SUPREME COURT OF QUEENSLAND

CITATION:	*Kambarbakis v G & L Scaffold Contracting P/L* [2008] QCA 262
PARTIES:	**LUKE PAUL KAMBARBAKIS** (applicant/appellant) **v** **G & L SCAFFOLD CONTRACTING PTY LTD** ACN 085 440 017/ ABN 61 085 440 017 (respondent/respondent)
FILE NO/S:	Appeal No 10828 of 2007 SC No 6132 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2008
JUDGES:	McMurdo P, Holmes JA and Muir JA Separate reasons for judgment of each member of the Court, Holmes and Muir JJA concurring as to the order made, McMurdo P dissenting
ORDER:	**Appeal dismissed with costs**
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 appellant suffered injury to neck after falling from scaffolding on 12 December 2003 – where appellant sought medical advice relating to his injury, and found himself unable to work on many occasions – whether there was a material fact of a decisive character beyond the means of knowledge of the defendant prior to the relevant day, being 12 December 2005 APPEAL AND NEW TRIAL – RIGHT OF APPEAL – NATURE OF RIGHT – APPEALS IN THE STRICT SENSE AND APPEALS BY WAY OF REHEARING – DISTINCTION – APPEALS IN THE STRICT SENSE – where r 765(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that an appeal from the decision of a single judge of the Supreme Court other than as to a final decision

in a proceeding is brought by way of an appeal in the strict sense – whether the appeal concerns a final decision in the proceeding

Limitation of Actions Act 1974 (Qld), s 30(1)(c), s 31(2)
Personal Injuries Proceedings Act 2002 (Qld), s 59(2)(b)
Supreme Court of Queensland Act 1991 (Qld), s 69
Uniform Civil Procedure Rules 1999 (Qld), r 8, r 744, r 765(1), r 765(2)

Byers v Capricorn Coal Management Pty Ltd [1992] Qd R 306, distinguished
Cheney v Spooner (1929) 41 CLR 532; [1929] HCA 12, cited
De Innocentis v Brisbane City Council [2000] 2 Qd R 349; [1999] QCA 404, considered
Dwyer v Calco Timbers Pty Ltd (2008) 244 ALR 257; [2008] HCA 13, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Fuller v Bunnings Group Ltd [2007] QCA 216, distinguished
Healy v Femdale Pty Ltd [1993] QCA 210, distinguished
Herbert Berry Associates Ltd v Inland Revenue Commissioners [1977] 1 WLR 1437, cited
Hordyk v Carruthers Contracting, unreported, Muir J, Queensland, SC No 11358 of 2006, 16 January 2007, distinguished
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Meddings v Council of the City of Gold Coast [1987] 1 Qd R 528, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: M Grant-Taylor SC for the appellant
T Matthews for the respondent

SOLICITORS: Schultz Toomey O'Brien for the appellant
Piper Alderman for the respondent

[1] **McMURDO P**: This is an appeal from a decision of a trial division judge dismissing the application by the appellant, Luke Paul Kambarbakis, for an order under s 31(2) *Limitation of Actions Act* 1974 (Qld) extending the period of limitation for his cause of action against the respondent, G & L Scaffold Contracting Pty Ltd, so that it expired on 18 May 2008 and for incidental orders under the *Personal Injuries Proceedings Act* 2002 (Qld).

The nature of the appeal

[2] Under s 69 *Supreme Court of Queensland Act* 1991 (Qld), an appeal lies to the Court of Appeal from any judgment or order of the court in the Trial Division. *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 765(1) provides that an appeal to the Court of Appeal is by way of rehearing. Rule 765(2) states:

> "However, an appeal from a decision, other than a final decision in a proceeding, or about the amount of damages or compensation awarded by a court is brought by way of an appeal."

[3] The UCPR does not define the term "proceeding". Historically, it has been given a narrow interpretation. In *Herbert Berry Associates Ltd v Inland Revenue Commissioners*[1] "proceeding" was held to mean the "invocation of jurisdiction of the court by process other than writ". In *Cheney v Spooner*[2] it was held to include "any application by a suitor to a Court in its civil jurisdiction for its intervention or action". In the context of r 765(2), it is clear that the term "proceeding" is intended to have a broader meaning to include all matters commenced by an originating process issued by the court whether by claim or application: see r 8.

[4] Rule 744 UCPR defines "decision" as used in r 765 as "an order, judgment, verdict or an assessment of damages". In *De Innocentis v Brisbane City Council*,[3] Chesterman J, with whom Pincus JA and Thomas JA agreed, noted that the use in r 765 of the term "final decision" rather than "final judgment" is significant; "final decision" is a broader concept than that encompassed by "final judgment". Although the primary judge's decision was interlocutory in the sense discussed by Holmes JA, its practical effect was to end Mr Kambarbakis's chance of success in any claim he might commence against the respondent. The respondent's limitation defence would necessarily defeat any claim Mr Kambarbakis might bring. Holmes JA has persuasively demonstrated the argument to the contrary, but I consider the better interpretation of r 765(2) is that "a final decision in a proceeding" includes a decision by a Supreme Court judge refusing an application to extend a limitation period: cf *De Innocentis v Brisbane City Council*.[4] This conclusion seems more consistent with the terms of s 69 and r 765 and the fact that the Court of Appeal is, for most purposes, the final appellate court in Queensland. In my view, this appeal is by way of rehearing. The well-established principles in *House v The King*[5] remain apposite to any appeal from discretionary aspects of an order extending or refusing to extend the limitation period.

[5] There is no application in this appeal to rely on evidence which was not before the primary judge. It follows that this Court is required to reach its own decision by drawing inferences and conclusions from the evidence before the primary judge: *Dwyer v Calco Timbers Pty Ltd*;[6] *Fox v Percy*[7] and *Warren v Coombes*.[8]

The appeal

[6] Holmes JA has set out much of the relevant evidence and statutory provisions so that my reasons for reaching a different conclusion to my colleagues and for allowing the appeal can be stated more briefly than otherwise.

(a) The issue

[7] The ultimate issue in this appeal is the narrow one correctly identified by the primary judge. It is whether, on the evidence, a reasonable person, knowing the

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1 [1977] 1 WLR 1437 at 1446.
2 (1929) 41 CLR 532 at 538-9.
3 [2000] 2 Qd R 349; [1999] QCA 404 at 356-357 [31]-[34].
4 [2000] 2 Qd R 349; [1999] QCA 404.
5 (1936) 55 CLR 499 at 507-508.
6 [2008] 82 ALJR 669; [2008] HCA 13.
7 (2003) 214 CLR 118; [2003] HCA 22 at 126-127 [25].
8 (1979) 142 CLR 531; [1979] HCA 9 at 551.

facts known to Mr Kambarbakis about his symptoms, their cause and the effect on his capacity for work, would have taken appropriate medical advice on those facts before 18 May 2007.[9]

[8] Her Honour concluded that a reasonable person would have sought medical advice because she found that Mr Kambarbakis:

> "was aware that his reduced capacity to work from the time of the incident (which resulted in days or part days off work or undertaking less work each day) was due to the injury sustained in the incident. Although this did not result in actual loss of income because of the profit-sharing arrangement under the partnership, [Mr Kambarbakis] has acknowledged the awkwardness that he felt about his relationship with his business partner as a result. As the symptoms and their effects continued impacting on [Mr Kambarbakis's] work, that raised the potential for [Mr Kambarbakis] of future loss of income, even if [Mr Kambarbakis] did not turn his mind to that consequence until the first half of 2007."[10]

(b)The evidence

[9] Mr Kambarbakis was 23 years old when he was injured on 12 December 2003 whilst working as a self-employed solid plasterer. He fell from the respondent's scaffolding when a portion of it gave way. The respondent conceded at first instance and in this appeal that there was prima facie evidence (apart from the defence founded on the expiration of the period of limitation) to establish Mr Kambarbakis's right of action in negligence (see s 31(2)(b) *Limitation of Actions Act*).

[10] In his affidavit of 17 July 2007 in support of his application, Mr Kambarbakis affirmed the following matters. He considered himself below average in terms of his academic ability. At high school he was unable to manage mainstream maths and undertook what he referred to as "TAFE maths". He also undertook a more vocational stream of English at high school, called "English for Life", because he was a "borderline" English student. He went into partnership with Mr Trevor Salisbury as a solid plasterer about 10 months before the accident in which he fell two storeys to the ground. He felt severe pain and suffered injuries to his neck, lower back and ribs. He was taken to a Maroochydore medical practice where he saw his general practitioner, Dr Ryan.

[11] The medical notes concerning Mr Kambarbakis from Dr Ryan's practice were in evidence. As to the consultation on 12 December 2003, they record:

> "fell from scafold 5m
> landed left side ribs, knee
> main injuries sore neck (no major head injury)
> laceration to left ant/lat rib area, tender ribs
> left knee pain
> tet ok
> **Examination:**
> neck overall dec rom 10-20%
> tender paravert muscles, vert ok

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9 *Kambarbakis v G & L Scaffold Contracting Pty Ltd* [2007] QSC 329 at [40]-[41]; and see particularly s 30 *Limitation of Actions Act* 1974 (Qld).

10 [2007] QSC 329 at [39].

> superficial lac/contusion to left lower rib, tender along corresponding area
> knee rom ok, tender medially with some minor swelling on femur
>
> **Diagnosis:**
> Sinusitis
> **Actions:**
> Diagnostic Imaging requested: X-ray – Ribs (L)
> Prescriptions printed:
> AUGMENTIN DUO FORTE TABLET 875mg/125mg 1 b.d."
> (errors as in the original)

[12] It seems that the only medication prescribed by Dr Ryan at that time was an antibiotic for sinusitis; he also referred Mr Kambarbakis for an x-ray of the left rib area, but not the cervical spine area.

[13] Mr Kambarbakis also affirmed the following facts in that affidavit. After the accident he undertook a single session of Bowen Therapy. He then had "periodic" massage therapy. He also "periodically" used his mother's panadeine forte, which had been prescribed for her lower back condition and which he found worked quite well; it reduced his pain level and allowed him to continue to work. On "a number of occasions" he could not work or could not work to his full capacity. He had to take "a number of days … or part days off work". He felt awkward about this because it meant that his partner had to "cover" for him. Mr Kambarbakis felt this was unfair to his partner because they were splitting the profits of their business equally and Mr Salisbury had to do more than his share of the work. Mr Kambarbakis continued to have symptoms throughout 2005 and 2006 and "at times [he] would suffer from 'pins and needles' in [his] hands, numbness and … 'screaming' headaches." He also had on-going problems sleeping, for which Dr Ryan prescribed sleeping tablets and anti-depressants. His symptoms became worse at the beginning of 2007. His girlfriend, a human resources manager of a large company, then discussed his on-going problems with him; she thought there was a time limit in which to make a claim for injuries. He saw Dr Ryan on 18 May 2007. He raised with Dr Ryan the prospect of bringing a claim for damages for his injuries because it then seemed to Mr Kambarbakis that he would not be able to continue working in his current trade. Dr Ryan gave him a referral for a CT scan. On 21 May 2007 Mr Kambarbakis contacted his present solicitors and decided to consider pursuing a claim against the respondent because of the economic loss to his solid plastering partnership and his worsening symptoms.

[14] In a letter of 2 June 2007 Dr Ryan stated that Mr Kambarbakis:

> "has chronic injuries from a fall from a scaffold in 2003. The chronic nature and severity of the symptoms are such that I have recommended he change vocations from the rigorous nature of plastering. He may never be fit to return to this job."

[15] Orthopaedic surgeon Dr Gregory Day examined Mr Kambarbakis in late May or early June. He noted that the CT scan of the cervical spine performed on 20 May 2007 demonstrated "post-traumatic spurring on the superior aspect of the right side articular process of C4" and "irregularities of the superior articular processes of C4 and C5 on the right side and C4 on the left side. The small bone fragments would be consistent with fractures related to these joints". These observations were

apparently consistent with Mr Kambarbakis having suffered a significant injury to his cervical spine in the fall from the respondent's scaffolding in December 2003. Neither these irregularities, nor any other significant matters, emerged in the previous radiology performed on Mr Kambarbakis's cervical spine following referral by Dr Ryan, either on 7 December 2004, or after a motor vehicle accident on 11 September 2006.

[16] It seems that on 7 February 2005, Dr Ryan wrote a referral for Mr Kambarbakis to an orthopaedic surgeon, Dr Clarke, asking him to review Mr Kambarbakis and detailing his history of chronic neck pain and headaches with some right C6 and C7 parasthesia. There is no evidence as to whether Mr Kambarbakis consulted Dr Clarke. In cross-examination Mr Kambarbakis stated that he was busy at the time and could not remember whether he did so. The probable inference from the absence of evidence on this issue is that he did not consult Dr Clarke.

[17] Mr Kambarbakis's lawyers sent a statutory declaration sworn by him on 24 May 2007 to the respondent. It included much the same information as in the later affidavit to which I have earlier referred. There were some relevant differences, including the following. There were "many occasions" on which he could not work or could not work to capacity. He had to take days or part days off work on "many occasions". By the end of 2006, he was having such significant problems that he began to think he "simply couldn't continue to work in the business". He did not "want to stop working in the partnership as it was [his] first real chance to make very good money in … self employment. There was heaps of work available … and it was paying well". After speaking to his girlfriend about her apprehension of a three year time limit to make a claim for injuries, he decided to raise it with his general practitioner when he next saw him.

[18] Mr Kambarbakis gave evidence before the primary judge. He said that the first time he was advised by a medical practitioner that he should give up his work as a solid plasterer was when Dr Ryan told him this in May 2007.

[19] In cross-examination, he agreed with leading questions put to him by the respondent's counsel, which suggested his headaches and cervical spine-related symptoms were somewhat worse and more frequent than he described in his affidavit. He said that the reason why he did not consult Dr Ryan until May in 2007, despite earlier that year receiving information from his girlfriend as to a possible time limit, was because he "was scared about not working because that's all [he was] good at".

(c) Discussion and conclusion

[20] In my view, the evidence to which I have referred supported the following conclusions. Dr Ryan did not initially consider the neck injury significant enough to warrant radiology. Mr Kambarbakis, however, clearly struggled with the injury, at least intermittently, over the ensuing three and a half years. He consulted Dr Ryan about his neck pain on a number of occasions, but these consultations were not as frequent as other consultations completely unrelated to neck pain. From my perusal of the tendered medical records, most visits to Dr Ryan's practice during this time were for matters such as chronic sinusitis, an assortment of infections, a hand injury, a motor vehicle accident in September 2006 and a punch to the nose in November 2006. Despite his neck pain, he was able to work in his solid plastering partnership, although he took days and parts of days off work "on a number of

occasions", using analgesia "periodically" and having "periodic" massage therapy. My understanding of his evidence in his affidavit was not that his symptoms were constant and unabated, but rather that they emerged periodically and on occasions interfered with his ability to work. The partnership was apparently doing well. I infer that Mr Kambarbakis optimistically hoped that he would be able to continue working in the business despite his injuries by using, as do many people, periodic analgesia and massage therapy. Whilst his partner, Mr Salisbury, "covered" for him, the nature of a partnership is that Mr Kambarbakis, no doubt, would have done the same thing for Mr Salisbury were the boot on the other foot.

[21] Mr Kambarbakis in cross-examination, and to a lesser extent in his statutory declaration sent to the respondent, described worse symptoms occurring more frequently than he described in his affidavit. I do not place great weight on his answers in cross-examination: these seemed to have been more the result of skilful questioning of an eager-to-please and unsophisticated witness than an accurate depiction of the frequency of symptoms and their effect on his work. His evidence in this respect does not seem to be supported by the medical evidence. His consultations with Dr Ryan about his neck pain were not especially frequent. No radiology of his cervical spine up until the CT scan of 20 May 2007 disclosed anything that would suggest a spinal injury that might significantly impact on his ability to earn income. That changed when Mr Kambarbakis received Dr Ryan's medical opinion on 18 May 2007, an opinion apparently supported by the CT scan then obtained.

[22] The evidence discloses that, in 2005, Mr Kambarbakis was referred by Dr Ryan to an orthopaedic specialist Dr Clarke. He apparently did not take up that referral. Mr Kambarbakis gave evidence that he could not remember what he did at this time as he was busy. The fact that he did not act on Dr Ryan's referral to Dr Clarke suggests that his symptoms at that time were not so significant to him that he considered it necessary to interrupt his busy life to consult an orthopaedic surgeon. People commonly obtain specialist referrals which they do not find necessary to activate. There is nothing remarkable or unreasonable in this, accepting, as I do, that his symptoms and medical advice were then not such as to alert him to the fact that his injuries from the fall were so significant that he should seek specialist medical advice about them.

[23] Whilst Mr Kambarbakis clearly attributed his symptoms to the accident well prior to the expiration of the limitation period, it was reasonable for him to consider that the injuries were not then so serious as to preclude him from working in his chosen field, and that he could live with and manage them. After all, he was able to continue working for three years, although with some indulgence from Mr Salisbury and with the use of periodic analgesia and massage. His symptoms became worse at the end of 2006 and in early 2007, perhaps because they were exacerbated by the other events noted in the medical records in September and November 2006. Only then did the realisation dawn on him that he may not be able to continue in his chosen field of work because of his cervical spine injury received in December 2003 and that he may therefore have a worthwhile claim. After discussion with his girlfriend about his on-going problems, including that there may be time limits to making a claim for his injuries, he investigated the matter with Dr Ryan on 18 May 2007. For the first time, he received medical advice that he should consider giving up his work as a solid plasterer. He contacted his present lawyers within days.

Dr Ryan's advice was consistent with the radiology then obtained and reviewed by orthopaedic surgeon, Dr Day, shortly afterwards.

[24] In applying the test of a reasonable person under Pt 3 *Limitation of Actions Act*, the Court is entitled to take into account the relevant subjective qualities of applicants, such as their standard of education, intelligence and life experience. Mr Kambarbakis was aged between 23 and 26 at the relevant times. He seems to have below average intelligence and is not of an academic bent. He completed an apprenticeship as a solid plasterer, however, and went into partnership in that business only 10 months before the incident leading to his injury. In the period preceding and following the injury, the business went well. After the injury, he had significant painful symptoms "at times". He was able to keep working, apart from a number of occasions when he had days or part days off work because of pain, through periodic analgesia and massage therapy. While Mr Salisbury chose to "cover" for him, that is the nature of a partnership. He visited his general practitioner from time to time and in 2004 and 2006 had radiology of the cervical spine which did not disclose any problems. Only when he consulted Dr Ryan on 18 May 2007 did he obtain medical advice that he should give up work as a solid plasterer. Until then, it was reasonable for him to take the optimistic view that he could continue in his thriving solid plastering business partnership, despite his symptoms, with the help of analgesia and massage therapy. I am satisfied that a reasonable person in Mr Kambarbakis's position, knowing the facts he knew about his symptoms, their cause and the effect on his capacity for work to which I have referred, would not have necessarily taken any different or additional medical advice on those facts before 18 May 2007.

[25] In my view, the learned primary judge erred in reaching the contrary conclusion. I am satisfied that Mr Kambarbakis has shown that a material fact of a decisive character relating to his right of action against the respondent was not within his means of knowledge until 18 May 2007.

[26] I agree with the primary judge's observations, which were not the subject of any cross-appeal or notice of contention, that the discretionary factors in this case favour the granting of Mr Kambarbakis's application under s 31(2) *Limitation of Actions Act* to extend the period of limitation. There is no discernible significant prejudice to the respondent from extending the limitation period but to refuse to do so would have the effect of denying Mr Kambarbakis the opportunity to pursue a claim to compensate him for what may be a significant injury causing substantial economic loss.

[27] It follows that I would make the following orders:

1. Allow the appeal.
2. Set aside the order at first instance and instead order that:
   (a) the period of limitation for the appellant's right of action against the respondent be extended so that it expires on 18 May 2008.
   (b) under s 59(2)(b) *Personal Injuries Proceedings Act* 2002 (Qld), the appellant is granted leave to commence a proceeding against the respondent conditional upon the appellant bringing such proceeding:
      (i) within 60 days of the date upon which the compulsory conference is convened; or

(ii) in the event that the parties agree to dispense with the compulsory conference, within 60 days of the date of such agreement; or

(iii) in the event that the court makes an order to dispense with the compulsory conference, within 60 days of the date of such order.

3. The costs of and incidental to the appeal and the proceeding at first instance should be costs in the cause.

[28] **HOLMES JA**: The appellant, Mr Luke Kambarbakis, unsuccessfully sought at first instance an order under s 31(2) of the *Limitation of Actions Act* 1974 (Qld) extending the limitation period for a negligence action against the respondent. Mr Kambarbakis injured his neck on 12 December 2003, when, while working as a plasterer, he fell through scaffolding installed by the respondent company. To obtain such an extension of the limitation period, s 31(2)(a) required him to satisfy the judge at first instance that

> "a material fact of a decisive character relating to [his] right of action was not within [his] means of knowledge until a date after the commencement of the year last preceding the expiration of the period of limitation for the action";

that is to say, not until after 12 December 2005.

[29] The "material fact of a decisive character" on which Mr Kambarbakis relied was as to the "extent of [his] personal injury"[11]: the discovery that because of his injury he would no longer be able to work as a plasterer. His evidence was that he first became aware of that fact on 18 May 2007, when he was so informed by his general practitioner. The learned judge at first instance, however, was not satisfied that it was a fact not within Mr Kambarbakis' "means of knowledge" by 12 December 2005, had he taken all reasonable steps to find it out, and dismissed the application. Mr Kambarbakis argues that, on all the evidence, her Honour could not properly have reached that conclusion.

The nature of the appeal

[30] During the hearing of the appeal, there was some discussion of its nature. Rule 765(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that an appeal to the Court of Appeal from the Supreme Court constituted by a single judge is by way of rehearing, but r 765(2) adds this qualification:

> "However, an appeal from a decision, other than a final decision in a proceeding, or about the amount of damages or compensation awarded by a Court is brought by way of an appeal".

Such an appeal may, however, be dealt with by way of rehearing if the Court is satisfied it is in the interest of justice to do so.[12]

[31] Although, as was pointed out by Chesterman J and accepted by the other members of this Court in *de Innocentis v Brisbane City Council*,[13] the expression "final decision" is broader than "final judgment" with which earlier case law was concerned, I would, nonetheless, regard a refusal of an extension of the limitation

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11 *Limitation of Actions Act* 1974 (Qld) s 30(1)(a)(iv).

12 r 765 (4), *Uniform Civil Procedure Rules* 1999 (Qld).

13 [2000] 2 Qd R 349; [1999] QCA 404

period as not being a "final decision in the proceedings". As was observed in *Meddings v Council of the City of Gold Coast*,[14] there is nothing to prevent an unsuccessful applicant from continuing with his or her action, although he or she will be met with an unanswerable defence, or from bringing another such application in the proceedings, unlikely though it would be to succeed. The appeal is, therefore, to be distinguished from that available under r 765(1); it is in the nature of an appeal *stricto sensu*.

The evidence

[32] No credit issue arose, and there was no dispute about the manner in which Mr Kambarbakis had sustained his injury, so it is unnecessary to dwell on the evidence in that regard. The evidence as to the circumstances in which Mr Kambarbakis came to make his claim for personal injuries emerged from his affidavit, on which he was cross-examined, from his notice of claim and accompanying statutory declaration, and from a series of medical records annexed to his solicitor's affidavit. No direct evidence was forthcoming from any of the medical practitioners who had treated Mr Kambarbakis; the information as to what he was told about his condition is limited to what can be discerned from the medical records, what he has said about the conversation with his general practitioner, Dr Ryan, on 18 May 2007, and the contents of a single letter written by Dr Ryan in June 2007.

[33] Mr Kambarbakis, a solid plasterer by trade, went into partnership with another man when he was 22 years old. They had been in business for about 10 months when scaffolding gave way under him as he inspected a plastering job, and he fell two stories to the ground, injuring his neck, lower back and ribs. He was taken to a Maroochydore medical practice, where he saw Dr Ryan, who noted his main injury as a sore neck. Dr Ryan suggested physiotherapy; but Mr Kambarbakis, in his affidavit, said that he could not recall if he followed that advice. It was difficult for him to take time off for treatment, because the partnership had a good deal of work on.

[34] Dr Ryan's notes record that on 19 January 2004, Mr Kambarbakis returned, complaining that he was getting headaches from his neck. Dr Ryan sent him for a cervical spine x-ray, but nothing indicates that one was performed. Mr Kambarbakis did not return to Dr Ryan for any neck problem until 7 December 2004; but he was, he said, managing in the meantime with massage and the use of analgesics prescribed to his mother. On 7 December, he was complaining of on-going neck pain and headaches and was sent for a cervical spine x-ray, which was undertaken. The report noted some abnormalities and degenerative change which do not seem to have been regarded as significant. On 13 January 2005, Mr Kambarbakis returned to Dr Ryan and was referred for a CT scan of the cervical spine. Nothing abnormal was found on that scan.

[35] Mr Kambarbakis said in his statutory declaration that throughout 2005 and 2006 he experienced pins and needles in his hands, numbness and "screaming" headaches. On 7 February 2005, Dr Ryan wrote a referral to Dr Clarke, an orthopaedic surgeon, asking him to review Mr Kambarbakis and detailing his history of chronic neck pain and headaches with "some right C6 & 7 paraesthesiae". Dr Ryan's records do not contain any response from, or further reference to, Dr Clarke. Mr Kambarbakis was

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[14] (1987) 1 Qd R 528.

asked in cross-examination whether he attended Dr Clarke and said he could not remember; he expanded on that response by saying "Yeah, mate, when you're busy I can't – you know, I was pretty flat out". The notice of claim which Mr Kambarbakis ultimately served under the *Personal Injuries Proceedings Act* 2002 (Qld) did not name Dr Clarke as a treating doctor. The obvious inference seems to be that Mr Kambarbakis did not consult Dr Clarke.

[36] In his statutory declaration, sworn in May 2007, Mr Kambarbakis described his work situation after the accident:

> "I attempted to continue to work, however, there were many occasions on which I could not work or could work to my capacity. I had to take days off work or part days off work on many occasions".

In cross-examination, he confirmed that that was the situation from December 2003, and it continued throughout 2005 and 2006. However, his partner was in effect carrying him, so that he was not losing income. In this passage of evidence, Mr Kambarbakis acknowledged that, but for the partnership, matters would have been different:

> "So you - you were losing, time off work?-- Yeah, yeah.
> So if you were to become employed plasterer ....?.-- .Yeah.
> ..... then you wouldn't be able to turn up at work for all the hours the boss would want, wouId you?-- No.-
> And you knew that back in 2004?-- Oh, I don't know.
> Well, if you're having time off work, but for this partnership ..... ?-- yeah.
> ..... if you had been employed by someone you know you couldn't have been working full-time?- Yeah, I guess so."

[37] On 14 June 2006, Mr Kambarbakis had massage therapy to relieve his pain and headache; he told the therapist that "he felt that some of his pain and discomfort in his neck & shoulders was due to his fall". On 9 September 2006, he was involved in a motor vehicle accident which caused him neck pain, and he was sent again for a cervical spine x-ray. The radiologist reported that there was "no evidence of a fracture, dislocation or other bone or joint abnormality". The neck problem was presumed to be muscle spasm. But by the end of 2006, Mr Kambarbakis said in his statutory declaration, he had such problems that he "began to think that [he] simply couldn't continue to work in the business."

[38] In 2007, Mr Kambarbakis discussed his problems with his girlfriend, who worked in human resources. She advised him that she thought there was a time limit to make a claim for injuries. Soon after that discussion, Mr Kambarbakis saw Dr Ryan again, on 18 May; on this occasion, to Mr Kambarbakis' recollection, he discussed with Dr Ryan the prospect of his making a personal injuries claim, "because it seemed as though [he] would not be able to continue working in [his] current trade". He was referred for yet another cervical spine x-ray and also a CT scan. Nothing in the material indicates that they took place; they may have been overtaken by another set of events. On 20 May 2007, Mr Kambarbakis attended the Nambour Hospital with symptoms of cervical spine pain and tingling in both arms after an altercation with some security staff at a night club. A CT scan of his cervical spine was performed at the hospital; the report noted "old fractures to the superior tips of the superior articular processes of C4 & C5 on the right side, and C4 on the left side".

[39] Having decided that he should pursue a claim because of the losses to the business and his continuing and worsening symptoms, Mr Kambarbakis consulted solicitors on 21 May 2007. They served a notice of claim under the *Personal Injuries Proceedings Act* on his behalf, initially on the wrong defendant; the respondent was served later. Mr Kambarbakis visited Dr Ryan again on 28 May and was referred to another orthopaedic surgeon, Dr Day, who wrote two reports describing Mr Kambarbakis' condition and treatment options, but offering nothing as to causation or prognosis. Dr Ryan, however, wrote a letter dated 2 June 2007 expressing his opinion that Mr Kambarbakis had chronic injuries with symptoms such that he ought to change employment from his trade of plastering, and might never be able to return to it. Soon after, Mr Kambarbakis ended the partnership and ceased working as a plasterer because, he said, his symptoms prevented him from continuing.

The reasons for judgment

[40] The learned judge at first instance characterised the issue for her determination as whether a "material fact of a decisive character", that Mr Kambarbakis' neck condition would prevent him from continuing to work as a plasterer, was within his means of knowledge prior to 12 December 2005.[15] Section 30(1)(c) of the *Limitation of Actions Act* provides:

> "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."

[41] The learned judge noted that, unlike the plaintiff in *Byers v Capricorn Coal Management Pty Ltd*,[16] who gave evidence of relying on medical opinion that his condition was a mere muscle strain which would improve with time, Mr Kambarbakis had not disclosed the content of his medical advice up until May 2007. She found, as was clearly the case on the evidence, that Mr Kambarbakis attributed his symptoms to the accident, unlike the plaintiff in *Hordyk v Carruthers Contracting*.[17] (Muir J, as he then was, concluded in that case that there was no reason for the plaintiff to have associated his temporary aggravated symptoms with his injury, as opposed to the heavy lifting he was doing at the time they occurred.) And, her Honour found, Mr Kambarbakis suffered from his symptoms on a continual basis, unlike the plaintiff in *Healy v Femdale Pty Ltd*.[18] He was aware that in consequence of his injury, his capacity to work had been reduced from the time of the accident. The impact of his symptoms had thus raised the prospect of future loss of income.

[42] Having made those findings, her Honour reached the following conclusions:

> "On the applicant's own statements, I am satisfied that a reasonable person knowing the facts known to the applicant about his

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15 In practical terms, since the limitation period could only be extended by 12 months, and the application was not brought until 8 August 2007, Mr Kambarbakis needed, at the least, to point to a material fact coming within his means of knowledge later than 8 August 2006; but the evidence as to his circumstances did not change significantly between December 2005 and August 2006.

16 [1992] Qd R 306.

17 Unreported, Muir J, Queensland, SC No 11358 of 2006, 16 January 2007.

18 [1993] QCA 210.

> symptoms, their cause and the effect on his capacity for work would have taken appropriate advice on those facts before 12 December 2005.
>
> I am therefore not satisfied that the applicant has shown that the material fact of a decisive character relating to his right of action against the respondent which he relies on for the purpose of this application was not within the means of knowledge of the applicant until a date after 18 May 2007 or even until a date after 12 December 2005."

The appeal

[43] Counsel for Mr Kambarbakis submitted that the learned judge had misconstrued his client's evidence and had inappropriately distinguished the authorities he relied on. Her Honour had unfairly criticised Mr Kambarbakis for not disclosing the content of his medical advice before May 2007, thereby assuming that he had received some relevant advice; when there was no evidence to that effect, and it had not been put to the appellant in cross-examination that there was. But it was not, in my view, an unreasonable assumption to suppose that in his medical consultations over three and a half years, particularly those with Dr Ryan, Mr Kambarbakis had received some advice about the significance of his symptoms. The learned judge did not, in fact, criticise the appellant's failure to disclose that advice, but made the factually correct observation that he had not disclosed it. Its absence was relevant in this way: it meant, simply, that Mr Kambarbakis was not in the position of the plaintiff in *Byers*, of having favourable medical advice which explained his inaction.

[44] Counsel next submitted that the learned judge ought not to have distinguished *Hordyk v Carruthers Contracting* on the basis that, unlike Mr Hordyk, Mr Kambarbakis was aware his symptoms were attributable to the accident. The distinction was irrelevant, his counsel said, because it had always been Mr Kambarbakis' case that his symptoms were related to his fall; it was the extent of his injury and its impact on his work prospects that constituted the fact beyond his means of knowledge. And, relevantly to Mr Kambarbakis' circumstances, Muir J in *Hordyk* had concluded that the plaintiff there, in not seeking medical advice about the unsuitability of his work, had not failed to take all reasonable steps. Mr Hordyk's general practitioner, it was reasonable to suppose, was familiar with his work and his symptoms and could be expected to advise the applicant if his employment was unsuitable without the applicant having to ask. The judge at first instance here should have adopted a similar approach.

[45] There are three points, I think, to be made about the submissions as to *Hordyk*. Firstly, it was plainly distinguishable on the basis her Honour identified: that the plaintiff there, as Muir J found, did not appreciate that his symptoms were linked to his injury. Secondly, it was relevant for her Honour to allude to that distinction, because although Mr Kambarbakis did not seek to contend that the connection between his symptoms and his fall was not within his means of knowledge, the fact that he was aware of the connection was relevant to whether he ought to have made enquiry as to the consequences of the symptoms. Thirdly, *Hordyk* was a single judge's decision on a particular set of facts; it was not a case in which any general statement of principle was made. Muir J found that Mr Hordyk had continued in his heavy work for years, with major difficulties on only a few occasions; he could do the work, intended to keep doing it and was coping well. While it might, on those

facts, have been reasonable for the applicant to rely on his general practitioner to advise him if his work was unsuitable, that does not follow as a proposition good in all cases; particularly one such as the present, where Mr Kambarbakis was perfectly aware that his symptoms were often the cause of his inability to work.

[46] At first instance, counsel for Mr Kambarbakis quoted this passage from *Healy v Femdale* to the learned judge, contending that it was apposite to his client's circumstances:

> "The question then is whether it can be said that in the circumstances the plaintiff took all reasonable steps to ascertain the fact that her injury was serious enough to justify the bringing of an action. She did not ask her doctor questions of this kind. The question whether an injured person has taken all reasonable steps to ascertain the seriousness of the injury depends very much on the warning signs of the injury itself and the extent to which it or any other facts might be thought to call for prudent enquiry to protect one's health and legal rights. 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."

But here, of course, Mr Kambarbakis did not return to plastering "without significant pain or disability", and there were, on his own account, significant warning signs in the form of his inability to work, from time to time, because of his symptoms. In those circumstances, it was reasonable to expect him to solicit advice from Dr Ryan about the prospect of the injuries continuing to have an effect on his working capacity; and to expect him to take the opportunity of specialist advice when he was referred to Dr Clark.

[47] But, counsel for Mr Kambarbakis complained, the learned judge had not made clear whether what she referred to as "appropriate advice" was medical or legal. Assuming the former, the court should not accept the respondent's position that Mr Kambarbakis would have been advised had he attended Dr Clarke in February 2005, that he should not continue in his trade. It was suggested that this passage from the judgment of Williams JA in *Fuller v Bunnings Group Ltd*[19] set out the appropriate test of what was within an applicant's means of knowledge; reflecting the two aspects of s 30(1)(c)(ii), "reasonable steps" and a fact "able to be found out":

> "It was clearly open to the Judge at first instance to conclude that the applicant did not take all reasonable steps to find out what was causing her pain in the left shoulder and that if she had consulted a doctor, as a reasonable person would have, she would have been made aware of the extent of her injury and the consequences of it to her".

[48] But Williams JA in *Fuller* was doing nothing more than affirming that the findings made by the first instance judge were open to him; he was not positing that an

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19 [2007] QCA 216, at [36].

applicant must succeed in the absence of positive evidence that he or she would have been told the material fact on enquiry. What might have happened had enquiry been made in the past can only be a matter of inference; but, if reasonable steps would have entailed an enquiry, it is the applicant contending that the material fact would not then have been discoverable who bears the onus, not the respondent.

[49] In any event, counsel submitted, it was probable, had Mr Kambarbakis asked a medical practitioner before 18 May 2007 whether he should continue in his trade, that he would not have been advised to give it up. The radiological findings prior to mid-May 2007 made no reference to any fractures, so any doctor examining him for the purpose of advising him on the suitability of his work would have seen no evidence of anything but degeneration. And without the claim for future economic loss which arose from his being forced to give up work, any award would not have been such as to justify bringing an action.

[50] In my view, there is no doubt that the learned judge in her reference to "appropriate advice" contemplated medical advice. She had characterised the relevant material fact as one of extent of injury, and identified the respondent's competing argument as being that medical advice should have been taken. It was open to her Honour to conclude that by December 2005, Mr Kambarbakis ought to have enquired of his doctor whether his neck injury would adversely affect his future earning capacity. His symptoms of neck pain, headache and paraesthesiae had continued unabated and worsening; they had caused him to take time off work. He appreciated that had he not been in partnership, those absences must have had an effect on both his employability and income. And in the circumstances, there was no reason to suppose the implications of his injury for his future capacity to work as a plasterer were undiscoverable. Although the radiological evidence did not disclose anything of moment until the CT scan of 20 May 2007 showed old fractures, the relationship between his symptoms and his continuing difficulties in carrying out his work was obvious. Indeed, Dr Ryan gave his advice that Mr Kambarbakis could not continue as a plasterer on 18 May, presumably on the basis of the latter's complaints and symptomatology, since it was before the first radiological evidence of traumatic injury emerged.

Conclusion and order

[51] On the evidence before the learned judge at first instance, the conclusion was open (and with respect, correct) that Mr Kambarbakis had not taken all reasonable steps to find out a fact he could have discovered, that the injury would adversely effect his capacity to remain as a plasterer. Armed with that fact, he would, by the end of 2005, have had an action worth bringing.

[52] I would dismiss the appeal with costs.

[53] **MUIR JA:** I do not find it necessary to decide whether the appeal is by way of re-hearing or is an appeal *stricto sensu.* The result of the appeal would not be affected by the categorisation of its nature. I would prefer to leave the determination of the point to a case in which it was material to the outcome and fully argued. Otherwise, I agree with the reasons of Holmes JA and with her Honour's proposed order.