SUPREME COURT OF QUEENSLAND

CITATION:	*Wrightson v State of Qld* [2005] QCA 367
PARTIES:	**TIMOTHY JAMES WRIGHTSON** (plaintiff/respondent) **v** **STATE OF QUEENSLAND** (defendant/appellant)
FILE NO/S:	Appeal No 6250 of 2004 SC No 11522 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2005
JUDGES:	McMurdo P, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellant to pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis**
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 – respondent formerly employed as a covert police operative – respondent developed psychiatric disorder and applied for retirement on medical grounds on 4 October 2000 – appellant granted medical retirement application from 9 March 2001 – respondent commenced personal injuries claim against the appellant on 20 December 2001 – appellant asserted that the respondent's claim was statute-barred and respondent applied for an extension of time under s 31 *Limitation of Actions Act* 1974 (Qld) – judge granted respondent an extension of time on the basis that a material fact of a decisive character relating to the action was not within the respondent's means of knowledge until after the expiration of the limitation period – whether the appellant's acceptance of the retirement application

constituted a new "material fact of a decisive character" thereby allowing an extension of the limitation period

Limitation Act 1969 (NSW), s 57B(1), s 58(2)
Limitation of Actions Act 1974 (Qld), s 30, s 31
Police Service Administration Act 1990 (Qld), s 8.1, s 8.2, s 8.3

Bougoure v State of Qld [2004] QCA 485; Appeal No 6094 of 2004, 17 December 2004, cited
Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 173 CLR 231, cited
Broken Hill Pty Co Ltd v Waugh (1988) 14 NSWLR 360, cited
Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234, cited
Reeman v State of Qld [2004] QCA 484; Appeal No 8239 of 2004, 17 December 2004, considered
Reeman v State of Queensland [2004] QSC 285; SC No 6649 of 2002, 9 September 2004, considered
Russell v State of Qld [2004] QCA 370; Appeal No 4264 of 2004, 8 October 2004, cited
Sola Optical Australia Pty Ltd v Mills (1987) 163 CLR 628, cited
Stephenson v State of Qld [2004] QCA 483; Appeal No 7621 of 2004, 17 December 2004, considered
Stephenson v State of Queensland [2004] QSC 226; SC No 11521 of 2001, 5 August 2004, considered
Watters v Queensland Rail [2000] QCA 51; [2001] 1 Qd R 448, cited

COUNSEL: D O J North SC, with J B Rolls, for the appellant
D B Fraser QC, with G R Mullins, for the respondent

SOLICITORS: C W Lohe, Crown Solicitor, for the appellant
Gilshenan & Luton for the respondent

[1] **McMURDO P:** The respondent plaintiff, Mr Wrightson, was employed as a police officer with the Queensland Police Service from 1990 until 9 March 2001 when he was retired medically unfit for duty for psychiatric reasons. He was notified in writing on 22 February 2001 that his application for retirement on medical grounds was approved and at about that time consulted solicitors. On 20 December 2001 he filed a claim for damages for personal injuries against the appellant defendant arising out of his activities in the course of his employment as an undercover police officer with the Queensland Police Service between 1994 and 1996. On 24 October 2003 the appellant filed an application for summary judgment under *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 293 based on its pleaded defence that Mr Wrightson's claim was statute barred. Mr Wrightson then applied for an order under s 31 *Limitation of Actions Act* 1974 (Qld) ("the Act") that the time for commencing his claim be extended to 20 December 2001. The learned primary judge dismissed the appellant's application for summary judgment and granted Mr Wrightson's application. This appeal is from those orders.

[2] The facts, issues and relevant statutory provisions are fully set out in Jerrard JA's reasons for judgment so that I need only repeat these as needed to explain my own reasons for agreeing with Jerrard JA that the appeal should be dismissed with costs.

[3] In this case the appellant will succeed unless the learned primary judge was entitled to conclude on the evidence before him that a material fact of a decisive character relating to Mr Wrightson's right of action was not within his means of knowledge until at least 20 December 2000.[1] Material facts relating to a right of action include the nature and extent of the personal injury caused by the appellant's negligence or breach of duty.[2] Material facts relating to Mr Wrightson's right of action are of a decisive character only if a reasonable person, knowing those facts and having taken the appropriate advice on them, would regard them as showing that Mr Wrightson had reasonable prospects of success resulting in an award of damages sufficient to justify bringing the action[3] and that Mr Wrightson ought in his own interests and taking his circumstances into account to bring the action against the appellant.[4]

[4] The appellant contends the primary judge erred in finding the following facts. His Honour found that there was a faint possibility that Mr Wrightson might be able to continue his police career, until the appellant accepted Mr Wrightson's retirement on medical grounds.[5] Mr Wrightson had performed police traffic duties from late 1997 until February 1999. He said he hoped he would be able to continue to be a police officer, even after he applied for early retirement on medical grounds. I infer he hoped he would recover sufficiently to allow him to do so. At the time of the primary hearing in April 2004 Mr Wrightson was working as a development control officer with the Redland Shire Council. These facts supported his Honour's finding that Mr Wrightson may possibly have been able to continue as a police officer, at least in some capacity, had the appellant rejected the application for retirement on medical grounds or had Mr Wrightson's health improved unexpectedly and significantly, even though the medical evidence did not suggest that this was then a likely prospect.

[5] His Honour also found that Mr Wrightson's application for retirement on medical grounds might not have succeeded and, if so, commencing legal proceedings against the appellant would have detrimentally affected his career prospects.[6] Although the evidence was that the great majority of applications for retirement on medical grounds made between October 1997 and October 2000 were successful, 15 out of the 182 such applications made during that period were unsuccessful. His Honour was entitled to find on that evidence that it was reasonable for Mr Wrightson to have been concerned about the possibility that his application for retirement on medical grounds might be unsuccessful and that commencing legal proceedings could adversely jeopardise his career if he were to stay in the police service.

[6] The third and by far the most persuasive relevant fact accepted by his Honour was that the pressure of instituting proceedings against the appellant, in circumstances where the appellant had not agreed to Mr Wrightson's retirement on medical

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1 The Act, s 31(2)(a).
2 The Act, s 30(1)(a)(iv).
3 The Act, s 30(1)(b)(i).
4 The Act, s 30(1)(b)(ii). Section 30(1)(c) is not contentious in this appeal.
5 See *Wrightson v State of Queensland* [2004] QSC 218; SC No 11522 of 2001, 22 June 2004, [9].
6 Above, [9].

grounds, could have caused a further deterioration in his mental health.[7] This conclusion was supported by the evidence of Mr Wrightson and especially by the evidence of his treating psychiatrist, Dr Unwin. The factual findings contested by the appellant were all open on and supported by the evidence.

[7] The learned primary judge articulated the question for determination in this case as:

> "Would a reasonable person knowing the material facts relating to [Mr Wrightson's] right of action, having taking appropriate advice on those facts, have regarded those facts as showing that [Mr Wrightson] ought, in his own interests and taking his circumstances into account, to have brought an action on the right of action on or before 20 December 2000, or would the reasonable person have concluded that that time did not arise until after 20 December 2000?"[8]

[8] His Honour concluded that it was only when Mr Wrightson knew that the appellant had accepted his retirement on medical grounds that the material facts relating to Mr Wrightson's right of action became of a decisive character because it was only then that a reasonable person would have concluded that Mr Wrightson ought to have brought his claim; until then he was justified in delaying the institution of his proceeding for the three reasons set out earlier but chiefly because of the third reason.[9] His Honour relied on observations of Mahoney JA in *Royal North Shore Hospital v Henderson*[10] as to the effect of a comparable New South Wales statutory provision[11] that "In a sense, its purpose is to provide considerations justifying delay in bringing an action". His Honour considered that even if Mr Wrightson could have instituted a claim earlier than the time when a reasonable person would have regarded the facts as showing that he ought to do so, it is only when a reasonable person would regard the facts as showing that he ought to do so, that time begins to run under s 31(2) of the Act.[12]

[9] The appellant contends that the learned primary judge was wrong to place emphasis on those observations of Mahoney JA and in concluding that a material fact known to Mr Wrightson before the expiry of the limitation period may subsequently become of a decisive character so as to then make that fact "a material fact of a decisive character relating to the right of action" within s 31(2)(a) of the Act allowing a court to order an extension of the limitation period. The appellant particularly relies on the reasoning of Chesterman J in his dissent in *Stephenson v State of Qld*[13] and on his Honour's earlier reasoning, where he was part of the majority, in *Reeman v State of Qld*[14] and on the observations of Holmes J in *Reeman* at first instance[15] and the observations of McMurdo J at first instance in *Stephenson*.[16]

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7 Above, [9].
8 Above, [8].
9 Above, [10].
10 (1986) 7 NSWLR 283, 300.
11 *Limitation Act* 1969 (NSW), now renumbered as s 57B(1)(c)(ii) but formerly s 57(1)(c)(ii): see *Limitation (Amendment) Act* 1990 (NSW), Sch 1, (7), (8).
12 *Wrightson v State of Queensland* [2004] QSC 218; SC No 11522 of 2001, 22 June 2004, [10].
13 [2004] QCA 483; Appeal No 7621 of 2004, 17 December 2004, [92] - [95].
14 [2004] QCA 484; Appeal No 8239 of 2004, 17 December 2004, [33].
15 [2004] QSC 285; SC No 6649 of 2002, 9 September 2004, [31] - [34].
16 [2004] QSC 226; SC No 11521 of 2001, 5 August 2004, [34].

[10] I am unpersuaded by the appellant's contention. The relevant provisions of the Act are remedial and should be given a beneficial interpretation, the widest permitted by the language of the sections: *Bridge Shipping Pty Ltd v Grand Shipping SA.*[17] I agree with the analysis of the sections of the Act given by Davies JA in *Stephenson.*[18] The question in construing s 31(2)(a) of the Act is not "when did a material fact come within an applicant's means of knowledge?" but rather "when did a material fact of a decisive character relating to the right of action come within the means of knowledge of the applicant?". But in the end this appeal fails whichever question is asked.

[11] The learned primary judge focussed on whether when Mr Wrightson learnt that the appellant had accepted his resignation from the police service on medical grounds he became aware of a fact of a decisive character under s 30(1)(b) of the Act rather than whether this was a material fact within the meaning of that term under the Act. On the facts found by his Honour, only then would a reasonable person knowing the material facts relating to Mr Wrightson's right of action against the appellant and having taken appropriate advice on those facts, regard them as then showing that Mr Wrightson ought in his own interests and taking his circumstances into account bring the action against the appellant. Commencing litigation against the appellant prior to the acceptance of his retirement on medical grounds could have caused a significant deterioration in Mr Wrightson's health. His Honour was, in my view, right to conclude that Mr Wrightson's learning that the appellant had accepted his resignation on medical grounds was a fact "of a decisive character" within s 30(1)(b) of the Act.

[12] But was this fact "material" under the Act? A fact is material to an applicant's case if it is both relevant to the issues to be proved if the applicant is to succeed in obtaining an award of damages sufficient to justify bringing the action and it is of sufficient importance to be likely to have a bearing on the case: *Sola Optical Australia Pty Ltd v Mills.*[19]

[13] Damages are an essential element of a right of action for negligence so that facts relevant to the economic effects of the injury are material facts under s 30(1)(a)(iv) of the Act: *Watters v Queensland Rail.*[20] The fact that the appellant regarded Mr Wrightson as medically unfit for psychiatric reasons to carry out his work as a police officer had a direct bearing on the extent of the economic effects of the personal injury caused to Mr Wrightson and so was a material fact under s 30(1)(a)(iv) of the Act. It follows this is not then a case where an applicant has been aware of a material fact which only later becomes of a decisive character after the expiration of the timeframe provided for in s 31(2)(a) of the Act. It was both a new material fact and a new material fact of a decisive character within the meaning of those terms under the Act. The appellant's contentions fail.

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17 (1991) 173 CLR 231, McHugh J, with whom Brennan J (as he then was) and Deane J agreed, 261 - 262. Although these comments related to remedial provisions in rules of court allowing amendments to the names of parties after the expiry of the limitation period, they are also apposite to the remedial provisions of the Act where neither the plain meaning of the words of the sections nor the objects and purposes of the Act require a different approach.

18 [2004] QCA 483; Appeal No 7621 of 2004, 17 December 2004, [13] - [14].

19 (1987) 163 CLR 628, Wilson, Deane, Dawson, Toohey and Gaudron JJ, 636 - 637.

20 [2000] QCA 51; [2001] 1 Qd R 448, Thomas JA, with whom McPherson JA and Byrne J agreed, [20].

[14] The learned primary judge was right in finding that he had a discretion under s 31(2) of the Act to order that the limitation period be extended. The appellant does not contend that the exercise of that discretion miscarried.

[15] The appeal should be dismissed with costs to be assessed.

[16] **WILLIAMS JA:** The circumstances giving rise to this appeal are fully set out in reasons for judgment of Jerrard JA and I will not repeat them.

[17] Particularly in *Stephenson v State of Qld* [2004] QCA 483 and *Reeman v State of Qld* [2004] QCA 484 I detailed my approach to an application such as was brought here by the respondent pursuant to the provisions of s 30 and s 31 of the *Limitation of Actions Act* 1974 (Qld). As presently advised I see no reason to depart from the approach which I took in those cases. For present purposes it is sufficient for me to quote briefly from what I said in *Stephenson*, although my conclusion in this case is based on all that I said in those decisions:

> "Once it is recognised that facts showing that the person ought, taking that person's circumstances into account, to bring an action may be of a decisive character it becomes clear that facts capable of being so described are not limited to facts essential to the existence of a cause of action; provided that the fact relates to the cause of action and is, for example, relevant to s 30(1)(b)(ii) it may ultimately be found to be of a decisive character. When the statutory provision refers to a person's decision to bring an action that must impliedly also include a decision not to bring an action at a particular point of time; facts relevant to such a decision must therefore be encompassed by the expression "material facts". A fact may be material and decisive if, for example, it "shows" that the person in his own interests ought or ought not to commence the proceeding at a particular point of time. Such a fact would not be an essential ingredient of the cause of action but could well be decisive in determining whether the action ought to be commenced.
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> . . .
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> If that is the correct approach, as I believe it to be, a fact showing a person ought in that person's own interest commence the proceedings may be a decisive fact though it does not of itself directly affect the prospect of success of an action or the likely award of damages. It may be decisive because of its impact, when regarded together with other material facts, on the decision whether or not the person ought to sue at a particular time.
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> But importantly the focus must be on what can conveniently be called the newly discovered fact. That is not to say that a change in a person's circumstances may never be a decisive fact; a re-evaluation of known circumstances would not suffice. But if that change in circumstances is brought about by some new fact becoming known then I can see no reason why that fact may not . . . be a material fact of a decisive character for the purposes of the legislative provisions."

[18] In the present case the learned trial judge concluded:

> "The plaintiff's case on this application was then that it was only when his application was granted that all of the requirements of a

> material fact of a decisive character had been satisfied. . . . It means that even if a claimant *could* have instituted a claim earlier than the time when a reasonable person would have regarded the facts as showing that he *ought* to do so, it is only when the reasonable person would regard the facts as showing that he ought to do so that time begins to run under s 31(2). In this case I accept the argument advanced for the plaintiff that that date was when the plaintiff's application was granted: a reasonable person would have concluded that it was only then that the plaintiff ought to have brought his claim, and that until then he was justified in delaying the institution of his proceeding for the three reasons to which I have referred, but chiefly because of the possible detrimental effect on his health in doing so earlier."

[19] In my view the findings of fact inherent in that passage were clearly open on the evidence before the learned trial judge.

[20] Given the finding that it was not until the respondent was directed to retire on medical grounds that he was aware of all material facts establishing that he should then sue, it follows that the direction to retire on medical grounds was a material fact of a decisive character not within the respondent's means of knowledge until after 20 December 2000 and therefore the requirements of legislation have been satisfied.

[21] It follows that the appeal should be dismissed with costs.

[22] **JERRARD JA:** This appeal proceeding sought the overturning of orders made on 22 June 2004 dismissing an application filed by the appellant State of Queensland, and granting an application by the respondent, Timothy Wrightson, formerly an officer in the Queensland Police Service. Mr Wrightson had applied on 20 November 2003 for an order pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) ("the Act") extending to 20 December 2001 the time for commencing a claim he had filed against the State of Queensland on that date. In that claim he sought $500,000.00 in damages for alleged negligence, breach of contract, and/or breach of statutory duty by the State of Queensland, its employees or agents, causing Mr Wrightson personal injury. The limitation period applying to his claim expired in late 2000. The State of Queensland had applied for summary judgment on 24 October 2003 under r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld); it had pleaded in its defence that Mr Wrightson's cause of action was statute-barred. It failed in its application for summary judgment and Mr Wrightson succeeded in obtaining his extension of the limitation period.

[23] Mr Wrightson is one of a number of former police officers whose service included active duty as covert operatives, and who, after subsequently becoming unfit for duty as police officers, have brought actions against the State of Queensland. Those claimants allege that the personal disabilities or conditions producing that unfitness, and consequent economic loss, resulted from breaches of duty owed to them in and about their service as covert operatives and thereafter. A number of those former officers have had to seek extensions of time within which to bring their claims, and recent judgments by this Court on applications for those orders (*Stephenson v State of Qld* [2004] QCA 483 and *Reeman v State of Qld* [2004] QCA 484) have been the

subject of grants of special leave to appeal.[21] The parties, after delaying, brought this appeal on, no doubt because the reasoning in the judgment of the learned trial judge in this claim was relied on by one of the majority in *Stephenson*.

Background

[24] Mr Wrightson was sworn in as a member of the Queensland Police Service in November 1990, and performed normal police duties at Rockhampton, Manly and Chandler police stations. He then performed duty as a covert operative from 30 November 1994 until late 1996. In that period he suffered from persistent anxiety, sleeplessness, and disturbed sleep with nightmares. After finishing that duty he took two months leave, and from March 1997 until October 1997 he performed general uniform duties at Capalaba. In September 1997 he consulted a Dr Komarowski, a General Practitioner, who diagnosed Mr Wrightson as suffering from post traumatic stress disorder. From late 1997 until February 1999 Mr Wrightson performed traffic duties at Chandler, but was then certified unfit for duties for a two month period by a consultant psychiatrist, Dr Unwin, to whom Dr Komarowski had referred Mr Wrightson. Dr Unwin's diagnosis in February 1999 was that Mr Wrightson was suffering from a major depressive disorder. At that stage Dr Unwin told Mr Wrightson that with the use of the prescribed anti-depressant medication Mr Wrightson should be capable of returning to work.

[25] Mr Wrightson did return to duties in May 1999, and Dr Unwin considered at that time that Mr Wrightson had shown a good response to drugs and to psychotherapy, and Dr Unwin expected that Mr Wrightson would achieve a full recovery. However, he did not and between late 1999 and April 2000 his condition deteriorated. On 20 April 2000 he began what ultimately became an unbroken period of 11 months leave because he was unfit for duty. In mid-2000 Dr Unwin advised Mr Wrightson that he should consider retiring from the Police Service on the grounds of his being medically unfit for duty.

[26] Mr Wrightson was at first reluctant to accept that advice because he still wanted to be a police officer. Ultimately he acted on it and on 4 October 2000 applied pursuant to s 8.3 of the *Police Service Administration Act* 1990 (Qld) ("the Police Act") "for retirement on medical grounds from the Queensland Police Service".[22]

[27] The Police Act, by s 8.1(2), permits an officer to resign after giving three months notice,[23] and to retire either when aged 55[24] – it is compulsory at 60 years of age – or to "retire from employment in the service when called upon under s 8.3 to retire from the service" (s 8.2.(b)). The retirement provided for by s 8.3(3) relevantly required that the Commissioner be satisfied (on the basis of medical opinions) both that Mr Wrightson should not continue to be required to perform the duties of office, and that the Commissioner not believe that Mr Wrightson was sufficiently fit to perform duties in alternative employment as a staff member.

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21 See *Reeman v State of Qld*; *State of Qld v Stephenson* [2005] HCA Trans 452 (23 June 2005)

22 Paragraph 93 of Mr Wrightson's affidavit at AR 57; reproduced in paragraph [4] of the reasons for judgment at AR 303

23 That period is provided for by Regulation 5.1 of the *Police Service Administration Regulations* 1990 (Qld)

24 That age is provided by Regulation 5.2 of the *Police Service Administration Regulations* 1990 (Qld)

[28] In practice, the evidence showed, the vast majority of applications made in the three years from 4 October 1997 to 4 October 2000 for medical retirement resulted in the officer being called on to retire. Mr Wrightson was one of those; he retired unfit, as directed, on 9 March 2001. The learned trial judge described it as common ground between the parties that at least from 1997 he was continuously ill, although the symptoms fluctuated from time to time, and that the limitation period applicable to his claim expired in late 2000. That was because his claim against the State of Queensland depended on the proposition that his depressive disorder resulted from service as an undercover operative and neglect of a duty of care owed to him. He consulted solicitors in mid-February 2001; and a detailed statement was taken on 23 February 2001. That was the day after he was officially called upon to retire under s 8.3 of the Police Act.

[29] Because he did not file his claim until 20 December 2001, he relies on provisions of s 30 and s 31 of the Act for the order extending the limitation period from late 2000 until 20 December 2001. That order in turn depended upon the learned trial judge being satisfied, pursuant to s 31(2) of the Act, that a material fact of a decisive character relating to Mr Wrightson's right of action was not within his means of knowledge until at least 20 December 2000 (the "critical date").

Limitation Act provisions

[30] Sections 30 and 31 of the Act provide as follows:

30 Interpretation

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) In this section—

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

31 Ordinary actions

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

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

(a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and

(b) that there is evidence to establish the right of action apart from a defence founded on the expiration of 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.

(3) This section applies to an action whether or not the period of limitation for the action has expired—

(a) before the commencement of this Act; or

(b) before an application is made under this section in respect of the right of action."

Medical evidence

[31] The affidavit evidence from Dr Unwin was that Mr Wrightson had been quite unwell during 2000, and that the conduct which had led Mr Wrightson to return to treatment from Dr Unwin in April 2000 was really quite concerning, in that Mr Wrightson was seriously compromised. He had suicidal thoughts and his disorder involved elements of paranoid ideation and features of post traumatic stress disorder, with symptoms including violence related elements – his killing people and being killed and violent confrontations. It had been difficult to bring Mr

Wrightson to accept that he needed to retire from the Service. Dr Unwin's affidavit evidence (not challenged) was that:

> "In my experience there are a number of stressors involved for patients in approaching retirement from a position they have held for some time. Not only is there the unknown of a major lifestyle change, but when patients have disorders of the kind that the Plaintiff has, there are processes which necessarily entail reliving and relating the stressful life events which have led to a development of the condition. This is in itself is very stressful for such patients. In my opinion, it would be very much against the interests of the Plaintiff to consider and engage in the process of instituting legal proceedings at that time in relation to the same concerns…his recovery would be further set back and he would run a risk of even more serious ill health in future."

Dr Unwin's affidavit made clear that the period about which he was writing was the latter part of 2000.

Why Mr Wrightson succeeded

[32] The learned trial judge granted Mr Wrightson's application for three reasons, and the judge said the third was by far the most important. The first – a very minor consideration – was that even as at late December 2000 Mr Wrightson might have been able to continue his police career. The next consideration was that his application, in reality for a direction that he retire, might have failed; and if it did his progress in the Police Service would probably be jeopardised by the fact of his having sought retirement on the grounds of a mental disorder. Knowledge of that might affect other officers assigning duties to him. The third, and the important point, was that the pressure of instituting proceedings against an employer from whose employment he had not been released could have caused a further deterioration in his mental health. That conclusion was supported by the evidence.

[33] The learned trial judge wrote at paragraph [10] of the reasons for judgment:

> "The plaintiff's case on this application was then that it was only when his application was granted that all of the requirements of a material fact of a decisive character had been satisfied….even if a claimant *could* have instituted a claim earlier than the time when a reasonable person would have regarded the facts as showing that he *ought* to do so, it is only when the reasonable person would regard the facts as showing that he ought to do so that the time begins to run under s. 31(2). In this case I accept the argument advanced for the plaintiff that that date was when the plaintiff's application was granted: a reasonable person would have concluded that it was only then that the plaintiff ought to have brought his claim, and that until then he was justified in delaying the institution of his proceeding for the three reasons to which I have referred, but chiefly because of the possible detrimental effect on his health in doing so earlier."

[34] The learned judge had earlier found that it was not in issue that the requirements of s 31(2)(b) of the Act had been satisfied, and that issue was whether the requirement of s 31(2)(a) had been. That issue turned on the application of s 30(1)(b)(ii), since the judge considered that it should be accepted that the requirement of s 30(1)(b)(i)

had been satisfied by early October 2000. The learned judge considered that the question for decision came down to this:[25]

> "Would a reasonable person knowing the material facts relating to the plaintiff's right of action, having taken appropriate advice on those facts, have regarded those facts as showing that the plaintiff ought, in his own interests and taking his circumstances into account, to have brought an action on the right of action on or before 20 December 2000, or would the reasonable person have concluded that that time did not arise until after 20 December 2000?"

Other tests

[35] The learned judge quoted the arguments of counsel as being that the one year period provided for in s 31(2) began to run, on the plaintiff's argument, in early 2001; on the defendant's argument, it began to run no later than October 2000. Mr North SC contended on the appeal, for the State of Queensland, that the learned judge proceeded upon the basis that the proper application of the Act permitted an extension of time to be made in relation to a material fact known before the date made critical by s 31(2), providing the quality of "decisiveness" was satisfied after that date, and that the approach the learned judge took was not sanctioned by the Act. Mr North SC submitted that the correct approach was that stated by Chesterman J, who dissented in the appeal in *Stephenson v State of Qld*, namely that whether a material fact is of a decisive character is to be determined when the fact becomes known or is within the applicant's means of knowledge; that the test for ascertaining whether a material fact was of a decisive character is objective; that the question whether a material fact was of a decisive character must be answered with respect to the time at which the fact became known; a material fact could not gain or lose the characteristic of decisiveness by reference to an applicant's personal circumstances, and that characteristic, determined objectively when either known or within the means of knowledge of the applicant, was an immutable one.[26]

[36] Mr North SC submitted that Williams JA in *Stephenson* had agreed with Chesterman J's reasoning in that case, although the latter judge dissented in the result. Williams JA did agree[27] that a fact known to a claimant prior to the critical date for the purposes of s 31 might not become "decisive" because of some change in the claimant's personal circumstances occurring after that date. Williams JA cited the decisions of the Full Court in *Taggart v The Workers' Compensation Board of Queensland*,[28] and in *Moriarty v Sunbeam Corporation Ltd*,[29] in support of the explanation for that view, namely that a person cannot choose when to commence proceedings by re-evaluating known facts from time to time. In *Taggart* and *Moriarty* it was established that if a newly-discovered fact merely went to an enlargement of prospective damages, it could not constitute a material fact of a decisive character.

[37] But Williams JA also relied on other earlier authority in the appeal in *Stephenson*, to demonstrate that the introduction of a new fact after the critical date, into the previous collection of material facts, might be of a decisive character and therefore

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25 In reasons for judgment [8] at AR 307

26 Chesterman J so held in *Stephenson* at [93]-[95] in the Court of Appeal ("CA") decision

27 At [42] in *Stephenson* (CA decision)

28 [1983] 2 Qd R 19 at 23

29 [1988] 2 Qd R 325

enliven s 31. Specifically Williams JA cited the decision in *Wrightson v State of Queensland*, the case now under appeal, including paragraph [9] of the judgment, as an illustration of that proposition. The new fact would have been Mr Wrightson's being directed to retire and his change thereby in his capacity to bring his claim without risking his mental health. Another case Williams JA relied on, in support of the proposition he articulated, was the recent decision of this Court in *Russell v State of Qld* [2004] QCA 370. These references by Williams JA in *Stephenson*,[30] particularly to the judgment under appeal, demonstrate that if there is a majority view on the proper construction and application of the Act, which view is against allowing a fact known to a claimant before the critical date for the purposes of s 31 becoming "decisive" after that date, that adverse view is restricted to the fact becoming decisive because of a change of the claimant's personal circumstances occurring after that date, and that view does not necessarily exclude, as capable of being decisive, a change in mental health consequent upon some event earlier foreseen, which actually occurs. In any event, that adverse view is different from the proposition which the appellant says that the learned trial judge was wrong in applying. That proposition was that the Act permits an extension of time to be made in relation to a material fact known at a time prior to the critical date, providing the quality of "decisiveness" of the material fact was satisfied only after the critical date.

[38] *Stephenson* and *Reeman* were each cases in which the learned judges hearing the relevant applications at first instance had concluded, on the medical evidence as to the effect that commencing proceedings before the critical date would have had on the relevant applicant, that a reasonable person would not have concluded that either applicant ought, in the applicants' interests, to commence an action before the critical date.[31] Each of the learned trial judges held that the material facts within the means of knowledge of the applicant whose case the respective judges were considering were not, at the critical date, of a decisive character;[32] it was not then in that applicant's interests, given his circumstances, to proceed.[33] Nevertheless, both learned judges dismissed the respective applications, each holding that a fact of which the applicant was already aware could not be said to come within his means of knowledge later, merely because it then became decisive. There was only one time at which a fact could come within the applicant's means of knowledge.[34]

[39] In *Reeman* the learned trial judge held that to obtain an extension of the limitation period the plaintiff must show firstly that a material fact came within the plaintiff's means of knowledge after the critical date, and secondly that it was of a decisive character;[35] the trial judge in *Stephenson* likewise held that s 31(2)(a) required that some material fact relating to the right of action come within the applicant's means of knowledge after the critical date.[36] Neither learned judge regarded the fact of retirement as medically unfit after the critical date – when it was known before that date that that applicant's police career had ended – as a material fact of a decisive

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30 At [47] and [48] of the CA decision

31 *Reeman v State of Queensland* [2004] QSC 285 at [19]; *Stephenson v State of Queensland* [2004] QSC 226 [22] and [31]

32 *Reeman*, reasons for judgment at [31]; *Stephenson*, reasons for judgment at [31]

33 *Reeman*, reasons for judgment at [31]; *Stephenson* at [22]

34 *Stephenson* in the reasons for judgment at [34]; that passage was cited in *Reeman* at [21] and approved in *Reeman* at [31]

35 *Reeman* at [34]

36 *Stephenson* at [34]

character. The trial judge in *Stephenson* did not regard that applicant's improvement in health, sufficient for his health not to be challenged by the applicant's litigation, to be a material fact: in Mr Reeman's case, it was not clear that his health had actually improved to that extent. I remark that one view of the findings in *Reeman* was that the material facts were still not of a decisive character as at the hearing before the learned trial judge.

[40] One of those applicants succeeded on appeal, by majority; the other failed by majority. The principal reasoning is found in the judgments in *Stephenson.* In *Stephenson,* Davies JA referred to s 57(1)(c)(ii)[37] of the *Limitation Act* 1969 (NSW) ("the New South Wales Act"), materially identical with s 30(1)(b)(ii) of the Act, and likewise to the materially identical terms of s 30(1)(b)(i) and s 57(1)(c)(i). The New South Wales Act in turn borrowed from the *Limitation Act* 1963 (UK). His Honour referred to the Report of the Queensland Law Reform Commission which preceded the enactment of the Act and noted that that s 30(1)(b)(ii) was based on the New South Wales Act provision, and to the report of the New South Wales Law Reform Commission. He did so in support of the construction of s 30(1)(b)(ii) and s 31(2)(a) at which His Honour arrived.

[41] Davies JA then referred to the findings of the learned trial judge in *Stephenson*, namely that all material facts relating to Mr Stephenson's right of action were within his means of knowledge on or before the critical date but that they did not become of a decisive character until after that date. That was because although before the critical date they established a cause of action with reasonable prospects of success for an amount of damages sufficient to justify bringing an action, a reasonable person, knowing those facts and having taken appropriate advice on them, would have considered that the applicant's personal circumstances precluded a conclusion that it was in his own interests to bring the action. Davies JA held that the correct question in construing s 31(2)(a) is: when did all material facts (which were then) of a decisive character come within the means of knowledge of the applicant?[38] He regarded the use of "of" in s 31(2)(a) as equivalent to "which then had" or some such phrase,[39] and not as meaning "which then **or later** had". Davies JA also reasoned that in order to reach the answer to the question, it was not necessary to show that some new material facts relating to the right of action, and which emerged after the critical date, caused the material facts as a whole to assume a decisive character. Those material facts existing before the critical date might become of a decisive character after that date simply because circumstances emerging after that date caused the character of those material facts so to change.

A suggested approach

[42] The New South Wales Act is relevantly reproduced in *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 236,[40] and also in the judgment of Clarke JA in *Broken Hill Pty Co Ltd v Waugh* (1988) 14 NSWLR 360 at 362-363. Examination of the New South Wales Act shows that it contains the same inclusive definition of the material facts relating to a right of action which appears in s 30(1)(a) of the Act, and the same description of when those material facts are of a

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37 Now renumbered as s 57B(1)(c)(ii)

38 *Stephenson* (CA decision) at [14]

39 I suggest "which only by then had"

40 And more fully at 242-243

decisive character as appears in s 30(1)(b). However, s 58(2) of the New South Wales Act provides:

> "Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that –
>
> (a) *Any of the material facts* of a decisive character relating to the cause of action was not within the means of knowledge of the applicant…."; (Italics mine)

whereas s 31(2) of the Act provides:

> "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 decisive character relating to the right of action was not within the means of knowledge of the applicant…" (Italics mine).

[43] The change in s 31(2), from the reference in the New South Wales Act to "any of the material facts" which was not within the means of knowledge, to "a material fact", makes application of the Queensland legislation more difficult. This is because s 31(2)(a) thereby focuses on a single material fact, implying that any one fact might have a decisive character relating to the right of action. But s 30(1)(b) reflects a drafting assumption in the New South Wales Act that it is only when the material facts relating to a right of action are considered *in toto*, that the judgments required by s 30(1)(b)(i) and (ii) can be made. That is why it appears more logical to ask, as s 58(2) of the New South Wales Act does, whether any of those material facts of a decisive character was not within the applicant's means of knowledge before the critical date. The question allows the material facts to be considered in combination, and the decisive character of that combination judged as at a particular critical date. Section 31(2)(a) of the Act strongly suggests there can be a judgment whether any one material fact had a decisive character at the critical date, but making that judgment about any one fact contradicts the unavoidable assumption in s 30(1)(b) that it is only the effect of the material facts in combination which can be considered to determine if they are of a decisive character. The unnecessary alteration to the New South Wales Act when it was being copied and applied in Queensland should not govern the interpretation of the Act. Section 31(2) should be understood as providing that the relevant inquiry is whether the material facts within the applicant's means of knowledge were (in combination) of a decisive character by the critical date. If they were not, the applicant has established the grounds for an order under s 31(2).

[44] That approach is consistent with the result in earlier decisions on the Act (and its New South Wales counterpart), other than in *Reeman*. These include *Opacic v Patane* [1997] 1 Qd R 84; *Royal North Shore Hospital v Henderson* (1986) 7 NSWLR 283 at 287 per Hope JA and 300 per Mahoney JA; *Watters v Queensland Rail* [2001] 1 Qd R 448; *NF v State of Qld* [2005] QCA 110 at [2] per Williams JA; *Do Carmo* (1984) 154 CLR 234, although my suggested approach is inconsistent with that of Dawson J at CLR 256 and 258 which identifies each material fact as decisive; *Tiernan v Tiernan* [1993] QSC 110; *Broken Hill Pty Ltd v Waugh* (1988) 14 NSWLR 360; *Russell v State of Qld* [2004] QCA 370 particularly at [26]-[27]; and *Bougoure v State of Qld* [2004] QCA 485. On that analysis, it does not matter why the material facts within the applicant's means of knowledge as at the critical date became of a decisive character after that date, and whether that was because the

applicant learnt only later of another fact, which extra fact now made the combination of material facts of a decisive character; or whether it was because the facts already known at the critical date only became of a decisive character; because circumstances later existing were such that the applicant ought (only by then) to bring on an action.

[45] That approach is consistent with what Clarke JA wrote in *Broken Hill Pty Co Ltd v Waugh* at NSWLR 368-9, in a passage quoted with approval by both Davies JA and Williams JA in *Stephenson v State of Qld*[41] Clarke JA wrote:

> "'Material facts' are defined (s 57(1)(b) [Qld s 30(1)(a)]) but the 'material facts of a decisive character' relating to a cause of action are not. Section 57(1)(c) [Qld s 30(1)(b)] however lays down when the material facts, as a group, qualify as having a decisive character. That occurs when there exists a group of the material facts which satisfy the tests expressed in s 57(1)(c). Once that group of facts qualifies then each of the material facts which go to make up the group is itself a material fact of a decisive character relating to a cause of action. It would seem therefore to follow that a court considering an application under s 58(2) [Qld s 31(2)] is bound to ascertain those facts which as a group qualify as a material fact under s 57(1)(c) and then determine whether any of them were not within the means of knowledge of the applicant at the relevant time."

[46] I also agree with what Williams JA wrote in *Stephenson*,[42] where His Honour held that it followed from the very wording of s 30(1)(b) that (expressing his reasoning in accordance with my own) it is clear that material facts may relate to the award of damages, considerations justifying the bringing of an action, and matters showing that a person "ought in the person's interest and taking the person's circumstances into account to bring an action on the right of action".

Decisive character

[47] Like its New South Wales counterpart s 30(1)(b) declares that 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 them would regard those facts as showing the matters specified in s 30(1)(b)(i) and (ii). The decisive character of those material facts is a matter for judgment by the court, on the tests supplied in s 30(1)(b)(i) and (ii), rather than a fact which an applicant could know or not know, or have taken all reasonable steps to find out. The first matter for judgment is whether the material facts show reasonable prospects of success with a sufficient award of damages to justify bringing an action. The second requires a judgment whether a reasonable person knowing those facts and properly advised would regard them as showing that the applicant ought to bring an action in the applicant's own interest, and taking the applicant's circumstances into account. That matter introduces the requirement that an applicant's interests and circumstances be considered when judging if a reasonable person knowing the material facts would regard them as showing that the applicant should bring an action on them. It is only when the material facts relating to a right of action at a particular date, on application of both those tests, would justify the bringing of an action which an

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41 At [25] and [37] of the CA decision

42 At [35] of the CA decision

applicant ought to bring as at that date, that those material facts "are" of a decisive character. Until then they are not, and none of them individually has that character until that judgment can be made about them collectively.

Means of knowledge

[48] Section 30(1)(c) refers only to "a fact" which is not within the means of knowledge at a particular time; this should be compared with s 30(1)(a), which refers to material facts relating to a right of action, and with s 30(1)(b), which refers to when material facts relating to a right of action are of a decisive character. The reference in s 30(1)(c) only to "a fact", and the difficulty in judging how any applicant would "know" what a reasonable person knowing the material facts would regard them as showing after taking appropriate advice, leads me to conclude that it is material facts which must be within an applicant's means of knowledge, not whether they are of a decisive nature. The question for the court will be whether the material facts within an applicant's means of knowledge, as at a critical date, were of a decisive character; the latter is a matter for a court to decide and not for an applicant to know.

[49] It follows that I respectfully agree with the view of Davies JA expressed in *Stephenson* and *Reeman*, and repeated in *Bougoure*. The question then is whether the material facts within Mr Wrightson's means of knowledge were of a decisive character as at 20 December 2000. For the reasons the learned trial judge gave, the answer is "no", because a reasonable person would have concluded that it was not until after Mr Wrightson had been directed to retire on medical grounds that he ought to have brought his action (it was not clear to me that the appellant actually challenged that view). The evidence established that to bring an action any earlier was very much against the interests of his mental health. The learned trial judge's reasons correctly applied the tests required by s 30(1)(b)(i) and (ii), which are cumulative.

[50] In any event, I am also of the opinion that the fact that Mr Wrightson was directed to retire and did so constituted a fact which, when added to the other material facts, meant that as at the date of his retirement those (only) then became material facts of a decisive character. In *Watters v Queensland Rail* [2001] 1 Qd R 448 Thomas JA, writing the judgment of the court, observed that this Court has consistently treated the consequences of injury, including economic consequences, as a potentially material fact of a decisive character relating to the right of action.[43] Mr Wrightson's prospect of success in a claim for future economic loss considerably brightened when he was directed to retire on the ground that he was unfit for any duty within the Queensland Police Service, even of a staff nature. Before that direction was given he had a good arguable prospect of success in obtaining an award of damages sufficient to justify the bringing of an action, but he had a much more reasonable prospect of success in achieving an award of that sort once it was rendered almost impossible to challenge the claim that he had been deprived of the prospect of future service as a police officer.

[51] It should be clear from these reasons that I would have upheld the appeals in each of the matters of *Stephenson* and *Reeman*. I would dismiss this appeal and order the

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43 At [11] and [20] and [23]

appellant pay the respondent’s costs of and incidental to the appeal, assessed on the standard basis.