

SUPREME COURT OF QUEENSLAND

CITATION: *Reeman v State of Queensland* [2004] QSC 285

PARTIES: **SCOTT WALTER REEMAN**
(plaintiff)
v
STATE OF QUEENSLAND
(defendant)

FILE NO/S: SC No 6649 of 2002

DIVISION: Trial Division

PROCEEDING: Application and Cross-Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 9 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 27 May 2004; 28 May 2004

JUDGE: Holmes J

ORDER: **1. Plaintiff's application is dismissed.**
2. Judgment for the defendant.

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 A DECISIVE CHARACTER – where the plaintiff was a covert police officer in the Queensland Police Service – where the plaintiff has suffered psychological injuries and drug dependency injuries in the course of his employment – where the plaintiff commenced proceedings outside the limitation period – whether the limitation period will be extended pursuant to section 31 of the *Limitations of Actions Act 1974* – whether a material facts of a decisive nature were within the plaintiff's means of knowledge prior to the relevant date
Limitation of Actions Act 1974, s 30, s 31
WorkCover Queensland Act 1996, Ch. 5, s 522
Beaver v Queensland [2001] QCA 21, followed
Berg v Kruger Enterprises [1990] 2 Qd R 301, followed

Bonser v Melnaxis [2002] 1 QdR 1, followed
Byers v Capricorn Coal Management Pty Ltd [1990] 2 Qd R 306, followed
Do Carmo v Ford Excavation Pty Ltd (1984) 154 CLR 234, followed
Fersch v Power and Water Authority (1990) 101 FLR 78, distinguished
Ipswich City Council v Smith [1997] QCA 263, followed
Moriarty v Sunbeam Corporation Ltd [1988] 2 Qd R 325, followed
Royal North Shore Hospital v Henderson (1986) 7 NSWLR 283, considered
Sugden v Crawford [1989] 1 Qd R 683, followed
Stephenson v State of Queensland (2004) QSC 226, applied
Taggart v The Workers Compensation Board of Queensland [1983] 2 Qd R 19, followed
Tiernan v Tiernan [1993] QSC 110 (Unreported, Byrne J, 22 April 1993), considered
Watters v Queensland Rail [2001] 1 Qd R 448, followed

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

SOLICITORS: Gilshenan & Luton for the plaintiff
Crown Solicitor for the defendant

The applications

- [1] The plaintiff, Mr Reeman, is a former police officer who seeks damages for negligence, breach of contract and/or breach of statutory duty in respect of psychiatric injury he says he suffered from work undercover in 1990 and 1991. His claim and statement of claim were filed on 22 July 2002. All but the last of his pleaded injuries were suffered more than three years before that date; and as to those most recent injuries it is said, without challenge, that no cause of action can accrue in respect of them because there has been no compliance with the requirements of Chapter 5 of the *WorkCover Queensland Act 1996*¹. There is no dispute that the rest of the plaintiff's claim is statute-barred unless he can obtain an extension of time under s 31 of the *Limitation of Actions Act 1974* for the commencement of his proceedings. Accordingly, the defendant, which took the limitation point in its defence, seeks summary judgment, while Mr Reeman seeks an extension of the limitation period, the former application depending on the outcome of the latter.
- [2] Section 31 (2) of the *Limitation of Actions Act* enables an applicant plaintiff in Mr Reeman's position to obtain an extension of the limitation period if he can show-:
- (a) that a material fact of a decisive character relating to the right of action was not within [his] means of knowledge until a date after

¹ *Bonser v Melnaxis* [2002] 1 Qd R 1.

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.

If the Court is so satisfied, it

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.

The defendant concedes, for the purposes of this application, that there is a prima facie case on liability, and also concedes that it would suffer no prejudice were time to be extended.

- [3] Given the commencement of proceedings on 22 July 2002, Mr Reeman accepts that he must, in order to obtain any benefit from a twelve-month extension, show that a material fact of a decisive character was not known to him until a date after 22 July 2001 (the “critical date”). The material fact on which he first relied was the discovery in early 2001 that his prospects of continuing in the Queensland Police Service were poor. His argument was that although that state of things emerged as a material fact before the critical date, it did not assume a decisive quality until after that date. In later submissions he suggested two different material facts occurring after the critical date: the termination of his employment with the Queensland Police Service on 10 August 2001 and an improvement in his health in February 2002.

Background to the commencement of the action

- [4] Mr Reeman became a police constable in July 1989, when he was 18 years old. His case, summarising heavily, is that the following year, at the age of nineteen, he was put on undercover duties for which he was not trained, during which his welfare was not properly monitored and in respect of which he was given no counselling or debriefing. It was necessary for him to associate with, and on occasion live with, drug users. He used cannabis, and on one operation snorted and injected amphetamines, in order to maintain his cover. His work was stressful: he feared discovery and physical harm; and he began regular and heavy use of cannabis and alcohol. In September 1991, Mr Reeman admitted to a senior officer that he had used amphetamines in the course of his work. Disciplinary proceedings ensued, and he was not assigned again to undercover work.
- [5] Although Mr Reeman subsequently ceased undercover duties and returned to more regular policing, he continued to suffer from depression manifested in an array of symptoms, including sleeplessness, shaking, crying, nail-biting and trichotillomania, and his dependence on cannabis continued. Those symptoms and that dependence seem to have been present in varying degrees of severity from 1991 to the present.
- [6] In July 2000, Mr Reeman began to consult Dr Sharon Harding, a psychiatrist, on a regular basis. Dr Harding made notes of their consultations, and frequently recorded the plaintiff’s views on his situation. I should say that I accept those notes (the contents of which Mr Reeman did not dispute) as accurate, and, more particularly, as providing a better reflection of what Mr Reeman was thinking and feeling at the relevant times than his affidavit. That is not to cast any aspersion on his credit, but

is simply to say that as a direct and contemporary expression of his sentiments, they are to be preferred to the endeavour in the affidavit sworn in May 2004 to reconstruct his reactions to events occurring three or four years earlier.

- [7] Mr Reeman commenced sick leave on Dr Harding's recommendation; she certified that he suffered from post-traumatic stress disorder and major depression. He did not, as it happened, return to work again, although for the balance of the year 2000, he, Dr Harding and representatives of the Queensland Police Service shared the view that he would be able to do so at some future point. On 9 November 2000, Mr Reeman made a WorkCover claim, and, at WorkCover's behest, was later interviewed by a psychologist, Helga Zimmerman. He gave Ms Zimmerman a detailed account of his experiences as an undercover police officer, in the course of which he disclosed his drug use. In late 2000, Dr Harding referred Mr Reeman to another psychiatrist, Dr Prior, who specialised in drug and alcohol rehabilitation. At his recommendation, Mr Reeman underwent three weeks detoxification as an inpatient in January 2001. After completing that programme, he managed to refrain from cannabis use until mid-April 2001.
- [8] In early 2001, the prospect of Mr Reeman's retiring from the police force became increasingly real. In March 2001, he told a representative of the Queensland Police Service that while he was not himself prepared to seek medical retirement, he would not oppose it. He discussed it with Dr Harding, indicating an increasing degree of acceptance of the notion: on 15 March, in her notes, she describes him as "agreeable" to the option of medical retirement; on 5 April she records that he "knows [he] can't go back to work". On 12 April Dr Harding wrote a report to WorkCover in which she expressed her concurrence with medical retirement for Mr Reeman, whom she regarded as "unlikely to be able to return to work as a Police Officer". On 19 April, Mr Reeman reported to Dr Harding that he had started to tell people he would not be returning to the police force.
- [9] On 4 April 2001, Mr Reeman spent three hours with a solicitor, Ms McCrostie, of the firm of Gilshenan and Luton, which, as he knew, had commenced proceedings for other former undercover officers claiming work-induced injuries similar to his. Ms McCrostie took some 39 pages of notes, recording a history of his experiences as an undercover operative. Mr Reeman did not give instructions on that occasion to commence an action; the purpose of his attendance was rather to give information from which it could be determined whether he had a cause of action. At some stage (by December 2000, according to Dr Harding's notes) he had discovered that the Police Union would fund such litigation for him. Mr Reeman was asked after seeing Ms McCrostie to provide documents relating to his employment to his solicitors; he managed to furnish only one group certificate. He said that he relapsed into depression, and found himself unable to marshal the material or to address the matter generally. He did not return phone calls and his symptoms worsened considerably. By 19 April, according to Dr Harding's notes, he was using cannabis again.
- [10] On 10 May 2001, the Queensland Police Service advised Mr Reeman in writing that his fitness to discharge his duties as a police officer was in doubt and that he was required to undergo assessment by a psychiatrist. Later that month, on 24 May, he discussed with Dr Harding qualifications he might acquire for other work. He had made inquiries about courses in tourism, information technology, and outdoor activities; he had also explored the possibility of qualifying as a coxswain. He told

Dr Harding then that he had passed a test (written, not practical) for his learner's permit as a truck driver, and had had his first lesson; and that he was to undertake an information technology course starting in July. Dr Harding's notes indicate that he was also involving himself in some other activities over the months of April and May: he had undertaken surf patrols as a lifesaver and a first aid course, and had done a little labouring for a friend. In late May or early June he was instructing in a bronze medallion course in lifesaving.

- [11] On 22 June 2001, Dr Cantor performed the psychiatric assessment of Mr Reeman required by the Queensland Police Service, in the course of which Mr Reeman again detailed his various difficulties, including his use of cannabis. Dr Cantor described Mr Reeman's post-traumatic stress disorder as a severe ongoing problem and his cannabis dependence as a moderate ongoing problem. On 11 July, he gave his opinion that Mr Reeman was permanently unfit and incapable of efficiently discharging his duties as a police officer. On 25 July 2001, Mr Reeman was advised that as of 10 August 2001 he would be discharged as medically unfit.

Material fact of a decisive character

- [12] In submissions at the hearing, it was accepted that the fact he was unlikely to return to the police force was material and was known to Mr Reeman in the first part of 2001. His argument was that it did not acquire a decisive quality until a date after the critical date, 22 July 2001; indeed, until after his discharge from the police force in August 2001. Those submissions were subsequently supplemented in light of a decision of McMurdo J in *Stephenson v State of Queensland*², given after the hearing: the fact of his retirement itself is now offered as a material fact, as is an improvement in his health in February 2002.
- [13] To discover what amounts to a material fact of a decisive character, one must look to s 30 of the *Limitation of Actions Act*, which interprets some of the expressions in s 31. Section 30 provides:

- (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—

² (2004) QSC 226.

- (i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
- (ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;
- (c) a fact is not within the means of knowledge of a person at a particular time if, but only if—
 - (i) the person does not know the fact at that time; and
 - (ii) as far as the fact is able to be found out by the person—the person has taken all reasonable steps to find out the fact before that time.
- (2) In this section—
 - “**appropriate advice**”, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.

[14] Here, the plaintiff argued, the knowledge that he was unlikely to be able to return to work as a police officer did not acquire a decisive character until after the critical date, because a reasonable man, knowing the material facts and having taken appropriate advice on them, would not have regarded them as showing that he ought bring an action “in his own interests and taking his circumstances into account”. It was not in the plaintiff's interest to pursue an action until after his discharge from the police force in August 2001, because of: the effect pursuing the claim would have on the prospects of his being able to continue in the police force; the risk of prosecution and disciplinary proceedings in relation to his admitted offences of drug use, which might in turn affect his opportunity for retirement and his superannuation; and the impact on his health and his ability to cope with the issues involved in the commencement of proceedings.

[15] I do not think that there is much in the first and second of these factors. By, at the very latest, May 2001, an objective observer would have concluded that the plaintiff had accepted he was not going to return to work as a police officer and that there was no real prospect of a career in the police force which might be jeopardised by litigation. The fact of his drug use as an undercover officer had been disclosed to some extent in 1991; and in the course of his WorkCover claim he had been frank about his current drug problems³. In order to obtain a medical retirement, the course to which he had become increasingly reconciled, it must have been apparent that he would have to reveal his drug use; and indeed, he did do so in his interview with Dr Cantor in late June. Again, it is difficult to accept that the reasonable person would have regarded any concern about disclosure in this regard as compelling or as having any bearing on whether Mr Reeman ought to bring proceedings. The most serious of the arguments was as to the impact on his health and his capacity to cope with the commencement of litigation.

³ Section 522 of the *WorkCover Queensland Act 1996* would have prevented the use of the information in a prosecution, but would not have affected its use in disciplinary proceedings for misconduct.

- [16] Mr Reeman gave evidence that his doctors had advised him that thinking about past events was bad for his rehabilitation, triggering cannabis and alcohol use and depression. Dr Harding in her affidavit said that the process of describing his experiences as an undercover officer to solicitors “would have been very difficult for the Plaintiff and would likely have caused a worsening in his condition.” She went on to say, “I believe that it would not have been in the interests of the Plaintiff’s mental health for him to commence the process of providing instructions to solicitors and commencing the litigation at this time” (that is, during 2001). Under cross-examination she conceded that there were periods of time in which Mr Reeman was capable of providing information.
- [17] Dr Prior, in his affidavit, said that, if he had been told by Mr Reeman that he was considering legal action, he would have advised him to delay it in the interests of his mental health. A proceeding against the Queensland Police Service while still in its employ would have aggravated his mental state. In evidence, Dr Prior said that each time Mr Reeman had had to face the question of his experience in the police force he was re-traumatised and lapsed into avoidance behaviour; avoiding thinking or talking about the experience. Confronting the issue of leaving the police force had precipitated at least two relapses into cannabis abuse. It was important for Mr Reeman’s long term recovery that he achieve 12 months abstinence from alcohol and cannabis; for that purpose, it was necessary to identify triggers which might increase his anxiety and to avoid them where possible.
- [18] For the defendant, Mr Douglas QC argued that the plaintiff had successfully given a long interview to Ms Zimmerman in February 2001 and had again given an extensive account of events to his solicitor in April 2001. There was no immediate relapse into cannabis use after either session. He had the support of the Queensland Police Union so far as the funding of the claim for damages was concerned, and his solicitors were experienced, in the sense that they were conducting other such litigation on behalf of people known to him. He had already provided a great deal of the information necessary for litigation in the form of the statement to Ms Zimmerman, what he had revealed to doctors and the information he had given Ms McCrostie in the conference with her. There was not, Mr Douglas argued, any significant difference between making a WorkCover claim against the employer and bringing an action against it. In any event, in April and May 2001, Mr Reeman had been in reasonably good health, undertaking surf patrols and other activities, making enquiries about courses he might undertake, and had been able to pass the test for a learner’s permit as a truck driver. It should be concluded that he was capable at that time of giving instructions and making decisions.
- [19] Notwithstanding Mr Reeman’s ability to cope with, and perhaps even enjoy, some aspects of his life, I accept the evidence of Dr Prior and Dr Harding to the effect that commencing proceedings would have been harmful to his recovery. It is reasonable to suppose that there was a relationship between his attendance on the solicitors to provide information and his slide, within a couple of weeks, back into cannabis use. I accept that he could not at that time bring himself to address the prospect of litigation or to assemble what was needed for it. It was not something he could cope with, and it was likely to be positively damaging to his health. A reasonable person would not have concluded that he ought, in his own interests, to commence an action before the critical date.

Material fact becoming decisive after the critical date

- [20] That is not, however, the end of the matter. While the prospect of retirement was a material fact known to Mr Reeman before the critical date, the question is whether, that fact having assumed a decisive quality only after the critical date, Mr Reeman's circumstances fall within s 31(2)(a). He argued, in effect, that the crucial question was whether it was in his interests to bring an action before the critical date; if it was not, he was entitled to an extension of time.
- [21] That argument runs counter to the approach taken by McMurdo J in *Stephenson v State of Queensland*, which, like the present case, concerned an application for an extension of limitation period by a former undercover police officer alleging work-induced psychiatric injury. McMurdo J found that the plaintiff there knew sufficient of the material facts before the critical date to show a reasonable person, taking the appropriate advice on them, that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing it. On the other hand, it was not in the plaintiff's interests to bring such an action until after the critical date, given the effects on his health and the prospect that he would lose the opportunity of medical retirement, as opposed to other means of discharge. Thus the material facts, while known to the plaintiff as at the critical date, were not then of "a decisive character". It was argued that an improvement in the plaintiff's health and his retirement on medical grounds, both of which occurred after the critical date, rendered the known material facts relating to the right of action decisive. Notwithstanding, McMurdo J held, the plaintiff had not satisfied the requirements of s 31(2)(a), because that subsection required a material fact of a decisive character to come within the plaintiff's knowledge after the critical date. A fact of which the applicant was already aware could not be said to come within his means of knowledge later, merely because it then became decisive. There was only one time at which a fact could come within the applicant's means of knowledge.
- [22] On the other hand, *Royal North Shore Hospital v Henderson*⁴, a decision of the New South Wales Court of Appeal on provisions of the *Limitation Act* 1969 (NSW) virtually identical to s 30 and s 31 of the Queensland legislation, lends some support to the plaintiff's proposition, and bears some analysis. The plaintiff there was a cancer patient being treated with radiotherapy at the defendant's hospital. In 1972 he was given an overdose of radiation and suffered burns and scarring which produced pain, stiffness and susceptibility to sunburn. A radiotherapist employed by the defendant then advised him that he was unlikely to experience any further adverse effects from the overdose. In November 1982 he was told that he had received a "double dosage" of radiation. In October 1983 he was informed that he was suffering from radiation myelopathy, a serious condition that could lead to quadriplegia, as a result of the excess of radiation. On 19 December 1983, he commenced his action.
- [23] At first instance, Foster J found that the plaintiff was aware of all material facts of a decisive character, sufficient to found a cause of action, before the limitation period had expired. He purported, however, to regard the condition of myelopathy as an entirely distinct injury from the initial burns and scarring, a view which does not seem to have been tenable, and which found no favour on appeal. More importantly, for present purposes, he found for the plaintiff on another ground: that although the plaintiff knew all material facts of a decisive character within the limitation period, there was a further test to be applied: whether a reasonable person would consider

⁴ (1986) 7 NSWLR 283.

that the plaintiff ought “in his own interest, and taking his circumstances into account” to have brought an action. In that regard, he said, a reasonable man would take into account that the plaintiff was dependent on the hospital for the cure of his cancer, and had been reassured that the overdose would not produce consequences beyond the scarring and vulnerability of the skin surface, which were, in context, a minor problem. That approach seems unsatisfactory: one would think it implicit in the finding that all material facts of a decisive character were known that a reasonable person would think litigation was in the plaintiff’s interests and should ensue; instead, on those findings, it might be open to say that the revelation of the far more serious condition of myelopathy converted an un compelling prospect into a worthwhile action, and was thus a new material fact of a decisive character.

[24] But the members of the Court of Appeal, while not all reaching the same conclusion, did not express any disagreement with the approach. Samuels JA, dissenting as to the result, took the view that the plaintiff knew within the limitation period that he had received an excessive dose of radiation, and had suffered a number of adverse effects which would sound in damages; and he could have obtained medical evidence as to the possible consequences of an overdose of radiation, which would have included radicular myelopathy. Thus he had within his knowledge all the material facts of a decisive character sufficient to found a cause of action. Notwithstanding that conclusion, Samuels JA then dealt with, as a further issue, Foster J’s finding that a reasonable man, taking appropriate advice on the possible effects of the overdose, would not have concluded that the plaintiff ought to have commenced an action. He did not criticise his apparent overlaying of a further test on that already comprised in the concept of decisiveness; rather he arrived at a contrary view.

[25] Mahoney JA treated as two separate issues the questions of when the necessary facts came within the plaintiff’s means of knowledge, and when he ought to have brought an action. He proceeded on the basis that what the plaintiff was told in 1972 and in 1982 was not sufficient to make him aware that the hospital was negligent; it was only in the discussion with the doctor in 1983 that its culpability was made known to him, and although by 1982 he knew he had had a double dose of radiation which had caused him major problems, it was not reasonable to expect that he should at that stage have taken steps necessary to ascertain whether the hospital had been negligent. So much is straightforward. But Mahoney JA then turned to consider an alternative position: what if the hospital’s negligence had within the limitation period been in the plaintiff’s means of knowledge? And here he said, referring to a New South Wales Law Reform Commission Report⁵,

“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.

⁵ Law Reform Commission of New South Wales Report on *Limitation of Actions* (LRC 3 - October 1967, par 296 et seq).

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

- [26] That passage suggests, in a similar vein to the plaintiff’s argument here, that although the material facts were known within the limitation period, the conclusion that it was not then in the plaintiff’s interests to sue might of itself justify an extension of time. But Mahoney JA went on to identify the features of the case he considered relevant in this regard; and what follows is a blend of matters, some of which might be regarded as material facts, while others are pure considerations of interest: the plaintiff might have felt some diffidence about suing the hospital while it continued to treat him; he was still suffering from the effects of the cancer, to treat which the radiation had been applied; he would still have remained uncertain as to his prospects of success, the extent to which the scarring was the result of the treatment and the role of negligence in what had happened. It is at least implicit in the reference to the last set of matters that the advice of the third doctor in September 1983 as to the myelopathy and its connection with excessive radiation provided the plaintiff with new and material facts.
- [27] Hope JA agreed with Foster J, for the reasons the latter had given as to the plaintiff’s dependence on the hospital’s treatment and his initial understanding as to the limited consequences of the radiation overdose, that the facts known to the plaintiff were not such that a reasonable man would consider that he should in his own interests have taken action. And he took the view that the advice given to the plaintiff in 1972 was “appropriate advice”; it was not incumbent on the plaintiff to seek further advice. He went on to make some statements about the expression “taking his circumstances into account” as it appeared in s 57(1)(c) of the New South Wales Act, the equivalent of s 30(1)(b)(ii):
- “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.”⁷
- [28] The plaintiff relied on this statement as supporting his argument. Again I confess to some perplexity in understanding how, if it were reasonable not to sue, the material facts could be said to be of a decisive character in the first place; but if the observation is regarded (as I think it has been) as no more than a gloss on the test for decisiveness set out in s 30(b)(ii), identifying considerations relevant in its application, it presents no difficulty.
- [29] The plaintiff also relied on *Tiernan v Tiernan*⁸, in which reference was made to Hope JA’s judgment. In that case, the applicant sought the extension of the

⁶ (1986) 7 NSWLR 283 at 300.

⁷ (1986) 7 NSWLR 283 at 287.

⁸ [1993] QSC 110 (Unreported, Byrne J, 22 April 1993) at 12 of 13.

limitation period for an action against her adoptive father, claiming damages for sexual assault. The incidents in question had occurred at various times in her childhood, and the limitation period expired when she became 21 in 1972. It was not until after 1 April 1991 that she came into contact with people whom she could discuss the events, and first came to appreciate that her problems of anxiety and depression were related to the sexual abuse.

- [30] Byrne J was satisfied that the material fact, being the connection between the abuse and the plaintiff's psychiatric problems, were not known to her before the 14 July 1971, and her ignorance was not a result of any failure to take reasonable steps. Nor would a reasonable person have considered that an action would have reasonable prospects of success resulting in a sufficient award of damages to justify it, in the absence of any residual consequences. In addition, it was not in her interests to embark on litigation; it would have jeopardised any chance of the reconciliation she had for a considerable time hoped for. In this context, his Honour referred to the remarks of Hope JA, and observed that s 30(b)(ii) recognised

“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”.⁹

That is unarguable; but I do not think it assists the plaintiff here on the question of whether an extension of time beyond the limitation period may be given when material facts were known within it.

- [31] I find myself in agreement with McMurdo J's approach. What s 31(2)(a) requires is that a material fact of a decisive character was not within the means of knowledge of the applicant until after the critical date. The converse (or “negative proposition”¹⁰) is that if all material facts of a decisive character *were* within his knowledge before that date, he cannot succeed; and examination of that question may properly be the first stage of inquiry. It seems to me that it was that part of the inquiry to which the judgments in *Royal North Shore Hospital v Henderson* were primarily directed. In the present case, as I have found, it can be said that the material facts known to Mr Reeman were not, at the critical date, of a decisive character, in the sense that it was not then in his interests, given his circumstances, to proceed; thus he did not at the critical date have within his means of knowledge all material facts of a decisive character.

- [32] But there is a further step. 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.

⁹

¹⁰ *Sugden v Crawford* [1989] 1 Qd R 683 at 685 per Connolly J.

- [33] Quite apart from questions of grammar, there is a well-established line of authority in this state in which extension has been considered on the premise that one starts by identifying a newly discovered fact, and then proceeds to determine whether it is material and decisive: see for example, *Taggart v The Workers Compensation Board of Queensland*¹¹; *Moriarty v Sunbeam Corporation Ltd*¹²; *Sugden v Crawford*¹³; *Berg v Kruger Enterprises*¹⁴; *Byers v Capricorn Coal Management Pty Ltd*¹⁵; *Ipswich City Council v Smith*¹⁶; *Watters v Queensland Rail*¹⁷; *Beaver v Queensland*.¹⁸ In *Do Carmo v Ford Excavation Pty Ltd*¹⁹ that position was made explicit: Dawson J described the step-by-step approach required, the first step being to enquire whether the facts of which the plaintiff was unaware were material facts; the second to ascertain whether they were of a decisive character; and the third to ascertain whether they were within the means of knowledge of the plaintiff before the specified date.
- [34] Section 31(2) enables a plaintiff to obtain an extension of the limitation period by showing two things: firstly, that a material fact came within his means of knowledge after the critical date; and secondly, that it was of a decisive character. Here it would be an absurdity to say that the material fact – the unlikelihood of his remaining in the police force – was not known to Mr Reeman before the critical date; indeed it is conceded that it was; so the first premise, that a material fact come within his knowledge after that date, has not been established.

New material facts?

- [35] No doubt with these difficulties in mind, the plaintiff, when invited to provide further submissions in light of the *Stephenson* decision identified the two additional facts which he said were material: the actuality of his retirement in August 2001 and an improvement in his health in February 2002.
- [36] The fact of the plaintiff's retirement on medical grounds in August 2001 seems to me neither a new material fact nor a decisive one. What was material was the economic consequence of the injury, in the loss of future income from employment as a police officer. Mr Reeman had known for some months that his career with the police force was at an end; the retirement merely formalised that state of affairs. At the point at which he realised it was the obvious outcome, a reasonable person would have considered his action to have a reasonable prospect of resulting in an award of damages sufficient to justify its bringing; or to put it another way, that his cause of action had then become worthwhile.
- [37] The plaintiff relied on *Fersch v Power and Water Authority*²⁰ for the proposition that termination of employment was a material fact, but in that case the appellant's termination was not something anticipated; it became known to him when he was actually put off work. It is instructive to look at the reasons of Asche CJ:

¹¹ [1983] 2 Qd R 19.
¹² [1988] 2 Qd R 325.
¹³ [1989] 1 Qd R 683.
¹⁴ [1990] 2 Qd R 301.
¹⁵ [1990] 2 Qd R 306.
¹⁶ [1997] QCA 263.
¹⁷ [2001] 1 Qd R 448.
¹⁸ [2001] QCA 21.
¹⁹ (1984) 154 CLR 234 at 256.
²⁰ (1990) 101 FLR 78

“There are certainly likely to be situations where a person returns to work after an injury believing or hoping that the injury will not affect his working capacity; but over a period which might be quite substantial he comes gradually to the realisation of a material fact, namely that his working capacity has declined because the injury or its effects are still with him. When he finally reaches the point where he positively concludes that his working capacity has been affected by the injury, that is the point when he has “ascertained (OED: made subjectively certain)” something he could not be said to have “ascertained” before.”²¹

Here that conclusion had been reached by Mr Reeman well before the critical date.

- [38] Mr Reeman also sought to rely on a supposed improvement in his health in February 2002 as a material fact, pointing to these entries in Dr Harding’s notes: for 13 February 2002, “better spirits”; for 21 February 2002, “not too bad feeling ok”. In the first instance, I doubt that those entries are of much consequence. They appear after entries for 24 January 2002, in which he says that he has had a “bad week”, feeling he had “hit rock bottom”, and another on 7 February 2002 in which he is said to be “average” but “depressed a lot”, “upset”, and refusing advice to return to the detoxification program. The entry immediately subsequent to the 21 February entry, for 7 March 2002, begins “worse [sic] couple of weeks for a long time”. They do not, in short, appear to indicate any significant recovery. Even assuming that they did, the difficulty for the plaintiff is that an improvement in his health could not amount to a material fact relating to his right of action; at its highest it might be a relevant circumstance for determining whether an existing material fact was decisive.

Conclusion

- [39] The outcome causes me some concern. At least on the facts so far presented, Mr Reeman seems to have very genuine cause for complaint, having been thrust into a difficult and dangerous form of work untrained, at the age of 19; and he appeared, so far as I could discern, to have suffered significant injury which, apart from its other consequences, was an impediment to his litigation. But I conclude that the premise necessary to found an extension of time has not been established; there has been identified no material fact of a decisive character not known to Mr Reeman before the critical date. His application is therefore dismissed, and the defendant is entitled to judgment. I will hear the parties as to costs.

²¹ (1990) 101 FLR 78 at 81.