SUPREME COURT OF QUEENSLAND

CITATION:	*Vicary v State of Queensland* [2009] QSC 284
PARTIES:	**WAYNE VICARY** (applicant) **v** **STATE OF QUEENSLAND (LOGAN HOSPITAL)** (respondent)
FILE NO:	SC 7845 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	11 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	22, 28 July of 2009
JUDGE:	P Lyons J
ORDERS:	1. **The limitation period is extended under s 31 of the *Limitation of Actions Act 1974* so that it expires on 19 June 2009.** **2. The applicant is relieved of the consequences of non-compliance with the condition of the order made on 4 September 2007.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – KNOWLEDGE – REASONABLE STEPS TAKEN TO ASCERTAIN FACTS – whether applicant should have taken action earlier to establish material facts – whether it was reasonable for the applicant not to pursue inquiries about a potential claim relating to his treatment at a hospital due to his ill-health and while experiencing legal and financial difficulties at the time LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – meaning of the term 'decisive character' – whether the material fact relied upon by the

applicant is of a decisive character – applicant had earlier commenced action with leave under s 43 of *Personal Injuries Proceedings Act* on condition he obtain specialist report within six months – whether report was a material fact of a decisive character.

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – PRINCIPLES UPON WHICH DISCRETION EXERCISED – consideration of "presumptive prejudice" – whether the respondent is prejudiced by the applicant's delay – hospital records available, and no evidence of actual prejudice

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULEES OF COURT – JUDMENTS AND ORDERS – OTHER MATTERS – applicant commenced action with leave under s 43 of *Personal Injuries Proceedings Act* on condition specifying time – condition not satisfied in time specified – applicant seeks a variation of the condition – whether the Court has the power to extend a time for fulfilment of condition specified in an order – consideration of rr 7, 905 *Uniform Civil Procedure Rules 1999* (UCPR) – whether time should be extended

Limitation of Actions Act 1974 (Qld), s 30, s 31
Personal Injuries Proceedings Act 2002 (Qld), s 9A, s 43
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305
Uniform Civil Procedure Rules 1999 (Qld), r 7, r 376, r 665, r 905

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, considered
Castillon v P & O Ports Limited (No 2) [2008] 2 Qd R 219, considered
Graham v WorkCover Queensland [2005] QDC 263, considered
Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (In Liquidation) & Ors [2008] QSC 330, cited

COUNSEL: K Fleming QC for the applicant

K Holyoak for the respondent

SOLICITORS: Turner Freeman Lawyers for the applicant

Corrs Chambers Westgarth for the respondent

[1] **P LYONS J:** The applicant was treated at the Logan Hospital over a period of time from April 2004. He commenced proceedings against the respondent in respect of that treatment on 5 September 2007. To do so, he obtained a grant of leave under s 43 of the *Personal Injuries Proceedings Act 2002* (Qld) (*PIPA*). Condition 3 of the grant of leave required that he make application for an extension of the limitation period under the *Limitation of Actions Act 1974* (Qld) (*Limitation Act)* within six months of the receipt of a report of a medical specialist. The applicant now seeks a variation of the condition, and an extension of the limitation period for making his claim.

History

[2] The applicant has had difficulties with an umbilical hernia. These difficulties apparently extend back to at least 1992. He received treatment for his condition between then and 1998. On 9 July 2003, he was referred to Logan Hospital, his condition then being described as a large abdominal incisional hernia which had been repaired previously. A CT scan was carried out in early 2004, and subsequently a decision was made that he should undergo surgery to repair the hernia.

[3] The applicant underwent surgery on 1 April 2004. The surgery was performed by Dr Brian McGowan, who had seen him in January and February of that year. Some mesh was inserted into his abdomen, with bellovac drains placed over the mesh. On 1 July 2004, the applicant attended the out-patients department at the hospital. At that time his wound was discharging purulent material. The presence of staphylococcus aureus had by then been detected, and he was referred to the Infectious Diseases Clinic. The staphylococcus infection was associated with severe post-operative abdominal wall sepsis.

[4] Further surgery was carried out on 6 September 2004. The material suggests that in September 2004 Penrose drains were inserted, which discharged from the wound on 30 October 2004.

[5] In November 2004, the applicant complained to the Logan Hospital that a drain had erupted out of his abdomen. He stated at this time that he had kept it to show it to his lawyer. He subsequently sought to have his treatment transferred to the Princess Alexandra Hospital.

[6] On 8 February 2005, the applicant saw Professor Wall at the Princess Alexandra Hospital. Professor Wall records that on that occasion, yellow pus issued from two sinuses adjacent to a mid-line wound in the abdomen. The clinical assessment for the applicant at that time included anxiety, depression (associated with prolonged illness), morbid obesity, a number of conditions apparently related to his hernia and its treatment, and family stress. The applicant was referred to a number of other medical and health care specialists. He was required to undergo a prolonged period of preparation for further surgery. A radical reconstruction of the abdominal wall and a resection of a mass of infected mesh was carried out on 5 March 2007. Professor Wall describes the period between April 2005 and the surgery in 2007 as

requiring "challenging management", relating to weight reduction, cessation of smoking, control of diabetes, hyperlipidaemia and hypertension. Management of the wound infection no doubt was involved. Professor Wall has expressed the view that from 31 March 2004 until 2008 the applicant was totally incapacitated, and in this period would have experienced a 50 percent loss of total body function, with moderately severe suffering.

[7] In 2000, the applicant had commenced work as a truck driver. In 2002 he commenced his own business. He apparently continued for some time to drive a truck, and associated with this, he carried out heavy lifting. By 2004 his business was experiencing financial difficulties. The applicant says that in November 2004 he was not physically capable of truck driving, and in early 2005 he was working in a managerial role in the transport company. The business failed in 2007, having been under financial pressure for some time because the applicant was unable to drive, and had to employ someone else to do that.

[8] In 2004 and 2005 the applicant was involved in family court proceedings.

[9] In June 2004, the applicant was arrested for possession of a quantity of cannabis. He retained lawyers to represent him in respect of the criminal charges. In September 2005 they sought a report from Dr Wall dealing with the applicant's medical condition, how it affected his health and daily activities, and how long it would be before he would be in a position to be before the court. Professor Wall replied on 29 September 2005, confirming that the applicant was on the waiting list for "a very major operation" and required preparation and a long period of recovery.

[10] On 2 December 2005, Professor Wall wrote again advising that surgery could not be carried out at that time. On 2 February 2006, Professor Wall provided a note stating that the applicant had a "severely disabling surgical disorder", and describing his condition in a way that suggested he was in quite poor health. Submissions were made to Members of Parliament about the delay in the treatment of the applicant, resulting in a letter of 22 December 2006 from the Chief of Staff of the Office of the Premier stating that Professor Wall would again see the applicant.

[11] Meanwhile, in February 2006, the applicant was sentenced on his criminal charges. The sentencing judge (Douglas J) told the applicant that he should do something about the treatment he had received at the Logan Hospital.

[12] The applicant says then he then asked the lawyers representing him in the criminal proceedings if they could assist him with a claim. He was advised that they could not. Subsequently, he saw an advertisement for the Queensland Law Society on television which alerted him to the prospect of having legal assistance with his claim. He then engaged a firm of solicitors to act for him in May 2007. He was advised that he might be able to obtain legal aid. His solicitors then sought copies of his medical records from the Princess Alexandra Hospital, the Logan Hospital, and his general practitioner.

[13] The solicitor who had the conduct of the applicant's matter then left the firm where she had been a partner, and took employment with another firm. The conduct of the applicant's matter was transferred to this firm, and remained with the same solicitor. This occurred in about August 2007.

[14] Although an application for legal aid had not been made at that time, there appears to have been concern about the expiry of a limitations period. That resulted in a letter being sent on 31 August 2007 to the operator of the Logan Hospital enclosing an Initial Notice under s 9A of the *PIPA*, and the filing of an originating application on 3 September 2007 seeking leave to start a proceeding urgently under s 43 of the same Act. An order, previously described, was made by consent on 4 September 2007. A claim and statement of claim were filed on the following day. In essence, the claim related to the treatment of the applicant from about 31 March 2004 until November 2004.

[15] On 4 October 2007 an application for legal aid funding was forwarded to the applicant. By this time, the applicant was in bankruptcy, and there was some delay in obtaining documents from his trustee. The application was finally made on 14 January 2008, and a grant of aid was given on 25 January 2008. On 13 March 2008, a brief was sent to Professor Wall for a medico-legal report. On 27 May 2008, Professor Wall provided a report, in which he expressed the view that because of the applicant's condition, even with the most dedicated care, the outcome of the operation would almost certainly have been failure, and there would have been a high likelihood of serious complications setting in for a long period of time, associated with disability. Professor Wall would not have carried out the operation himself unless the applicant had undergone a substantial period of preparation. However, if the applicant had been warned of the dangers, and that it was unwise to proceed with the surgery, that the patient had nevertheless chosen to go ahead, the treatment would not represent a failure to provide an appropriate standard of care. Professor Wall also considered that the insertion of the Penrose drain was liable to precipitate infection, and to prolong it. Otherwise, he seems to make no adverse comment about treatment until September 2004. Professor Wall notes that when he saw the applicant, the applicant complained of pain and discharge following his last operation at Logan Hospital, and attributed all of his problems to the failure of the clinical care unit to care for the drain tube appropriately. He also described the potential future significance of the applicant's condition, noting that he would be restricted in his activities, and a failure to recognise the restrictions might have life-threatening complications.

[16] On 10 September 2007, the respondent provided a response to the s 9A notice of the applicant. It asked for an explanation for the fact that the applicant's s 9A notice had been delivered more than nine months after the dates referred to in the applicant's notice. The applicant's solicitor deposes that she did not receive the response to the s 9A notice until 19 March 2008. She replied on 30 April 2008. To a significant extent, the explanation for the applicant's delay in providing the notice was that the applicant was undergoing treatment or awaiting treatment for his condition, and was ill. It was after treatment in March 2007 that he had considered the possibility that the 2004 treatment may have been negligent and may warrant investigation. He consulted solicitors who told him that they could not advise him

until they had obtained and reviewed hospital and medical records. He was subsequently told that he may have a cause of action against the Logan Hospital, but further information was required from Professor Wall. The letter from the applicant's solicitor also contains a statement that around the end of August 2007, the applicant was advised that a cause of action in negligence might lie against the treating health professionals at the Logan Hospital, and that the prospects of recovering significant damages justified proceeding with a claim against them. I shall return to a consideration of this last-mentioned statement.

[17] On 19 June 2008, the applicant's solicitor advised him of the substance of Professor Wall's report, and that his prospects of recovering significant damages justified the prosecution of a claim against the respondent.

[18] In mid-July 2008, the applicant's solicitor then commenced employment with the firm currently acting for the applicant. The applicant's file was transferred to this firm a little over a month later. The applicant's solicitor has deposed that it then became a priority to complete the pre-court steps under the *PIPA*. However, the applicant considered that he had until 19 March 2009 under s 9A(9)(b) of the *PIPA* to provide the Part 1 Notice of Claim. This was sent to the respondent on 23 February 2009. A copy of the report of Professor Wall was provided at this time.

[19] Steps were being taken to complete the Part 2 Notice of Claim form. This was complicated by the applicant's bankruptcy. On 23 April 2009, a USB stick containing documentation from the applicant's company was provided to the applicant's solicitors by Insolvency & Trustee Services Australia. The applicant's solicitors did not have a program which would enable them to read the documents, but were in the process of obtaining it. The applicant's solicitor deposes that she became distracted by efforts to acquire necessary materials to complete the pre-court procedures, and by the transfer of the conduct of the file from one firm to another, with the result that she failed to make the application under s 31 of the *Limitation Act*. She did not become aware of her oversight until she received a letter from the respondent's solicitors dated 27 March 2009, which raised this matter. On 6 April 2009 she advised the solicitors for the respondent that the applicant intended to proceed with the application. She also swears that the failure to make the application within six months of the receipt of Professor Wall's report was due to an oversight by her, and not through intention or inadvertence by the applicant himself.

[20] On 12 June 2009, the respondent's solicitors received a copy of an e-mail from the applicant's solicitors, attached to which was a statutory declaration by the applicant. This was a response to the respondent's request for further documentation and information made pursuant to s 22 (incorrectly referred to as s 27) of the *PIPA*.

[21] It is apparent that the applicant's solicitor became concerned by the time that had passed since receipt of Professor Wall's report dated 27 May 2008. She formed the view that a further claim and statement of claim should be filed, based on this report. She sought leave to start this proceeding under s 43 of the *PIPA*. A consent order granting leave was made on 2 July 2009. On the same day, a claim and

statement of claim limited to the matters dealt with in Professor Wall's report was filed. A notice pursuant to s 9A of that Act in relation to this claim was sent to the respondent on 21 July 2009. A Part 1 Notice of Claim form and a copy of Professor Wall's report were given to the respondent and its solicitors under cover of a letter dated 21 July 2009.

Application for extension of limitation period

[22] Counsel for the applicant seeks an extension of the limitation period for the claim made in the claim and statement of claim filed on 5 September 2007.

[23] The power to extend the limitation period is found in s 31 of the *Limitation Act*, which is as follows:

> **"31 Ordinary actions**
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> (1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.
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> (2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court—
>
> (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
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> (b) that there is 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.
>
> (3) This section applies to an action whether or not the period of limitation for the action has expired—
>
> (a) before the commencement of this Act; or
>
> (b) before an application is made under this section in respect of the right of action."

[24] Section 30 of the *Limitation Act* sets out as follows:

> "**30 Interpretation**
>
> (1) For the purposes of this section and sections 31, 32, 33 and 34—
>
> (a) the material facts relating to a right of action include the following—

(i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
(ii) the identity of the person against whom the right of action lies;
(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;
(iv) the nature and extent of the personal injury so caused;
(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing—
(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
(ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;

(c) a fact is not within the means of knowledge of a person at a particular time if, but only if—
(i) the person does not know the fact at that time; and
(ii) as far as the fact is able to be found out by the person—the person has taken all reasonable steps to find out the fact before that time.

(2) In this section—
appropriate advice, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts."

[25] The material fact of a decisive character relied upon by the applicant is Professor Wall's report of 19 May 2008. The respondent does not suggest that such a report cannot be a material fact of decisive character.[1] Its principal grounds of opposition to the extension of the limitation period appear to be the following:

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[1] *Pikrt v Hagemeyer Brands Australia Pty Ltd* [2006] QCA 112, [26], [44]-[45]; *Greenhalgh v Bacas Trading Ltd & Ors* [2007] QCA 327 [2], [18], [24].

(a) The material fact was within the applicant's means of knowledge at an earlier point in time (the means of knowledge point);
(b) Professor Wall's report lacks the character of decisiveness required by s 31 (the decisiveness point);
(c) Prejudice.

Means of knowledge

[26] The respondent contends that the applicant has not taken reasonable steps to ascertain the material facts within an appropriate timeframe. In its submissions, the following propositions are identified as part of the framework for the consideration of this question:

(a) It is the means of knowledge of the particular applicant which is relevant, not that of a hypothetical reasonable person;[2]
(b) The means of knowledge of an applicant extend beyond the actual knowledge of the applicant, and include means of knowledge reasonably available to the applicant;[3]
(c) Progressive stages of awareness may be involved;[4]
(d) The date by which a court may find that a necessary fact was within an applicant's means of knowledge is the date by which a court may find the applicant to have been able to find it out by taking all reasonable steps to do so;[5]
(e) Where an applicant needs the help of a solicitor or someone else to obtain knowledge of a material fact, time may reasonably elapse before it should be held that the fact is within the applicant's means of knowledge, and will include the time which would reasonably elapse if the applicant, taking all reasonable steps to do so, consults a solicitor or some other person and the solicitor or that other person undertakes the necessary inquiries to ascertain the fact;[6]
(f) The question whether an applicant 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.[7]

[27] In support of its submissions, the respondent referred to a number of matters. They were that on 7 November 2004, the applicant said that he was keeping his expelled Penrose drain to show his lawyer; on 15 November 2004, he said that he could not talk as the matter was in the hands of his solicitor; he had lawyers acting for him in relation to his criminal proceedings; his first consultation with a solicitor specifically with reference to his potential claim was not until 28 May 2007; there was then delay by the solicitors until August 2007; and there had been action taken on behalf of the applicant involving Members of Parliament, which suggests that the applicant could have sought legal assistance earlier.

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2 *Dick v University of Queensland & BP Australia Ltd* [2000] 2 Qd R 476 at para [30].
3 *Dick* at para [30].
4 *Dick* at para [34].
5 *Dick* at para [35].
6 *Dick* at para [36].
7 *NF v State of Queensland* [2005] QCA 110 at para [29].

[28] The effect of s 31 of the *Limitations Act* is that the limitation period can be extended to 5 September 2007 if a material fact of a decisive character was not within the applicant's means of knowledge until 5 September 2006. It is the period up to 5 September 2006, therefore, which must be examined to see if the statutory test is satisfied.

[29] In the period from 2004 until September 2006, the applicant was suffering from ill-health. The applicant says that in late 2004 and the early part of 2005 he was seriously ill. Professor Wall has expressed the view that the applicant was totally incapacitated between March 2004 and 2008. In that time, he had a prolonged period of 50 percent loss of total body function, and he experienced moderately severe suffering. Professor Wall also said of him that he was severely disabled. Significant treatment could not be carried out for a substantial period of time.

[30] In addition, in this period, the applicant was struggling to maintain his business, which was failing, and to avoid bankruptcy. He said that he did not have the funds to pursue litigation. It was not until some time after February 2006 that he came to realise that it might be possible to have the services of a solicitor, presumably either without cost, or at a cost which was within his means. In fact, he deposes that it was not until he saw his present solicitor (in May 2007) that he realised that he might be eligible for legal aid.

[31] In addition, he was involved in Family Court proceedings in this period. Further, the applicant was facing criminal charges for which he was arrested in June 2004, and which were not resolved until February 2006.

[32] Further, the applicant is a person of limited education.

[33] In my view, the conduct of a person in the particular circumstances of the applicant is to be judged by different standards to those which would apply to a person in reasonable health and not subject to the other difficulties the applicant was experiencing in this period.

[34] For much if not all of the period until September 2006, the applicant was unaware that it might be possible for him to pursue a claim without significant expense to him. In that period, he had to decide whether to put funds into the investigation of a possible claim, when he was struggling to maintain a business which was under financial pressure and which ultimately failed in 2007. Throughout this period, he had significant health issues. In this period he was also facing criminal charges, and was engaged in proceedings in the Family Court.

[35] In my view, it was reasonable for the applicant not to pursue inquiries about a potential claim relating to his treatment in the period until at least September 2006, by reason of the circumstances which I have mentioned. There are, however, some matters to which I should make specific reference.

[36] The applicant says that in the period until February 2006 he did not contemplate litigation, notwithstanding pressure from friends and family about the way he was treated at the Logan Hospital and that he "despised the litigious nature of American culture" that he had observed in the media. However, it cannot be said that he steadfastly refused to consider litigation. After Douglas J said in February 2006 that the applicant should do something about the treatment he received, he made inquiries of the solicitors acting for him in the criminal proceedings; and he subsequently engaged his present solicitor when he realised he could do so. I think that the more realistic view of what happened was that in the circumstances in which he found himself between 2004 and 2006, he did not consider the suggestions of his friends and family sufficient to warrant the taking of any actions; but when someone whose view carried more weight suggested that he should consider taking legal action, he made inquiries about doing so. I do not think that this consideration should alter the conclusion which I have expressed above.

[37] The respondent submits that the applicant stated on 7 November 2004 that he was keeping his expelled Penrose drain to show his lawyer; and on 15 November 2004 he said that he could not talk about the matter as it was in the hands of his solicitor. These submissions were based on notes from the file at the Logan hospital. The author was neither identified nor called, but this application appears to have been conducted on the basis that the documents themselves should have evidentiary value as to their contents.

[38] The applicant, in his affidavit material, said that he had not in fact retained a solicitor at this time. He has no recollection of making the statement that he had kept the Penrose drain to show his lawyers, nor of making a formal complaint. He says, apparently by way of explanation for any comment he may have made about having retained a lawyer, that he felt the hospital was not taking his complaint seriously. He also says that on 11 November 2004, he was asked where the drain was and he said that he had left it at home. Dr McGowan told him there was not much more that he could do for the applicant as a result of which the applicant was angry. The applicant was not cross-examined about these matters.

[39] I accept that the applicant had not retained solicitors to act for him in relation to his treatment by the Logan hospital in late 2004. If the applicant made the statements recorded in the hospital notes, that would reflect some awareness on his part of the possibility of making a claim against the hospital. However, it does not show that he knew of the existence of evidence which would make it worthwhile to pursue a claim against the hospital. Whether his awareness of the possibility of a claim meant that, acting reasonably, he should have taken steps to investigate it, would depend on the circumstances in which he found himself. I have already made reference to these circumstances. In my opinion, for the reasons I have discussed, it was reasonable for him not to investigate the potential claim in late 2004, and indeed not to do so until early 2007, by which time significant treatment had been provided by Professor Wall.

[40] I do not attribute much significance to the fact that the applicant had lawyers acting for him in the criminal proceedings. He says that he asked them if they could assist him to investigate a possible claim against Queensland Health, and was advised that

they could not do so. That demonstrates the taking of some step with the view to investigating whether he had a basis to commence an action, which was unsuccessful. In light of the matters discussed earlier, I do not think it was unreasonable for the applicant not to do more.

Decisive character of Professor Wall's report

[41] The respondent relies upon the fact that the proceedings were commenced in September 2007 as demonstrating that Professor Wall's report does not constitute a material fact of a decisive character for the purposes of s 31 of the *Limitation Act*.

[42] The respondent has orally submitted that an action based upon the failure of the doctor who carried out the surgery in April 2004 to advise the applicant before undergoing surgery to undertake a course of preparation is a different cause of action from one based on a negligent act in the course of performing the surgery itself. In my view, the availability of evidence to support a cause of action based on negligence in relation to giving advice is a material fact of a decisive character. Evidence is required to support a claim alleging that the treating doctor was negligent because he did not advise the applicant of the need to undergo a substantive period of preparation, without which it would be unwise to undergo the surgery, and without it would almost certainly be unsuccessful. A typical source of such evidence is a medical specialist. Without such evidence, a reasonable person, taking appropriate advice, would not consider that a claim based on that cause of action would have reasonable prospects of success and have resulted in an award of damages sufficient to justify the bringing of an action.[8] The respondent does not attempt to identify any evidence of this kind available to the applicant before Professor Wall provided his report in May 2008.

[43] The respondent relies upon a passage from *Castillon v P & O Ports Limited (No 2)*[9] which deals with the significances of the fact that, in that case, the plaintiff had commenced proceedings at an early point in time. *Castillon* is a very unusual case. The plaintiff in that case twice made an application for an extension of the limitations period under s 31 of the *Limitation Act*. On the first occasion he was unsuccessful, the learned primary judge finding that, prior to 27 November 2001, it was within the plaintiff's means of knowledge that he was suffering from permanent injury which was likely to prevent him from continuing in his position as crane operator. The second application was made some years later, on the basis that documents had come to light, which should have been disclosed by the defendant prior to the determination of the first application. The Court of Appeal confirmed the finding made at first instance on the first application that by 30 October 2001, the material facts of a decisive character were within the plaintiff's means of knowledge. That finding was based upon facts known to the plaintiff, including the report of an occupational therapist dated 30 October 2001, indicating that his working life was likely to be significantly curtailed as a result of his injuries, resulting in significant economic loss. An orthopaedic surgeon had also provided a report, prior to 30 October 2001, to the effect that he could not continue to work as

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8 *Pikrt v Hagemeyer Brands Australia Pty Ltd* [2006] QCA 112 [26],[44]-[45]; *Greenhalgh v Bacas Trading Ltd* [2007] QCA 327 [2],[18],[24].

9 [2008] 2 Qd R 219, 233.

a crane operator. The plaintiff stopped work because of his injury on 26 November 1999, and, save for a period of about seven months in the second half of 2002 and early 2003, did not attend at work again until the final termination of his employment in December 2004.

[44] The plaintiff had retained solicitors prior to June 2001. On 22 May 2001, a Notice of Assessment was issued by WorkCover. It assessed a degree of permanent impairment for the plaintiff. The plaintiff's solicitors and the plaintiff accepted the degree of impairment "for the purposes only of moving on to a common law claim". The solicitors then wrote to WorkCover, stating that they would commence preparation of the plaintiff's Notice of Claim for damages, which would be delivered in the near future. By June 2001, the plaintiff regarded an action for damages as worthwhile. A claim and statement of claim were filed in August 2003. In my respectful opinion, it is against that background that the comments of Keane JA as to the significance of the commencement of the earlier proceedings in that case are to be understood.

[45] There are obvious differences between that case and the present one, not the least being the absence in the present case of any expert evidence to support a claim based in negligence until Professor Wall's report was received in May 2008, and the absence of evidence that the present applicant had formed a view prior to the receipt of that report that an action against Logan Hospital would be worthwhile.

[46] The respondent has also relied on *Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (In Liquidation) & Ors*,[10] but in that case, *Castillon* was distinguished.

[47] There are, in my opinion, significant reasons why it should not be accepted that the commencement of the proceedings in September 2007 demonstrates that the material facts of a decisive character were within the knowledge of the applicant at that time. I have already mentioned some of them, namely, the absence of any suggestion that the applicant at that time had available to him evidence that would support a claim in negligence in respect of his treatment in April 2004. A significant feature of the proceedings commenced in 2007 is that it is not simply a claim in respect of the treatment in April 2004. It was also a claim relating to treatment in September 2004, and possibly later. The history of the matter strongly suggests that the proceedings were commenced at that time because there was a concern that the limitations period in respect of the treatment of September 2004 was about to expire. It will be recalled that the order made on 4 September included a grant of leave to issue urgent proceedings.

[48] Beyond that, the very terms of the order which was then made, with the consent of the respondent, demonstrate a recognition that a material fact of a decisive character relating to the treatment of the applicant in April 2004 was not then within the applicant's means of knowledge. It was a condition of the grant of leave that the applicant make a claim for an extension of the limitation period for the treatment in

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[10] [2008] QSC 330, at [44] - [45].

April 2004 within six months of the receipt of an independent specialist's report; and there was a further order that the applicant make all reasonable and genuine attempts to procure the report within six months of his application in September 2007. The only sensible explanation for these parts of the order was a recognition that in September 2007 the applicant did not have a proper basis to apply for an extension of the limitation period in respect of the April 2004 treatment. The purpose of these provisions was to enable the applicant to carry out further investigations which would justify proceedings against the respondent in respect of that treatment; and armed with that information, to make the application for the extension for the limitation period. One of the things the applicant would have to demonstrate at the time of applying for an extension was, pursuant to s 31(2)(b), that there was evidence to establish the claim, if it were not defeated by a limitations defence.

[49] I am therefore of the view that as at September 2007, the applicant did not have available to him sufficient information to warrant the commencement of proceedings in respect of the April 2004 treatment, and that accordingly Professor Wall's report, provided in May 2008, satisfies the test in s 34 for a material fact of a decisive character.

[50] In an affidavit sworn on 16 July 2009, the applicant states that in the course of his consultations with Dr Wall from 2005 to 2007, at no stage did Dr Wall criticise the treatment he had received at the Logan Hospital; and that it was only on receipt of Dr Wall's opinion on 19 June 2008 that he became aware that the treatment he received at the Logan Hospital was below standard and that he should have been advised about steps to be undertaken prior to the surgery which was carried out in April 2004.

[51] In an affidavit sworn in May 2009, the applicant states, to rather similar effect, that 19 June 2008 was the first time he became aware that he had reasonable prospects of success for bringing a claim for negligence against the respondent relating to his treatment between April and September 2004, and that had he been given proper pre-operative advice, it is probable he would not have suffered the ongoing complications of the surgery. No attempt was made to cross-examine the applicant.

[52] His solicitor has exhibited a letter to the solicitors for the respondent dated 30 April 2008 which was written to explain the applicant's delay in giving the initial notice under the *PIPA*. It sets out much of the history. It records a request for the files of the Logan Hospital and the Princess Alexandra Hospital, as a result of which initial advice was said to have been given to the applicant that a possible cause of action might lie against the Logan Hospital, but further information was required from Professor Wall. It then records that the file was transferred to another firm of solicitors on 29 August 2007, and says that at that point, advice was given to the claimant based on a review of the hospital files, that a cause of action in negligence might lie against the applicant's treating health professionals at the Logan Hospital, and that prospects of recovering significant damages justified proceeding with a claim against them. That statement would appear to be in constant with the applicant's affidavits.

[53] There are some things to be noted about the statement in the solicitors' letter of 13 April 2008. It does not specifically refer to the treatment in April 2007. It indicates a view formed on a review of the hospital files, which were regarded as insufficient to enable a view to be formed that the applicant had a good cause of action. Further, it is quite inconsistent with the order permitting a claim to be instituted urgently, but providing for the obtaining of an expert report in relation to the surgery carried out in April 2004.

[54] Having regard to these matters, I see no reason not to accept the applicant's sworn and unchallenged evidence about when he was first advised that he had a good cause of action.

Prejudice

[55] The respondent submits that the extension under s 31 of the *Limitation Act* should be refused because of what is referred to as "presumptive prejudice related to fading memories and recollections". This prejudice is to be contrasted with what is referred to as actual prejudice by McHugh J in *Brisbane South Regional Health Authority v Taylor*.[11] His Honour indicates that when actual prejudice is established, the limitation period should prevail over the power to extend it.

[56] The weight to be given to presumptive prejudice must inevitably vary from case to case. It is likely to attract greater weight, as the period of time between the events which gives rise to the action and the commencement of the proceedings gets longer. Its weight may be affected by the nature of the claim, and the importance of unrecorded recollections of events.

[57] In the present case, the records of the hospital show that in November 2004 someone at the hospital understood that the applicant had engaged a solicitor; and in January 2005 it was considered that legal action was probably pending. A note records that the matter was referred "to Legal Counsel" to obtain a statement. Another note in the same hand, and likely to have been made on 19 January 2005, recommended that statements be obtained, including from Dr McGowan, the surgeon who carried out the surgery in April 2004.

[58] The respondent has chosen not to call any evidence as to whether statements were taken in late 2004 or early 2005 from potential witnesses in the case, or as to the state of their recollections of matters relevant to the applicant's claim. Indeed, there are not insignificant notes available in the file, including what appears to be relatively contemporaneous notes prepared by Dr McGowan relating to his discussions with the applicant.

[59] These documents suggest that it is likely that the respondent has available to it a good record of relevant and important evidence in relation to the applicant's claim

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[11] (1996) 186 CLR 541, 555.

for which the extension is sought. In those circumstances, I am reluctant to attach much weight to considerations of presumptive prejudice.

[60] The other aspect of prejudice raised by the respondent is said to be in absence of real information about the quantum of the applicant's claim.

[61] The plaintiff has undergone treatment both at the Logan Hospital and the Princess Alexandra Hospital. The records of the Logan Hospital are in evidence, and there has been no suggestion that they fail adequately to record the applicant's treatment and condition when he attended there. Indeed, their effect is deposed to in the affidavit of the solicitor for the respondent. This solicitor also deposes to the effect of the records of the applicant's treatment at the Princess Alexandra Hospital. Again, there is no suggestion of any inadequacy in those records.

[62] The statement of claim provides a reasonably particularised statement of the allegations relating to the consequences of the alleged negligence. There is also information about the applicant's claim in notices provided under the *PIPA*.

[63] The assessment of quantum is not limited to a consideration of past events. It is concerned with the ongoing effects of wrongful conduct. This can often be determined more accurately at a time relatively remote from when the wrongful conduct occurred. It seems to me that some caution should be taken about adopting generalised statements relating to presumptions of prejudice when one is considering issues related to quantum.

[64] The respondent makes a broad submission that the applicant's history is complicated, in part because of his medical condition, and in part because of his bankruptcy, a criminal conviction, and what are said to be "other health issues which complicate the plaintiff's case". The submission does not attempt to identify health issues which are unrelated to the claim, but which might be relevant to an assessment of quantum. Nor does this submission explain how the applicant's bankruptcy and conviction have caused prejudice to the respondent. On one view, they may make certain, outcomes which might otherwise be contingent at the time quantum is to be assessed, whether those outcomes increase or decrease the amount to be awarded.

[65] In my view, considerations relating to prejudice do not, in this case, warrant the refusal of an extension of the limitation period.

Condition 3 of order of 5 September 2007

[66] As has been mentioned, it was a condition of the grant of leave to institute proceedings made on 4 September 2007 that the applicant file an application for an extension of the limitation period within six months of the receipt of an independent specialist's report. That condition was not satisfied. The applicant now seeks relief from the consequences of that non-compliance.

[67] Under r 905(2) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), unless a court orders otherwise, if a person fails to satisfy a condition the court has included in an order, the person loses the benefit of the order. The term "order" is broadly defined in schedule 4 of the *UCPR*. There is no reason to doubt that the order made on 4 September 2007 is one to which r 905(2) applies.

[68] The effect of the rule is that, as from November 2008, the applicant had lost the benefit of the order granting him leave to institute proceedings urgently, unless there is an order to some other effect. The respondent accordingly contends that, in the absence of leave, the proceedings are void.

[69] Apart from the language of r 905 itself, the applicant submits that relief is available under r 7 (a general power to extend a time set by order) and r 665(4) (the power to extend the times specified in an order for the performance of an act).

[70] In my view, it is not correct to identify the condition relating to the making of an application under the *Limitation Act* as an order setting a time for the performance of an act, for the purposes of r 665. That rule is concerned with orders requiring a person to perform an act, and states that the order must specify the time within which the person is required to perform the act. It subsequently provides for a variation of that time. Where an order is subject to a condition, the time for the fulfilment of which is specified in the order, the order does not require the person to perform the act specified in the condition.[12]

[71] It seems to me, however, that relief is available to the applicant under r 905. That rule confers on the court the power to make an order which would avoid the consequences of non-fulfilment of a condition specified in an earlier order.

[72] It also seems to me that relief may be available to the applicant under r 7. It confers a power to extend a time set by order. Given that r 665 confers a power on the court to vary a time specified in an order for the performance of an act, it seems to me that r 7 is likely to provide a power to permit an extension of a time within which a condition of an order is to be fulfilled.

[73] However, counsel for the respondent submits that the discretions in rr 7 and 905(2) are not available, unless an application is made before the time for fulfilment of the condition has expired. It relies for support of that submission on *Graham v WorkCover Queensland*.[13]

[74] A reading of this case does not support the submission. With reference to r 7, the learned District Court judge said, "(t)he rule is potentially applicable here". It is clear that his Honour considered that he had a discretion, but was not prepared to exercise it in favour of the applicant in that case.

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12 See *Asia Pacific Glass Pty Ltd v Sindea Trading Co Pty Ltd (No 2)* (2004) 47 ASCR 737 at [13].

13 [2005] QDC 263.

[75] The other source of power which his Honour considered was a power said to be found within the order itself. The case was concerned with an order which had been made granting leave pursuant to s 305 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) to start proceedings despite non-compliance with certain requirements of that Act. The grant of leave was expressly stated to be subject to the applicant applying for and being granted an extension of the relevant limitation period within three months of the date of the grant of leave. His Honour held that an application based on such a power must be made, and the extension of time granted, within the period specified in the order.

[76] His Honour also made reference to r 905, which he considered to be "completely consistent" with the view to which he had come. It appears that His Honour's attention was not drawn to the words within that rule, "unless a court orders otherwise"; and to the fact that the rule does not say that such an order must be sought or made at a time when the condition may yet be satisfied.

[77] Rule 905 plainly contemplates the making of an order which would avoid the consequences of non-satisfaction of a condition. Its language encompasses an order sought and made at a time when there has been failure to satisfy the condition. Indeed, the structure of the rule rather suggests that the failure to satisfy the condition is the anticipated trigger for an application for such an order. The conferral of the power to make an order avoiding the consequences of the failure to satisfy a condition is remedial, and there does not appear to be any reason to read that conferral narrowly. An additional reason for a liberal construction of these words is that they confer a discretion which is no doubt to be exercised judicially.[14]

[78] The view taken in the decision relied upon by the respondent was that r 7 confers a power to extend the time for the satisfaction of a condition in an order, and that an application might be made for the extension at a time when there has been a failure to satisfy the condition. It would be inconsistent with that view to a hold that time can be extended as a result of an application made when there has been a failure to satisfy the condition, but that an application under r 905(2) could not be made when there has been such a failure. I should add that with respect to r 7 itself, it has been recognised as a remedial provision conferring on a court a broad power to relieve against injustice; though it is manifestly a power to be exercised with caution.[15]

[79] The respondent also points to the fact that the order was made by consent. However, the respondent recognises that any underlying agreement does not displace any discretion the court might have to vary its earlier order, or alter the effect of non-satisfaction of the condition.[16]

[80] A consent order such as that made in September 2007 is not the compromise of the substantive claim, resulting in the abandonment or modification of substantive

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14 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205, per Gaudron J.

15 *Mango Boulevard Pty Ltd v Spencer* [2007] QSC 276 at [16], referring to *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1987) 165 CLR 268, 283.

16 See *Alford v Ebbage* [2003] 1 Qd R 343 at [61], [69]-[72]; see also *Smith v Smith* [1987] 2 Qd R 807, 813.

rights. It rather has the appearance of a practical recognition of the likely outcome of an application, coupled with the desire of the parties to give effect to that recognition at a minimum of cost. It may be doubted whether it is founded on a binding agreement, but the fact both parties concurred in its terms is relevant to the discretion which I am asked to exercise.

[81] The explanation for the failure of the applicant to satisfy the condition is simply oversight by his solicitor. She undertook actions required by the *PIPA*, but deposes that she became distracted by efforts to acquire the necessary materials and by the transfer of the conduct of a file around the time the application should have been for the extension of the limitation period. She was not reminded of her oversight until she received a letter from the solicitors for the respondent dated 27 March 2009. On 6 April 2009 she advised those solicitors that the applicant intended to proceed with the application. There is no suggestion of any personal fault on the part of the applicant.

[82] Issues of prejudice are raised by the respondent. They are, however, no different from those considered in relation to the extent of the limitation period.

[83] The respondent submits that it would be futile to grant a relief in respect of non-compliance with the condition, because a claim based on Professor Wall's report would not come within the claim commenced in September 2007, being the different cause of action. Indeed, the respondent submits that such a claim has no connection with the cause of action pleaded in those proceedings.

[84] The statement of claim filed on 5 September 2007 pleads the applicant's admission to the Logan Hospital on 31 March 2004, and the performance of surgery in April 2005. It also pleads subsequent treatment of the applicant at the Logan Hospital up and until and including November 2004. It alleges that the hospital and its servants and agents owed to the plaintiff a duty to exercise all reasonable care in carrying out surgical procedures. It alleges on the part of the surgeon who conducted the surgery in April 2004 a duty to inform himself of all relevant matters that would affect the applicant's response to surgery and prospects of a recovery, including the fact that the plaintiff had engaged in heavy lifting with strenuous activity during the course of his employment as a truck driver. Breaches of duty which are pleaded include the failure to perform an adequate procedure on 1 April 2004, and a failure to note the prior history of the applicant, particularly that he engaged in heavy lifting with strenuous activity during the course of his employment as a truck driver. It may well be that the claim which the applicant seeks to pursue on the basis of Professor Wall's report is made by the pleading. If not, it seems to me that the applicant would have good prospects of success in an application to amend the statement of claim, notwithstanding that the amendment may add a cause of action after the expiry of the limitation period, under r 376(4). In essence, the new claim seems to be that the surgery was carried out without warning the applicant of the risk of undergoing it; and without recommending to him that he undertake a significant course of preparation before he should undergo the surgery, to minimise that risk and enhance the prospects that the surgery would be successful.

[85] Under those circumstances, I do not consider it to be futile to grant the applicant relief against non-satisfaction of the condition.

[86] If the applicant were not granted relief, it may seriously jeopardise his prospects of pursuing an action in respect of his treatment in April 2004. On the basis of Professor Wall's report, it seems to be an action with some real prospect of success, and likely to result in a substantial award of damages.

[87] The respondent also relies on non-compliance with some aspects of the *PIPA*. However, it is not suggested that any additional prejudice flows from this non-compliance.

[88] Weighing up these matters, it seems to me appropriate to grant the applicant relief. If necessary, I will extend the time set by the condition for the making of the application for the extension of the limitation period. However, it seems to me to be sufficient simply to order that the applicant be relieved of the consequences of the non-satisfaction of the condition of the order made on 4 September 2007.

Conclusion

[89] I propose to make an order for the extension of the limitation period. I propose to order that the applicant be relieved of the consequences of non-compliance with the condition of the order made on 4 September 2007. I propose to invite the parties to provide submissions about whether any further order should be made; about the form of the orders; and as to costs.