SUPREME COURT OF QUEENSLAND

CITATION:	*Magarey v Sunshine Coast Hospital and Health Service (Nambour Hospital)* [2022] QCA 189
PARTIES:	**JESSIE PATRICIA MAGAREY** (appellant) **v** **SUNSHINE COAST HOSPITAL AND HEALTH SERVICE (NAMBOUR HOSPITAL)** (respondent)
FILE NO/S:	Appeal No 12465 of 2021 SC No 2970 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2021] QSC 240 (Brown J)
DELIVERED ON:	30 September 2022
DELIVERED AT:	Brisbane
HEARING DATE:	7 April 2022
JUDGES:	Morrison and Mullins JJA and Boddice J
ORDERS:	**1. Appeal dismissed.** **2. The appellant must pay the respondent's costs of the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – LIMITATION OF ACTIONS – GENERAL MATTERS – STATUTES OF LIMITATION GENERALLY – OTHER MATTERS – where the appellant applied under s 31 of the *Limitation of Actions Act 1974* (Qld) (the Act) for an extension of the limitation period to pursue a claim for damages for personal injuries against the respondent – where the application was dismissed – where the appellant injured her right ankle in May 2013 – where surgery on the ankle was performed at the respondent's hospital in May 2015 that was unnecessary – where a below the knee amputation was performed in August 2018 due to an infection caused from the unnecessary surgery – where the primary judge found the appellant failed to discharge her onus under s 30(1)(c)(ii) of the Act to show that the relevant material fact of a decisive character, the nexus between the impugned treatment and the subsequent infection which led to the amputation, was not within her means of knowledge prior to the receipt of an expert report (the report) in September 2020 from an orthopaedic specialist – where the appellant first considered

taking legal action in November 2016 – where it was three years between the appellant engaging new lawyers and obtaining the report – whether a reasonable person in the appellant's situation would develop a view that her solicitors were not properly pursuing her case due to the delay in the expert report being available – whether the primary judge erred in failing to consider whether the delay was unreasonable in the context of the pursuit of the report by the appellant from her perspective

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – LIMITATION OF ACTIONS – GENERAL MATTERS – STATUTES OF LIMITATION GENERALLY – OTHER MATTERS – where the appellant applied under s 31 of the *Limitation of Actions Act 1974* (Qld) (the Act) for an extension of the limitation period to pursue a claim for damages for personal injuries against the respondent – where the application was dismissed – where the appellant injured her right ankle in May 2013 – where surgery on the ankle was performed at the respondent's hospital in May 2015 that was unnecessary – where a below the knee amputation was performed in August 2018 due to an infection caused from the unnecessary surgery – where the primary judge found the appellant failed to discharge her onus under s 30(1)(c)(ii) of the Act to show that the relevant material fact of a decisive character, the nexus between the impugned treatment and the subsequent infection which led to the amputation, was not within her means of knowledge prior to the receipt of an expert report (the report) in September 2020 from an orthopaedic specialist – where the appellant submitted that it was not until the effect of the report was made known to her that she appreciated she had a basis for a claim for negligence against the respondent in respect of the surgery in May 2015 – whether the expert's opinion was procurable at an earlier date – whether the appellant took all reasonable steps to find out the material fact – whether the primary judge erred in failing to hold that the material fact was not within the appellant's means of knowledge prior to the receipt of the report

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

Dick v University of Queensland [2000] 2 Qd R 476; [1999] QCA 474, cited
Neilson v Peters Ship Repair Pty Ltd [1983] 2 Qd R 419, considered
NF v State of Queensland [2005] QCA 110, cited
Wolverson v Todman [2016] 2 Qd R 106; [2015] QCA 74, considered

COUNSEL: P J Dunning QC, with R D Green, for the appellant
B F Charrington QC for the respondent

SOLICITORS: Meneghello Law Pty Ltd for the appellant
Corrs Chambers Westgarth Lawyers for the respondent

[1] **MORRISON JA:** I agree with Mullins JA.

[2] **MULLINS JA:** The learned primary judge dismissed Ms Magarey's application filed on 15 March 2021 pursuant to s 31 of the *Limitation of Actions Act 1974* (Qld) (the Act) for an extension of the limitation period until 30 September 2021 to pursue her claim for damages for personal injuries against the respondent: *Magarey v Sunshine Coast Hospital and Health Service (Nambour Hospital)* [2021] QSC 240 (the reasons). The only issue on which Ms Magarey failed before the primary judge was in the discharge of her onus under s 31(2) of the Act to show that the relevant material fact of a decisive character was not within her means of knowledge prior to the receipt by her on 30 September 2020 (the critical date) of the report dated 27 August 2020 of orthopaedic consultant Professor Higgs.

Chronology

[3] Prior to Ms Magarey's injury to her right ankle, she was suffering from medical conditions including ischaemic heart disease, Ehlers-Danlos syndrome (the syndrome), type 2 diabetes, cardiovascular disease and peripheral vascular disease. Ms Magarey had undergone a double osteotomy in her left leg at age 12 years and thereafter wore a full leg calliper on that leg which meant her right leg was her dominant leg.

[4] There is no issue as to the chronology of events set out by the primary judge primarily at [23]-[58] of the reasons. It can be summarised as follows.

[5] Ms Magarey injured her right ankle on 2 May 2013. She attended her general practitioner on 7 June 2013. She was referred to the Nambour Hospital (the hospital) where radiology was conducted on her ankle on 2 July 2013. Ms Magarey continued to see her general practitioner and also saw orthopaedic specialist Dr Dick at the hospital. On 29 August 2013 Ms Magarey was placed on the wait list at the hospital's orthopaedic department. On 17 April 2014 Ms Magarey was referred by her general practitioner to orthopaedic specialist Dr Ho. An MRI of her ankle on 28 April 2014 revealed a longitudinal tear of the posterior tibialis. Ms Magarey attended her general practitioner nine times between 29 April and 8 October 2014 complaining of ankle pain.

[6] On 28 September 2014 Dr Dick advised Ms Magarey to consider ankle fusion surgery. Dr Dick performed that surgery on 12 May 2015, but Ms Magarey continued to experience pain with no improvement. She attended on Dr Dick for seven reviews between 26 May 2015 and 12 March 2016. On 20 April 2016 Ms Magarey consulted Dr Dick about a revision procedure which he then performed on 9 August 2016. Following that procedure, Ms Magarey experienced severe pain.

[7] In November 2016 Ms Magarey considered the possibility of a claim in relation to her initial treatment and met with a solicitor from Carswell & Company whom she instructed to act on her behalf. By letter dated 23 November 2016, Carswell served a s 9A *Personal Injuries Proceedings Act 2002* (Qld) (PIPA) initial notice on the hospital that claimed damages for a longitudinal tear of the posterior tibialis tendon

as a result of the fusion of the right subtalar joint performed by Dr Dick on 12 May 2015 and 9 August 2016.

[8] On 29 November 2016 Dr Dick informed Ms Magarey that there was still non-fusion and advised that the pins would need to be removed. Ms Magarey obtained a referral to a different orthopaedic surgeon, Dr Noovao, who advised her on 20 December 2016 to undergo a hip graft.

[9] The hospital's solicitors sent Carswell a letter dated 25 January 2017 which noted that the s 9A initial notice had not been served within the time required by PIPA and required Ms Magarey to provide pursuant to s 9A(6) of PIPA a reasonable explanation for the delay in giving the initial notice. The substance of the hospital's solicitors' request must have been conveyed to Ms Magarey, as she made a statutory declaration before her solicitor on 2 February 2017 explaining that the s 9A notice "was not served within the time required by the *Personal Injuries Proceedings Act 2002* as I was not aware of my rights and further the hospital kept suggesting alternate referrals and treatment".

[10] The hospital's solicitors had provided a copy of the hospital's clinical record relating to the treatment of Ms Magarey to Carswell under cover of the letter dated 25 January 2017. Further disclosure of medical records as Ms Magarey had further treatment was made to Carswell on 9 and 21 February 2017.

[11] On 20 March 2017 Dr Noovao performed a revision right subtalar fusion and right iliac bone graft. On 4 April 2017 an Xray scan showed reduced bone density and soft tissue swelling.

[12] Further disclosure of the hospital's records of treatment of Ms Magarey was made on 7 and 14 June 2017 to Carswell.

[13] On 4 July 2017 Carswell advised Ms Magarey that her claim had no prospects of success and that it would cost her $5,000 to obtain an expert report to confirm matters. On 17 August 2017 Ms Magarey contacted CMC Lawyers as she had ascertained that firm would take on her case and meet the costs. CMC Lawyers requested her medical records on 28 August 2017 and were formally engaged to act on Ms Magarey's behalf on 6 September 2017 when they served a second s 9A PIPA initial notice on Dr Dick and the hospital.

[14] On 1 September 2017 Ms Magarey underwent an MRI which showed signs of infection of her bone. Between 7 September and 12 October 2017, she underwent four surgical procedures. On 12 October 2017 she was found to have Finegoldia Magna which is a rare infection of the bones and joints usually caused by foreign materials such as nails and screws used during orthopaedic surgery.

[15] On 31 October 2017, the respondent's solicitors advised a person at CMC Lawyers by telephone that the respondent had previously responded to Carswell pursuant to s 9A(8) of PIPA which had included providing relevant medical records. There was a diary note made at CMC Lawyers of the contact, but no action was taken by CMC Lawyers as a result of that contact.

[16] On 25 January 2018 Ms Magarey was advised by Dr Sowden that the infection had worsened and that amputation may be required.

[17] On 15 February 2018 CMC Lawyers briefed counsel to review Ms Magarey's medical records and to draft a letter of instruction to an orthopaedic surgeon to obtain an expert opinion on breach of duty and causation.

[18] On 19 February 2018, Ms Magarey was advised by another specialist that amputation was the only option. A below the knee amputation was performed on her on 23 August 2018.

[19] CMC Lawyers followed up counsel on 2 August 2018 for the requested letter of instruction. Counsel advised on 6 August 2018 that the brief did not contain all the relevant medical records. On 7 August 2018 CMC Lawyers emailed counsel Ms Magarey's clinical records that were held on their file.

[20] On 11 September 2018 the respondent informed CMC Lawyers that the s 9A PIPA notice of claim had been complied with and Ms Magarey's medical records had been provided to Carswell. CMC Lawyers requested those records from Carswell and followed that firm up until they provided Ms Magarey's file on 24 January 2019. Counsel was then briefed with those records. On 12 February 2019 counsel provided the settled letter of instruction which was sent to Professor Higgs. Professor Higgs sent an invoice in February 2019 for the review of documents and a preliminary opinion. Professor Higgs confirmed in April 2019 that he required prepayment of his invoice and that he would not be able to provide a preliminary opinion without full records relating to Ms Magarey from Dr Noovao and the hospital. Professor Higgs' invoice was paid on 21 May 2019.

[21] Between April and September 2019 CMC Lawyers communicated with various medical centres and practitioners and paid invoices to obtain records and reports, some of which were forwarded to Professor Higgs and counsel. In a telephone conference on 13 August 2019 with Professor Higgs and counsel, Professor Higgs advised of further medical records that he required which were obtained by CMC Lawyers and sent to Professor Higgs on 30 October 2019. Another conference between Professor Higgs and counsel on 6 December 2019 resulted in counsel advising CMC Lawyers that expert radiology opinion was required for Professor Higgs to finalise his opinion. On 19 March 2020 CMC Lawyers contacted radiologist Dr Baker to request an opinion.

[22] On 6 May 2020 the respondent's solicitors advised CMC Lawyers that any claim from the s 9A PIPA initial notice was statute barred. On 25 May 2020 CMC Lawyers advised the respondent's solicitors that Ms Magarey was proceeding with her claim and that the application for extension of the limitation period and supporting material would be served in due course. CMC Lawyers received the report and opinion of Dr Baker on 24 June 2020 which was forwarded to counsel and Professor Higgs. Counsel and Professor Higgs had telephone conferences on 7 July and 5 August 2020 before Professor Higgs finalised his opinion. Professor Higgs required prepayment of his invoice prior to the provision of his written opinion. That was paid by CMC Lawyers on 8 September 2020. (Consistent with the fact that Professor Higgs required payment before releasing his report, Ms Wills who is a solicitor employed by CMC Lawyers set out in her email to the respondent's solicitors on 21 January 2021 that CMC Lawyers received Professor Higgs' report on 23 September 2020.) On 29 September 2020 CMC Lawyers sent the reports of Dr Baker and Professor Higgs to the respondent's solicitors.

[23] On 30 September 2020 CMC Lawyers sent a s 9 PIPA notice of claim part 1 to Ms Magarey and arranged for her to be assessed by several specialists. Ms Magarey returned the signed notice of claim on 21 October 2020 and the notice was served on the respondent's solicitors and the Crown Solicitor on 27 October 2020. By letter dated 27 November 2020, CMC Lawyers proposed to the respondent's solicitors that they enter into an agreement pursuant to s 44 of PIPA to enable Ms Magarey to commence her proceeding for damages for personal injuries. The respondent's solicitors noted that the letter of instruction to Professor Higgs was dated 12 February 2019 after the limitation period had expired on 12 May 2018 and requested an explanation for Ms Magarey's delay in pursuing her claim. A lengthy email response was provided by CMC Lawyers on 21 January 2021 that generally dealt with the chronology that is set out above in relation to Ms Magarey's dealings with Carswell and the steps taken by CMC Lawyers after they were retained. On 28 January 2021, the respondent's solicitors advised CMC Lawyers that the respondent required Ms Magarey to bring an application to extend the limitation period before taking any further steps in the matter.

[24] The application before the primary judge was conducted on Ms Magarey's behalf on the basis that it was not until the effect of Professor Higgs' report was made known to her on 30 September 2020 that she appreciated she had a basis for a claim for negligence against the respondent in respect of the surgery performed on her ankle on 12 May 2015 by Dr Dick.

The evidence before the primary judge

[25] The primary affidavit that supported Ms Magarey's application was sworn by Ms Wills who recommenced working for CMC Lawyers in March 2019 when she reviewed the file and then had the day to day conduct of the matter under the supervision of one of the partners. Her affidavit was prepared from a review of Ms Magarey's file held by CMC Lawyers and recorded the chronology from the first instructions given by Ms Magarey to CMC Lawyers on 17 August 2017. Ms Wills was cross examined during the hearing of the application.

[26] The only communications from Ms Magarey disclosed in Ms Wills' affidavit are referred to in paragraphs 22, 24, 104 and 106. At paragraph 22, Ms Wills referred to advice from Ms Magarey in or about February 2018 that she would require a below the knee amputation on her right leg. At paragraph 24, Ms Wills referred to advice received from Ms Magarey around 2 August 2018 that she would require a below the right knee amputation. Ms Wills stated (at paragraph 24) that CMC Lawyers formed the view that Ms Magarey, as a consequence of being informed of the need for the amputation, "was not in a good way" and that it was therefore difficult for CMC Lawyers to determine the right course of action with respect to her claim. Ms Wills also stated in the same paragraph that there were no issues in terms of Ms Magarey's capacity to give instructions, but the pending surgery was "a more fundamental concern for her than giving instructions in relation to a possible claim". Ms Wills dealt with the dispatch by CMC Lawyers to Ms Magarey of the PIPA notice of claim part 1 in paragraph 104 and the receipt of the signed notice of claim part 1 from Ms Magarey in paragraph 106.

[27] Ms Magarey swore an affidavit on 19 May 2021 and another affidavit on 16 June 2021 in support of her application. Ms Magarey stated at paragraph 4 of the first affidavit that, prior to the subject claim, she had not been involved in a PIPA claim

and was neither a lawyer nor had received any legal training. The first affidavit described the medical conditions from which she suffered prior to injuring her right ankle, the treatment she received for that injury, and details of the first three surgical procedures she had on that ankle. The first affidavit set out her dealings with Carswell. She stated in paragraph 32 of the first affidavit:

> "I recall that I met with a solicitor from Carswell & Company soon after the telephone call [in early 2017] and I instructed them to act on my behalf. I was of the understanding that they would perform initial investigations into whether I had a potential claim. I had regular contact with the solicitor during the period I instructed Carswell & Company and I believed that they would contact me if they required any further information from me. I was under the impression that they were doing regular work on moving my claim forward."

[28] Ms Magarey's first affidavit then dealt with her instructions to CMC Lawyers. She stated at paragraph 45 of that affidavit:

> "It was my understanding that CMC Lawyers would contact me if they required any information from me, or for me to do anything in relation to my claim. I thought that they would obtain all of my medical records as they needed to."

[29] Ms Magarey did not elaborate on any factual matters on which she relied for her understanding that CMC Lawyers would be in contact with her when they required information or for her to do something in relation to her claim and did not record what contact she did have CMC Lawyers after retaining them. (Little, if any, weight can be given to Ms Magarey's statement of her understanding in paragraph 45 of her affidavit, when it was not underpinned by any advice provided to her by CMC Lawyers that resulted in that understanding.)

[30] Ms Magarey recorded at paragraph 46 of her first affidavit that in or around August 2017 during the time she was first contacting CMC Lawyers, she experienced a sudden increase in pain and swelling and was referred again to Dr Noovao. Ms Magarey's first affidavit (at paragraphs 48 to 52) dealt with the following treatment. She underwent further surgery on 7 September 2017 at Sunshine Coast University Hospital when her right ankle was opened and washed out and cleaned. On 6 October 2017, she underwent the fifth surgery when subtalar screws were removed and another washout was performed by Dr Noovao. On 10 and 12 October 2017 Ms Magarey had repeat washouts on her right ankle performed by Dr Noovao.

[31] Ms Magarey explained in paragraphs 57 and 58 of the first affidavit, that leading up and following the amputation, she had frequent appointments with her treating doctors (including Dr Noovao, Dr Gray, cardiologist Dr Cox and her new general practitioner) and consultations with her psychologist and a physiotherapist and during this time she "struggled to find the mental, physical and emotional energy to be completely involved in [her] claim". Ms Magarey also stated that she focussed on her mental health, as she was struggling to cope with the loss of her right leg which was her dominant leg and the ongoing associated issues. Without identifying when she was provided with this information, Ms Magarey stated in paragraph 59 of the first affidavit that she had been informed by CMC Lawyers that it took some time for them to obtain the file from Carswell. Again, without identifying the

circumstances and timing of what she was told, Ms Magarey stated in paragraph of 60 of her first affidavit that she had been told by CMC Lawyers they had to make numerous requests for her clinical notes from the hospital and Sunshine Coast University Private Hospital and other treating doctors, so they had received all her records before obtaining expert reports.

[32] Ms Magarey stated in paragraph 2 of her second affidavit that she gave instructions to Carswell for the purpose of discovering whether there was any basis for a claim in relation to the medical treatment she had received and she was advised there were no prospects of any claim. Because she could not afford to pay the amount of $5,000 requested by Carswell for an expert medical report, she engaged CMC Lawyers to undertake enquiries and further investigations to ascertain whether there was any basis for her to make a claim. Although Ms Magarey stated in paragraph 5 of her second affidavit that she "remained in contact with CMC Lawyers as best [she] was able" in the context of the health issues she was dealing with over the relevant time, she again did not detail the nature or timing of any contact she had with CMC Lawyers. She stated at paragraph 6 of her second affidavit in respect of CMC Lawyers (without any detail of the dates or manner of the contact and the advice given about the progress of the inquiries being made by CMC Lawyers):

> "I was advised by my solicitors on various dates as to the progress of the investigations into the treatment that I had received, and everything that had been required. I was aware that this was not a simple matter of investigation and numerous pieces of information needed to be obtained so that it could be done properly."

[33] The PIPA notice of claim part 1 prepared by CMC Lawyers recorded that the delay of six months between Ms Magarey being recommended to undergo the amputation and the surgery taking place on 23 August 2018 was due to unrelated cardiology complaints with Ms Magarey having a stent inserted in November 2017.

[34] During the hearing of the appeal, Ms Magarey's counsel accepted that the evidence of the extent to which Ms Magarey followed up CMC Lawyers was sparse and submitted that that was due to Ms Magarey not being cross-examined on those matters. That submission about lack of cross-examination must be rejected, as an applicant for the extension of the limitation period should adduce the evidence that is relevant for the purpose of showing the threshold conditions in s 31(2) of the Act are satisfied. It is not an excuse for Ms Magarey's not adducing more detailed evidence of her contact with CMC lawyers that she was not cross-examined.

Professor Higgs' report

[35] Professor Higgs' report was not based on an interview or examination of Ms Magarey but was prepared following a review of the documentary and radiographic evidence (including the expert report of Dr Baker) that was provided to Professor Higgs by CMC Lawyers for the purpose of the report.

[36] Prior to the surgery performed by Dr Dick, it was apparent from Professor Higgs' review of the x-rays of Ms Magarey's right ankle joint in 2013 and 2014 and the recorded opinions of other orthopaedic specialists who had reviewed Ms Magarey that she had only been considered as suffering from right ankle joint osteoarthritis and from symptoms that could be causally associated with the suffering of a soft

tissue sprain injury on 2 May 2013. Professor Higgs described that it was "out of the blue" that Dr Dick booked Ms Magarey for a category III right sub-talar joint fusion. Professor Higgs was unable to identify any clinical indication for the undertaking of an isolated fusion of the right talo-calcaneal joint. From the review of a CT scan of the right ankle joint performed on or about 8 December 2015 that showed that a non-union had occurred at the site of the talo-calcaneal (arthrodesis) surgery, Professor Higgs expressed the opinion that the procedure performed by Dr Dick was also performed inappropriately.

[37] Professor Higgs concluded that Ms Magarey's lower extremity joint dysfunction was associated with her suffering the syndrome with pathology at the posterior tibialis tendon and with early osteoarthritis of the ankle joint and that "a fusion of the right talo-calcaneal joint was unwise, not indicated, and unlikely to have had any beneficial effect on [Ms Magarey's] right ankle joint region symptoms".

[38] Professor Higgs also dealt in the report with alternative actions that could have been taken in lieu of the revision of the right talo-calcaneal fusion procedure performed by Dr Dick on 9 August 2016 in light of what was shown on the x-rays that had been taken on 13 April 2016.

The reasons

[39] From the chronology, the primary judge concluded (at [62] of the reasons) that there were lengthy delays in the conduct of the file by CMC Lawyers, citing that medical records were requested after the engagement of CMC Lawyers in 2017, some of which were not followed up until after March 2019 and some not until April 2020. The primary judge also noted (at [62]) that requests were not made for the relevant records from Carswell until September 2018 and the requests were not followed up until January 2019. The primary judge found (at [64] of the reasons) (and there is no challenge by Ms Magarey to these findings):

> "While Professor Higgs required records to be provided to him, there is no reason that they could not have been obtained in 2017, other than the fact that there was a failure to follow up on requests made and to obtain the relevant file from Carswell & Co who had been given the respondents records. Similarly, while Professor Higgs required a report to be provided by a radiologist, the records provided to Dr Baker, the radiologist who provided a report requested by Professor Higgs, were historical records."

[40] Key findings were made by the primary judge (at [68] of the reasons) that there was no reasonable explanation as to why CMC Lawyers could not have obtained historical medical records and briefed Professor Higgs well in advance of when he was briefed and Ms Magarey's solicitors "have not identified what engagement was required with the applicant that can explain the further delay, given that Professor Higgs and Dr Baker's reports were largely based on historical medical records and not an examination of the applicant".

[41] The primary judge observed (at [70] of the reasons) that both affidavits of Ms Magarey "suffered from being cast with a high degree of generality".

[42] In favour of Ms Magarey, the primary judge accepted (at [108] of the reasons) that Professor Higgs' report, in the circumstances set out at [100]-[107] of the reasons, could be regarded as a material fact of a decisive character.

[43] The primary judge then considered whether the material fact was not within the means of knowledge of Ms Magarey earlier than the critical date of 30 September 2020. The primary judge observed (at [109] of the reasons) that it was necessary to consider whether Ms Magarey should reasonably have taken steps at an earlier time to obtain Professor Higgs' report. The primary judge quoted (at [110]) from [29] of the judgment of Keane JA (with whom Williams JA, with additional reasons, and Holmes J, as her Honour then was, agreed) in *NF v State of Queensland* [2005] QCA 110 that dealt with s 30(1)(c) of the Act and, in particular, that:

> "Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant. It seems to me that, if that person has taken all the reasonable steps that she is able to take to find out the fact, and has not found it out, that fact is not within her means of knowledge for the purpose of s 30(1)(c) of the Act."

[44] The primary judge considered (at [113] of the reasons) that had CMC Lawyers acted expeditiously in obtaining the medical records after being engaged, or at least when they discovered the respondent had provided records to Carswell (which was 11 September 2018), such report could have been obtained by August 2019.

[45] In view of the instructions that Ms Magarey gave to CMC Lawyers on 6 September 2017 to carry out investigations to see whether she had a claim, the primary judge concluded (at [122] of the reasons) that Ms Magarey was by then aware that a medical opinion was needed to establish whether she had a claim and had engaged those lawyers, because they were prepared to meet the costs of obtaining a report.

[46] The primary judge observed (at [126] of the reasons) on what amounts to a reasonable step for the purpose of s 30(1)(c)(ii) of the Act:

> "While engaging solicitors to provide advice as to a potential claim is generally a reasonable step, that does not necessarily satisfy the taking of reasonable steps over time if the applicant does not do their best to ensure that the solicitors did not languish in the prosecution of the action."

[47] The primary judge then referred (at [127]-[128] of the reasons) to the respective statements made by Holmes and Gotterson JJA in *Wolverson v Todman* [2016] 2 Qd R 106 at [2] and [63].

[48] The primary judge found (at [132] of the reasons) that CMC Lawyers "did languish in the prosecution of the action and the conduct of the matter was affected by periods of significant delays and periods of inactivity". (There is no challenge to the finding of fact that there was delay on the part of CMC Lawyers.) The primary judge identified (at [134]) that the question was whether the failure of CMC Lawyers to take reasonable steps to obtain an expert opinion on liability extended to Ms Magarey. The primary judge then stated:

> "In that regard, there is no real evidence, other than general assertions of maintaining contact, that Ms Magarey took any steps to ensure that the prosecution of the claim by her solicitors did not languish."

[49] The primary judge made some favourable findings relating to Ms Magarey. These included the findings (at [135] of the reasons) that Ms Magarey understood that CMC Lawyers were carrying out, and bearing the cost of, the relevant investigations to obtain her medical records and an expert report and at the same time she was undergoing numerous surgical operations and ultimately had to deal in 2018 with the requirement for the amputation of her leg and the operation for that purpose. These also included the finding (at [136]) that there was no evidence that anything was requested of Ms Magarey by CMC Lawyers to which she had failed to attend or that she had been aware of any statutory time frames under PIPA or the Act which had to be met, if she wished to make a claim.

[50] The primary judge noted (at [135] of the reasons) the advice to Ms Magarey that her leg required amputation and the operation itself would have been "a significant source of trauma", but "there is nothing to suggest she lacked capacity to engage with her solicitors about her claim".

[51] The primary judge also noted (at [136] of the reasons) favourably to Ms Magarey that, while it appeared that Ms Magarey was told by her solicitors they were having to obtain a lot of records, there was nothing to suggest that she was aware of what was required or the fact that the records had not been obtained with any expedition or that a report could have been prepared without awaiting the outcome of the amputation. In contrast, the primary judge noted (at [136]) that Ms Magarey had instructed that a legal process be put in train by the issuing of the s 9A PIPA initial notices by both firms of solicitors and had sworn a statutory declaration to explain the delay in issuing the initial notice by Carswell. The primary judge therefore concluded (at [136]) with a finding that is directed at Ms Magarey's own inaction in the context of the lengthy delays on the part of CMC Lawyers:

> "In those circumstances, her failure to take any action to follow up CMC Lawyers and determine the progress of her matter and the source of delays was unreasonable inaction even taking account the trauma suffered."

[52] Against Ms Magarey, the primary judge found (at [137] of the reasons) that the delay of three years for CMC Lawyers to obtain the expert report required Ms Magarey "to press them to obtain the report they said they would obtain or to have sought other legal advice if they then did not take action in a timely way". The primary judge noted (at [137]) that "other than the length of time, there was nothing to suggest that there was anything amiss". The primary judge accepted (at [138] of the reasons) that, after being advised by Carswell that her claim had no prospects of success, it was reasonable for her to form the view that she needed a favourable expert report in order to determine whether she had a claim that was worthwhile pursuing. The primary judge also accepted (at [139]) that Ms Magarey could not fund an expert report herself and was reliant on CMC Lawyers and therefore reasonably constrained as to what she could require of the solicitors to progress the matters "and may have had some degree of hesitancy in pressing for the report". That did not preclude the primary judge from emphasising (at [139]) that, even

accepting Ms Magarey may not have been advised of time limitations in bringing a personal injuries action, "the period over which it took to obtain the report required her to follow up [the] solicitors".

[53] On the basis of applying *Wolverson* at [2] and [63] that it was a question of fact whether in a particular case for an applicant to leave everything to a solicitor amounts to taking reasonable steps in pursuing a claim, the primary judge found (at [139]-[140] of the reasons) there was "a paucity of evidence suggesting any regular follow up to ensure the solicitors were taking the relevant steps on her behalf to ascertain the material fact" in circumstances where it was taking "an extraordinary period of time" to obtain the report on liability, a significant part of the delay could not be explained by what Ms Magarey had to endure in relation to treatment and being distracted by it, and "had reasonable steps been taken, the material fact was within her means of knowledge well prior to the critical date".

[54] Another relevant observation made by the primary judge (at [139] of the reasons) which was not challenged on this appeal was that the evidence did not "rise to the level that [Ms Magarey] was suffering such depression and anxiety that she could not provide instructions or take any action to protect her interests".

Grounds of appeal

[55] The grounds of appeal assert that error was made by the primary judge in making the following findings taken from [135]-[139] of the reasons where the "Material Fact" was defined as the nexus between the impugned treatment and the subsequent infection first identified in Professor Higgs' report which is defined in the grounds as "the Report":

> "2.3 there was a lack of real evidence to show that the Appellant followed up with CMC Lawyers as to the progress of the matter and failed to make an enquiry regarding the progress of that matter in an appropriate fashion;
>
> 2.4 had reasonable steps been taken, the Material Fact was within her means of knowledge well prior to the critical date;
>
> 2.5 the applicant failed to discharge the onus to establish that the Material Fact was not within her means of knowledge prior to the actual receipt of the Report in about September 2020;"

[56] The asserted error based on these grounds of appeal was that the primary judge had failed to consider whether the delay was unreasonable in the context of the pursuit of Professor Higgs' report in the circumstances that applied to Ms Magarey at the relevant time of her deteriorating health due to the negligence of the treatment that was the subject of the investigation by CMC Lawyers. Mr Dunning of Queen's Counsel who appeared with Mr Green of Counsel for Ms Magarey expressed it in terms that the primary judge focussed on the length of the delay without calibrating whether the delay was excessive viewed from Ms Magarey's perspective. It was submitted that the context explained why a longer period would elapse before a reasonable person in Ms Magarey's position ought to have developed the view that her solicitors were not properly pursuing the case.

[57] The second error that it is asserted was made by the primary judge was outlined in paragraph 2.6 of the grounds of appeal:

> "The learned primary judge erred in failing to hold that the Material Fact was not within the Appellant's means of knowledge prior to the receipt of the Report by failing to have regard to the obvious complexity and difficulty of ascertainment of the Material Fact, which to the appellant would not be expected to cause her to consider that the prosecution of her claim by her solicitors was languishing, and further, in combination with certain of the matters found in the appellant's favour at [134]-[139]."

[58] In other words, it was asserted on behalf of Ms Magarey, that where the cause of Ms Magarey's condition had remained elusive to a variety of medical professionals over some years, the amount of time that had elapsed before Professor Higgs' report was obtained was not sufficient to alert Ms Magarey to the dilatoriness of her solicitor.

The relevant law

[59] Because the primary judge had used (at [132] and [134] of the reasons) the language of McPherson J in *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419, 431 to describe the prosecution of the action by the solicitors as "languishing", counsel on behalf of Ms Magarey endeavoured to show that the statement of McPherson J was not part of the decision in *Neilson*. As much of the appeal was taken up in analysing the language of the judgments comprising the majority in *Neilson*, it is necessary to consider those judgments in the context of the undisputed facts in *Neilson*.

[60] The plaintiff in *Neilson* who was injured in the course of his employment when he fell from a vessel in dry dock on 5 April 1977 required an extension of the limitation period to pursue his claim for damages for personal injury against the third defendant which had chartered the vessel from the owner (which was the second defendant) at the time of the injury. The plaintiff had consulted solicitors who instituted a proceeding by filing a writ against the plaintiff's employer (which was the first defendant) and the second defendant two days prior to the expiration of the limitation period. Both the plaintiff and his solicitors thought he was working on a named vessel owned by the second defendant. A statement of claim delivered in July 1980 named that particular vessel. The second defendant's solicitors then immediately alerted the plaintiff's solicitors to the name of the vessel owned by the second defendant that was in port when the plaintiff was injured and advised it was on charter to the third defendant. The plaintiff himself did not know of the charter to the third defendant until he was advised by his lawyers on 11 December 1980. The plaintiff's solicitors had made numerous attempts to contact the plaintiff to advise him and take instructions about the charter after receiving advice from the second defendant's solicitors, but the plaintiff had been away from home.

[61] On a summons filed on 26 August 1981, the plaintiff was given leave on 25 November 1981 to join the third defendant to the action, leaving it open to the third defendant to raise the matter of the limitation period by way of defence. On 9 December 1981, the writ was amended by adding the third defendant. An amended statement of claim was delivered on 28 January 1982. The third defendant

delivered its defence which relied on the limitation period. The plaintiff then obtained an order pursuant to s 31(2) of the Act that extended the limitation period, so that it expired only at the end of one year after 11 December 1980. *Neilson* concerned the third defendant's appeal against that order.

[62] It was common ground on the appeal in *Neilson* that the material fact of a decisive character was the fact that the third defendant was the charterer of the ship. The third defendant argued on the appeal that the plaintiff's solicitors knew of the charter and the identity of the third defendant as the charterer in July 1980 and that knowledge of that fact was therefore to be imputed to the plaintiff himself. McPherson and Thomas JJ (with Macrossan J dissenting) dismissed the appeal. The first question on the appeal concerned the construction of s 30(d)(i) of the Act (which is now found in s 30(1)(c) of the Act in substantially the same terms). Section 30(d) then provided:

> "… a fact is not within the means of knowledge of a person at a particular time if but only if:-
>
> (i) he does not at that time know the fact; and
>
> (ii) so far as the fact is capable of being ascertained by him, he has before that time taken all reasonable steps to ascertain the fact."

[63] McPherson J construed s 30(d) of the Act as distinguishing between a fact that is known and a fact that is capable of being ascertained by taking all relevant steps and that there was no justification for reading additional words "or his agent" into s 30(d)(i). For that reason and for the reasons that appeared in Thomas J's judgment on the first question, McPherson J concluded (at 431) that s 30(d)(i) should be read as it stood.

[64] In respect of the second question of whether the facts concerning the identity of the third defendant were, within the meaning of s 30(d)(ii), capable of being ascertained by the plaintiff by taking all reasonable steps to ascertain those facts before 11 December 1980, McPherson J also agreed with the reasons and reasoning of Thomas J and observed (at 431-432):

> "Placing the matter in the hands of apparently competent solicitors with adequate instructions including information relevant to the cause of action would ordinarily amount to taking all reasonable steps to ascertain the relevant facts, provided that the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action. In the present case the plaintiff had no reason to suspect that any further facts were required in order to enable his solicitors to pursue his claim. He was not aware of the demise charter or of the identity of the charterer. In these circumstances I do not think that he can reasonably have been expected to make inquiries or to take other steps to ascertain facts the existence and significance of which he was ignorant. Nor do I consider it in the circumstances unreasonable for him to have absented himself from his residence for a period of some four and a half months at a time when, having given his instructions, he had no reason to suspect that during that period his solicitors might wish to inform him of facts of that character."

[65] On the first question of construction, Thomas J concluded (at 439) that there was no warrant for transposing the law of imputed knowledge in construing s 30(d)(i) of the Act. The focus of the submissions made by the third defendant on the second question was the plaintiff's failure to keep in touch with his solicitors between 31 July and 11 December 1980. Thomas J stated (at 439-440):

> "Now when an applicant has a solicitor acting for him, and the solicitor comes into possession of the material fact, a nice point will rise as to when that fact comes within the means of knowledge of the applicant. This will always involve a question of fact, to be answered according to notions of what are in the circumstances 'reasonable steps to ascertain the fact'… The appellant placed reliance upon the following statement of Lucas J. in a passage cited with approval in *Castlemaine Perkins Limited v. McPhee* (supra):
>
> > 'The question is whether a man of that background can be expected to do anything more than consult a solicitor, keep in touch with him and act according to the advice which the solicitor gives him from time to time…'
>
> It may be observed that His Honour was there stating maximum expectations against a particular background. I do not think that there is any general expectation that every applicant must at all times remain in diligent contact with his solicitor, especially when he has no reason to expect an emergency. On the other hand, a client who renders himself incommunicado for lengthy periods will find it difficult to establish that he has taken all reasonable steps under s. 30(d)(ii)… It would be unwise to attempt to lay down any particular expectations as to the regularity of contact that may be expected between solicitor and client. But it may be said of s. 30(d)(ii) that not many "steps to ascertain the fact" can reasonably be expected of a client when he is in ignorance of the need to ascertain it."

[66] The key to Thomas J's decision on the second question based on the facts of the particular case is set out at 440. Thomas J observed that during the period of four and a half months between the time when the plaintiff's solicitors ascertained the material fact and their communication of that fact to the plaintiff, the plaintiff had no particular reason to suspect that anything was amiss. From the plaintiff's position, he had provided all relevant information to his solicitors and they had delivered the statement of claim. Thomas J then concluded:

> "I therefore fail to see how his absence for part of the next four and a half months should be taken as a failure to take all reasonable steps to ascertain a further fact the need to ascertain which was unknown to him."

[67] Counsel for Ms Magarey sought to confine the statement made by McPherson J in *Neilson* at 431 on the second question as not being part of the decision, because McPherson J had otherwise agreed with the reasons and reasoning of Thomas J and the statement of McPherson J was not consistent with the statement of Thomas J at 440. The subtle distinction to which attention was drawn on this appeal between the statement made in general terms by McPherson J at 431 that a plaintiff could show that reasonable steps to ascertain a material fact were taken by providing adequate

instructions to competent solicitors, subject to the proviso that "the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action", and the statement by Thomas J at 440 that there was not "any general expectation that every applicant must at all times remain in diligent contact with his solicitor, especially when he has no reason to expect an emergency" is more apparent than real. Both judges were making general statements by way of *obiter dicta* to give helpful future guidance that were not strictly reflective of the facts, or essential to the decision, of *Neilson*.

[68] The decision in *Neilson* was confined to the circumstances where the action had been commenced to the knowledge of the plaintiff in July 1980, when he was ignorant of the complication of the charter to the third defendant, so the fact that he was absent from his home for a period of four and a half months which prevented the solicitors contacting him for further instructions did not preclude his showing that he had taken all reasonable steps to ascertain the material fact (about the charter) by instructing his solicitors to commence his personal injuries action when he did. It is also relevant to note that Thomas J's statements were made in the context where the plaintiff knew that his action had been commenced before he went away. The statement by Thomas J about no general expectation that the plaintiff must remain in diligent contact was also in the context of an absence by the plaintiff of only four and a half months.

[69] Thomas JA (with whose reasons Pincus JA relevantly agreed) in *Dick v University of Queensland* [2000] 2 Qd R 476 at [34] confirmed (as stated in *Neilson*) that whether a fact is not within the means of knowledge of a person at a particular time is a question of fact.

[70] In *Wolverson*, the appellant had been unsuccessful on two applications to extend the limitation period to enable her to sue her treating neurologist and her radiologists. She had issued two sets of proceedings, first against the neurologist on 27 May 2010 and then later against the radiologists on 31 July 2013. The essence of the appellant's complaint against the neurologist was that he misdiagnosed her condition as, and treated her for, multiple sclerosis and had failed to diagnose properly her condition as one caused by a Chiari Type 1 malformation. The claim against the radiologists was based on the alleged failure to diagnose Chiari Type 1 malformation which was depicted in MRI scans of her. The appellant had engaged a solicitor to investigate the possibility of making a claim for damages against the neurologist in May 2010. That solicitor had obtained a grant of legal aid in mid-June 2010 to fund an independent radiologist's report. The solicitor had all the documents that were required for briefing a radiologist by the end of October 2010 with the exception of the original MRI scans that the solicitor had provided to the Health Quality and Complaints Commission on 26 July 2010 in connection with a written complaint that the appellant had made to the HQCC in May 2010 about the neurologist. The HQCC undertook to copy the scans and return them to the appellant, but they were neither returned nor pursued by the appellant's solicitor. They were eventually returned on 31 May 2012 when the expert was briefed to prepare his report. The opinion of the expert was not sought earlier, because the solicitor and the appellant mutually decided not to progress the personal injuries proceedings while the HQCC process was ongoing. The judge at first instance had found that the expert opinions relevant to the claim against the radiologists could have been obtained in early 2011 had the appellant taken reasonable steps to ensure her action against the radiologists progressed in a timely way.

[71] On the issue which arose on the application concerning the radiologists of whether the appellant had taken all reasonable steps within the meaning of s 30(1)(c) of the Act in the period before 31 July 2012 to obtain the expert opinion, Holmes JA agreed with the reasons of Gotterson JA (who concluded (at [74]-[75]) that it was not reasonable for the appellant to defer obtaining the expert radiologist's opinion) and added some additional observations, including at [2]:

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

[72] Gotterson JA in *Wolverson* at [63] applied what was described as two principles articulated by McPherson J in *Neilson*, the first being the construction of s 30(1)(c)(i) of the Act and the second characterised as "practical guidance" which was the statement quoted above from McPherson J's judgment at 431 to the effect that the plaintiff's placing the matter in the hands of apparently competent solicitors with adequate instructions ordinarily would amount to taking all reasonable steps to ascertain the relevant facts with the proviso that "the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action". It was found (at [73]) that the appellant knew it was important that an independent radiologist be engaged to express an opinion about what was observable on the MRI scans and that she knew that legal aid for such a report had been approved and participated in the decision to defer obtaining the radiological opinion. The reason for the deferral was not satisfactory, as the proceeding in the HQCC only concerned the neurologist and not the radiologists whose professional work was to be the subject of the opinion. The appellant's appeal against the refusal to extend the limitation period for her proceeding against the radiologists was unsuccessful.

[73] The decisions in *Neilson* and *Wolverson* are examples of findings of fact made in the circumstances of those cases in determining whether a fact was within the means of knowledge of the relevant party at a particular point in time.

[74] Importantly, as set out in *NF* at [29] in applying s 30(1)(c) of the Act, the focus is on the particular person who has suffered the personal injuries and whether that person has taken all reasonable steps to find out a fact must be answered by

reference to what can reasonably be expected from the actual person in the person's circumstances.

Did the primary judge err in finding that Ms Magarey failed to take all reasonable steps to ascertain the material fact?

[75] The arguments advanced on behalf of Ms Magarey are directed at challenging the finding of fact made by the primary judge on this issue that the expert's opinion was procurable earlier than 30 September 2020 and also by submitting that there was an incorrect application by the primary judge of *Neilson* and no real application of s 30(1)(c)(ii) from the viewpoint of Ms Magarey.

[76] As the above analysis of both *Neilson* and *Wolverson* shows, there are many factors that may be relevant to determining whether an applicant for an extension of the limitation period can satisfy the onus under s 30(1)(c)(ii) of the Act. These factors may include the stage of investigation of the proposed claim for personal injuries, the stage of any pre-proceeding steps, whether the proceeding has commenced, the steps taken in the proceeding, the nature and frequency of the contact between the applicant and the solicitors as to the progress of the claim or the proceeding, and the effect on the applicant of any advice given by the solicitors as to the requirements to advance, and about the progress of, the claim or the proceeding. The general statement set out by the primary judge (at [126] of the reasons) as to what amounts to a reasonable step for the purpose of s 30(1)(c)(ii) of the Act which is based on *dicta* in *Neilson* and the decision in *Wolverson* is unremarkable. The statement was made in the context of the lengthy delay that occurred in obtaining Professor Higgs' report and is not appropriately characterised as an incorrect application of *Neilson*. It is obvious that a long delay in pursuing the claim or the proceeding may make an applicant's own conduct in following up the solicitors more relevant.

[77] It is not a legal principle that an applicant for the extension of a limitation period must have followed up the solicitor's handling the applicant's claim (cf the facts in *Neilson*), but it may be a relevant factor taken into account with other relevant factors, if there have been lengthy delays in the pursuit of the claim or the proceeding to an applicant's knowledge.

[78] It is apparent from the primary judge's analysis of the facts (at [134]-[140] and particularly at [135]-[137] and [139] of the reasons) that the primary judge was mindful to apply *NF* at [29] and has considered whether Ms Magarey had taken all reasonable steps to find out the material fact by reference to what could be expected from her in her circumstances.

[79] Ms Magarey was dealing with the hospital, orthopaedic specialists and her general practitioners over the injury to her right ankle from mid-2013 and underwent seven surgical treatments through to the amputation of her right leg some five years later. It was obvious to Ms Magarey that she may have a cause of action against Dr Dick and/or the hospital as she commenced investigations for legal redress from late 2016. By the time she consulted CMC Lawyers in mid-August 2017, she knew that she had to obtain an orthopaedic specialist's report to pursue any legal claim against the hospital and/or Dr Dick. As the primary judge found (at [138] of the reasons), it was reasonable for Ms Magarey to obtain such a report. Ms Magarey must have understood that the report was being prepared by reference to medical records and not by an interview or examination of her by Professor Higgs. Even allowing for

the trauma of the amputation in August 2018, her subsequent recovery with the complication of her other health issues, and that she depended on CMC Lawyers to pay for the expert report, the length of time of three years between engaging CMC Lawyers and obtaining Professor Higgs' report was excessive in the circumstances in which she had retained CMC Lawyers.

[80] It was therefore critical to Ms Magarey's success on the extension application for her to provide detail of the contact she had with CMC Lawyers, any follow up inquiries by her, and any advice CMC Lawyers provided to her from time to time that explained why it was taking so long to obtain a report from the expert. The state of the evidence of Ms Wills and Ms Magarey before the primary judge supports the conclusion of the primary judge (at [140] of the reasons) that there was a lack of any real evidence to show that Ms Magarey had followed up with CMC Lawyers as to the progress of the matter. The submission that the primary judge focussed on the delay without calibrating Ms Magarey's view of the delay has no force, when Ms Magarey failed to adduce relevant evidence that provided a more detailed explanation of her perspective of the delay. As Ms Magarey bore the onus to show that s 30(1)(c)(ii) was satisfied, there was therefore no error by the primary judge in finding that Ms Magarey had failed to take all reasonable steps to obtain Professor Higgs' report earlier than 30 September 2020.

[81] Ms Magarey does not succeed on her appeal.

Orders

[82] There is no reason why costs should not follow the event. The following orders should be made:

1. Appeal dismissed.

2. The appellant must pay the respondent's costs of the appeal.

[83] **BODDICE J:** I agree with Mullins JA.