

SUPREME COURT OF QUEENSLAND

CITATION: *Stephenson v State of Qld* [2004] QCA 483

PARTIES: **PETER ROBERT STEPHENSON**
(plaintiff/appellant)
v
STATE OF QUEENSLAND
(defendant/respondent)

FILE NO/S: Appeal No 7621 of 2004
SC No 11521 of 2001

DIVISION: Court of Appeal

PROCEEDING: Personal Injury

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 14 October 2004

JUDGES: Davies and Williams JJA and Chesterman J
Separate reasons for judgment of each member of the Court,
Davies and Williams JJA concurring as to the orders made,
Chesterman J dissenting

ORDER: **1. Appeal allowed**
2. Set aside the orders made by the learned primary judge
3. In lieu:
(a) order that the period of limitation for the action commenced by the applicant on 20 December 2001 be extended so that it expires on 20 December 2001
(b) order that the respondent's application be dismissed
4. That the respondent pay the appellant's costs of the applications before the learned primary judge and of this appeal to be assessed

CATCHWORDS: LIMITATION OF ACTIONS - POSTPONEMENT OF THE BAR - EXTENSION OF PERIOD - CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES - KNOWLEDGE OF MATERIAL FACTS - MATERIAL FACTS OF DECISIVE CHARACTER - where the application for extension of time within which to commence proceedings was dismissed by the learned primary judge - where the appellant was formerly a police officer who performed covert police work - where the appellant sustained psychological

injury as a result of that work - where a cause of action existed except for the fact that the action was not commenced within time - where the appellant must prove that a material fact of a decisive character relating to his right of action was not within his means of knowledge until after a certain date, if an extension is to be granted - whether the learned primary judge correctly interpreted s 31(2)(a) and s 30(1)(b)(ii) *Limitation of Actions Act 1974* (Qld)

Limitation of Actions Act 1974 (Qld), s 30(1)(b)(ii), s 31(2)(a)

Broken Hill Proprietary Company Ltd and Anor v Waugh (1988) 14 NSWLR 360, discussed

Castlemaine Perkins Limited v McPhee [1979] QdR 469, cited

Ditchburn v Seltsam Ltd (1989) 17 NSWLR 697, cited

Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234, discussed

Ipswich City Council v Smith [1997] QCA 263; Appeal No 5443 of 1997, 29 August 1997, discussed

Moriarty v Sunbeam Corporation Limited [1988] 2 QdR 325, discussed

Randel v Brisbane City Council [1984] 2 QdR 276, cited

Reeman v State of Queensland [2004] QCA 484; Appeal No 8239 of 2004, 17 December 2004, discussed

Re Sihvola [1979] QdR 458, cited

Royal North Shore Hospital v Henderson (1986) 7 NSWLR 283, discussed

Russell v State of Queensland [2004] QCA 370; Appeal No 4264 of 2004, 8 October 2004, cited

Sugden v Crawford [1989] 1 QdR 683, cited

Taggart v The Workers' Compensation Board of Queensland [1983] 2 QdR 19, discussed

Tiernan v Tiernan [1993] QSC 110; Supreme Court No 39 of 1992, 22 April 1993, discussed

Watters v Queensland Rail [2001] 1 QdR 448, cited

Wrightson v State of Queensland [2004] QSC 218; SC No 11522 of 2001, 22 June 2004, cited

COUNSEL: D B Fraser QC, with G R Mullins, for the appellant
R J Douglas SC, with D J Campbell, for the respondent

SOLICITORS: Gilshenan & Luton for the appellant
C W Lohe, Crown Solicitor, for the respondent

- [1] **DAVIES JA:** On 5 August 2004 the learned primary judge dismissed an application by the appellant, made pursuant to s 31 of the *Limitation of Actions Act 1974* ("the Act"), that the time for commencing proceedings against the respondent be extended to 20 December 2001, the date on which they were in fact commenced. In consequence his Honour gave judgment for the respondent against the appellant in that action with costs. This is an appeal against those orders. It is common

ground that if his Honour was correct in dismissing the appellant's application, the other orders were correctly made.

- [2] In order to succeed in his application the appellant had to prove:
1. that a material fact of a decisive character relating to his right of action against the respondent was not within his means of knowledge until after 20 December 2000 which date may be conveniently referred to hereafter as "the critical date"; and
 2. that there was evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation.

It was common ground that the second of those requirements had been established. It was also common ground that there were no discretionary factors which might cause a court to refuse to make the order which the appellant sought.

- [3] Two questions arise in this appeal. The first is primarily one of construction of two relevant provisions of the Act, s 31(2)(a) and s 30(1)(b)(ii) which the learned primary judge resolved against the appellant. The second is whether the termination of the appellant's employment with the respondent was a material fact of a decisive character relating to his right of action. The learned primary judge held that it was a material fact but that it was not of a decisive character. The appellant contends that it was of a decisive character; the respondent contends, by its notice of contention, that it was not material. As will appear from what I say hereunder, if the first of these questions is answered in the appellant's favour, it will not be necessary to answer the second.

- [4] It is convenient to discuss those questions in that order.

The construction of s 31(2)(a) and s 30(1)(b)(ii)

- [5] Section 31(2)(a) is in the following terms:

"(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;

...

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."

- Section 30(1)(b) is in the following terms:

"(1) For the purposes of this section and sections 31, 32, 33 and 34—

....

(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;"

- [6] The facts relevant to this question are not in dispute. They are set out fully and accurately in the reasons of the learned trial judge and it is unnecessary for me to set them out fully here. I shall set them out in summary form only.
- [7] The appellant is a former police officer who was employed by the respondent. He is 34 years of age. He joined the Queensland Police Service in May 1992 and in 1994 and 1995 he worked as a covert police officer. That work brought him into contact with dangerous criminals and illegal drugs, he experienced a number of traumatic events and he was often in fear for his life. In consequence he became a heavy user of cannabis and alcohol and ultimately became permanently incapacitated for work as a police officer. By November 2000 he knew that he was permanently incapacitated for police work. He did not then appreciate the impact of his condition upon his ability to perform other equally remunerative work but it was accepted on his behalf that this information was available to him then had he inquired.
- [8] The learned primary judge held that, by the end of November 2000, the material facts relating to the appellant's right of action against the respondent, which were within his means of knowledge, would have shown to a reasonable person, having taken the appropriate advice on those facts, that an action on that right of action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify it. That finding was accepted by the appellant. Consequently the Court was not concerned with the meaning or application of s 30(1)(b)(i).
- [9] However the learned primary judge held, and this is also now common ground, that, because of two circumstances, those facts, though constituting all material facts relating to the right of action, were not of a decisive character until after the critical date. The first of those circumstances was that the commencement of an action before then would have exacerbated the applicant's psychiatric disability. And the second of them was that the commencement of an action before then may have put at risk his attempt to retire on medical grounds with a consequent loss of \$267,000 in retirement benefits. Together, the learned primary judge held, these circumstances prevented those material facts from being of a decisive character before the critical date because a reasonable person, taking appropriate advice on those facts, would not, because of those circumstances, have regarded them as showing that the applicant ought in his own interests and taking his circumstances into account to have brought the action on the right of action which those facts established. Those material facts became decisive only after the critical date when the applicant's retirement application on medical grounds was accepted and his psychiatric condition improved somewhat.

- [10] The result of his Honour's findings of fact is that, as his Honour held, all material facts relating to the applicant's right of action were within his means of knowledge on or before the critical date but that they did not become of a decisive character until after that date. It is not just that, between the end of November 2000 and the critical date, they were decisive but that the appellant did not know that they were; it is that they were not, before that date, of a decisive character. They did not assume that character until after the critical date. That is because, within the meaning of s 30(1)(b)(ii), though the material facts relating to the applicant's cause of action, before that date, established a cause of action with reasonable prospects of success for an amount of damages sufficient to justify bringing an action, a reasonable person, knowing those facts and having taken appropriate advice on them, would have considered that the applicant's personal circumstances precluded a conclusion that it was in his own interests to bring the action.
- [11] The question of construction before his Honour and before this Court is whether, in those circumstances, all material facts of a decisive character relating to the right of action were, within the meaning of s 31(2)(a), within the means of knowledge of the appellant on or before the critical date. The learned primary judge held that they were. His Honour said:
- "A fact of which the applicant was already aware but which was not of a decisive character, does not come within the applicant's means of knowledge at a subsequent point when, having regard to the applicant's then interests and circumstances, it can be said to be decisive. There is but one point when a fact comes within the applicant's means of knowledge."
- [12] It may be accepted that there is but one point when a fact comes within the applicant's means of knowledge. But to say that assumes that the subject of the verb "was" or, more completely, "was not within the means of knowledge of the applicant", in s 31(2)(a), is "fact" or possibly "material fact". That assumption was expressed as an explicit proposition by Holmes J in her reasons for judgment in *Reeman v State of Queensland*, the appeal against which was heard together with this appeal and the judgment in which is being delivered immediately after this judgment. In that case Holmes J said:
- "To succeed, Mr Reeman must be able to point to a material fact which was not within his means of knowledge at the critical date; that is to say, a material fact which came within his means of knowledge after that date; and he must be able to demonstrate its decisive character. To read s 31(2)(a) otherwise, as if what is determinative is the point at which existing material facts become decisive, is to do violence to ordinary grammar. The verb 'was' (as in 'was not within the means of knowledge of the applicant') must have a subject. That subject can only be a noun: in this case, 'fact'. Plainly it is the 'material fact' which, it must be shown, 'was not within the means of knowledge'; not the adjectival phrase, 'of a decisive character', which describes the noun."
- [13] With great respect to her Honour I disagree. The subject of the verb "was" in that paragraph of s 31, in my opinion, is the compound phrase "material fact of a decisive character relating to the right of action". Thus the question is not when all material facts came within the means of knowledge of the applicant. It is when all

material facts of a decisive character relating to the right of action came within his means of knowledge.

- [14] Consequently while it is correct to say, as the learned primary judge said, that there is only one point when a fact comes within an applicant's means of knowledge, that is, in my respectful opinion, to pose the wrong question. The correct question in construing s 31(2)(a) is: when did all material facts (which were then)¹ of a decisive character come within the means of knowledge of the applicant. One cannot have the means of knowledge of material facts of a decisive character at a time when those material facts do not have that character. If the correct question is as I have stated it then the answer is that it was after the critical date because the material facts did not acquire a decisive character until after that date.
- [15] In order to reach that answer it is not necessary to show, as counsel for the appellant appeared to assume it was, that some new material fact relating to the right of action, emerging after the critical date, caused the material facts as a whole to then assume a decisive character. The material facts existing before the critical date may become of a decisive character after that date simply because circumstances emerging after that date (which may or may not be material facts relating to the right of action) cause the character of those material facts to so change. Here those circumstances, which were not material facts relating to the right of action, caused that change of character because those circumstances would have caused a reasonable person, knowing the material facts, for the first time to have regarded them as showing that, taking the appellant's circumstances into account, it was in his own interests to bring the action on the right of action.
- [16] The construction of s 30(1)(b)(ii) and s 31(2)(a) which I have adopted is, in my view, conveyed by the ordinary meaning of those provisions. And in my view also it may be confirmed² by reference to the report of the New South Wales Law Reform Commission on limitation of actions.³
- [17] It may seem an unusual course to refer to the report of a New South Wales Law Reform Commission to confirm a construction of a provision in a Queensland Statute. However I think that that reference is justified here. Section 30(1)(b)(ii) is in materially identical terms to s 57(1)(c)(ii) of the *Limitation Act 1969 (NSW)*.⁴ Moreover it was acknowledged in the Report of the Queensland Law Reform Commission which preceded the enactment of the Act, that s 30(1)(b)(ii) was based on the New South Wales provision and the New South Wales Law Reform Commission Report is specifically referred to.⁵ In those circumstances I think it appropriate to include within the inclusive definition of extrinsic material in s 14B(3) of the *Acts Interpretation Act 1954* the New South Wales Law Reform Commission Report.

¹ The word "of" in s 31(2)(a) being equivalent to "which then had" or some such phrase; not "which then **or later** had".

² See s 14B(1)(c) of the *Acts Interpretation Act 1954 (Qld)*.

³ LRC 3, October 1967.

⁴ And s 30(1)(b)(i) is in materially identical terms to s 57(1)(c)(i).

⁵ QLRC 14 at 6 - 7.

- [18] In that Report the Commission said, referring to s 57(1)(c)(ii) of the New South Wales Act:

"297. Then again, there may be personal reasons for not suing when the apparent injury is small. An injured employee may, for example, reasonably take the view that an action against his employer may jeopardize the future course of his employment to an extent which outweighs the prospective damages for the injuries at first apparent. Section 57 (1) (c) (ii) would allow circumstances such as these to be taken into account."

- [19] It was not suggested in that report that such circumstances should be taken into account only for some limited purpose. On the contrary, the quoted paragraph implies that such circumstances may be taken into account generally for the purpose of extending the period of limitation. The relevant circumstances here, the effect on the plaintiff's mental condition of commencing proceedings earlier than he did and the possible prejudice to his attempt to retire on medical grounds of his commencing such proceedings, are, by analogy, circumstances to be taken into account generally for that purpose. They would be so taken into account only upon the construction of s 30(1)(b)(ii) and s 31(2)(a) which I have adopted.

- [20] Dicta and, it would seem, the decision in *Royal North Shore Hospital v Henderson*,⁶ the decision and reasoning in *Tiernan v Tiernan*⁷ and the decision in *Wrightson v State of Queensland*⁸ support this construction. And a dictum in *Broken Hill Proprietary Comp Ltd and Anor v Waugh*⁹ appears also to support this construction.

- [21] In *Royal North Shore Hospital* Mahoney JA who, with Hope JA, formed the majority of the court which dismissed the defendant hospital's appeal against an order extending time under the *Limitation Act 1969* (NSW), after referring to the New South Wales Law Reform Commission Report, said of s 57(1)(c)(ii):

"The provision is not directed to excusing inadvertence, or inadvertence as such. It assumes appropriate knowledge and advice as to a plaintiff's rights and looks to considerations which justify a decision not to exercise them, or not to exercise them at the particular time. And it requires a determination to be made of when the plaintiff is to be expected, for the purposes of his rights under the sections, to have taken action.

Under the general law, the judgment of such a question is simple: he ought to bring an action within the limitation period. This provision substitutes criteria for deciding when he ought to bring the action other than the limitation period: these are his own interests and his circumstances. In a sense, its purpose is to provide considerations justifying delay in bringing an action.

...

⁶ (1986) 7 NSWLR 283.

⁷ [1993] QSC 110.

⁸ [2004] QSC 218.

⁹ (1988) 14 NSWLR 360.

A reasonable man, appropriately informed and advised, would I believe have apprehension that the Hospital would prefer not to continue his treatment but to refer him elsewhere or, at least, that it and its officers might feel less enthusiastic in his supervision and treatment [if he had commenced proceedings against it before the critical date]. This is, as was said in argument, not to impute improper motives to the Hospital or its staff. But a reasonable man would, I think, at least apprehend that there would be tension and conflict between duty and human nature in this regard and would feel apprehension, in the circumstances of his condition, about bringing such an action."¹⁰

[22] His Honour concluded that, for the reason stated in the last quoted paragraph, the learned trial judge was correct in his conclusion that time should be extended to a date beyond the critical date. In my opinion, his Honour's reasoning supports the above construction.

[23] Hope JA said of this provision that it "clearly contemplates that there are some circumstances where, notwithstanding a knowledge of material facts of a decisive character, it might nonetheless be reasonable for a person not to sue".¹¹ However, with great respect, I think that what his Honour meant to say was that the provision contemplates that there are some circumstances where, notwithstanding a knowledge of all material facts satisfying s 57(1)(c)(i), it might nonetheless be reasonable for a person, because of his circumstances, not to sue. That would reflect the terms of s 57(1)(c)(i) and (ii) and would be consistent with the view expressed by Mahoney JA. So read, his Honour's reasons also support the above construction.

[24] In *Tiernan* the Supreme Court granted an extension of time to an applicant pursuant to s 31. Byrne J said:¹²

"Both paragraphs (i) and (ii) of the s. 30(b) definition of 'decisive character' must be considered. The respondent contends that the applicant 'had a worthwhile cause of action ... prior to 14 July 1971 based upon the facts that were then known to her ... in trespass to the person.' Two responses are made. First, that but for the recently discovered connection the likely outcome would have been too unpromising to bother. Secondly, taking into account the applicant's personal circumstances, it cannot be said that she 'ought' in her 'own interests' to have instituted proceedings before mid-July 1971.

...

Section 30(b)(ii) acknowledges that there may be sufficient reason not to launch proceedings which appear to have reasonable prospects of success and of resulting in an award sufficient to warrant the litigation: cf. the remarks of Hope J.A. in Royal North Shore Hospital -v- Henderson (1986) 7 N.S.W.L.R. 283, 287 mentioned by Kelly S.P.J. in Moriarty at 330 - 331. In my opinion, a reasonable

¹⁰ At 300 - 301.

¹¹ At 287.

¹² At 8, 9, 12. His Honour construed the remarks of Hope JA in the same way as I have.

person in 1971, whatever views had been taken of the prospects of success and as to the damages, would have considered, taking into account the applicant's circumstances, that she 'ought' not in her 'own interests' to have sued."

In saying that, his Honour adopted the construction of s 30(1)(b)(ii), as it now is, and of s 31(2)(a) which I have adopted.

[25] In *Broken Hill Proprietary Company Ltd* Clarke JA, with whose reasons the other members of the court agreed said:

"Section 57(1)(c) however lays down when the material facts, as a group, qualify as having a decisive character. That occurs when there exists a group of the material facts which satisfy the tests expressed in s 57(1)(c). Once that group of facts qualifies then each of the material facts which go to make up the group is itself a material fact of a decisive character relating to a cause of action. It would seem therefore to follow that a court considering an application under s 58(2) is bound to ascertain those facts which as a group qualify as the material facts under s 57(1)(c) and then determine whether any of them were not within the means of knowledge of the applicant at the relevant time."¹³

His Honour's statement appears to support the view which I expressed earlier that the question is: when did all material facts which were then of a decisive character come within the means of knowledge of the applicant. The appeal by the applicant for an extension of time under the New South Wales Act was dismissed on other grounds.

[26] It follows from this construction of the Act that, on the undisputed facts, all material facts of a decisive character were not within the means of knowledge of the appellant until after the critical date. It follows from this that the appeal must be allowed and that the appellant should have the order which he sought.

[27] In the light of that conclusion it is unnecessary to consider the appellant's contention that the actual termination of his employment was of a decisive character or the respondent's contention that it was not a material fact.

Orders

1. Allow the appeal.
2. Set aside the orders made by the learned primary judge.
3. In lieu:
 - (a) order that the period of limitation for the action commenced by the applicant on 20 December 2001 be extended so that it expires on 20 December 2001;
 - (b) order that the respondent's application be dismissed.
4. That the respondent pay the appellant's costs of the applications before the learned primary judge and of this appeal to be assessed.

[28] **WILLIAMS JA:** The issues raised by this appeal must be resolved in the light of the background facts which are fully set out in the reasons for judgment of both Davies JA and Chesterman J which I have had the advantage of reading; I will only refer to the facts to the extent necessary to explain my reasoning.

¹³

At 368 - 369.

- [29] The proceeding commenced by the appellant on 20 December 2001 is statute barred (by virtue of s 11 of the *Limitation of Actions Act* 1974) unless it is established that s 31 of that Act applied. To avail himself of s 31 the appellant, given the relevant circumstances, has to establish that a material fact of a decisive character relating to his right of action against the respondent was not within his means of knowledge until after 20 December 2000.
- [30] Section 31(2) of the Act provides:
 “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
 (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.”
- [31] It was accepted that sub-paragraph (b) was satisfied and that can be put to one side. The issue raised by the appeal is whether or not the requirements of (a) have been satisfied.
- [32] Section 30 of the Act contains a number of relevant definitions and it is the proper meaning of s 30, particularly of s 30(1)(b), that is called into question by this appeal.
- [33] Section 30 is in the following terms:
 “(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 interest and taking the person's circumstances into account to bring an action on the right of action;
- (c) a fact is not within the means of knowledge of a person at a particular time if, but only if—
 - (i) the person does not know the fact at that time; and
 - (ii) as far as the fact is able to be found out by the person—the person has taken all reasonable steps to find out the fact before that time.
- (2) In this section—
'appropriate advice', in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.”

[34] It is clear that there is no all inclusive definition given to the expression “material facts”; the ambit of matters which will be caught by that expression will vary from case to case. Wanstall CJ said in *Re Sihvola* [1979] Qd R 458 at 463 that it was “clear enough that the compound phrase ‘material facts relating to a right of action’ is capable of embracing factors beyond those which comprise the bare and essential ingredients of a given ‘cause of action’”. That statement was cited with approval by the Full Court in *Castlemaine Perkins Limited v McPhee* [1979] Qd R 469 at 471. To similar effect is the statement by Thomas JA in *Watters v Queensland Rail* [2001] 1 Qd R 448 at 456:

“Moreover, the designation in subparas (i) to (v) of the material facts relating to a right of action in s. 30(1)(a) is inclusive only. Five specific examples are given and there is a residuum of unspecified instances. The breadth of the connecting words ‘relating to’ in the introductory part of s. 30(1)(a) hardly requires emphasis.”

[35] The range of matters which can be encompassed by the phrase “material facts” must be considered in the light of what is said in paragraph 30(1)(b). It is clear that a material fact may relate to the award of damages, considerations justifying the bringing of an action, and matters showing that a person “ought in the person's own interest and taking the person's circumstances into account to bring an action on the right of action”. That to my mind follows from the very wording of paragraph (b). Once it is recognised that facts showing that the person ought, taking that person's circumstances into account, to bring an action may be of a decisive character it becomes clear that facts capable of being so described are not limited to facts essential to the existence of a cause of action; provided that the fact relates to the cause of action and is, for example, relevant to s 30(1)(b)(ii) it may ultimately be found to be of a decisive character. When the statutory provision refers to a person's decision to bring an action that must impliedly also include a decision not to bring an action at a particular point of time; facts relevant to such a decision must therefore be encompassed by the expression “material facts”. A fact may be material and decisive if, for example, it “shows” that the person in his own interests ought or ought not to commence the proceeding at a particular point of time. Such a

fact would not be an essential ingredient of the cause of action but could well be decisive in determining whether the action ought to be commenced.

[36] It follows that I cannot accept all of the reasoning of McMurdo J, at first instance where he said:

“[40] According to s 30(1)(b), facts have a decisive character only if they show two things, being those respectively described in sub-paragraphs (i) and (ii). Accordingly, a material fact relating to a right of action must be a fact which is relevant to whether the action has a reasonable prospect of success or will result in a sufficient award of damages. It must be a fact which is relevant to the likely outcome of an action. Amongst the material facts relating to a right of action, there is a more limited category of facts which are those of a decisive character.

[41] The decisive character of a fact results from its being one of a combination of material facts which are ‘those facts’ which would show each of the matters in sub-paragraphs (i) and (ii) of s 30(1)(b). It is decisive because, absent that fact as within the applicant’s means of knowledge, the other material facts would not demonstrate those matters, including that the prospects are reasonable and the likely award is sufficient. The material fact within s 31(2) is one which is decisive by its impact on the right of action, and consequently by its importance for the likely outcome of an action and for the question of whether the applicant ought to sue. It is by what the material facts of a decisive character would show to be the likely outcome of an action that ‘those facts’ might also show whether a person ought to bring an action.

[42] It follows that if the newly discovered fact is one which does not affect the prospect of success of an action or the likely award of damages, it is not of a decisive character. In the present case, the termination of employment had a relevance for a decision to sue. But if it was in any sense a decisive event, it was because it affected the plaintiff’s circumstances and not because of any impact on his right of action. It was not a fact having a decisive character *qua* a material fact relating to a right of action.”

[37] Given the wording in s 30 it is clear that whilst the focus in a specific case may be on one particular fact, there will in every case be a number of facts which meet the test of being decisive. Further, subparagraphs (i) and (ii) of s 30(1)(b) are conjunctive and ultimately it will be the combination of matters within the scope of operation of those subparagraphs which will determine whether or not a particular fact satisfies the test of being “decisive” for purposes of the section. Clarke JA in *Broken Hill Pty Co Ltd v Waugh* (1988) 14 NSWLR 360 at 368-9 recognised that for practical purposes one must really speak of a group of facts. He said:

“‘Material facts’ are defined (s 57(1)(b) [Qld s 30(1)(a)]) but the ‘material facts of a decisive character’ relating to a cause of action are not. Section 57(1)(c) [Qld s 30(1)(b)] however lays down when the material facts, as a group, qualify as having a decisive character. That occurs when there exists a group of the material facts which satisfy the tests expressed in s 57(1)(c). Once that group of facts

qualifies then each of the material facts which go to make up the group is itself a material fact of a decisive character relating to a cause of action. It would seem therefore to follow that a court considering an application under s 58(2) [Qld s 31(2)] is bound to ascertain those facts which as a group qualify as the material facts under s 57(1)(c) and then determine whether any of them were not within the means of knowledge of the applicant at the relevant time.”

- [38] That echoes what was said by Andrews SPJ in *Taggart v The Workers' Compensation Board of Queensland* [1983] 2 Qd R 19 at 23: “... the newly discovered fact should not be considered as separate from facts already known and that it should be regarded in context with such other facts.” (See also *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325 at 333 where Macrossan J refers to the “combination of facts”; *Randel v Brisbane City Council* [1984] 2 Qd R 276 at 279 where McPherson J refers to the “number of constituent of facts”; *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 250 where Deane J refers to the “combination of facts” and *Ipswich City Council v Smith* [1997] QCA 263 where Pincus JA refers to the “collection of facts”.)
- [39] If that is the correct approach, as I believe it to be, a fact showing a person ought in that person’s own interest commence the proceedings may be a decisive fact though it does not of itself directly affect the prospect of success of an action or the likely award of damages. It may be decisive because of its impact, when regarded together with other material facts, on the decision whether or not the person ought to sue at a particular time.
- [40] But importantly the focus must be on what can conveniently be called the newly discovered fact. That is not to say that a change in a person’s circumstances may never be a decisive fact; a re-evaluation of known circumstances would not suffice. But if that change in circumstances is brought about by some new fact becoming known then I can see no reason why that fact may not, given the approach of Clarke JA, be a material fact of a decisive character for purposes of the legislative provisions.
- [41] It was because of his reasoning quoted above that McMurdo J concluded that the termination of the appellant’s employment with the Queensland Police Service in February 2001 could not be a material fact of a decisive character. But if the approach I prefer is adopted then that could in particular circumstances satisfy the test of being an external fact directly impacting upon the appellant’s “own interests” and “circumstances” as referred to in subparagraph (ii) and therefore could be one of the relevant group of facts which qualifies as a material fact of a decisive character.
- [42] I agree with the reasoning of Chesterman J (which largely accords with that of McMurdo J at first instance in this case and of Holmes J in *Reeman v State of Queensland* [2004] QSC 285) that a fact known to the claimant prior to the critical date for purposes of s 31 may not become “decisive” because of some change in the claimant’s personal circumstances occurring after that date. As McMurdo J said: “A fact of which the applicant was already aware but which was not of a decisive character, does not come within the applicant’s means of knowledge at a subsequent point when, having regard to the applicant’s then interests and circumstances, it can be said to be decisive.” But that does not mean that a new fact coming into

existence (or coming within the means of knowledge of the claimant) after the critical date and which is material to whether the claimant ought in his own interests to commence an action may, as one of the relevant group of facts for purposes of s 30(1)(b), qualify as a material fact of a decisive character.

[43] It is correct to say, as Chesterman J does in his reasons, that the “scheme of the provisions would be severely disrupted if a material fact could change character by reason of a change in the applicant’s personal circumstances and become decisive after he knew of it”. A person cannot choose when to commence proceedings by re-evaluating known facts from time to time. As already said a re-evaluation of known facts cannot convert facts known for some time into a decisive one for purposes of the provisions in question.

[44] Such an approach is in accord with decided cases. The Full Court in *Taggart v The Workers’ Compensation Board of Queensland* approved at 23 the proposition that if the newly discovered fact merely goes to an enlargement of prospective damages it cannot constitute a material fact of a decisive character. That was essentially a case of the re-evaluation of previously known basic facts with respect to the injury. The court did however recognise a qualification at 24; if the newly discovered fact added substantially to the quantum of damages likely to be recovered, and without it the amount recoverable would be too small to bother about, that newly discovered fact may be decisive. To similar effect was the reasoning of the Full Court in *Moriarty v Sunbeam Corporation Ltd.* There the alleged newly discovered fact was that the injury would have more serious consequences than had previously been believed; the court held that it could not be a material fact of a decisive character. Relevantly Macrossan J said in that case at 333:

“He must show that without the newly learnt 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.”

[45] Davies JA in *Ipswich City Council v Smith* noted that the earlier cases established that generally a material fact which merely increases an applicant’s damages was unlikely to be decisive, and he then went on to conclude that the facts in the case then under consideration revealed no more than that the condition was worse than the applicant had originally thought and therefore the requirements of s 31 were not satisfied.

[46] Those cases demonstrate that something more is needed to satisfy s 31 than asserting that after the critical date the person became aware that known injuries were more serious and a larger amount may be recoverable by way of damages.

[47] But other cases demonstrate that the introduction of a new fact after the critical date into the previous collection of material facts may be of a decisive character and therefore enliven s 31. *Wrightson v State of Queensland* [2004] QSC 218 provides an illustration; there the critical date was 20 December 2000. Relevantly Helman J reasoned as follows:

“The plaintiff was, as was conceded on his behalf, ‘possessed of the relevant material fact’ soon after his ‘breakdown’ in April 2000 and clearly enough there was sufficient to show that by 4 October 2000 that [sic] the plaintiff had, if his case was accepted, a right of action against the defendant: he had been told by his treating psychiatrist

that he could not continue to work as a police officer, and he had applied for retirement. It may be accepted that a very large majority of such applications are successful. If that were all to the plaintiff's circumstances he would fail on his application. But it is not all. In the first place, there was the possibility – admittedly faint – that he might be able to continue his police career. Secondly, his application might not have succeeded, and if it had failed his progress in the police service would, one could reasonably conclude, be jeopardized by his seeking retirement on the ground of a mental disorder Thirdly – and this was the point relied on heavily on his behalf – the pressure of instituting proceedings against an employer from whose employment he had not been released, in addition to that arising from his reluctantly-made decision to apply for retirement, could have caused a further deterioration in his mental health.

The plaintiff's case on this application was then that it was only when his application was granted that all the requirements of a material fact of a decisive character had been satisfied. ... It means that even if a claimant *could* have instituted a claim earlier than the time when a reasonable person would have regarded the facts as showing that he *ought* to do so, it is only when the reasonable person would regard the facts as showing that he ought to do so that time begins to run under s. 31(2). In this case I accept the argument advanced for the plaintiff that that date was when the plaintiff's application was granted: a reasonable person would have concluded that it was only then that the plaintiff ought to have brought his claim, and that until then he was justified in delaying the institution of his proceeding for the three reasons to which I have referred, but chiefly because of the possible detrimental effect on his health in doing so earlier."

- [48] Another case which illustrates that point is the recent decision of this court in *Russell v State of Queensland* [2004] QCA 370. The factual background there was broadly similar to that under consideration now. There the plaintiff was aware for some time that he had a stress disorder and had developed a dependence on the use of illegal drugs. But it was not until after the critical date that he was diagnosed as suffering from a psychiatric disorder which was chronic and disabling. That it was held was a newly discovered fact which amounted to a material fact of a decisive character satisfying s 31.
- [49] There are three other cases which need to be considered: *Tiernan v Tiernan* [1993] QSC 110, *Do Carmo v Ford Excavations Pty Ltd*, and *Royal North Shore Hospital v Henderson* (1986) 7 NSWLR 283.
- [50] *Tiernan* is a rather unusual case. The claim was for damages for assault and battery, being sexual molestation of the claimant some 30 years prior to the commencement of the action. During the three year limitation period the claimant was aware of the conduct constituting the assaults but the learned trial judge was satisfied that a reasonable person acquainted with the facts known to the applicant during that period, and having taken appropriate advice about them, would not have then regarded those facts as showing that a cause of action would have reasonable prospects of success and of resulting in an award of damages sufficient to justify

bringing the action. One of the principal reasons for the judge so concluding was that commencing the action would have jeopardised any chance of reconciliation between the claimant and the defendant, her adopted father, and would have put at risk her inheritance. Over the intervening years the claimant suffered anxieties, fears and other emotional problems but it was not until within 12 months before the writ was issued that she “knew of a possible causal relationship between her problems and the abuse”. In those circumstances Byrne J concluded that the claimant only became aware of a material fact of a decisive character (the causal link) after the critical date and in consequence the provisions of s 31 were satisfied. On that analysis *Tiernan* was a case where it was established that a newly discovered fact of a decisive character only became known after the critical date.

- [51] The facts in *Do Carmo* can be briefly stated, but they gave rise to marked differences of judicial opinion both before the matter reached the High Court and in the High Court. The claimant worked for the relevant employer in the years 1971-4. In 1976 he developed chest problems and they became disabling in 1978. The writ was issued in 1979. Only a month or so prior to commencing the proceedings he became aware of the fact that there were means available to his employer in the years in question to prevent or reduce the inhalation of dust. That was the material fact on which he relied to overcome the operation of the ordinary limitation period. By a majority the claimant succeeded in the High Court. The divergence of reasoning makes it difficult to extract from *Do Carmo* a principle relevant for present purposes. However, Deane J in dissent at 251 made an observation which is of some assistance in the present circumstances; there he said:

“Subject to an important qualification, [the question whether material facts relating to the cause of action are of a decisive character is to be determined by reference to the hypothetical opinion of a reasonable man, knowing those facts and having taken the appropriate advice on those facts], one or more of the material facts of a decisive character will be shown not to have been within the means of knowledge of an applicant if it appears that an applicant did not have within his or her means of knowledge some fact or facts which, in the context of the facts within his or her means of knowledge, made the difference between his or her having and not having a worthwhile cause of action.”

- [52] The critical words in that passage, in my view, are “made the difference between ... having and not having a worthwhile cause of action.” Such a consideration will generally determine whether or not the fact in question is a material fact of a decisive character. On the previous page that learned judge had observed that the legislative policy underlying the section was that the “limitation period should be extended only in favour of a person who was, without fault on his part, unaware that he had a worthwhile cause of action until not more than twelve months before the commencement of proceedings.”

- [53] A case frequently cited in this context is *Royal North Shore Hospital*. There the claimant was subjected to radiotherapy in July-August 1972 after being diagnosed to be suffering from Hodgkins disease. In the course of that treatment he was given an overdose of radiation which caused immediate injury to the skin; he was told that apart from ongoing relatively minor problems with his skin there would be no adverse consequences from the treatment. But in October 1983 he was diagnosed as suffering from radicular myelopathy, a grave disease which could ultimately lead to

quadriplegia. His action was commenced in December 1983. At first instance it was held that the radicular myelopathy was a completely different injury to that immediately sustained in 1972 and in consequence the limitation period was extended. By a majority that conclusion was upheld on appeal. Samuels JA, who dissented, was of the view that the claimant was “well aware of material facts of a decisive character sufficient to support a substantial action for damages well before the limitation period had expired” (292), and in consequence he could not bring himself within the legislative provisions.

- [54] Hope JA substantially adopted the reasoning at first instance. In his view the claimant was entitled to regard the skin complaints as an unfortunate by-product of a successful treatment of his major life threatening problem. On that approach a reasonable person would not have sued until becoming aware of the major problem which developed. Relevantly he said at 287:

“Obviously different conclusions can be reached but in my opinion a most important qualification in s 57(1)(c) [Qld s 30(1)(b)] is to be found in the words ‘taking his circumstances into account’. I do not understand it to be a policy of the law that persons should sue whenever they have an opportunity of doing so. This consideration is not of course in any sense determinative of the issue to be resolved, but it helps to understand the way in which s 57(1)(c) should be applied, for it clearly contemplates that there are some circumstances where, notwithstanding a knowledge of material facts of a decisive character, it might nonetheless be reasonable for a person not to sue.”

- [55] Mahoney JA, the other majority judge, also concluded that it was not until October 1983 that it became known to the claimant that the overdose of radiation was due to a lack of proper care on the part of the hospital; he found that that fact “was not within the means of knowledge” of the claimant until that date. The significant reasoning of Mahoney JA for present purposes is that dealing with the question when proceedings should have been brought. He said at 300: “In one sense, s 58(2)(a) [Qld s 31(2)] requires a judgment to be formed as to when a reasonable man ought to sue and, consequently, it looks to when such a person, knowing that he has a relevant cause of action, may be excused from not suing.” With respect, I agree with that approach; it accords with what I have said previously. Mahoney JA pointed out that throughout the relevant period the claimant saw himself as subject to the supervision of the hospital so far as his treatment was concerned; he went on:

“It is not necessary to form a detailed view as to what would have been his relationship to the Hospital and his continued supervision and treatment there if he had sued the Hospital on the suggested course of action. A reasonable man, appropriately informed and advised, would I believe have apprehension that the Hospital would prefer not to continue his treatment but to refer him elsewhere or, at least, that it and its officers might feel less enthusiastic in his supervision and treatment. This is, as was said in argument, not to impute improper motives to the Hospital or its staff. But a reasonable man would, I think, at least apprehend that there would be tension and conflict between duty and human nature in this regard and would feel apprehension, in the circumstances of his condition, about bringing such an action.” (300-1)

- [56] He then concluded that it was only after receiving the advice he did in October 1983 that his relationship to the hospital could properly be put aside and it was then, at the earliest, that the claimant ought to have brought his cause of action.
- [57] It is significant, in my view, that the judges constituting the majority regarded a fact which became known to the claimant in October 1983 as tipping the scales in favour of the conclusion that he ought then commence proceedings. In other words, a material fact of a decisive character only became known to the claimant in October 1983.
- [58] It is clear that fine distinctions are drawn in a number of the cases but that is essentially the consequence of the drafting of the legislative provisions in question. In practice there will often be little difference between a re-evaluation of known circumstances resulting in a conclusion that the injury was more serious than originally thought, and the situation where it can be found that the claimant became aware of a new fact, namely that the injury was different in kind and was more serious than was earlier thought to be the case. In the latter circumstance a finding could be made that a material fact of a decisive character only became known to the claimant at that later point in time and in consequence the limitation period could be extended; in the former case no extension could be granted.
- [59] Both Davies JA and Chesterman J referred to the Report of the New South Wales Law Reform Commission on the legislative provisions in question. To my mind paragraphs 296 and 297 thereof are consistent with my analysis.
- [60] The final question is whether or not, given my analysis of the legislative provisions, the termination of the appellant's employment with the Queensland Police Service in February 2001 was a material fact of a decisive character relating to his right of action against the respondent which was not within his means of knowledge until after 20 December 2000. That necessitates re-visiting the findings of the learned judge at first instance.
- [61] Those findings were summarised at an early stage when he said in paragraph [3]:
“According to my findings, by the critical date, the plaintiff knew sufficient of the material facts relating to his right of action to show a reasonable person, appropriately advised, that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify that action But I find also that it was not until after the critical date, that the plaintiff's interests and circumstances would have showed that he ought to bring an action”
- [62] Those conclusions were expanded upon as follows:
“... the plaintiff knew by the end of November 2000 that he was permanently incapacitated for police work. From that he knew, or should have known, that he would have to leave the QPS, whether by being allowed to retire on medical grounds or by simply resigning. ... Accordingly, by the end of November 2000, the facts of his condition and its impact upon his earning capacity were within his means of knowledge, as were the facts of the defendant's (alleged) negligence and its causal effect. ...

However, there were then two further matters which were relevant to whether the plaintiff should bring this action. The first was the plaintiff's mental health. The second was whether the commencement of litigation against his employer could lead to disciplinary action or some other response by the QPS which would prejudice his application to retire on medical grounds."

- [63] The learned judge at first instance then accepted the appellant's evidence when he said that at that time he "was worried about what would happen to my police career as I informed each of the medical practitioners that I saw on request from the QPS or WorkCover that I had a drug problem." He also accepted the appellant's evidence to the following effect:

"After I went on sick leave I was unable to make decisions about what I should do about the loss of my career with the QPS as I started to appreciate that I may not continue as [a] police officer. I did not have any discussions with my solicitor about instituting any common law action. I could not bring myself to discuss my life as a CPO because I knew that simply brought it all back and added to my stresses."

- [64] Thereafter the following relevant findings were made:

"I am unpersuaded that during this period, that is the second half of 2000, the plaintiff was unable to give instructions to bring an action. Accepting as I do the substance of his description of his symptoms, it is another thing to say that he was incapable of deciding to sue. He was able to decide that he should apply to retire from the police force. And he was also able to then consult the solicitors who eventually brought these proceedings on his behalf. He consulted them in July 2000 concerning his dealings with WorkCover, and the potential ramifications of his disclosure to it of his drug use. ...

But Dr Holm's evidence raises a further consideration as to whether the plaintiff could be expected to have sued in 2000. In Dr Holm's view the commencement of an action at this time would have made the plaintiff's condition even worse. In his view:

'Part of the problem for the Plaintiff in being able to address his legal rights is the circumstance that his treatment was directed to shielding him from the triggers associated with his past history as a covert police operative. For the Plaintiff, the very problems which gave rise to his illness, if they needed to be canvassed and instructions given about them to his solicitors, would exacerbate and perpetuate his condition and by the latter part of 2000, the treatment which the Plaintiff was receiving was directed very much against that occurring.'

I accept that opinion. The likelihood that the steps necessary for the commencement of an action would have exacerbated his problems was a circumstance relevant to whether he ought then to have sued.

There was also to be considered whether the commencement of litigation against the QPS would have prejudiced his attempt to then retire on medical grounds. The difference between that means of leaving the force, and his simply resigning, was worth \$267,000, which was the amount he received on his being retired as medically unfit in February 2001. If the commencement of litigation had a real prospect of delaying and perhaps defeating his retirement application, then the application would have been an important consideration for a decision as to whether he should then sue.

Would the commencement of proceedings have put at risk his retirement? Part of the process of the consideration by QPS of an application for retirement was a ‘vetting’ of the application, to determine whether the officer was then the subject of any outstanding investigation or complaint. Had the plaintiff’s illegal use of drugs, which was continuing, come to the attention of a police officer, it appears that the officer would have been obliged to report the matter to the Commissioner of Police Had the plaintiff been disciplined for his drug use, there was some prospect of demotion with a consequent diminution in his retirement benefit.

... Although some members of the QPS already knew of his drug habit, the bringing of an action could well have caused the QPS to take a less sympathetic approach to the plaintiff’s circumstances and his attempt to retire. The pleading of a case for a substantial damages award for the alleged negligence of the QPS could have caused the QPS to take an adversarial approach to his retirement application.

In my view, had the plaintiff sought advice in late 2000, as to the potential effect on his retirement application from the bringing of an action against the QPS for negligence, the appropriate advice would have been that the plaintiff should await the outcome of his application before suing. ... The financial benefit of retiring on medical grounds was substantial, especially if the plaintiff was not demoted. If the possible effect on his retirement application had been considered with the likely adverse effect on his health, the material facts within his means of knowledge would not have shown to a person in his position that he should *then* sue.”

- [65] Ultimately it was because of the reasoning of the learned judge at first instance quoted above in [36] (paragraphs [40], [41] and [42] of the reasons below) that he concluded that those findings did not establish that a material fact of a decisive character relating to the appellant’s right of action against the respondent was not within the appellant’s means of knowledge until after 20 December 2000.
- [66] Given the finding that it was not until after retirement in February 2001 that the appellant was aware of all material facts establishing that he should then sue, I am of the opinion that, given my approach to s 30 and 31 of the Act, there is implicit in the findings of the learned judge at first instance a finding that the retirement was a material fact of a decisive character not within the appellant’s means of knowledge until after 20 December 2000 and therefore the requirements of s 31 of the Act

would be satisfied. To my mind it is obvious that the only reason the learned judge at first instance did not so conclude is that he erroneously considered that retirement “was not a fact having a decisive character *qua* a material fact relating to a right of action.”

[67] It follows that though I do not agree with the reasoning of Davies JA, and in fact agree with much of the reasoning of Chesterman J, I have come to the conclusion that the appeal should be allowed.

[68] The orders of the court should therefore be:

- (1) Allow the appeal;
- (2) Set aside the orders of 5 August 2004 dismissing the plaintiff’s application and giving judgment for the defendant on its application and the order as to costs;
- (3) Order that the respondent’s application of 26 September 2003 be dismissed with costs;
- (4) Order on the appellant’s application of 14 October 2003 that the period of limitation for the action commenced by the appellant on 20 December 2001 be extended so that it expires on 20 December 2001 and that the respondent pay the appellant’s costs of that application to be assessed;
- (5) Order that the respondent pay the appellant’s costs of the appeal to be assessed.

[69] **CHESTERMAN J:** The appellant wishes to prosecute an action for damages against his former employer, the respondent, for a psychiatric injury he complains was brought on by conditions in which he worked, and the respondent’s lack of care in failing to provide services necessary to adjust to those conditions. The appellant did commence an action on 20 December 2001 but this was more than three years after the development of his psychiatric injury. Accordingly the action was commenced beyond the time allowed by s 11 of the *Limitation of Actions Act 1974 (Qld)* (‘the Act’). The respondent objected to the action on that ground and the appellant applied for an order extending to 20 December 2001 the time by which his action could commence. On 5 August 2004 McMurdo J dismissed the application and entered judgment for the respondent. The appeal is brought against that judgment.

[70] The plaintiff was a police officer employed by the defendant between May 1992 and February 2001. In 1993 he requested assignment as a covert police officer and worked in that role in 1994 and 1995. His work brought him into contact with dangerous criminals and illegal drugs. He became a heavy user of cannabis and alcohol. He experienced a number of disturbing events and often went in fear of his life. He returned to work as a uniformed police officer in December 1995 but had great difficulty adjusting to the role. He was extremely anxious, slept poorly and consumed copious amounts of cannabis. He was absent from work on sick leave for about eight weeks in the first half of 1996. When he returned to work he noted a sense of antagonism towards his employer and performed his work poorly. He continued to consume cannabis and alcohol to excess. Between 1996 and his retirement from the Police Service in February 2001, his life, according to the trial judge, ‘remained in disarray’. He did not work as a police officer after May 2000 when ‘he had something of a breakdown and his general practitioner ... certified him as unfit for work ...’.

- [71] In July 2000 the plaintiff was assessed by two psychiatrists, one engaged by his employer and the other by WorkCover. In October 2000 the applicant's treating psychiatrist recommended that he retire on medical grounds because he thought the appellant was permanently incapacitated for police work.
- [72] The trial judge found:
'... the plaintiff knew by the end of November 2000 that he was permanently incapacitated for police work. From that he knew, or should have known, that he would have to leave the QPS, whether by being allowed to retire on medical grounds or by simply resigning ... It was by then clear that the loss of his police career would result in a substantial loss whether he so retired or he resigned. He did not then appreciate the impact of his condition upon his ability to perform other equally remunerative work, but ... this information was then available to him had he inquired. Accordingly, by the end of November 2000, the facts of his condition and its impact upon his earning capacity were within his means of knowledge, as were the facts of the defendant's (alleged) negligence and its causal effect. By then, the material facts relating to the right of action which were within his means of knowledge would have shown that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify it.'
- [73] Notwithstanding these findings the appellant argued before the trial judge, and on appeal, that the limitation period should be extended because the plaintiff's circumstances were such that it was reasonable for him not to commence proceedings before 20 December 2000, notwithstanding that he then knew that he had an arguable case for substantial damages against the respondent or, to use the words of the Act, to show that he had an action which would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify it.
- [74] There were two circumstances which were said to make it reasonable for the appellant to delay proceedings. They were that the institution of an action (i) would exacerbate his psychiatric condition and (ii) might jeopardise his retirement from the Police Service on medical grounds.
- [75] As to the first of these the trial judge found that the appellant suffers from a chronic post-traumatic stress disorder and that the commencement of an action in 2000 would have made the condition 'even worse'. The appellant's psychiatrist thought, and the trial judge accepted, 'the very problems which gave rise to his illness ... needed to be canvassed and instructions given about them to his solicitors, would exacerbate and perpetuate his condition ...'.
- [76] As to the second point the trial judge found that the appellant would be better off by an amount of \$267,000 by retiring from the Police Service on medical grounds rather than by resigning. Had the appellant commenced proceedings before he was allowed to retire on medical grounds the fact that he had persistently consumed cannabis while a serving police officer would have been starkly revealed and may have led to disciplinary action and perhaps demotion. The assertion of a case for substantial damages for the alleged negligence of the Police Service might have caused the defendant to take an unsympathetic and even obdurate approach to the appellant's application to retire. The trial judge found:

‘... had the [appellant] sought advice in late 2000, as to the potential effect on his retirement application from the bringing of an action against the QPS for negligence, the appropriate advice would have been that the [appellant] should await the outcome of his application before suing.’

[77] Section 31 of the Act relevantly provides:

‘**31(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

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- (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
- (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.’

[78] Section 31(2) provides, in effect, that three issues must be addressed by a court entertaining an application to extend time. They are:

- (a) there must be a material fact of a decisive character relating to the right of action which was not known to a plaintiff and was not within his means of knowledge until a date after the commencement of the last year of the limitation period and not more than a year before the commencement of proceedings.
- (b) there must be a *prima facie* case that the defendant would be liable to the plaintiff in an action brought by the plaintiff.
- (c) upon proof by the plaintiff of the first two matters there is a discretion whether or not to grant an extension of time, the discretion being affected by any prejudice the defendant might suffer by reason of an extension of time.

[79] Section 30(1)(b) 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;'

[80] It is only the first of the considerations mentioned in s 31(2) which is in contest in the appeal. More precisely the only issue is whether a material fact of a decisive character relating to the appellant's right of action was not within his means of knowledge until after 20 December 2000.

[81] The subsection provides for what is usually called 'the critical date', which is a date less than a year prior to the time when proceedings are commenced, or to which time may be extended to allow them to be commenced, and subsequent to the commencement of the last year of the limitation period. If, after that last mentioned period, an applicant first knows, or is taken to have known, of a material fact of a decisive character relating to his cause of action the court may extend the time in which an action may be commenced but for no greater time than 12 months after the date on which the fact became known to the applicant.

[82] As I mentioned the appellant retired from the Police Service on medical grounds on 23 February 2001. By March 2001 he had made a substantial recovery from his symptoms though his condition persisted. His position appears to have stabilised by about August of 2001.

[83] Notwithstanding his findings the trial judge refused the appellant's application to extend time. His Honour accepted that material facts relating to the appellant's right of action had not become decisive until less than a year before his action was commenced. However, it was also found that the plaintiff knew or had the means of knowing all material facts relating to his right of action more than a year before he commenced the action. His Honour concluded, therefore, that s 31 did not allow him to extend time.

[84] The trial judge rejected the appellant's submission that a change to the appellant's circumstances, after the critical date, by which it became appropriate to sue on the basis of material facts already known to the appellant meant that only then did he discover material facts of a decisive character. His Honour reasoned that s 31(2) of the Act is concerned with whether a material fact relating to a right of action came within an applicant's means of knowledge after the critical date. His Honour pointed out that s 31 does not apply unless the date by which the material fact of a decisive character comes within the applicant's means of knowledge is subsequent to the commencement of the last year of the limitation period, and that the period may be extended 'so that it expires at the end of 1 year after that date'. His Honour concluded:

'[34] ... A fact of which the applicant was already aware but which was not of a decisive character, does not come within the applicant's means of knowledge at a subsequent point when, having regard to the applicant's then interests and circumstances, it can be said to be decisive. There is

but one point when a fact comes within the applicant's means of knowledge.'

- [85] It is clear from two passages in the reasons for judgment of the trial judge that his Honour thought that material facts relating to a right of action may take on a decisive character for the purposes of s 31 of the Act at a time subsequent to that at which the putative plaintiff becomes aware of the facts. His Honour said:

'[31] ... the material facts of knowledge at the critical date were sufficient to show that he had a worthwhile case according to s 31(1)(b)(i), but they would not have shown a reasonable person in the plaintiff's circumstances that he ought to then sue. It follows the material facts relating to the right of action which were within the plaintiff's means of knowledge prior to the critical date were not *then* of a "decisive character".

...

[36] This is not to deny the effect of paragraph 30(1)(b)(ii). The decisiveness of the new fact must be tested by reference to whether the other known material facts themselves warranted an action. The newly discovered fact could be decisive only if, absent that fact, a person would not consider that he ought to sue. The individual circumstances of the applicant are thereby relevant for the characterisation, as decisive or otherwise, of the newly ascertained fact.'

- [86] The appellant had advanced a second argument before the trial judge. It was that his retirement in February 2001 was a new and material fact of a decisive character relating to his right of action. The argument was rejected for the reason that such a fact must be one which is relevant to whether the action has a reasonable prospect of success or will result in a sufficient award of damages and, as well, shows that it is in the interests of the person concerned to commence an action. His Honour said:

'[41] ... The material fact within s 31(2) is one which is decisive by its impact on the right of action, and consequently by its importance for the likely outcome of an action and for the question of whether the applicant ought to sue. It is by what the material facts of a decisive character would show to be the likely outcome of an action that "those facts" might also show whether a person ought to bring an action.

[42] It follows that if the newly discovered fact is one which does not affect the prospect of success of an action or the likely award of damages, it is not of a decisive character.'

- [87] The trial judge concluded that the termination of employment was relevant to the appellant's decision to sue but it was not 'decisive' because it affected only the plaintiff's circumstances and had no impact on his right of action.

- [88] The appellant accepts that there is force in the analysis of the first argument, though it challenged the analysis on appeal, and submits that the trial judge erred in rejecting the submission that the appellant's retirement was a material fact of a

decisive character which only occurred after the commencement of the last year of limitation period and was less than one year prior to the commencement of proceedings.

[89] It will be recalled that the submission was rejected because the fact, if material, was not of a decisive character because it did not affect the prospect of success in the action or the likely award of damages. It was not, as his Honour said, ‘a fact having a decisive character *qua* a material fact relating to a right of action.’

[90] In summary the trial judge found:

(a) That the appellant knew or had the means of knowing the material facts relating to his right of action more than a year before he commenced proceedings but that those facts were not then of a decisive character because his personal circumstances made it reasonable for him not to sue until he had retired on medical grounds and/or his health had improved. Time could not be extended because the critical factor is when material facts were known by the appellant not when they became of a decisive character.

(b) The fact of the appellant’s retirement was not a material fact of a decisive character because it did not go to the appellant’s prospects of success in the action or the amount of damages.

[91] Section 30 provides the test for ascertaining when a material fact of a decisive character was within an applicant’s means of knowledge. Timing is critical to the operation of s 31(2) and the court’s power to extend the limitation period. The power exists only where the material fact of a decisive character was not within an applicant’s means of knowledge for the first two years of the ordinary period of limitation, and time may be extended for no more than a year from the date on which an applicant knows or has means of knowing the material fact of decisive character.

[92] The outcome of an application for extension depends upon the determination of the time when an applicant had the requisite knowledge. The inquiry directed by these provisions of Part 3 is into what an applicant knew, and when. In particular the inquiry is of the time when an applicant first knew of the material fact of a decisive character. The scheme of the provisions would be severely disrupted if a material fact could change character by reason of a change in an applicant’s personal circumstances and become decisive after he knew of it.

[93] The only justification for such an opinion are the words found in s 30(1)(b)(ii) which refer to an applicant’s ‘own interests ... taking [his] circumstances into account’. The words must be read in context. The decisive character of a material fact is an attribute of that fact. The material fact, if it has that attribute, if it is of decisive character, is one which shows that an action for personal injuries would have a reasonable prospect of success, would result in an award of damages sufficient to justify bringing the action and shows that the person in his particular circumstances and in his own interests should bring the action. Whether a material fact is of decisive character is to be determined when the fact becomes known or is within the applicant’s means of knowledge. Whether a material fact has that characteristic is to be determined by assessing whether it shows the matters I have

mentioned: that an action has reasonable prospects of success; will result in a substantial award of damages; that the applicant should in his own interests commence the action.

- [94] It is to be noted that the test for ascertaining whether a material fact is of a decisive character is objective. It has that characteristic if a reasonable person knowing the facts (and having taken advice on them) would regard the facts as showing the matters just mentioned. The assessment of the reasonable person is of the facts. Do the facts show those attributes which make it decisive; that the putative plaintiff ought to bring the action in his own interests and taking his circumstances into account. The fact itself to be decisive must have those characteristics. The question must be answered with respect to the time at which the fact becomes known.
- [95] If the characteristic of the fact is to be determined objectively when it is known or becomes within the means of knowledge of an applicant the character of the fact must be immutable. It cannot gain or lose the characteristic of decisiveness by reference to an applicant's personal circumstances. It is the fact which determines whether it is decisive, not the idiosyncratic circumstances of an applicant.
- [96] There are good reasons why this should be so. Section 11 of the Act applies to those who have suffered personal injury whatever their personal circumstances (except of course those who are under a legal disability because of their injuries). The Act offers no concessions to those who might have compelling personal circumstances for not commencing an action within three years. It would be inconsistent to allow an injured person who discovers late that he has a worthwhile cause of action to delay, perhaps for years, to apply for an extension of time because his personal circumstances make it reasonable to delay. The second reason is that a very compelling circumstance making it in an applicant's interests to commence proceedings is that time can be extended for no more than a year after the material fact comes within his knowledge or means of knowledge.
- [97] Section 31 requires 'a material fact of a decisive character relating to the right of action' not to be within an applicant's means of knowledge before a certain time. The phrase is a composite one: 'a material fact of a decisive character relating to the right of action.' Material facts relating to the right of action are such things as the occurrence of the wrongful act, the identity of the wrongdoer and the infliction and extent of the injury. It is a fact like these which must be of decisive character. It would seem to follow that decisiveness is to be judged by the importance of the fact to the cause of action. The fact will be decisive depending on what it shows about the cause of action and whether objectively viewed the cause of action justifies commencing proceedings. The assessment is affected by the circumstances of the applicant. To be decisive the fact must show that it is in the applicant's interests, in his circumstances, to sue. This criterion is to be used only to judge the character of the fact, whether it be decisive. The decisiveness of the fact is not to be assessed by reference to whether the putative plaintiff has some personal reason not to sue which is distinct from matters concerning questions of liability and damages, facts relating to the cause of action. The assessment to be made is whether the particular applicant (taking into account his circumstances) should commence proceedings on the basis of the new material fact, which relates to the cause of action.

[98] There is support for this point in the report of the (New South Wales) Law Reform Commission (The First Report on the Limitation of Actions, LRC 3, October 1967) which recommended the introduction in New South Wales of provisions relevantly identical to s 30 and s 31 of the Act. The report stated:

‘295. Section 57 (1) (c) states the tests for determining whether material facts relating to a cause of action are of a decisive character ...

296. Section 57 (1) (c) (ii) is new: it requires consideration of matters peculiar to the person whose means of knowledge is in question. Cases may arise where the prospective damages are sufficient in amount to justify bringing the action but the injured person would be obliged to pay to someone else the whole or a large part of the damages so that what would be left for the injured party would not be enough to outweigh the hazards of litigation. An example is the case where the only known heads of damage are medical expenses and loss of wages If the injured person has received workers’ compensation, the bringing of an action might in substance (after allowance for ... costs) result only in a benefit to the workers’ compensation insurer. The injured person may, acting reasonably in his own interests, refrain from suing in such a case but he should not, we think, be deprived on that account of the possibility of getting an extension of time in case the injuries later turn out to be much more serious.

297. Then again, there may be personal reasons for not suing when the apparent injury is small. An injured employee may, for example, reasonably take the view that an action against his employer may jeopardize the future course of his employment to an extent which outweighs the prospective damages for the injuries at first apparent. ...’.

[99] It appears from this discussion that the matters which are ‘peculiar’ to an applicant are limited to those which affect the economic consequences to an applicant from a proposed action. They are factors which affect the assessment, for the particular applicant, whether there is a worthwhile cause of action. Section 30(1)(b)(ii) (the equivalent of s 57(1)(c)(ii) in the New South Wales legislation) operates as a qualification on s 30(1)(b)(i). An action must appear to the reasonable person to have reasonable prospects of success resulting in an award sufficient to justify the litigation. As well it must be in his interests to sue, objectively viewed. The Law Reform Commission report suggests that whether the anticipated result is in the person’s interest depends on what effect his circumstances will have on the monetary outcome. There is no warrant, in the report at least, to justify giving the qualification a wider operation.

[100] There is support for the contrary view, that taken by the trial judge, in *Royal North Shore Hospital v Henderson* (1986) 7 NSWLR 283, in which the plaintiff was suffering from a form of cancer for which the treatment was a course of radium therapy. He was treated at the defendant hospital where, between July and August 1972, he was given an excessive dose of radioactivity. On 5 September 1972 he was told by the defendant that he had received an accidental overdose and was

liable to suffer tissue damage. In fact he developed radiation burns on his neck and shoulders which resulted in unsightly scarring. The skin was susceptible to breakdown and ulceration. In November 1974 the plaintiff complained of pain in his neck and jaw which was diagnosed as being consequential upon the overdose. In November 1982 the plaintiff was told by the defendant that he had received a ‘double dosage’ of radiation. On 12 October 1983 a neurologist told the plaintiff that he was suffering from radiation myelopathy which was caused by the overdose and which was a serious neurological disease. The plaintiff commenced proceedings on 19 December 1983. He applied for, and obtained, an order extending the limitation period to that date. The defendant’s appeal was, by majority, unsuccessful, though the reasons of the three judges on the point of interest in this appeal are divergent.

[101] The trial judge had found:

- The radiation treatment was given to arrest a terminal disease.
- The treatment was successful and was of paramount importance to the plaintiff.
- The scarring and associated symptoms were ‘an unfortunate by-product of a successful treatment of his major life-threatening problem.’
- He was reassured that the overdose would not produce further symptoms.
- The symptoms of scarring, vulnerability to trauma and sunburn were not insignificant or trifling but were something that the plaintiff ‘was quite prepared to live with.’

[102] To these facts Hope JA added the observation that, had the plaintiff taken appropriate advice in 1972, it would have been that he was unlikely to suffer any further adverse effect from the overdose of radiotherapy. Hope JA went on (287):

‘It is in these circumstances that one has to decide what the attitude of a reasonable man would be. Obviously different conclusions can be reached but in my opinion a most important qualification in s 57(1)(c) is to be found in the words “taking his circumstances into account”. I do not understand it to be a policy of the law that persons should sue whenever they have an opportunity of doing so. This consideration is not of course in any sense determinative of the issue to be resolved, but it helps to understand the way in which s 57(1)(c) should be applied, for it clearly contemplates that there are some circumstances where, notwithstanding a knowledge of material facts of a decisive character, it might nonetheless be reasonable for a person not to sue. I see no reason to attempt to confine the circumstances which would justify the not bringing of an action to any particular class or category, ... as it seems to me the circumstances relied on by the respondent were relevant in determining the attitude of the hypothetical reasonable man. Taking them into account I have concluded ... that the reasonable man contemplated by s 57(1)(c) would not conclude that the respondent ought, in his own interests, to have brought an action against the Hospital within the limitation period.’

[103] Samuels JA dissented. The trial judge had found:

‘... Henderson had a worthwhile cause of action. He could have obtained not trifling damages for the scarring and associated injuries which at all times were well-known to him. He elected not to sue within the limitation period. He had, during the limitation period, all material facts of a decisive character within his knowledge sufficient to found a cause of action.’

Samuels JA thought that that conclusion should have been ‘fatal’ to the application. He found it (294):

‘... difficult to do other than conclude that a reasonable man would take the view, or would have been of the opinion at the time he was supposed to consider the matter, that the respondent ought to commence or to have commenced an action.’

[104] Mahoney JA identified the two issues to be decided as (297):

‘(A) When did the necessary facts come within the plaintiff’s means of knowledge?; and

(B) When ought [the plaintiff], in the statutory sense, have brought an action?’

The plaintiff commenced his action on 12 December 1983. Mahoney JA held that it was not until some time after 12 October 1983 that the plaintiff, having taken advice from the neurologist, knew that the overdose had been given negligently. His Honour said (300):

‘In one sense, s 58(2)(a) [s 31(2)(a)] requires a judgment to be formed as to when a reasonable man ought to sue and, consequently, it looks to when such a person, knowing that he has a relevant cause of action, may be excused from not suing. ... The provision is not directed to excusing inadvertence, or inadvertence as such. It assumes appropriate knowledge and advice as to a plaintiff’s rights and looks to considerations which justify a decision not to exercise them, or not to exercise them at the particular time. And it requires a determination to be made of when the plaintiff is to be expected, for the purposes of his rights under the sections, to have taken action.

Under the general law, the judgment of such a question is simple: he ought to bring an action within the limitation period. This provision substitutes criteria for deciding when he ought to bring the action other than the limitation period: these are his own interests and his circumstances. In a sense, its purpose is to provide considerations justifying delay in bringing an action.’

[105] A similar view of the provisions appears to have been taken by Kirby P in *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697. His Honour (with whose judgment Hope A-JA agreed) said (704):

‘... in considering whether an action ought to have been brought earlier, having regard to the belated knowledge of the material facts of a decisive character, practical questions must be asked. Would such a hypothetical earlier action have had a “reasonable prospect of success”? Would it have resulted in “an award of damages sufficient to justify the bringing of an action ...”? Ought, therefore, the person “in his own interest” to have brought that action? And in judging the

last question it is necessary to take the “circumstances” of the claimant into account. The importance of this last provision was emphasised in ... *Henderson* ...’.

- [106] Byrne J took the same view in *Tiernan v Tiernan* ([1993] QSC 110; SC No 39 of 1992, 22 April 1993, unreported) in which time was extended to allow a very old claim for damages for assault to be brought by the applicant against her father. His Honour said that:

‘Section 30(b)(ii) acknowledges that there may be sufficient reason not to launch proceedings which appear to have reasonable prospects of success and of resulting in an award sufficient to warrant the litigation ... *Henderson* ...’.

His Honour thought that the applicant ought not in her own interests to have sued earlier. Those interests were that the applicant wanted to avoid a public confrontation with her father and the damage such conflict would have to any chance of reconciliation with him. As well commencing an action ‘must also have risked her inheritance.’

- [107] I respectfully disagree with the exposition of the operation of s 31(2) found in *Henderson*. There is no warrant, in my opinion, for regarding the subsection as requiring a judgment as to when a reasonable man ought to sue and when he may be excused from not suing by reference to matters other than his knowledge of facts relating to the cause of action. What the section does is to confer jurisdiction on the court to extend a limitation period, for no more than a year from the date on which, or by which, the applicant knew or had the means of knowing, a material fact of a decisive character, when that fact was not within its means of knowledge until a date after the commencement of the last year of the ordinary limitation period. Section 30(1)(b)(ii) does not confer on a plaintiff a right, acting reasonably, to choose when he should sue. Section 30(1)(b) defines what it is about a material fact relating to a right of action that makes it decisive. The applicant’s circumstances are relevant to the assessment of whether the fact is decisive. The scheme of the sections is that an applicant should commence proceedings within 12 months of his knowing sufficient material facts, of decisive character, relating to his right of action. It is what he knows about the cause of action that determines whether a fact is of decisive character. More particularly it is whether he knows *that the fact* shows that there is a worthwhile cause of action *for him*. This, in my opinion, is all that is meant by s 30(1)(b)(ii).

- [108] There is, as Connelly J pointed out in *Sugden v Crawford* [1989] 1 Qd R 683 at 685, a negative proposition implicit in the operation of s 30 and s 31. It is:

‘... that time will not be extended where the requirements of s.30(b) are satisfied without the emergence of the newly discovered fact or facts, that is to say, where it is apparent, without those facts, that a reasonable man, appropriately advised, would have brought the action on the facts already in his possession ...’.

Section 31(2) is also expressed in the negative. It provides that where it appears to the court that a material fact etc. was *not* within the means of knowledge of the applicant until the critical date the court may extend time.

- [109] The point is, of course, that time may not be extended where, before the critical date, an applicant knew of sufficient facts to make it unreasonable not to have commenced an action earlier. As Deane J pointed out in *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 251, if any one of a number of facts would, with other facts within the means of knowledge of an applicant, satisfy the requirements of “the material facts of a decisive character” s 31(2) will not justify an extension of time if an applicant was unaware of one of the facts but was aware that he had a worthwhile cause of action because he knew of others.
- [110] Section 30(1)(b) comprises part of the test to determine whether sufficient material facts of the requisite character were not within an applicant’s means of knowledge before the critical date. They will not have been if, relevantly, the facts known to the applicant would not persuade a reasonable man who took appropriate advice that it would have been in the applicant’s interests, having regard to his circumstances, to commence an action.
- [111] The subsection does not, as I have postulated, confer a discretion on an applicant who discovers a new material fact to delay commencing a suit because of his personal circumstances. This proposition is what the appellant’s submission comes down to. It would put an applicant for extension of time in a superior position to someone who knew of all relevant facts concerning a cause of action within the limitation period. If such a person does not sue in time because of personal circumstances the right of action is lost. I can see no sensible reason why s 30(1)(b) should be construed so as to give rise to such discrimination.
- [112] There is an established line of cases which have considered the meaning and operation of s 30 and s 31 and their equivalents which have regarded the applicant’s knowledge at the time in question as being of critical importance. The approach to the Act manifested by these authorities is, in my opinion, inconsistent with the appellant’s submissions, and with *Henderson*.
- [113] In *Do Carmo* Deane J said (250-251):
 ‘The benefit of any extension of the limitation period ... is conferred at the cost of a corresponding detriment to the potential defendant in the action. The legislative policy underlining the sections is plain enough. It is that the limitation period should be extended only in favour of a person who was, without fault on his part, unaware that he had a worthwhile cause of action until not more than twelve months before the commencement of proceedings. In that context, the reference in s. 58 to “any” of the material facts of a decisive character not being within the means of knowledge of the applicant should be construed as being to a fact or facts which would need to be within the means of knowledge of an applicant before it could be said that the facts within his means of knowledge constituted “material facts of a decisive character”.’
- [114] Dawson J said (258):
 ‘The test laid down by s. 57(1)(c) is an objective one to be applied by reference to the reaction of a reasonable man who has taken appropriate advice. I think that it must be assumed that the reference to appropriate advice contemplates not only the taking, but also the receiving, of such advice upon the facts which are relied on as being

of a decisive character. Whatever else may be said of this paragraph ... it is clear ... that it characterizes as decisive at least each of those facts which must be proved in order to establish a cause of action. The question is whether a reasonable man, having received appropriate advice, would regard at least that concatenation of facts as showing “a reasonable prospect of success”.’

[115] There is no support in either of these analyses for the opinion that whether a material fact is of decisive character depends, in part, upon the personal circumstances of an applicant separate from his knowledge about the existence or value of a cause of action.

[116] In *Moriarty v Sunbeam Corporation Ltd* [1988] 2 Qd R 325 Macrossan J said (333) in a passage which has been frequently approved:

‘In cases like the present, an applicant for extension discharges his onus not simply by showing that he has learnt some new fact which bears upon the nature or extent of his injury and would cause a new assessment in a quantitative or qualitative sense to be made of it. He must show that without the newly learnt 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. This is what the application of the test of decisiveness under s.30(b) comes down to ...

The definition in s.30(b) is hard to apply to give an immediately comprehensible meaning to the notion of a single fact which within s.31(2) can be both material and decisive. Like Deane J., I think that to resolve this question it is necessary to have in mind the general underlying policy which may be discerned in the enactment. The reference to the facts or, as it may be, to the single fact which s.31(2)(a) envisages as only belatedly coming to an applicant’s means of knowledge must then be understood as being to an outstanding fact or facts vital to complete any necessary combination of facts which establish the existence or worthwhile nature of the cause of action as referred to in s.30(b). This interpretation may be taken as concluded by a number of prior decisions upon the legislation including *Do Carmo*.’

[117] Again, there is no hint in this analysis of the decisiveness of a material fact depending upon whether an applicant’s personal circumstances make it reasonable for him to commence proceedings. The emphasis is on knowledge of facts showing that there is a worthwhile cause of action which should be pursued in the applicant’s interests.

[118] In *Taggart v The Workers’ Compensation Board of Queensland* [1983] 2 Qd R 19 Andrews SPJ said (at 23):

‘With respect it was correctly decided ... [by the trial judge] that the newly discovered fact should not be considered as separate from facts already known and that it should be regarded in context with such other facts. The question of damages likely to be recovered is properly to be regarded in determining whether the bringing of an

action for damages for personal injury is justified. The following statement appears in the reasons for judgement:

“It follows ... that if a reasonable man, appropriately advised, would have brought the action on the facts already in his possession and the newly discovered fact merely goes to an enlargement of his prospective damages, the newly discovered fact cannot be described as a material fact of a decisive character ...”.

- [119] There is here no encouragement for an inquiry into whether the applicant’s personal circumstances determine that he ought to commence proceedings in his own interests. There is, instead, a gloss put upon s 30(1)(b)(ii) to the effect that a material fact is of a decisive character if a reasonable man advised appropriately would regard the fact as showing that he had a worthwhile cause of action. It should be pointed out that Andrews SPJ went on, following the passage just quoted, to say that it was (24):

‘... valid to consider in determining what a reasonable man might do, viewed objectively, whether substantial parts of any sum to be recovered in a judgment would be refundable by a successful plaintiff ... [who] is not required to adopt any sympathetic view towards the Workers’ Compensation Board for example ...’.

This observation echoes the point made in para 296 of the Law Reform Commission’s report. It does not make personal circumstances relevant beyond an assessment of what effect they have on the value of the result of a cause of action to the particular applicant.

- [120] The point made in *Taggart* emerges also from the judgment of McPherson J in *Randel v Brisbane City Council* [1984] 2 Qd R 276 at 277-9. His Honour said:

‘In determining whether time should under s. 31(2) be extended there are three matters to be considered under subsecs. (a), (b) and (d) of s. 30. Essentially these are:

(a) whether the unknown fact relating to the right of action is a “material fact” ...; (b) whether the material facts relating to a right of action are “of a decisive character”; and (d) whether the fact in question was not within the means of knowledge of the plaintiff.

Of these, the standard to be applied in determining the second of these matters, involving as it does the behaviour of a reasonable man, is not related to the mentality, personal idiosyncrasies, or behaviour of the particular plaintiff in question. The assessment required by this provision is entirely objective. ...

...

The question whether the material fact of identity is “of a decisive character” within s. 30(b) ... is readily answered ... by saying that a reasonable man, knowing the identity of the Commissioner as a potential defendant and knowing the other material facts of the incident, would on taking appropriate advice have regarded those facts as showing that an action against the Commissioner had a reasonable prospect of success; and also that the plaintiff ought in his own interests to bring an action against the Commissioner: see s. 30(b)(i) and (ii) of the Act.’

[121] *Ipswich City Council v Smith* ([1997] QCA 263; Appeal No 5443 of 1997, 29 August 1997, Supreme Court of Queensland Court of Appeal, Pincus, Davies JJA, Byrne J) is an illustration of this approach which, in my opinion, corroborates the view that it is what an applicant knows of material facts, not some extraneous personal circumstance of the applicant, which determines whether time can be extended. Davies JA, with whom Pincus JA and Byrne J agreed, said:

‘The test for decisive character of material facts, stated in s.30(b) ... was the subject of decisions of the Full Court, in relation to nature and extent of personal injury, in Taggart ... and Moriarty Adopting the construction adopted in those cases this Court said in Peabody Resources Limited v. Norton (Appeal No. 200 of 1994, judgment delivered 16 June 1995) that s.30(b):

“... requires the respondent to show that, without the fact said to be decisive, a reasonable person would have thought, even with the benefit of appropriate advice, that the prospects of an award of damages did not justify bringing an action or that, in his own interest, taking his circumstances into account, the respondent acted reasonably in not bringing it.”

The Court went on to say that generally a material fact which merely increases an applicant’s damages is unlikely to be decisive. Thus the questions will generally be whether without the fact said to be decisive it would have been reasonable not to sue and whether that fact made it reasonable to sue.’

[122] These cases contain no hint that the second part of the test for decisiveness, the applicant’s interests and circumstances, give him a discretion to delay his suit. On the contrary they suggest that it would not be reasonable for an applicant not to commence proceedings if he has a worthwhile cause of action. In determining that question, the value of the right of action *to the applicant* must be assessed. The question is whether the fact which became known to the applicant, objectively viewed, is such that, in his circumstances, he has a cause of action with reasonable prospects of success and which will result in an award sufficient to justify the suit. This, in my opinion, is what is meant by s 30(1)(b)(ii). It is all that is meant by it.

[123] In my opinion the trial judge was wrong to conclude that the appellant’s state of health and reluctance to commence proceedings prior to securing his retirement were relevant to determining whether the material facts relating to his right of action were of a decisive character. It follows that there was no material fact of a decisive character first within the applicant’s means of knowledge in the year preceding the commencement of his action. The application was rightly refused. The appeal should be dismissed.