DISTRICT COURT OF QUEENSLAND

CITATION:	*Preddy v Bi-Lo Pty Ltd* [2014] QDC 102
PARTIES:	**Beverley Carol Preddy** **(Applicant)** **and** **Bi-Lo Pty Ltd** **(Respondent)**
FILE NO:	No 176 of 2013
DIVISION:	Civil
PROCEEDING:	Originating Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	08 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2013 (written submissions 13 and 27 September 2013 and 03 October 2013).
JUDGE:	Durward SC DCJ
ORDERS:	1. **Application granted.** **2. The time for commencement of proceedings claiming damages for personal injury by the applicant is extended to 05 July 2013.** **3. I will hear the parties as to costs by written submissions.**
CATCHWORDS:	EMPLOYMENT LAW – injury to employee – applicant injured in workplace incident – pulling trolley containing trays of meat product – through doorway – trolley tipped, struck her left shoulder and pinned her against stationary trolleys – soft tissue injury LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – applicant did not consult lawyer within limitation period – whether she had knowledge of material facts of incident, injury and consequences within limitation period – applicant subsequently involved in second workplace incident – alleged aggravation of injury caused in first incident – whether reasonable steps taken to ascertain material facts EMPLOYMENT LAW – injury to employee – previously

undisclosed other injury – back injury caused by a fall not related to workplace – whether non-disclosure prejudicial to respondent

LEGISLATION: *Limitation of Actions Act 1974* sections 30 (1) and 31 (2).

CASES: *Moriarty v Sunbeam Corporation Ltd* [1998] 2 QdR 325; *Eldridge v Coles Myer Group Limited* [2012] QSC 39; *Queensland v Stephenson* [2006] 227 ALR 17; *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 QdR 306; *Thompson v EP World Australia* [2011] QSC 406; *N F v Queensland* [2005] QCA 110; *Healy v Femdale* [1993] QCA 210; *Stanley-Clarke v Boyle* [2013] QCA 75; *Wood v Glaxo Australia Pty Ltd* [1994] 2 QdR 431; *Fuller v Bunnings Group Limited* [2007] QCA 216

COUNSEL: Ms B Keegan for the Applicant
MJ Liddy for the Respondent

SOLICITORS: Maurice Blackburn Lawyers for the Applicant
Minter Ellison Solicitors for the Respondent

[1] The applicant Beverley Carol Preddy was employed by the respondent at its supermarket store in Townsville as a meat packer. She suffered injury in two separate workplace incidents in 2007 and 2011.

The workplace incidents

[2] The applicant was injured in a workplace incident on 06 May 2011 ("the second incident") when unloading 10 to 15 boxes of chickens, each weighing between two and ten kilograms, from a pallet onto a flat top trolley so that they could then be placed into a display case. The job required, firstly lifting the product from a low to a high position; and secondly lifting the product from a high to a low position. The applicant's left shoulder began to ache and became worse during the day.

[3] The second incident has been characterised as having caused an 'aggravation' of a previous injury suffered in a workplace incident on 01 June 2007 ("the first incident"), when the applicant pulled a trolley of meat products, situated on 13 levels of trays - each weighing about 14 to 20 kilograms and containing 4 to 5, 3.5 to 4 kilogram pork leg roasts - through a doorway. The applicant was pulling at one side of the trolley when the wheels hit a brass floor strip in the doorway opening. The trolley tipped over and pinned her against other stationary trolleys. They had to be lifted off to free her. The trolley had struck her left shoulder and she suffered a soft tissue injury.

The application

[4] The applicant filed an application for the period of limitation for the commencement of the proceeding to be extended pursuant to s.31 of the *Limitation of Actions Act 1974* ("the Act"), with respect to the first incident.

Chronology: 2007 to 2011

01 June 2007	**First incident.** Reported and an application for worker's compensation was made.
02 June 2007	Attendance on the respondent's general practitioner. Applicant placed on light duties.
During 2008	Claim closed but later reopened when the applicant complained of increased left shoulder pain. Treatment with physiotherapy and Panadeine Forte followed.
18 November 2008	Assessment by Dr Halliday, orthopaedic physician.
28 April 2009	Assessment by Ms Nicholls, occupational therapist. Applicant was able to resume meat packer duties.
19 June 2009	Discharge from physiotherapy by Ms Lanksy who noted "pain persisting but slowing improving … I do not feel any further intervention would be of benefit …"
During 2009	Applicant continued a home exercise programme.
20 July 2009	Review by Dr Low: he expressed the view that there had been maximum medical improvement, no permanent impairment, recommended self management and a return to full work duties.
10 August 2009	Dr Gibberd, orthopaedic physician, diagnosed left shoulder joint tendinopathy that was not attributable to the first incident, which may have exacerbated a constitutional condition but not caused it. He said that the condition was stable and assessed impairment at 0 per cent. He proposed treatment with analgesic and a very rapid "return to work" programme.
August 2009	Assessment by North Queensland Therapy Solutions.
21 August 2009	Worker's Compensation claim ceased. Notice of Assessment at nil permanent impairment issued. The applicant returned to normal meat packing duties.
06 May 2011	**Second incident.** Further WorkCover application lodged. Attendance on the respondent's general practitioner and referred to physiotherapy.
23 June 2011	Dr Ness, orthopaedic surgeon, diagnosed an exacerbation of a pre-existing rotator cuff tendinopathy condition in the left shoulder which was symptomatic for four years prior to 06 May 2011. He said that the work related exacerbation had ceased and

	that further exacerbations or possible aggravations of that underlying condition would likely occur if there was a return to meat packer duties.
Post-June 2011	Applicant returned to work in the general merchandise department.
24 August 2011	Applicant attended upon lawyers.
29 November 2011	Lawyers recommended commencement of a common law claim.
13 December 2012	Notice of Assessment made.
14 December 2012	Lawyers were instructed to commence a common law claim for damages.
23 April 2013	Notice of claim served on the respondent.
30 April 2013	The respondent accepted the Notice of Claim, save for the issue of the limitation period.

The Statutory Provisions

[5] The relevant statutory provisions are sections 30(1) (a) (iii) and (iv) and (b) (i) and (ii); and 31(2) of the Act.

> *"**30 Interpretation***
>
> *(1) For the purposes of this section and section 31, 32, 33 and 34 –*
>
> *(a) The material facts relating to a right of action include the following -*
>
> **……**
>
> *(iii) The fact that the negligence, trespass, nuisance or breach of duty causes personal injuries;*
>
> *(iv) The nature and extent of the personal injuries so caused.*
>
> *……..*
>
> *(b) Material facts relating to a right of action are of a decisive character if, but only if, a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing –*

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

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

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

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

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

(2) In this section -

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

"31 Ordinary Actions

……..

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

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

> *(b) That there was evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;*
>
> *The court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly."*

Onus of proof

[6] It is for the applicant to establish that the material fact would not have been discoverable prior to the critical date: *Stanley-Clarke v Boyle* [2013] QCA 75.

[7] The extent to which an applicant must 'show a case' in a hearing of this nature is discussed in *Wood v Glaxo Australia Pty Ltd* [1994] 2 QdR 431. On a proceeding such as this the court is not required to conclude upon an applicant's prospects of success at trial. Macrossan CJ, at p 434 wrote:

> *"... the extent to which an applicant must show a case on the hearing of the application to extend time or frequently depend on the impression on the judge's mind of the material which the applicant presents or the existence of which he demonstrates or points to. It is nevertheless recognised as wrong to place potential plaintiffs in anything like a situation where they must on the probabilities show that it is likely they will succeed in their actions."*

The Applicant's contentions

[8] The applicant contended that:

(a) the second incident was the catalyst for the report of Dr Ness and that report enlivened s 31(2) of the Act;

(b) she had continued to work as a meat packer, albeit having some pain and discomfort, after the first incident when the medical opinion was that the injury could be managed conservatively and that she was fit to return to work on normal duties;

(c) the report of Dr Ness opined that she was likely to suffer "further exacerbations or possible aggravation" of her underlying rotator cuff tendinopathy condition if she continued to work as a meat packer;

(d) the respondent thence moved her to another work role;

(e) the report of Dr Ness had established for the first time that the first incident was caused by the negligence or breach of duty of the respondent, in terms of s 30(1)(a) of the Act; and

(f) acting upon the report of Dr Ness, she had taken appropriate action and that the requirements of s 31(1)(b) were thereby met.

The respondent's contentions

[9] The respondent contended that:

(a) the applicant did not act reasonably by not seeing a solicitor within the limitation period, having knowledge of the fact of the first incident and that the injury had very serious consequences: that is, she knew her injury adversely affected her employability;

(b) subsequent "material" facts merely confirmed what the applicant already knew but did not pursue with reasonable enquiry and were not of a "decisive character";

(c) on the applicant's pleadings the claim is predicated on a soft tissue injury pursuant to section 30(1)(2)(iv) of the Act only;

(d) the legal advice she received implied that the nature of the first incident and the injurious consequences were – but for the limitation period – sufficient to commence a claim; and

(e) her condition is little changed from the relevant point in time in late 2008 when all material facts of a decisive character within her means of knowledge.

Potential prejudice to respondent

[10] The respondent asserts that it is potentially prejudiced by reason of the applicant's previously non-disclosed back condition: *Fuller v Bunnings Group Limited* [2007] QCA 216.

[11] However, the respondent's reliance on Fuller is misconceived. That is a quite different case. The further injuries involve the same shoulder, the subject of the initial claim. Here the sciatica is a condition that is distinct and separate to the applicant's left shoulder condition. There is no evidence that the sciatica would have of itself impacted on the applicant's capacity to continue to work as a meat packer; nor is there evidence that in some way a combination of injuries, one not previously disclosed, now impacts on the applicant's capacity to work in that role. I do not see any basis for a claim by the respondent that it is in some way prejudiced by the non-disclosure. There is no necessity in determining liability in this claim for a "teasing-out" or dissection of the two conditions. In my view the assertion by the respondent that it is now prejudiced is without substance.

The affidavit and oral evidence of the applicant and the solicitor's file note

[12] Following the first injury, the applicant made a workers' compensation claim, which was subsequently opened and closed several times. She continued working on light duties and initially experienced some pain "*every now and then*". She reported the occasions when she experienced pain, "which settled down somewhat in the period after "*she consulted Dr Low in about 2007. By about November 2008 she was having weekly physiotherapy and taking panadeine forte medication to relieve the pain in her shoulder. She was not in constant severe pain but there was a dull ache in the shoulder 'the majority of the time'*".

[13] She deposed that she believed on advice from Dr Halliday that she had an excellent prognosis and surgical intervention as a last resort was a very slim likelihood.

[14] The applicant deposed that in the entire period between the injury on 1 June 2007 and 6 May 2011, "*the pain in my left shoulder region was only ever intermittent and did not prohibit my ability to continue working in my normal duties. The injury on 6 May 2011, however, greatly aggravated the pain in my left shoulder and the pain has since not gone away*".

[15] She deposed that during the period after the first incident she would experience severe pain every month or so and at times requested lighter duties at work. In the period between the first incident and the second incident, she took occasional days off work due to intermittent pain.

[16] The applicant deposed that she was currently earning the same income as she would have, had she continued working as a meat packer, but was concerned that her employer would either not keep her engaged in the new work role or that the injury might prevent her from continuing to work.

[17] So far as daily domestic tasks were concerned, she deposed the following:

> *"I feel that the pain in my left shoulder region is greatly aggravated by performing tasks such as mopping, sweeping and vacuuming. I also feel pain with above and below shoulder level work, and feel that I have to protect my left arm and therefore will over-compensate with my right arm whenever I am required to lift anything more than about 5 kgs."*
>
> *and*
>
> *"I am able to do household chores and perform some work around the yard, however I have increased pain with certain duties and have to break these up. I feel quite a lot of pain when I am hanging out the washing and mowing the lawn. When I do these duties, I am in great pain that evening and the following day."*

[18] The applicant gave evidence on the hearing of the application. She relied on her affidavit filed in the proceeding. In cross-examination she agreed that she had always constantly felt pain in her left shoulder since the first incident and had taken pain relief after that - including panadeine forte, one to five tablets per days continuously, when the pain flared up.

[19] She agreed the injury caused pain and interfered with things she was able to do. She gave several examples: she could hang out the washing but had to be careful not to hold her arm up for too long; she would sometimes hang washing on a clotheshorse and put that under a fan, but sheets and towels and the like would go over the clothesline, she did that because she was conscious of her injury and did not want to exacerbate the pain.

[20] From the time of the first incident she agreed that any work requiring her left arm to be lifted up high would later cause her pain, even though she could do the work. She would then have to take increased pain relief.

[21] With respect to mowing the grass, prior to the first incident she mowed the grass herself but had not done so since that time: the use of the motor mower, the vibration and the angle from which it was pushed, caused an inflammation of pain and she would be required to take pain relief. Similarly, she was able to use a whipper snipper prior to the first incident, but not since then. The pain that followed use of that tool had required stronger pain killers.

[22] She said that her sleep had been interrupted since the first incident on occasions perhaps three times a week or sometimes more now. When the pain caused her to wake up she would take pain relief.

[23] She would do some lifting below the level of her shoulder if the item was not heavy and would use her dominant right arm more. She favoured her dominant right arm because it would minimise pain and inconvenience. It was the movement of the arm above the level of her shoulder that was restricted.

[24] She had engaged in recreational activities such as fishing, crabbing and playing pool before the first incident. However, she cannot now participate in those activities.

[25] She said she had pain every day. She needed to work (and earn an income). She agreed that she had not wanted to make a complaint at work for fear that a complaint might affect her prospects of continued employment. That was a reason why she initially did not consult a lawyer. She had been worried about losing her job from soon after the first incident.

[26] The applicant said she had other health issues, including hepatitis C (but that did not affect her day to day life) and sciatica (which was diagnosed years ago, in about 1998, and came and went and had been treated with anti-inflammatory tablets).

[27] The applicant was cross-examined with respect to the second incident. She described the sciatica as “pins and needles” in her legs. However, she had a

lumbo-sacral CT scan in about January 2012. She agreed that at that time the condition flared up every now and then. She had left buttock pain which was related to a fall, which had some time afterwards started the tingling in her legs. She managed the back pain but did not tell her lawyers about that condition.

[28] She agreed that WorkCover paid for the cost of treatment from time to time and that when advice was given to her employer that she should be allocated restricted duties, she was allocated and performed those restricted duties.

[29] In re-examination the applicant said that she had more pain after the second incident than prior to its occurrence. She was now more restricted in what she was able to do. Her interrupted sleep was worse after the second incident because she was experiencing more ongoing pain. The restrictions on her domestic tasks remained.

[30] After the second incident, she described her capacity to lift items at work in this way: the difference was "*... a lot like I couldn't lift anything heavy, it would have hurt again ... when there's any heavy boxes now ... I get one of the boys to come and do it for me ...*". She was asked if there was a difference between the impact of the pain on her recreational activities before and after the second incident, and she replied that *"... well, the pain was at bay before the second incident. I could still do a lot of things ... fishing, crabbing, playing pool, playing cricket with the kids ... I was fine before ... [but] can't do that now."*

[31] In a file note by the first lawyer whom the applicant consulted, on 24 August 2011, the following was recorded:

> *"I advise that we would need to obtain her claim files and to do that we would need to obtain her Authority ...*
>
> *She then launched into a bit of a tirade about [her concern] that she will lose her job as she's not fit for returning to her normal duties at this stage ... she seemed pretty adamant about the fact that she didn't want us to be involved ..."*

[32] The lawyer's file note referred to advice to the applicant that:

> *"Potentially she has access to a Common Law Claim for Damages in respect of the [first] incident as it appears her Employer was negligent in requiring her to pull such a heavy trolley and also not providing sufficient instruction in relation to pushing not pulling."*

But that she was outside the three year time period within which to bring a Common Law Claim and the file note continues:

> *"I advised her that she would have to rely upon a new material fact of a decisive character, and I explained what that was, to bring the claim within time. I advised her that*

> *that may be possible but we needed a thorough review of her workers' compensation claim files in order to be able to do that."*

[33] The applicant said in re-examination in the hearing that she consulted a lawyer after she was moved from the meat department and given a job in general merchandise.

Medical Evidence

[34] The new material fact of a decisive character asserted by the applicant is the medical advice provided to her after the second incident, to the effect that she would be unable to continue working in her occupation as a meatpacker. That advice was given by Dr Ness.

[35] Dr Halliday was consulted by the applicant on 18 November 2008 and in his report dated 23 December 2008 he stated the following:

> *"Every month or so the pain gets quite severe and she has to go back on to light duties which she negotiates with her employer. She describes her occupation as not particularly heavy. There is nothing about her work that she cannot do. She does suffer with pain in the shoulder at night. Even on busy days the pain is not particularly aggravated. It is made worse by heavy lifting or overhead work."*

[36] Dr Halliday considered the condition not stable at the time of the examination and recommended further treatment.

[37] Dr Lowe in a brief report dated 10 August 2009 stated that the applicant's shoulder condition had reached maximum medical improvement. He stated the following:

> *"Last time I saw her on 29 July 2009 she had full range of movement and no pain. Therefore I would not give her any degree of permanent impairment as a result of this injury."*

[38] Dr Gibberd in a report dated 11 August 2009 expressed the view that her prognosis was good and the applicant had been left with minimal residual disability. He had diagnosed a soft tissue lesion to the left shoulder joint area. He believed there was a "constitutional degeneration" of the rotator cuff, not attributable to the first incident and therefore no permanent impairment.

[39] Dr Ness was consulted by the applicant on 23 June 2011 and he made a report dated 27 June 2011, in which he stated that the applicant had a long standing left shoulder condition, exacerbated in the [second incident] by that pre-existing condition by lifting activities at work. That work injury resolved. He diagnosed degenerative disease of the rotator cuff of the left shoulder (rotator cuff tendinopathy).

[40] Dr Ness referred to the applicant's current capacity for work as follows:

> *"Ms Preddy could return to work as a meatpacker although it is likely that her underlying condition has now reached a stage where she will not manage this type of work. Return to work as a meatpacker is likely to cause further exacerbation of her condition and it would be appropriate for her to remain on lighter duties as a service assistant. She said that she preferred meatpacking, however, in the interests of her left shoulder condition, she would accept the permanent change to her work duties."*

[41] Dr Cook was consulted by the applicant on 6 December 2012 and in his report dated 16 February 2013 he referred to the first and second incidents in the following terms:

> *"With respect to the first incident he diagnosed a "soft tissue injury of the left shoulder and secondary subacromial/subedeltoid bursitis and tendonitis of the left shoulder that had never fully settled."*

[42] Dr Cook considered that the second incident involved an aggravation of the condition that arose from the first incident. He said that there was nil or minimal degenerative change in the left shoulder and that there was no indication for surgery, at least at the date of the examination. He postulated that in the future that might be a consideration. He opined that the applicant was able to continue to carry out her general duties at work, but not work of a heavy or moderately heavy nature or even light work if this was above head or shoulder height or required constant and repetitive use of the left upper limb."

Discussion

[43] The applicant had been under the care of Dr Low and had been assessed by Dr Gibberd (for WorkCover) after the first incident. Dr Low certified the applicant as fit to return to full duties on 29 July 2009. Dr Gibberd assessed a 0% impairment on 10 August 2009. Both opinions were expressed within the limitation period for the first incident. The WorkCover claim was ceased on 21 August 2009 and the applicant received a nil permanent impairment Notice of Assessment. She returned to her normal meat packing duties. After the second incident she received the advice of Dr Ness on 23 June 2011 that she would not be able to continue employment as a meat packer. Her case is that this the first time she had become aware of this and she subsequently consulted her union and then a lawyer.

[44] In her affidavit the applicant deposed that she was not aware of the severity of her left shoulder injury. She had been in pain, taking panadeine forte, since she had consulted Dr Low and was continuing to take that form of pain relief.

[45] The applicant's oral evidence was, in my view, explicit and frank: for example her concession that she had pain "*everyday*", inferentially at least since the date of the initial incident. After the second incident her pain was greater, the restrictions on activity had increased, she had moved to lighter duties at work and she did not attempt to participate in previous recreational pursuits. She rated her pain after the second incident as variable, probably at about 6 and a half up to 10. Her pain prior to the second incident was rated at probably 4 and a half.

[46] In her oral evidence she referred to restriction in the movement of her left shoulder, cessation of recreational activities and limitations experienced in carrying out domestic tasks. When her capacity to carry out normal duties was affected by pain and restriction, she informed her employer. She said that she thought she would lose her job. That seems to have been a reason she did not consult a lawyer. The injury, its cause, symptoms and its impact on her health and capacity to work, as described above, were known to her, even if she did not have knowledge of the full nature and extent of her injury until Dr Ness provided his report.

[47] The adverse affects of the injury and her management of it, such as I have described, were of course known to her before she consulted with Dr Ness. Those adverse effects prima facie were in conflict with the assessments made by Dr Low and, subsequently Dr Gibberd. She appears to have relied on the opinion of Dr Low. She was concerned, whether on any rational basis or not, that she would lose her job if she could not work as a meat packer.

The legal position

[48] The applicant knew that the injury was suffered as a consequence of the work place task assigned to her by the respondent. The issue in this case is whether she had knowledge of the material facts of the nature and extent of the injury she had suffered. Did the applicant take all reasonable steps defined in the material fact of a decisive character? Is there a requirement to take "appropriate advice"? In *Healy v Femdale* [1993] QCA 210, the court wrote:

> *"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 unable 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 circumstances it would not be reasonable to expect the applicant to have done so."*

[49] In *NF v Queensland* [2005] QCA 110, Keane JA wrote, at [29]:

> *"It is to be emphasised that s 30(1)(c) does not contemplate a state of knowledge of material facts attainable in the abstract, either by the exercise of 'all reasonable steps' or, by the efforts of a reasonable person. It speaks of a state of knowledge attainable by an actual person who has taken all reasonable steps. The actual person postulated by s 30(1)(c) as the person who has taken all reasonable steps, is the particular person who has suffered the particular personal injuries. Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant. It seems to me that, if that person has taken all the reasonable steps that she is able to take to find out the fact, and has not found it out, the fact is not within her means of knowledge for the purposes of s 30(1)(c) of the* Act *..."*

[50] To the extent that the applicant may not have been aware of the "full extent or seriousness" of her injuries, is immaterial: *Moriarty v Sunbeam Corporation Ltd* [1998] 2 QdR 325. The respondent cited *Eldridge v Coles Myer Group Limited* [2012] QSC 39 per Ann Lyons J at [55] in support of its contention that the applicant had sufficient knowledge to appreciate that it was reasonable to commence legal proceedings at a point within the limitation period. However the applicant, Eldrige, was in a quite different position: she had significant "pain and disability from the time of the accident and she did not feel better within one year", she "experienced significant pain and did so for many years", and she changed jobs to accommodate her disability." I do not consider that there is any similarity between that case and the subject proceeding.

[51] In *Queensland v Stephenson* [2006] 227 ALR 17, the majority of the court held, at [29]:

> *"Whether the decisive character is achieved by the applicant becoming aware of some new material fact, or whether the circumstances developed that such facts already known acquire a decisive character, is immaterial. It is true to say, as the plaintiff submitted in their written submissions, that in a sense none of the material facts relating to the applicant's right of action is of a decisive character until a reasonable person 'knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing' the features described in sub-paras (i) and (ii) of s 30(1)(b). Whether that test has been satisfied at a particular point in time is a question for the court",*
>
> and at [10]:

> *"It is accepted by the State that, if the criteria specified in s 31 otherwise is satisfied, a discretion indicated by the use of that term should be exercised in favour of the plaintiffs for the extension of the time bar."*

[52] An applicant who ascertains that his or her condition is much worse than initially believed, including the fact that the capacity to carry out the employment might be significantly compromised, is a material fact of a decisive character: See *Thompson v DP World Australia* [2011] QSC 406; and *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 QdR 306.

Conclusion

[53] I am prepared to act on the evidence of the applicant. I agree with the characterisation by the respondent of her oral evidence, as being "candid". However, I do not consider that there are inconsistencies or material differences between the applicant's oral evidence and the statements deposed in her affidavit. I accept her evidence as truthful and frank. To the extent that she may have believed she would lose her job, there is evidence of a note to that possible effect expressed by her employer; and in the critical period to the end of the limitation period, I accept that she had told her employer whenever she was having difficulty in carrying out her meat packer duties. To the extent she had a belief that she might lose her job during that period it is qualified by what in fact she said she did when she had difficulties. It was only after the second incident that concerns about employability per se manifested in any significant way. She then consulted a union representative and then consulted a lawyer.

[54] In the course of the limitation period and until May 2011, the applicant was able to cope with work as a meat packer, save for intermittent bad days, as it were, and it was reasonable for her to accept that her employer was content to maintain her employment as a matter of fact and it was reasonable for her to accept the advice her treating specialist Dr Low and other providers of health care such as her physiotherapist, to the effect respectively that she had a nil impairment and that her condition was conservatively manageable.

[55] I conclude that the applicant did not within her means of knowledge material facts of a decisive character concerning the nature and extent of her personal injury, within the period of limitation for the commencement of proceedings claiming damages for personal injuries.

[56] The application is granted.

Costs

[57] I will hear the parties as to costs upon delivery of the judgment.

Orders

1. Application granted.

2. The time for commencement of proceedings claiming damages for personal injury by the applicant is extended to 05 July 2013.

3. I will hear the parties as to costs by written submissions.