior to July 1995 in order to identify the condition from which he was suffering. Indeed it may ultimately be established that the condition diagnosed in July 1995 did not exist prior to about that time.

[40] The relevant order made at first instance was that the "time for commencing proceedings in respect of the cause of action to recover damages for the injuries described in the amended statement of claim be extended to 11 June 1996." Counsel for the appellant submitted that if the decision at first instance was upheld nevertheless the order made was too wide. By referring to "the injuries described in the amended statement of claim" the extension as granted extended to those injuries therein described as "the initial injuries"; that is, the injuries defined as the respondent becoming a user of illegal drugs in about 1989 and developing a drug dependence in or about 1990.

[41] As was said in the written outline of argument on behalf of the appellant, just as the respondent wanted to preserve the right to argue at trial that his cause of action first accrued in 1995 and therefore no extension of the limitation period was necessary, so the appellant wanted to preserve an entitlement to argue at trial that the onset of cannabis dependency in 1990 evidenced the accrual of a cause of action and any claim based thereon would be statute barred. It is a corollary of that latter proposition that if it be established that no separate cause of action arose in 1992 (or 1995) then all claims made by the respondent would fail because they were barred by the statute of limitations.

[42] Clearly the exposure to cannabis in 1989, and the development of drug dependency in 1990, are relevant facts in the narrative and linked to the medical condition diagnosed in 1992 which gave rise to the cause of action which vested at that time. That does not necessarily mean that the exposure to drugs and the development of the dependency are essential components of the cause of action which accrued in 1992.

[43] But as the respondent only sought, and obtained, an extension of the limitation period with respect to a cause of action accruing in 1992, the appellant ought to be able at trial to rely on the statute of limitations if, on all the evidence, it was found that the respondent's sole cause of action in fact accrued in 1990 (or at some time prior to 1992). That latter situation would necessitate the trial judge concluding on all the evidence then available, and contrary to the view expressed by the learned judge at first instance here on the evidence available to him, that mere drug dependency constituted an injury sufficient to found a cause of action.

[44] It seems to me that what was litigated and decided at first instance was that there should be an extension of the limitation period with respect to a cause of action which accrued in 1992; that must be a cause of action based on "the later injuries" referred to in paragraph 18 of the statement of claim. The order should be amended so that the extension is limited to that cause of action.

[45] Counsel for the appellant also submitted that paragraph 15 of the statement of claim which pleads "the initial injuries" should be struck out, as should some later parts of the amended statement of claim referring to that paragraph.

[46] It is not clear to me whether the respondent is asserting any separate cause of action with respect to "the initial injuries" rather than merely referring to them as part of the background to the 1992 cause of action. In my view the preferable course is not to strike out the parts of the amended statement of claim as contended for by the appellant, but rather to leave it open to the appellant to plead the statute of limitations with respect to any cause of action relied on by the respondent accruing prior to 1992. That would mean that the parties could litigate, if they wished, the question whether the sole relevant cause of action accrued in 1990 and all that happened thereafter ("the later injuries" and "the latest injuries") were but further particulars of that initial cause of action. If the appellant established that at trial the proceeding would be dismissed on the ground it was statute barred.

[47] The learned judge at first instance ordered that the "costs of both parties of and incidental to both applications should be costs in the cause". Here the appellant has only been partially successful, but the respondent resisted the amendment of the order sought by the appellant. In the circumstances the appropriate order to make with respect to costs is that the costs of each party be its costs in the proceeding.

[48] The order of the court should therefore be:

(1) Allow the appeal only to the extent of varying paragraph 1 of the order of 20 April 2004 so that it reads: "The time for commencing proceedings in respect of the cause of action which accrued in 1992 to recover damages for the injuries alleged in paragraph 18 of the amended statement of claim be extended so that it expires on 11 June 1996."

(2) The costs of the appeal of each party as assessed be that party's costs in the proceeding.

[49] **CULLINANE J:** I agree with the reasons of Williams JA and with the orders he proposes.

[50] **HOLMES J:** I agree with the reasons of Williams JA and with the orders he proposes.