SUPREME COURT OF QUEENSLAND

CITATION:	*Carter v Queensland Formwork Contractors Pty Ltd* [2010] QSC 315
PARTIES:	**BRIAN JAMES CARTER** (applicant) **v** **QUEENSLAND FORMWORK CONTRACTORS PTY LTD** **ACN 086144238** (respondent)
FILE NO:	S 15 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Bundaberg Supreme Court
DELIVERED ON:	30 August 2010
DELIVERED AT:	Rockhampton
HEARING DATE:	19 August 2010
JUDGE:	McMeekin J
ORDERS:	**1. The applications are dismissed.** **2. Counsel will be heard as to costs.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – where applicant suffered injury to his back in two separate incidents in November and December 2002 during the course of his employment with the respondent – where Notice of Claims were lodged under *WorkCover Queensland Act* 1996 within time in respect to both incidents – where the claim for the December incident was accepted but the claim for the November incident was rejected – whether an extension of the limitation period to commence an action should be granted in respect of the November incident *Limitation of Actions Act* 1974 (Qld), s 30, s 31 *WorkCover Queensland Act* 1996, s 250, s 253, s 273, s 273A, s 280A, s 305 *Castillon v P&O Ports Ltd* [2008] 2 Qd R 219; [2007] QCA 364

Gillespie v Swift Australia Pty Ltd [2009] QCA 316
Glenn Alexander Pikrt v Hagemeyer Brands Australia Pty Ltd [2006] QCA 112
Greenhalgh v Bacas Training Limited and Ors [2007] QCA 327
Kambarbakis v G & L Scaffold Contracting Pty Ltd [2008] QCA 262
Mason v Toowoomba City Council [2005] 1 Qd R 600; [2005] QCA 46
Moriarty v Sunbeam Corporation Ltd [1988] 2 Qd R 325
NF v State of Queensland [2005] QCA 110
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431

COUNSEL: J. Webb for the applicant
G. Crow for the respondent

SOLICITORS: Suthers Lawyers for the applicant
Gadens Lawyers for the respondent

[1] **McMeekin J:** The applicant is Brian James Carter. He has two applications now before the Court in respect of an injury he says he sustained in the course of his employment with the respondent, Queensland Formwork Contractors, in November 2002 when he took the weight of an unexpectedly heavy scaffold frame. He applies:

(a) pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) ("the Act") to extend the limitation period applicable to that injury;
(b) pursuant to s 305 of the *WorkCover Queensland Act* 1996 (WCQA) for leave to commence proceedings in respect of that injury despite noncompliance with the requirements of the WCQA.

[2] The respondent opposes the applications. Two grounds were argued – first that the proposed extension application is futile as Mr Carter is prohibited by statute from bringing proceedings in respect of the injury of November 2002 even if the limitation period was extended. Secondly, that all material facts of a decisive character were within Mr Carter's means of knowledge years ago.

The Background

[3] It is necessary that I say a little more about the facts.

[4] Following the November 2002 incident Mr Carter did not cease work. He alleges that he suffered a further insult to his spine on 16 or 17 December 2002[1] when pushing a wheel barrow with a flat tyre when filled with cement, again in the course of his employment with the respondent.

[5] He commenced proceedings for damages for the injury sustained in December 2002. As the pleadings in those proceedings now stand the respondent/defendant alleges that prior to the December 2002 incident Mr Carter had suffered from "significant pre-existing back degeneration" and had suffered a number of injuries to his back such that he was likely to have "suffered the same or similar losses in any event" had the December incident not occurred.[2] Included in the particulars of injuries suffered was the incident of November 2002. In an earlier version of the

1 See paragraph 4 of the Statement of Claim.
2 Paragraph 6 of the Further Amended Defence filed 19 August 2010.

pleading the defendant had alleged that the plaintiff had a pre-existing back injury that would frequently re-occur, but without any particularisation of those reoccurrences.[3]

[6] That action for damages was called on for hearing on 18 May 2010. The defendant sought and obtained leave to amend the defence to make the allegations that I have set out above. A file note dated 14 May 2010 of a conversation between the respondent's counsel, Mr Crow, and an orthopaedic specialist, Dr Winstanley, had been made available to Mr Carter's counsel the night before the commencement of the trial advising that Dr Winstanley had expressed the opinion, based on the accuracy of certain medical records, that Mr Carter had suffered a permanent injury to his spine in November 2002 contributing some 2% to his overall condition. The trial was adjourned at Mr Carter's request.

[7] The parties are agreed that Mr Carter's right to claim damages from the respondent for any injury sustained in November 2002 is governed by the provisions of the WCQA as amended to the date of injury. That date is no better identified than mid-November 2002 and so it would seem that reprint 5A is applicable.

[8] Under the WCQA it was a necessary precondition of the exercise of Mr Carter's right to claim damages[4] that WorkCover accept that at the relevant time he was a worker, that he had sustained an injury, and that WorkCover give to Mr Carter a Notice of Assessment for the injury: s 273A WCQA.

[9] In order to initiate the process of claiming damages, and as the expiration of the limitation period was fast approaching, on 14 October 2005 Mr Carter lodged a Notice of Claim for Damages form with WorkCover under s 280A of the WCQA. It was common ground that the form related to the same injury now the subject of the applications before the Court.

[10] In a declaration at the end of the form he declared that to the best of his knowledge the contents of it were "true, correct and complete in every respect". In the form he claimed to have suffered an injury to his lumbar spine in mid-November 2002 and the degree of impairment alleged to have resulted was 5%. In response to a question as to how the injury affected him he replied: "I have ongoing pain in the centre of my lumbar spine which varies in intensity depending on the activity that I do. I have on occasion had pain refer down into my leg … the pain in my back restricts me in my every day activities". In the form he claimed damages in the sum of $416,563.11 including a claim for economic loss into the future in the sum of $274,550 based on an ongoing loss of $500 per week.

[11] WorkCover declined to accept the claim finding that Mr Carter had not suffered an injury. Mr Carter exercised his right of appeal to Q Comp but was not successful. He did not pursue a further appeal to the Industrial Magistrate as he might have done.[5] Mr Webb informs me that the case that Mr Carter will present at trial is that any injury sustained in November 2002 was not of significance.

[12] No Notice of Assessment has issued, WorkCover not being obliged to issue one, given the decision of Q Comp and the absence of any further appeal.

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3 Paragraph 3 of the Amended Defence filed 20 October 2008.

4 *Bonser v Melnacis & Anor* [2002] 1 Qd R 1; [2000] QCA 13; *Tanks v WorkCover Qld* [2001] QCA 103.

5 See Part 3 of Chapter 9 WCQA.

[13] Further it is common ground that on the same date as he lodged the Notice of Claim for Damages form with WorkCover in respect of the November incident, Mr Carter also lodged a Notice of Claim form in respect of the December incident – identical in every respect including the claims of injury to the spine and the assessment of damages. That latter claim was accepted and the proceedings claiming damages were eventually initiated and came on for hearing before me in May.

[14] The case therefore has this peculiarity – Mr Carter contends that there was an incident in November 2002 in which he sustained an injury to his back which he maintains was transient in its effects. Nonetheless he brings these applications which are designed to put him into a position to claim damages for any injury sustained. He does so because the respondent, contrary to the position taken by WorkCover in 2005, contends that the injury sustained was permanent in its effect and should be brought into account as a discount to the damages.

[15] Understandably Mr Carter feels a sense of grievance. He contends, with some justification, that WorkCover have prevented him from pursuing his claim for damages in relation to the November incident by successfully arguing throughout the pre-proceedings process that he had not suffered an injury, that he has proceeded on that basis ever since, but now, as the respondent's insurer, WorkCover seek to argue in his damages claim the contrary, that is, that he did suffer an injury and of sufficient significance to justify a reduction in damages.

[16] That sense of grievance however can have no bearing on the application of the relevant principles to which I now turn.

The Application of the WCQA

[17] The first issue to determine is whether there is any point to the extension application.

[18] Chapter 5 of the WCQA restricts an employee's access to damages for personal injury suffered in the course of employment. Section 253 of the WCQA provides:

> "(1) The following are the only persons entitled to seek damages for an injury sustained by a worker—
>
> (a) the worker, if the worker—
>
> (i) has received a notice of assessment from WorkCover for the injury; or
>
> (ii) has not received a notice of assessment for the injury, but—
>
> (A) has received a notice of assessment for any injury resulting from the same event (the "assessed injury"); and
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> (B) for the assessed injury, the worker has a WRI of 20% or more or, under section 255,[102] the worker has elected to seek damages; or
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> (b) the worker, if the worker's application for compensation was allowed and the injury has not been assessed for permanent impairment; or
>
> (c) the worker, if—
>
> (i) the worker has lodged an application, for compensation for the injury, that is or has been the subject of a review or appeal under chapter 9; and
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> (ii) the application has not been decided in or following the review or appeal; or

(d) the worker, if the worker has not lodged an application for compensation for the injury; or
(e) a dependant of the deceased worker, if the injury results in the worker's death.
…
(5) To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker.

[19] Thus it is clear enough that unless Mr Carter can bring himself within one of the provisions in subsection 253(1) of the *WCQA* then his right to claim damages has been abolished.

[20] Mr Carter contends, accurately, that he comes under s 253(1)(d) as he did not lodge a claim for compensation in respect of the subject injury. In that case Division 6 of Part 2 of Chapter 5 of the WCQA applies: see s 273. Section 273A appears in that Division and provides:

"(1) The claimant may seek damages for the injury only if WorkCover—
(a) decides that the claimant—
(i) was a worker when the injury was sustained; and
(ii) has sustained an injury; and
(b) gives the claimant a notice of assessment for the injury."

[21] Here, WorkCover decided that Mr Carter had not sustained an injury and hence did not give him a notice of assessment. That decision was confirmed on appeal. Mr Carter therefore cannot satisfy the preconditions laid down by the legislation which entitle him to seek damages. It would seem then that Mr Carter has no right to claim damages, that right having been abolished in the circumstances.

[22] Mr Webb, who appears for the applicant, contends that this difficulty can be overcome by application of s 305 of the WCQA.

[23] Section 305 provides:

"**Court to have given leave despite noncompliance**

(1) Subject to section 303, the claimant may start the proceeding if the court, on application by the claimant, gives leave to bring the proceeding despite noncompliance with the requirements of section 280.

(2) The order giving leave to bring the proceeding may be made on conditions the court considers necessary or appropriate to minimise prejudice to WorkCover from the claimant's failure to comply with the requirements of section 280."

[24] What that submission overlooks, in my respectful opinion, is that it is evident from the terms of s 305 that the court's power to give leave is dependant on the applicant establishing that he is a "claimant", as it is only a "claimant" who can apply under s 305 and who can start a proceeding. "Claimant" is defined by s 250 of the WCQA as "a person entitled to seek damages". Thus it is necessary for Mr Carter to first demonstrate that he has an entitlement to seek damages. That was the reasoning of the Court of Appeal in *Mason v Toowoomba City Council* [2005] 1 Qd R 600; [2005] QCA 46. Mr Carter cannot do that.

[25] So far as I am aware I have no power to override the provisions of the WCQA or extend time to enable Mr Carter to exercise a right of appeal to the Industrial Magistrate from Q Comp's decision. No source of any such power was suggested to me.

[26] There is then no point to the extension application as Mr Carter is not permitted to bring proceedings for damages even if the limitation period was extended. However, in case I am wrong in this view, I will deal with the extension application.

The Requirements of the *Limitation of Actions Act*

[27] The limitation period within which Mr Carter was permitted to commence a proceeding for damages expired in November 2005 without an action having been commenced.

[28] In order to succeed on an application to have the limitation period extended the applicant must show that "a material fact of a decisive character relating to the right of action was not within [his] means of knowledge" until a date after, in this case, November 2004: s 31(2)(a) of the Act. There must be evidence which if unopposed would be sufficient to prove his case.[6] Those two matters being shown I have a discretion to extend the limitation period for 12 months from the time the material fact first came within his means of knowledge. Normally that discretion would be exercised in favour of the applicant unless there was relevant prejudice to the respondents.[7] The onus lies throughout on the applicant.

[29] The respondent concedes that relevant prejudice cannot be shown and that there is evidence to establish the right of action, apart from the limitation period.

The Basis of the Application

[30] The material fact relied on is said to be the opinion that I have mentioned of Dr Winstanley, that is that Mr Carter had suffered a permanent injury to his spine in November 2002 contributing some 2% to his overall condition. In other words it is claimed that it is the existence of a causal relationship between the November incident and the ongoing and debilitating back condition that was not within Mr Carter's means of knowledge until the eve of trial.

[31] The extent to which an injury has been caused by a relevant negligent act or breach of duty is clearly capable of being a material fact within the meaning of the legislation: see s 30 (1)(a)(iii) and(v) of the Act.

[32] The contention is that without expert assistance Mr Carter cannot know the cause of his continuing back pain and disability given that he suffered two insults with the potential to cause injury to his back within a relatively short space of time and that Mr Carter did not have that expert opinion available until he received the opinion of Dr Winstanley. Here there is the added twist that Mr Carter rejects that opinion, presumably relying on alternative advice from other qualified practitioners, but nonetheless seeks to be protected if he is wrong in his own view.

Is Dr Winstanley's Opinion a Material Fact?

[33] The respondent submits that Dr Winstanley's opinion is not a fact at all and could not be a material fact within the meaning of s 31(1)(a) of the Act.

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[6] Cf. *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 at 434-435 per Macrossan CJ.

[7] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544 per Dawson J; 555 per McHugh J.

[34] The existence of a causal connection between an event and an injury might sometimes be plain enough to an unqualified person but where, as here, there are potentially alternative causes open then it is expert medical opinion that will provide the evidence on which the Court will determine the existence of that casual connection. So far as an unqualified lay man such as Mr Carter is concerned, knowledge of the existence of that connection can only be obtained through the medium of the opinions of others suitably qualified to assess the evidence available.

[35] In *Greenhalgh v Bacas Training Limited and Ors*[8] Keane JA (with the concurrence of Cullinane J) considered it settled law that "the availability of evidence which establishes an aspect of a claimant's case can itself be a material fact relating to a right of action" relying on the decisions of *Wood v Glaxo Australia Pty Ltd* (particularly that of the Chief Justice) and *Glenn Alexander Pikrt v Hagemeyer Brands Australia Pty Ltd.*[9]

[36] In *Wood v Glaxo Australia Pty Ltd*[10] Macrossan CJ appeared to consider that means of knowledge of the evidence available to establish a relevant fact as being the relevant enquiry[11], contrary to the approach of Davies JA who thought that it was means of knowledge of the fact itself and not the evidence to establish it that was relevant[12]. Davies JA held that the relevant causal connection in that case was within the means of knowledge of the applicant there "only when the steady preponderance of opinion or belief of a person who had taken all reasonable steps to ascertain that fact would have been that that was so." He added the qualification that "that would not necessarily have been when a favourable opinion was first communicated to [the applicant] particularly where … there were for a time thereafter conflicting opinions."[13] That test was applied by Keane JA (with whom the other members of the Court agreed) in *Castillon v P&O Ports Ltd.*[14]

[37] I proceed on the basis that the test propounded by Davies JA is apposite in this situation where an applicant for an extension is confronted with potentially alternative causes and conflicting opinions and that Dr Winstanley's opinion is capable of being a material fact.

[38] On the assumption that Dr Winstanley's opinion is capable of being a material fact the respondent makes two submissions – that Dr Winstanley's opinion was within the applicant's means of knowledge more than one year ago, and that it is not of a decisive character. To put those submissions into context it is necessary to examine more closely Dr Winstanley's previous involvement in the matter.

Dr Winstanley's Opinions

[39] Dr Winstanley was originally engaged by the applicant's solicitors to provide a report. Subsequently the respondent sought a supplementary report.

[40] In the first report dated 7 September 2004, provided to the plaintiff's solicitors, he recorded that he had been supplied with the Burrum Street Medical Practice records. That is of significance as the crucial history that Dr Winstanley was asked to assume by the respondent as accurate, and that prompted the conference note

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8 [2007] QCA 327 at [18].
9 [2006] QCA 112.
10 [1994] 2 Qd R 431.
11 [1994] 2 Qd R 431 at 437/25-30.
12 [1994] 2 Qd R 431 at 440/30-35.
13 [1994] 2 Qd R 431 at 442.
14 [2008] 2 Qd R 219; [2007] QCA 364 at [38].

containing the critical opinion, is that contained in the Burrum Street Medical Practice records.[15]

[41] In that first report Dr Winstanley stated the history of symptoms that he assumed following the November incident as being that Mr Carter "was able to continue to work after the incident but had been experiencing discomfort across his lumbar spine".[16] I do not understand Mr Carer to resile from that history – his affidavit suggests a similar account.[17] Dr Winstanley concluded that Mr Carter had an 8% loss of function of the whole person with 4% attributable to a pre-existing degenerative condition and 4% related to the injuries sustained in November and December 2002, without drawing any distinction between them.

[42] In the second report dated 18 November 2008 Dr Winstanley again records the receipt of the Burrum Street Medical Practice records.[18] The history he records is that after the November 2002 incident Mr Carter "subsequently was able to continue with work activity but developed increasing symptomatology with his lumbar spine following [the December incident]". Again I do not understand Mr Carter to resile from that as accurately setting out his history.

[43] In that second report Dr Winstanley expressed the opinion that "the major injury" to the lumbar spine occurred in the December 2002 incident. He repeated his earlier assessment of an 8% impairment with a 4% attributable to pre-existing degeneration but attributed 4% to the December incident. If this opinion be accepted the November incident is of no consequence.

[44] The file note that triggered the adjournment of the trial and these two applications indicates that Dr Winstanley now holds significantly different views. He now concludes that of the 8% impairment that he says exists "at least 6 % … relates to pre-existing degeneration" and the remaining 2% is attributable to the November incident. The December incident he now considers to be "only a minor and very short term (one to two weeks) aggravation". Obviously enough if those opinions were accepted then Mr Carter would receive no significant damages in his present proceedings.

[45] Dr Winstanley also expresses the view in that file note that "from 9 June 2000 Mr Carter was unfit for manual work by reason of his pre-existing back degeneration".

[46] The change in opinion was brought about it is said because in the earlier reports Dr Winstanley assumed a different history, and one provided by Mr Carter, whereas when he most recently advised Dr Winstanley assumed, for the first time, the accuracy of the records of the Burrum Street Medical Practice. According to the file note, of significance to Dr Winstanley was not only the record made of the symptoms reported and treatment proffered on attendances at that practice at various times over the years leading up to June 2000, but also a report contained within those records of a Dr Mergard of 5 February 2003.

[47] Was Dr Winstanley's recently expressed opinion within the applicant's means of knowledge as the respondent contends?

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15 See the note at exhibit BJC 4 to Mr Carter's affidavit filed 3 August 2010 and at Exhibit JG 17 to Mr Gurry's affidavit filed 5 August 2010.

16 See exhibit BJC 2 to Mr Carter's affidavit filed 3 August 2010.

17 See paragraph 7 of Mr Carter's affidavit filed 3 August 2010..

18 See Exhibit BJC 3 to Mr Carter's affidavit filed 3 August 2010 at p. 1.

Means of Knowledge

[48] Section 30(1)(c) of the Act provides:

> "A fact is not within the means of knowledge of a person at a particular time if, but only if –
>
> (i) the person does not know the fact at the 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."

[49] I bear in mind that the correct approach is to determine the state of knowledge attainable by this applicant and that the Act, in s 30(1)(c) does not speak of "a reasonable person". The significance of this was explained by Keane JA in *NF v State of Queensland* [2005] QCA 110 at [29]:

> "It is to be emphasized 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 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, that fact is not within her means of knowledge for the purpose of s 30(1)(c) of the Act. ..." (underlining added)

[50] The respondent contends that what has occurred here is that the applicant failed to provide Dr Winstanley with an accurate history and ask the obvious question. The applicant, acting reasonably, should have done so. If he had then he would have learnt of the Doctor's opinion years ago.

[51] I do not accept that Mr Carter has in any way misled Dr Winstanley or failed to provide him with a comprehensive history.

[52] As the reports of Dr Winstanley show he was, prior to the preparation of his reports, provided with the Burrum Street Medical Practice records and so was given access to all the records which he now contends are crucial in his change of position. There was no evidence that he was asked to assume that the record of symptoms and attendances were not accurate. Indeed the applicant's solicitors not only enclosed the records when seeking the first report but expressly enclosed as a separate item the, apparently crucial, report of Dr Mergard of 5 February 2003 and then posed the question: "We would ask that if you feel that our client's injury is complicated by any pre-existing degenerative change that you specifically address any acceleration of degeneration caused by the injury and detail the evidence based procedures you have used to form such opinion".[19]

[53] Similarly when asked to provide the second report Dr Winstanley had available the Burrum Street Medical Practice records.

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[19] See Exhibit RJS 1 to the affidavit of Mr Suthers filed by leave 19 August 2010.

[54] What has apparently occurred here is that Dr Winstanley has not done what he was asked to do. He was plainly provided with the Burrum Street Medical Practice records in the expectation that he would read them and, so far as he considered them relevant, bring them into account. He was expressly asked to consider in August 2004 the very question that was posed to him by the respondent's solicitors on the eve of trial, that is, the impact that any pre-existing degeneration would have on the assessment. What Dr Winstanley has now done is read and evaluated the material that he was originally given and addressed the question posed to him in 2005.

[55] The question then is whether a labourer who has engaged apparently competent solicitors, who in turn have engaged an apparently qualified orthopaedic specialist to advise, and who have asked what, with respect, appears to be the apposite question of that specialist, is required to go further and presumably instruct his solicitors not to accept the opinion of the specialist, to go behind the report obtained and check to see if the specialist has read the material provided and followed his instructions? I think it evident that would be going well beyond what could be considered reasonable. Litigants are entitled to assume that specialists will conscientiously perform their function.

[56] No suggestion was made that any other avenue was reasonably open to Mr Carter to establish the opinions now expressed by Dr Winstanley.

[57] Dr Winstanley did not draw a distinction between the November 2002 incident and the December 2002 incident in his first report. He was not asked to do so presumably because at that stage the intention was to pursue claims in respect of both incidents and it was not of great moment to determine the precise attribution of impairment. That did become relevant when Q Comp determined on 23 April 2006 that there was no injury sustained in the November 2002 incident. It could be said that if Dr Winstanley's views were of significance then acting reasonably Mr Carter should the have clarified the position then. I think that there are two answers to that. The first is that Mr Carter was entitled to rely on his solicitors to seek any necessary clarifying report of a medical specialist. He is a labourer unfamiliar with the procedures and issues relevant to his case. He has retained solicitors to protect his interests and take any necessary steps. Acting reasonably I cannot see that he needed to do more than leave it to them to act as they saw fit.

[58] Secondly, any enquiry would presumably have produced the opinion that Dr Winstanley did in fact provide to the respondent in November 2008. Again on that occasion Dr Winstanley was provided with the relevant material. That opinion provided support for the stand the applicant had taken – acceptance of Q Comp's decision that no injury of significance was suffered in November 2002.

[59] It is for the applicant to establish that the material fact would not have been discoverable prior to the critical date: *Kambarbakis v G & L Scaffold Contracting Pty Ltd* [2008] QCA 262 per Holmes JA at [48]; *Gillespie v Swift Australia Pty Ltd* [2009] QCA 316 at [20]. In my view, acting reasonably Mr Carter was not expected to do more than he did. He has discharged the onus on him.

Decisive Character

[60] Section 30(1)(b) of the Act provides:

> "(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."

[61] Section 30(2) of the Act provides that for the purposes of s 30 "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."

[62] In determining whether a newly learned fact has the necessary quality of decisiveness an applicant 'must show that without the newly learned fact or facts he would not, even with the benefit of appropriate advice, have previously appreciated that he had a worthwhile action to pursue and should in his own interests pursue it': *Moriarty v Sunbeam Corporation Ltd* [1988] 2 Qd R 325 per Macrossan J at 333.[20]

[63] Mr Crow was inclined to argue that the lodging of the Notice of Claim form with WorkCover in 2005 in respect of the November 2002 incident advancing a claim for $416,563.11 demonstrates that Mr Carter then had sufficient material facts in his possession to justify a substantial action for damages and hence nothing learned after that time can qualify as a "material fact of a decisive character".

[64] As Keane JA observed of a similar argument put forward in *Castillon v P&O Ports Ltd*[21] in relation to the commencement of proceedings there, such a step is not determinative of the issue but "[t]hey are circumstances which, at least, call for a clear explanation as to why the 'conjunction of circumstances', and the plaintiff's awareness of them, was not such as to justify and require the bringing of an action in the plaintiff's own interest."[22]

[65] Here there is an obvious explanation for the substantial claim. Two identical claims were advanced based on the two events because at that stage Mr Carter was not to know what the cause of his back disability was, his limitation period was on the point of expiry, and he simply put forward the two possible alternative causes, it being irrelevant to him which cause be adopted, and no doubt expecting to leave it for another day to unravel the causation issue if it became necessary to do so.

[66] However, in my view, there are two significant difficulties for the applicant here. The first is that Dr Winstanley's altered views are dependent upon a factual assumption that the applicant says is false. The second is that if one accepts Dr Winstanley's opinions then the applicant is entitled to very little in the way of damages.

[67] As to the first point the essential factual assumption is an inference that Dr Winstanley draws from Dr Mergard's report of 5 February 2003 that "Mr Carter's significant back pain commenced six weeks prior to 15 January 2003 and from the

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20 Cited with approval in *Byers v Capricorn Coal Management Pty Ltd* [1990] 2 Qd R 306; *Berg v Kruger Enterprises* [1990] 1 Qd R 301; *Hintz v WorkCover Qld & Anor* [2007] QCA 72 at [38]-[39].

21 [2007] QCA 364.

22 At [18].

time Mr Carter grabbed the frame for the scaffold, two jacks and ply". Dr Mergard makes no reference to the December incident. I note that Dr Mergard does not use the word "significant" in his report. That is Dr Winstanley's assumption.

[68] Mr Carter effectively says that assumption is wrong. His affidavit asserts that "the back pain was much less in November 2002 than the back pain that I suffered in December 2002."[23] Only Mr Carter can know the pain that he suffered following each incident. For the purpose of these proceedings Mr Carter has not asserted that "the significant back pain" commenced in November. Rather his account is consistent only with the assertion that the significant back pain commenced four weeks prior to the attendance on 15 January 2003 and in a differently described incident.

[69] I cannot see how an opinion based on a false premise could be decisive in the relevant sense. On this issue Mr Carter is assumed to have taken appropriate advice. Such advice could only be that an opinion based on a false premise would not enable him to succeed to any damages.

[70] As to the second point, Dr Winstanley's opinions do not support any significant damages award. According to Dr Winstanley Mr Carter had reached the stage where he could no longer perform his labouring work by June 2000 - 2½ years before the November 2002 incident. The only contribution that the November 2002 incident made to his condition was a 2% impairment. Damages based on these opinions could only include a fairly modest assessment of general damages for pain, suffering and loss of amenities and, perhaps, a very modest component for impaired earning capacity.

[71] No precise submission was made as to the damages said to be available. The Notice of Claim form that I have earlier referred to suggested a damages assessment for the general damages component of the award at $35,000. Presumably that assumed a 4% contribution to the existing impairment, that being the advice of Dr Winstanley at that time and he not differentiating between the two incidents. That would be reduced, and perhaps halved, if Dr Winstanley's recently expressed views were accepted.

[72] Given the risks and expense involved in litigation[24] any competent advisor would have told Mr Carter that Dr Winstanley's views were such that it was not in Mr Carter's interests to persist with the case as those views were of no assistance in establishing any significant award.

[73] I conclude that Dr Winstanley's opinions do not amount to "a material fact of a decisive character" within the meaning of the Act.

Orders

[74] The applications are dismissed.

[75] I will hear from counsel as to costs.

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[23] Paragraph 7 of Mr Carter's affidavit filed 3 August 2010.

[24] As to the potential impact of costs see *Jocumsen v Thiess Pty Ltd & Anor* [2005] QCA 198.