HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

STATE OF QUEENSLAND APPELLANT

AND

PETER ROBERT STEPHENSON RESPONDENT

State of Queensland v Stephenson
[2006] HCA 20
17 May 2006
B59/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation:

D O J North SC with D J Campbell SC for the appellant (instructed by Crown Solicitor for the State of Queensland)

D B Fraser QC with G R Mullins for the respondent (instructed by Gilshenan & Luton Lawyers)

HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

SCOTT WILLIAM REEMAN APPELLANT

AND

STATE OF QUEENSLAND RESPONDENT

Reeman v State of Queensland
B60/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 17 December 2004 and, in lieu thereof, order that:*

   (a) *the appeal to that Court be allowed;*

   (b) *the orders made by Holmes J on 9 September 2004 be set aside and, in lieu thereof, it be ordered that the period of limitation for the action commenced by the appellant on 22 July 2002 be extended so that it expired on 22 July 2002; and*

   (c) *the respondent pay the appellant's costs of the applications before Holmes J and of the appeal.*

On appeal from the Supreme Court of Queensland

Representation:

D B Fraser QC with G R Mullins for the appellant (instructed by Gilshenan & Luton Lawyers)

D O J North SC with D J Campbell SC for the respondent (instructed by Crown Solicitor for the State of Queensland)

HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

STATE OF QUEENSLAND APPLICANT

AND

TIMOTHY JAMES WRIGHTSON RESPONDENT

State of Queensland v Wrightson
B91/2005

ORDER

Application for special leave to appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation:

D O J North SC with J B Rolls for the applicant (instructed by Crown Solicitor for the State of Queensland)

D B Fraser QC with G R Mullins for the respondent (instructed by Gilshenan & Luton Lawyers)

CATCHWORDS

State of Queensland v Stephenson
Reeman v State of Queensland
State of Queensland v Wrightson

Limitation of actions − Proceedings instituted after expiry of limitation period – Application for extension of limitation period − Under s 31(2)(a) of the *Limitation of Actions Act* 1974 (Q) ("the Act") a court may extend a limitation period if "a material fact of a decisive character relating to the right of action" was not within the applicant's means of knowledge until a date after the commencement of the year last preceding the expiration of the limitation period ("the relevant date") − Where the Act separately defines "material fact[s] relating to a right of action" and when those material facts are of a "decisive character" − Where material fact was within each applicant's means of knowledge before the relevant date but only attained a decisive character after that date − Whether par (a) of s 31(2) of the Act was satisfied, such that the court had power to extend the limitation period in respect of each applicant.

Statutory interpretation – Remedial legislation – Purposive approach – *Limitation of Actions Act* 1974 (Q), s 31(2)(a).

Words and phrases − "material fact of a decisive character relating to the right of action".

Limitation of Actions Act 1974 (Q), ss 30, 31.

1 GUMMOW, HAYNE AND CRENNAN JJ. These appeals[1] and application for special leave[2] are brought from the Queensland Court of Appeal and involve common issues. These turn upon a close consideration of the text and structure of Pt 3 (ss 29-40) of the *Limitation of Actions Act* 1974 (Q) ("the Limitation Act"). Of the British ancestor of Pt 3[3], Lord Reid observed that it had a strong claim to the distinction of being the worst drafted Act on the statute book[4]. The three cases now before this Court in turn reflect divergences of views in the Supreme Court of Queensland, both at first instance and in the Court of Appeal, on fundamental matters of construction of the Queensland statute.

2 The plaintiff in each proceeding is a former member of the Queensland Police Service ("the Service") who had performed duties in the investigation of drug dealing which involved him in undercover or covert activities. There were dramatic and life-threatening events and each plaintiff claims that, after return to his ordinary duties, he developed a psychiatric condition and attempted unsuccessfully to persevere with his Service career. After the end of his employment in the Service, each plaintiff sued the employer, the State of Queensland ("the State"), in negligence for damages for personal injury.

3 The *Police Service Administration Act* 1990 (Q) ("the PSA Act") provided for retirement on medical grounds. It was more financially advantageous to the plaintiffs for them to retire on medical grounds rather than resign from the Service. However, the procedures for retirement on medical grounds include[5] the

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1 *State of Queensland v Stephenson*, an appeal from the decision of Davies and Williams JJA; Chesterman J dissenting [2004] QCA 483; *Reeman v State of Queensland*, an appeal from the decision of Williams JA and Chesterman J; Davies JA dissenting [2004] QCA 484. In *Stephenson*, the Court of Appeal allowed an appeal by Mr Stephenson against the dismissal of his extension of time application by McMurdo J. In *Reeman*, the Court of Appeal dismissed an appeal by Mr Reeman against the dismissal by Holmes J of his extension of time application.

2 *State of Queensland v Wrightson*, an application for special leave to appeal from the decision of McMurdo P, Williams and Jerrard JJA [2005] QCA 367. The Court of Appeal dismissed an appeal by the State against the grant by Helman J of the extension of time application by Mr Wrightson.

3 *Limitation Act* 1963 (UK).

4 *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 529.

5 PSA Act, s 8.3(3).

satisfaction of the Commissioner, on the basis of medical opinion, that the officer in question should not continue to be required to perform duties as an officer and also is insufficiently fit to perform duties in alternate employment. By the time these procedures had been completed and the plaintiffs had retired on medical grounds (23 February 2001 in the case of Mr Stephenson, 10 August 2001 in the case of Mr Reeman and 9 March 2001 in the case of Mr Wrightson) more than three years had elapsed since the accrual of their causes of action. Accordingly, the time bar imposed by s 11 of the Limitation Act had operated.

4 Section 11 of the Limitation Act is found in Pt 2 (ss 9-28). Part 2 is headed "PERIODS OF LIMITATION FOR DIFFERENT CLASSES OF ACTIONS". In respect of actions for personal injury in tort, s 11 fixes a general limitation period of three years from the date on which the cause of action arose.

5 Each of the proceedings against the State was instituted in the Supreme Court after the expiry of the three year limitation period fixed by s 11. Proceedings were instituted on 20 December 2001 by Mr Stephenson, 22 July 2002 by Mr Reeman and 20 December 2001 by Mr Wrightson. The actions were statute-barred unless there was some additional statutory provision for relaxation of that time bar imposed by s 11. The State pleaded the time bar in each case and applied for summary judgment. Each plaintiff responded with an extension of time application under s 31 of the Limitation Act. If the extension of time were granted, this would answer the summary judgment application.

6 Part 3 of the Limitation Act (ss 29-40) is headed "EXTENSION OF PERIODS OF LIMITATION". Section 33 states:

> "Where after the expiration of a period of limitation to which this Part applies, the period of limitation is extended by order under this Part, the prior expiration of the period of limitation has no effect for the purposes of this Act."

Section 29 deals with extension in cases of disability, s 32 with survival of actions and s 31, upon which the present cases turn, with what is identified as "ordinary actions".

7 Section 31(1) provides that the section applies to a range of actions for damages, including those relied upon by the plaintiffs, Messrs Stephenson, Reeman and Wrightson. The critical provision is s 31(2). It provides for the extension of the period of limitation by force of a court order. The application may be made ex parte but the court may require that notice of the application be given to other parties (s 34(1)). The State appeared and was heard on the applications by the plaintiffs.

8 The text of s 31(2) should now be set out. It states:

> "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." (emphasis added)

9 It will be apparent that s 31(2) both creates a new subject-matter for adjudication and invests jurisdiction to determine applications made thereunder. The section thus is an example of the double function discussed in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[6] and in later authorities concerning State legislation including *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*[7].

10 The jurisdictional threshold requires that the applicant claim to have a right of action to which the description in s 31(1) applies. That requirement, as has been indicated, was met by all the plaintiffs in these cases. Further, it must appear to the court that, limitation questions aside, there is evidence to establish the right of action in question. The satisfaction of that requirement also is not in dispute. The provision states that the court "may" make an order. It is accepted by the State that, if the criteria specified in s 31 otherwise are satisfied, the discretion indicated by the use of that term should be exercised in favour of the plaintiffs for extension of the time bar.

11 The exercise of the jurisdiction created by s 31(2) operates upon the period of limitation otherwise applicable, here the three year period prescribed by

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6 (1945) 70 CLR 141.

7 (1998) 196 CLR 53 at 64-65 [22]-[24].

s 11. The court may make an order which has the effect of altering the prescribed period so that it expires at the end of one year after a date which is ascertained in accordance with par (a) of s 31(2).

12 On its face, s 31 authorises the obtaining of an extension before the institution of the action within the period so extended. However, s 31 may also be utilised where an action already has been instituted (s 31(3)). That was the state of affairs with which all three cases were concerned. As remarked above, in each instance, an action had been instituted out of time and an application under s 31 was made subsequently.

13 An appreciation of the operation of the critical provision made by s 31(2) is assisted by reference to the chronology of the *Stephenson* litigation. During mid-1997, Mr Stephenson commenced to suffer from symptoms of increasingly severe depression and he developed a paranoid reaction to the Service. The limitation period fixed by s 11 thus expired by mid-2000. He retired on medical grounds on 23 February 2001. Thereafter, on 20 December 2001, Mr Stephenson instituted an action in the Supreme Court. The State pleaded the time bar imposed by s 11 and applied for summary judgment. In response, on 14 October 2003, Mr Stephenson made an application, under s 31 and in the action which was on foot, for an extension, as it were *nunc pro tunc*, of the time for the commencement of that action to 20 December 2001.

14 If the terms of s 31(2) be read against that sequence of events in *Stephenson*, the following appears. The commencement of the last year preceding the expiration of the three year s 11 period was mid-1999; until a date ("the relevant date") occurring after mid-1999, a material fact of a decisive character relating to the right of action must not have been within the means of knowledge of Mr Stephenson; the court then might order an extension to expire on a date ("the expiry date") being at the end of one year after the relevant date.

15 But, in the events that had happened, the expiry date could be no later than 20 December 2001. This was when the action had been instituted, and it was that action which Mr Stephenson sought to keep on foot, so that, in turn, "the relevant date" could be no later than 20 December 2000. Mr Stephenson thus had to show that until after 20 December 2000 a material fact of a decisive character relating to the right of action was not within his means of knowledge.

16 This conjunction of circumstances attracted the description by the primary judge (McMurdo J) of 20 December 2000 as the "critical date". However, it is to be observed that what made 20 December 2000 of critical importance, rather than any other date after mid-1999, was the date of the institution of the action, out of time, on 20 December 2001. That narrowed the selection of the relevant date, in a fashion that would not necessarily have obtained, for example, if the extension

application had been made in advance of the institution of an action, so that the action was to be commenced within the extended period[8].

17 Hence, in construing the legislation, reference will be made to the two temporal points fixed in s 31(2) as "the expiry date" and "the relevant date".

18 The determinative issue of construction concerns the phrase in par (a) of s 31(2) "a material fact of a decisive character relating to the right of action"; it is this which "was not within the means of knowledge of the applicant" until the relevant date. Counsel for the State interprets the critical expression as involving two key conceptions. One is "a material fact ... relating to the right of action" and the other is the possession by that material fact of "a decisive character". The consequence is said to be that an applicant must fail if reliance is placed on a material fact which, although it did not assume a decisive character until after the relevant date, was within the means of knowledge of the applicant before the relevant date.

19 On the other hand, counsel for Messrs Stephenson, Reeman and Wrightson submit that the critical phrase in par (a) of s 31(2) is a composite term which is not to be dissected in the fashion urged by the State. In that regard, counsel rely upon the reasoning of Davies JA in his judgment in *Stephenson*[9]. His Honour said:

> "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

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8 The "critical date" in respect of Mr Reeman was 22 July 2001, and in respect of Mr Wrightson was 20 December 2000, their actions having been instituted on 22 July 2002 and 20 December 2001 respectively.

9 [2004] QCA 483 at [12]-[13].

> 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.'
>
> 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." (original emphasis)

Davies JA added[10]:

> "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."

That construction should be accepted. To what his Honour said, we would add the following.

20 The text of par (a) of s 31(2) suggests further questions for the elaboration of its terms in at least three respects. First, what is conveyed by the expression "within the means of knowledge of the applicant"? To this, par (c) of s 30(1) is addressed[11]. Secondly, what is "a material fact"? Paragraph (a) of s 30(1)

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10 [2004] QCA 483 at [14].

11 Paragraph (c) states:

> "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".

supplies content to that expression[12]. Thirdly, what gives to a material fact "a decisive character"? This is explained by par (b) of s 30(1)[13].

21 At what the particular applicant puts forward as the relevant date, a certain fact must not have been "within the means of knowledge of the applicant" (s 31(2)(a)). A fact is not within the means of knowledge of the applicant if ("but only if") the applicant did not know it and in so far as the fact was "able to be found out" by the applicant, the applicant had taken all reasonable steps to find it out. This reading of par (a) of s 31(2) follows from the exegesis provided in par (c) of s 30(1). The fact which is identified must answer the description in par (a) of s 31(2) "a material fact of a decisive character relating to the right of action". It is a fact of this particular quality which, until the relevant date, must not have been within the means of knowledge of the applicant. What must not have been within the means of knowledge of the applicant until the relevant date

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12 Paragraph (a) states:

> "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".

13 Paragraph (b) states:

> "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".

is not merely a material fact relating to the right of action in question. The material fact must be "of a decisive character". The provision is so drawn as to assume that there may be material facts which are not of a decisive character.

22 Awareness before the relevant date of a material fact, of itself, will be of no significance for the operation of par (a) of s 31(2). However, awareness of a material fact of a decisive character before that date will be fatal to an application to the court if that is what is relied upon to satisfy par (a). These cases turn upon neither of those circumstances.

23 The State points to findings of the awareness by the plaintiffs of a material fact before what was the critical date (the relevant date dictated by the particular circumstances) as sufficient to disqualify the plaintiffs. It is said to be beside the point that there were also findings that the material fact had not assumed a decisive character before the critical date.

24 The additional provisions made in s 30(1) do not assist the submission of the State. The phrase "a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant" has elements which suggest both objectively ascertainable criteria and also a response to the existence of those criteria. The objectively ascertainable criteria include those facts and circumstances included by par (a) of s 30(1) in the expression "the material facts relating to a right of action". Paragraph (a) states that the material facts relating to the right of action "include" certain matters. These include the fact of the occurrence of the acts or omissions upon which the right of action is founded, the identity of the tortfeasor, the fact that the breach has caused personal injury, the nature and extent of the personal injury and the extent to which it was caused by the tortious act or omission.

25 The ascription to material facts of the character of "decisive" looks to the response of an actor. It is here that the exegesis supplied by par (b) of s 30(1) comes into play. The court is to consider the response of "a reasonable person" in the manner explained in that paragraph. The particular claimant is to enjoy the advantage conferred by the provision in s 30(1) for the making of an extension order only by satisfaction of criteria which look to the response of a reasonable person. In this way, s 30(1) assists and controls an understanding of the compound conception in s 31(2).

26 This understanding of the significance of the explanatory provisions in pars (a), (b) and (c) of s 30(1) assists rather than weakens the construction which favours Messrs Stephenson, Reeman and Wrightson. The relevant provisions of ss 30 and 31, read together, indicate what it is that, if not within the means of knowledge of the applicant until a date after the relevant date, provides the necessary step for a successful application for extension.

27 Read in this way, s 31 addresses the injustice which would arise if a plaintiff were to be met with the immovable barrier raised by the expiration of the limitation period where the plaintiff neither would nor should have sued in time because of the lack of the means of knowledge of a material fact of a decisive character which related to the right of action.

28 The effect of the construction urged by the State is to destroy the composite nature of the expression "a material fact of a decisive character relating to the right of action" and also to sever the temporal nexus between the material facts and the "decisive character" which they must bear. An applicant might yet be precluded from obtaining an extension of time even though a reasonable person would not and could not form the view mandated by par (b) of s 30(1) that allows material facts to be regarded as having "a decisive character". On the construction favoured by the State, par (b) of s 30(1) only assumes significance once an applicant has established that a material fact came within the means of knowledge of the applicant *after* the relevant date.

29 The better view is that the means of knowledge (in the sense given by par (c) of s 30(1)) of a material fact is insufficient of itself to propel the applicant outside s 31(2)(a). For circumstances to run against the making of a successful extension application, the material fact must have "a decisive character". Whether the decisive character is achieved by the applicant becoming aware of some new material fact, or whether the circumstances develop such that facts already known acquire a decisive character, is immaterial. It is true to say, as the plaintiffs submit in their written submissions, that in a sense none of the material facts relating to the applicant's right of action is of a decisive character until a reasonable person "knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing" the features described in sub-pars (i) and (ii) of s 30(1)(b). Whether that test has been satisfied *at a particular point in time* is a question for the court.

30 The practical result of this construction is that an applicant always has at least one year to commence proceedings from the time when his or her knowledge of material facts (as defined in s 30(1)(a)) coincides with the circumstance that a reasonable person with the applicant's knowledge would regard the facts as justifying and mandating that an action be brought in the applicant's own interests (as in s 30(1)(b)). If this conjunction of circumstances first occurs before the commencement of the last year of the limitation period, no application for an extension can be brought; the applicant has the benefit of at least one year before the limitation period expires and is required to act within that time. If the conjunction occurs after the commencement of that last year, the court is empowered, if the other criteria in s 31 are satisfied, to extend time for one year from the date of that conjunction of circumstances.

31 If the question of statutory construction be resolved in this way and if it be accepted that in each case a material fact did not assume its decisive character until after the critical date, then the applications for extension should have succeeded. Upon that basis, it would be unnecessary to consider the plaintiffs' alternative submissions that a "new" material fact (and so a new relevant date) emerged after the critical date.

32 The question then becomes whether the primary judges concluded in each case that the element that a material fact be "of a decisive character" had not been satisfied before the critical date and, if so, whether those conclusions are challenged. We turn to consider the situation in each of the three cases.

Stephenson

33 McMurdo J found that "the material facts which were within the plaintiff's means of knowledge at the critical date were not, at that date, of a 'decisive character'". That finding was not challenged on appeal. (It is important to recall that, although whether or not the relevant date occurs after the critical date in general does not govern s 31(2)(a), it is vital for success on Mr Stephenson's application for the reasons explained earlier.)

34 It follows that McMurdo J erred in refusing the application for extension of time. The Court of Appeal was correct to allow Mr Stephenson's appeal and the appeal by the State to this Court must fail.

35 Davies JA noted the findings by McMurdo J: that by November 2000 Mr Stephenson knew that he was permanently incapacitated for police work; that the material facts relating to his right of action against the State 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 would have a reasonable prospect of success resulting in an award of damages sufficient to justify it; and that these findings were accepted by the State. Davies JA went on to explain that it was now common ground that, because of two circumstances, the facts above described, although constituting all material facts relating to the right of action, were not of a decisive character until after the critical date. The first circumstance was that earlier commencement of the Supreme Court action would have exacerbated Mr Stephenson's psychiatric disability; the second was that earlier commencement might have put at risk his attempt to retire on medical grounds with consequent loss of $267,000 retirement benefits.

Reeman

36 In Mr Reeman's case, Holmes J found 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". This finding was not challenged on appeal.

37 However, Holmes J had gone on to say that, while the prospect of retirement was a material fact known to Mr Reeman before the critical date, the question was whether he failed because that fact had assumed a decisive quality only after the critical date. In that respect, her Honour followed the construction of s 31(2)(a) adopted by McMurdo J in *Stephenson*.

38 The majority of the Court of Appeal (Davies JA dissenting) affirmed the decision of Holmes J. In the light of the construction of s 31(2)(a) set out previously, the majority erred and the judgment of Davies JA should be preferred. Accordingly, the appeal by Mr Reeman to this Court must be allowed.

Wrightson

39 In reasons for judgment delivered earlier than those of McMurdo J in *Stephenson* and of Holmes J in *Reeman*, Helman J granted the plaintiff's application. His Honour found that it was only when Mr Wrightson's application to retire on medical grounds was accepted that sub-par (ii) of s 30(1)(b) was satisfied. This finding has not been challenged. In the course of his reasons, Helman J spoke of this provision as having a purpose of providing considerations justifying delay in bringing an action. He also said:

> "The plaintiff's case on this application was then that it was only when his application [to accept his resignation on medical grounds] was granted that all of 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)." (original emphasis)

That analysis is consistent with the reasoning of Davies JA and should be accepted as correct.

40 The Court of Appeal affirmed the decision of Helman J, for reasons which are more fully explored in the judgment of Heydon J. Two members of the Court

(McMurdo P and Jerrard JA) may be said to have preferred the reasoning of Davies JA set out earlier in these reasons. However, the decision of McMurdo P and Williams JA turned upon the view that Mr Wrightson had shown that a new material fact of a decisive character had come within the means of his knowledge after the critical date, namely his retirement from the Service. We agree with Heydon J that this conclusion was flawed. However, on the construction of the legislation favoured in these reasons, the orders of the Court of Appeal were correct, and there is no warrant for a grant of special leave to the State.

Orders

41 In *Stephenson*, the appeal should be dismissed with costs.

42 In *Reeman*, the appeal should be allowed with costs, and the orders of the Court of Appeal set aside. In lieu thereof it should be ordered that: (1) the appeal to that Court be allowed; (2) the orders made by Holmes J be set aside and in lieu thereof it be ordered that the period of limitation for the action commenced by the appellant on 22 July 2002 be extended so that it expired on 22 July 2002; (3) the respondent pay the appellant's costs of the applications before Holmes J and of the appeal.

43 In *Wrightson*, the application for special leave to appeal should be dismissed with costs.

44 KIRBY J. In *Ditchburn v Seltsam Ltd*[14], I suggested that an encounter with statutory provisions similar to those under consideration in this appeal[15] was liable to confuse judges and lawyers causing them to emerge "on the other side dazed, bruised and not entirely certain of their whereabouts"[16]. The passage of 17 years, and many more cases struggling with the meaning of the statutory language, has not removed the sense of disorientation. In a competition involving many worthy candidates, Lord Reid's prize[17] remains in place. This is so although, as Rehnquist J noted in *Chardon v Fumoro Solo*[18], "[f]ew laws stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation". This desirable goal has not been attained in Australia[19]. This appeal affords the latest illustration of that fact.

45 In 1986, a law reform commission report was delivered proposing changes to the then template of Australian laws. It suggested a simplified approach to applications for extension of time for commencement of actions[20]. However, amendments were not enacted in Queensland applicable to these proceedings, despite judicial endorsement elsewhere of the need for reform[21]. The result is that, in the present cases, the Queensland courts were obliged to struggle with the complex and obscure statutory language borrowed originally from a deficient English model.

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14 (1989) 17 NSWLR 697.

15 In that case the *Limitation Act* 1969 (NSW), ss 57 and 58.

16 (1989) 17 NSWLR 697 at 698.

17 *Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 529. See reasons of Gummow, Hayne and Crennan JJ at [1] ("the joint reasons"). See also *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 238 per Murphy ACJ, 250 per Deane J, 253 per Dawson J (with whom Brennan J agreed).

18 462 US 650 at 667 (1983).

19 Cf Morabito, "Statutory limitation periods and the traditional representative action procedure", (2005) 5 *Oxford University Commonwealth Law Journal* 113 at 137.

20 New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, Report No 50, (1986) at [6.24]. The original provisions were introduced in New South Wales following an earlier report of the New South Wales Law Reform Commission: *Limitation of Actions*, Report No 3, (1967). Cf *Royal North Shore Hospital v Henderson* (1986) 7 NSWLR 283 at 294-295.

21 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 at 565.

46 As a consequence of this history, there are unsurprising differences of judicial opinion over the meaning of the enacted preconditions to the courts' making orders[22] that a period of limitation be extended to expire at a later date and thereby to lift a limitation bar that would otherwise apply against the bringing of the proceeding[23]. Relevant to the present proceedings, three approaches to the uncertain language of the Limitations Act have arisen in the Supreme Court of Queensland. As explained in the joint reasons[24] and in the reasons of Heydon J[25], the several approaches may be classified as those respectively taken by Davies JA in the Court of Appeal or by McMurdo J and Holmes J in the Supreme Court, with a variation of the latter expressed in the Supreme Court by Chesterman J[26].

47 These appeals afford this Court the opportunity of resolving these differences of interpretation. The joint reasons prefer the interpretation favoured by Davies JA[27]. Heydon J prefers the approach favoured by McMurdo J and Holmes J[28]. Heydon J finds it unnecessary in this case to resolve the variant proposed by Chesterman J[29]. With inevitable hesitations, I join in the joint reasons in preferring the analysis of Davies JA[30]. My reasons for doing so are essentially twofold. First, I consider that Davies JA's approach is more faithful to the entirety of the language of s 31. Secondly, I consider that it more accurately upholds the remedial purpose of the legislation.

Attention to the language of the statute

48 As to the reason founded in the statutory language, I agree with Davies JA's observation[31] that the subject of the verb "was", appearing in

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22 *Limitation of Actions Act* 1974 (Q), s 31(2) ("the Limitations Act").

23 Limitations Act, s 11.

24 Joint reasons at [18]-[32].

25 Reasons of Heydon J at [91].

26 Reasons of Heydon J at [124]-[125].

27 Joint reasons at [19].

28 Reasons of Heydon J at [104].

29 Reasons of Heydon J at [125].

30 *Stephenson v State of Queensland* [2004] QCA 483 at [13]-[14].

31 [2004] QCA 483 at [12]-[13]. See reasons of Heydon J at [95].

s 31(2)(a) of the Limitations Act, is the entire preceding compound phrase "material fact of a decisive character relating to the right of action". Once this construction is accepted, the question becomes not "when all material facts", viewed generally, 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 such means of knowledge. Although the operation of the critical paragraph is not entirely clear, the approach of Davies JA has the merit of adhering more closely to the preconditions expressed in the statute. In this, I agree with the joint reasons[32].

A beneficial approach to remedial provisions

49 There is an additional consideration. It is one that Heydon J, in his reasons, disputes. His Honour[33] rejects the appellants' submission that the extension of time provisions in the Limitations Act, being remedial, should be given the widest interpretation which the language will permit[34]. In Heydon J's reasons, his Honour states that this approach is unsupported by the authorities cited and fails to take into account the subsequent cautionary words, and analysis, of McHugh J in *Brisbane South Regional Health Authority v Taylor*[35].

50 In his reasons in *Taylor*, McHugh J correctly drew attention to the burden, and potential for injustice for defendants, that extensions of the limitation period may involve, including for a defendant otherwise entitled to regard itself as free from unsettling, expensive and much delayed claims. Thus, McHugh J said[36]:

> "To subject a defendant once again to a potential liability that has expired may often be a lesser evil than to deprive the plaintiff of the right to reinstate the lost action. This will often be the case where the plaintiff is without fault and no actual prejudice to the defendant is readily apparent. But the justice of a plaintiff's claim is seldom likely to be strong enough to warrant a court reinstating a right of action against a defendant who, by reason of delay in commencing the action, is unable to fairly defend itself or is otherwise prejudiced in fact and who is not guilty of fraud, deception or concealment in respect of the existence of the action."

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32 Joint reasons at [19].

33 Reasons of Heydon J at [97].

34 This, as Heydon J notes, was the approach favoured in *Wrightson v State of Queensland* [2005] QCA 367 at [10].

35 (1996) 186 CLR 541 at 553.

36 (1996) 186 CLR 541 at 555.

51 These and other considerations in *Taylor* establish that a plaintiff who comes within the provisions of s 31(2) of the Limitations Act has no presumptive right to an order. The plaintiff must still justify the exercise of a discretion in favour of an extension order. However, such considerations do not alter the character of the extension provisions in the Limitations Act as beneficial or remedial. Nor do they resolve the differences that have arisen over the meaning of such statutory language.

52 The provenance of the statutory provisions, their purpose and the authorities cited by the appellants all support the proposition that the provisions are beneficial and remedial and thus to be read literally so as to achieve their protective objects. Historically, they came about in response to the apparently unjust decision in England in *Cartledge v E Jopling & Sons Ltd*[37]. The House of Lords had there held that a plaintiff in a personal injury action was statute-barred, even before the existence of the action became discoverable by him by any reasonable means. The consequence of the disquiet that followed the decision in *Cartledge* was the establishment of the Committee on Limitation of Actions in Personal Injury, the presentation by that Committee of its report and the enactment by the United Kingdom Parliament in 1963 of reforms to the Limitations Act designed to respond to the Committee's recommendations[38].

53 Against the background of this legislative history, it cannot be doubted that the amendments, reflected in Queensland in s 31 of the Limitations Act, were intended to be remedial and, to the full extent that the enacted language permitted it, beneficial and reformatory. They were beneficial because, in the circumstances specified, they permitted plaintiffs, otherwise statute-barred, to bring proceedings. As this Court explained in *Sola Optical Australia Pty Ltd v Mills*[39], "the broad purpose of the Act was … to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced".

54 Other courts have also recognised the remedial character of provisions, similar to those in issue in this appeal, allowing an extension of the limitation

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37 [1963] AC 758. See reasons of Heydon J at [83]; *Hawkins v Clayton* (1988) 165 CLR 539 at 560; *Kamloops v Nielsen* [1984] 2 SCR 2 at 40.

38 McGee and Scanlan, "Judicial attitudes to limitation", (2005) 24 *Civil Justice Quarterly* 460 at 470.

39 (1987) 163 CLR 628 at 635. See *Taylor* (1996) 186 CLR 541 at 565.

period. Thus in *Briggs*, Hope JA, struggling with the meaning of the New South Wales equivalent to s 31(2)(a) of the Limitations Act[40], said[41]:

> "The section is a remedial provision, designed to give relief against what otherwise might be, and has been established in many cases to be, the harshness of the operation of the general limitation provisions. It calls for a liberal construction. In *Broken Hill Pty Co Ltd v Waugh*[42] it was held by this Court[43] that this principle is to be applied to applications under s 58. Leave to re-argue this decision (which was brought to the attention of the parties after the hearing of the appeal) was neither sought nor given, although it was submitted that it was wrong."

55 In reaching his conclusion in that case, Hope JA proceeded to apply the stated approach to the meaning of the provisions. In the same decision, a similar approach was taken by Rogers AJA[44]:

> "The starting point is the general rule that, on the elapse of the general period of limitation, a person is safe from becoming embroiled in litigation. However, the general rule may occasion gross injustice, for example, in cases where the damage or injury may not become manifest for many years after the wrongful act. Asbestosis is a very good illustration. Therefore, there is a discretion to extend the time for commencement of actions."

56 Similar differences have arisen in England over the meaning and application of like limitation extension provisions[45]. It cannot be denied that competing considerations of legal policy inform the approach that judges take to the meaning and application of provisions such as s 31(2) of the Limitations Act.

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40 *Limitation Act* 1969 (NSW), s 58(2). There are similar provisions in other State and Territory Limitation Acts: *Limitation of Actions Act* 1958 (Vic), s 27K; *Limitation of Actions Act* 1936 (SA), s 48; *Limitation Act* 1935 (WA), s 38A; *Limitation Act* 1974 (Tas), s 5(3); *Limitation Act* 1985 (ACT), s 36; *Limitation Act* (NT), s 44.

41 (1989) 16 NSWLR 549 at 554.

42 (1988) 14 NSWLR 360 at 371-372.

43 Clarke JA; Hope JA and myself concurring.

44 (1989) 16 NSWLR 549 at 564.

45 See, eg, *Adams v Bracknell Forest BC* [2005] 1 AC 76 at 100 per Baroness Hale of Richmond.

It is important to be alert to such considerations. However, it does not assist their accurate resolution to deny that the general purpose of the contested provisions was beneficial for plaintiffs (otherwise out of time) and remedial (of the unjust outcomes that earlier limitations law had produced).

Conclusions: the preferable construction

57 When, therefore, there are alternative interpretations that may be adopted, as demonstrated in this case, it is more consistent with the reformatory purposes of s 31 in the Limitations Act to adopt the "beneficial" or "liberal" approach, to the full extent that doing so is consistent with the statutory language. The interpretation favoured by Davies JA in the Court of Appeal is more consistent with that approach.

58 This conclusion does not mean that an applicant will necessarily secure an order for extension of the period of limitation for the action. The making of such an order is still dependent on the applicant's demonstrating that the justice of the case requires that the discretion be exercised favourably[46]. That is the point at which the concerns voiced by McHugh J in *Taylor* may be given weight to the extent that the discretion allows that to happen[47]. However, the considerations of statutory language and interpretative approach support the analysis of the contested provision favoured by Davies JA and preferred by the joint reasons.

Orders

59 I therefore agree in the orders proposed by the joint reasons.

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46 *Taylor* (1996) 186 CLR 541 at 544 per Dawson J, 550 per Toohey and Gummow JJ, 556 per McHugh J, 567 my own reasons.

47 See above these reasons at [50].

60 HEYDON J. This judgment concerns two appeals and one application for special leave to appeal which was argued as an appeal. The three appeals, as they are henceforth described, were heard together. They are attended by a degree of factual, legal and procedural complexity which may be explained as follows.

Factual background

61 The plaintiff in the first proceeding is Peter Robert Stephenson. The plaintiff in the second proceeding is Scott Walter Reeman. The plaintiff in the third proceeding is Timothy James Wrightson.

62 There is evidence that each plaintiff is a former police officer who had carried out undercover or covert duties investigating drug dealing; each had experienced traumatic and life threatening events, and was exposed to peril; after returning to ordinary duties, each developed a psychiatric condition; each sought medical treatment; and each attempted to persevere with his police career, but unsuccessfully.

63 Following the termination of his employment in the Queensland Police Service ("QPS"), each sued his employer, the State of Queensland, in negligence for damages for personal injury. Each of the proceedings was instituted more than three years after the cause of action accrued.

The legislation

64 Section 11 of the *Limitation of Actions Act* 1974 (Q) ("the Act") provides that "an action for damages for negligence ... in which damages claimed by the plaintiff consist of or include damages in respect of personal injury ... shall not be brought after the expiration of 3 years from the date on which the cause of action arose." It followed that the claims were statute-barred. However, the Act permits this limitation period to be extended, and each plaintiff applied for it to be extended. Section 31(2) provides:

> "(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court –
>
> (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
>
> (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."

65 Various key expressions in s 31(2) are defined in s 30(1), which 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 –

(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."

66 The parties followed ordinary and conventional usage in describing the date 12 months before each set of proceedings was commenced as "the critical date". The usage arises in this way.

67 Section 31(2) grants a limited power to the court to extend a limitation period for no more than one year. Leaving aside s 31(2)(b), it operates in two stages. The first is dealt with in s 31(2)(a). Section 31(2)(a) requires identification of a date on which a material fact comes within the plaintiff's means of knowledge. That date must occur "after the commencement of the year last preceding the expiration of the period of limitation", that is, it must occur within the last year of a three year limitation period. The tailpiece to s 31(2) provides that the limitation period may only be extended for one year after that date. It follows that the relevant date must be located within one year of proceedings being commenced: if it were earlier, the power to extend the limitation period for one year from that date would still leave the proceedings statute-barred.

The issues

68 It was common ground that there was evidence to establish the right of action of each plaintiff apart from any limitation defence; hence s 31(2)(b) was satisfied. It was also common ground that the defendant in each proceeding, the State of Queensland, would not suffer prejudice if the extensions were granted under s 31(2). And it was common ground that if s 31(2)(a) were satisfied, the discretion to extend time should be exercised in favour of each plaintiff.

69 In other respects, too, there turned out to be common ground. Before the critical date each plaintiff had instituted or participated in processes designed to bring about his departure from the QPS. Each knew or, on taking all reasonable steps, could have found out that if that happened, a considerable loss of income would be suffered, either because of a total incapacity for work or because it would be necessary to seek work in the general labour market as a very ill man. Each knew all of the material facts described in s 30(1)(a)(i)-(v) with respect to his claim. In each case a reasonable person would have regarded those facts as showing that an action by each plaintiff had a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action, within the meaning of s 30(1)(b)(i). Each primary judge so found. However, each primary judge also found that it was not in the plaintiff's interest to bring an action before the critical date so that the material facts were not of a decisive character and s 30(1)(b)(ii) was not satisfied. These findings have not been challenged.

70 The primary issue of law is whether, where it is established that a material fact relating to a right of action is within an applicant's means of knowledge before the critical date, but it only becomes of a decisive character after the critical date, the applicant satisfies s 31(2)(a). That issue generated considerable diversity of judicial opinion in the courts below.

Mr Stephenson's case

71 Mr Stephenson began proceedings on 20 December 2001. For him the critical date was thus 20 December 2000.

72 As just indicated, McMurdo J at first instance[48] found that as at the critical date s 30(1)(b)(i) was satisfied. He also found, however, that s 30(1)(b)(ii) was not satisfied, because had Mr Stephenson commenced proceedings before 20 December 2000 he would have exacerbated the mental illnesses from which he was suffering and put at risk his chance of being allowed to take a medical retirement on favourable terms, since it might cause the QPS to take a less sympathetic approach to that course. Prior to 20 December 2000, the material facts were not, therefore, of a decisive character.

73 Mr Stephenson then advanced two arguments to bring himself within s 31(2)(a).

74 The first was that changes in his circumstances after the critical date caused already known material facts to take on a decisive character. The changes were that his health improved, and an application to retire on medical grounds succeeded, taking effect on 23 February 2001. McMurdo J rejected this argument on the ground that it followed from s 31(2)(a) that there was only one date on which a fact entered an applicant's means of knowledge: if it did so before the critical date, s 31(2)(a) was not satisfied, even if its character changed after that date from being non-decisive to decisive. As was just noted, the correctness of this conclusion is the primary issue of law in these appeals.

75 The second argument was that a new material fact of a decisive character had come into existence after the material date – Mr Stephenson's employment had ceased. McMurdo J rejected this argument on the ground that while the fact was a material fact relating to the cause of action, because it was relevant to Mr Stephenson's claim for economic loss, it was not of a decisive character. A fact could only have a decisive character if it satisfied both sub-pars (i) and (ii) of s 30(1)(b). While the termination of employment was relevant to the decision to sue (a s 30(1)(b)(ii) matter), it did not affect the prospect of success of the action or the recovery of sufficient damages within the meaning of s 30(1)(b)(i).

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48 *Stephenson v State of Queensland* [2004] QSC 226.

Accordingly, McMurdo J concluded that Mr Stephenson failed to establish what s 31(2)(a) required.

76 In the Court of Appeal[49], Chesterman J concluded that McMurdo J was correct to dismiss Mr Stephenson's application, but essentially on a different ground. On the other hand, Davies and Williams JJA allowed the appeal. Davies JA's reasons for judgment, in particular, developed a construction of s 31(2)(a) which has attracted later support. It led him to disagree with McMurdo J's reasons for rejecting Mr Stephenson's first argument on s 31(2)(b). He said: "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."[50]

Mr Reeman's case

77 Mr Reeman instituted proceedings on 22 July 2002. For him the critical date was thus 22 July 2001. Like Mr Stephenson, before the critical date he knew facts which satisfied s 30(1)(a) and (b)(i), but not s 30(1)(b)(ii).

78 Mr Reeman relied on three material facts of a decisive character as not being known to him until after 22 July 2001. The first was the fact that his prospects of continuing in the QPS were poor: he discovered this as a material fact in early 2001, but it did not assume a decisive character until after the critical date. The second was his retirement on 10 August 2001. The third was an improvement in his health in February 2002.

79 The primary judge, Holmes J, held[51], as McMurdo J had held in relation to Mr Stephenson, that while the prospect of not continuing in the QPS was a material fact relating to the right of action, and was known before the critical date, because s 30(1)(b)(ii) was not satisfied, that fact was not then decisive, and only became decisive after that date when his health improved. In her Honour's judgment that did not satisfy the requirements of s 31(2)(a). She concurred in McMurdo J's reasons. As to the second material fact relied on, Holmes J held that Mr Reeman's actual retirement was not a material fact of a decisive character which only entered his means of knowledge after the critical date, because he had known before that date that his career with the QPS was over. In relation to the third alleged material fact, his supposed improvement in health, her Honour held that it did not exist, and, even if it did, that it was not a material fact "relating to

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49 *Stephenson v State of Queensland* [2004] QCA 483.

50 [2004] QCA 483 at [13].

51 *Reeman v State of Queensland* [2004] QSC 285.

the right of action" but, at most, a matter relevant to determining whether an existing material fact was decisive.

80 The Court of Appeal dismissed Mr Reeman's appeal[52]. Chesterman J did so for the reasons he gave in Mr Stephenson's case. Williams JA agreed in substance with Holmes J. Davies JA, on the other hand, allowed the appeal, because he applied the construction of s 31(2)(a) he had propounded in *Stephenson v State of Queensland*, and rejected that of Holmes J.

Mr Wrightson's case

81 Mr Wrightson commenced proceedings on 20 December 2001. The critical date in his case was thus 20 December 2000. The primary judge, Helman J (who heard Mr Wrightson's application at a date earlier than the dates on which McMurdo J and Holmes J decided those of Mr Stephenson and Mr Reeman respectively), granted Mr Wrightson's application[53]. It was accepted that sub-par (i) of the definition in s 30(1)(b) of "material facts ... of a decisive character" was satisfied by 4 October 2000 when, having been told by his treating psychiatrist that he was unfit for duty, Mr Wrightson applied for retirement from the QPS. Helman J approached the question as being whether Mr Wrightson ought, in his own interests and taking his own circumstances into account, to have brought an action before 20 December 2000. In particular, should he have brought the action before 20 December 2000, or early in 2001, after being told on 22 February 2001 that his application to retire on medical grounds had been accepted with effect from 9 March 2001? Helman J held that a reasonable person would not have regarded the facts as showing that Mr Wrightson ought to have brought an action before 20 December 2000 principally because the pressure of instituting proceedings against an employer from whose employment he had not been released would have caused a further deterioration in his mental health.

82 An appeal to the Court of Appeal by the State of Queensland failed[54]. Judgment was delivered after the decisions in the appeals of Mr Stephenson and Mr Reeman, and after special leave to appeal to this Court against the orders in the Court of Appeal in those cases had been granted. McMurdo P preferred the approach of Davies JA in *Stephenson v State of Queensland* to the approaches of McMurdo J and Chesterman J in that case, but this approach was not decisive for her Honour's reasoning. She agreed with Helman J's reasons for concluding that

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52 *Reeman v State of Queensland* [2004] QCA 484.

53 *Wrightson v State of Queensland* [2004] QSC 218.

54 *Wrightson v State of Queensland* [2005] QCA 367.

when Mr Wrightson learned that his resignation had been accepted he had learned a fact "of a decisive character". Her Honour said the fact was "material" because it went to the nature and extent of the personal injury caused to Mr Wrightson: the decision by his employer that he was medically unfit for work bore on the extent of its economic effects. Williams JA based his decision to dismiss the appeal on his reasoning in *Stephenson v State of Queensland*. Jerrard JA agreed with the approach of Davies JA, and with the reasons of Helman J.

History of the legislation

83 In *Cartledge v E Jopling & Sons Ltd*[55], the English Court of Appeal upheld the finding of Glyn-Jones J that a limitation period began to run against a plaintiff from the moment the defendant employer injured the plaintiff's lungs by exposing him to noxious dust and causing him to suffer from pneumoconiosis, and expired before he realised, or could have realised, that he was suffering from the disease. In response to the decision of Glyn-Jones J, the Edmund Davies Committee was appointed to report on limitation of actions in personal injury cases. The English Court of Appeal affirmed Glyn-Jones J's decision before the Committee reported, and the House of Lords dismissed an appeal after the Committee had reported[56].

84 The Edmund Davies Committee "found it necessary to propose a rather elaborate scheme"[57]. Its Report[58], which contained no draft Bill, did not employ the key expressions used in ss 30 and 31 of the Queensland Act. Some of them are first to be found in the *Limitation Act* 1963 (UK) which was enacted in response to the Report. Section 1, which related to actions in negligence, nuisance or breach of duties for damages for personal injury, provided in part:

> "(1) Section 2 (1) of the Limitation Act 1939 (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which –
>
> (*a*) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and

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55 *Cartledge v E Jopling & Sons Ltd* [1962] 1 QB 189.

56 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758.

57 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 773 per Lord Reid.

58 Great Britain, *Report of the Committee on Limitation of Actions in Cases of Personal Injury*, (1962) Cmnd 1829.

(*b*) the requirements of subsection (3) of this section are fulfilled.

...

(3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –

(*a*) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period, and

(*b*) in either case, was a date not earlier than twelve months before the date on which the action was brought."

85 Section 7(3) and (4) provided:

"(3) In this Part of this Act any reference to the *material facts relating to a cause of action* is a reference to any one or more of the following, that is to say –

(*a*) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;

(*b*) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(*c*) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

(4) For the purposes of this Part of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been *facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining*, in relation to that cause of action, that (apart from any defence under section 2(1) of the Limitation Act 1939) *an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action*." (emphasis added)

86 In its first Report on the Limitation of Actions, the New South Wales Law Reform Commission proposed legislation embodying the English legislation in a

modified form[59]. It was enacted as ss 57 and 58 of the *Limitation Act* 1969 (NSW). These sections correspond substantially with ss 30 and 31 of the *Limitation of Actions Act* 1974 (Q) which are under consideration in this appeal.

87 In argument, and in some of the judgments leading to these appeals, the following passages from the Report of the New South Wales Law Reform Commission were referred to. The Commission wrote of the proposed provision which became s 57(1)(c)(ii) in the New South Wales Act (ie s 30(1)(b)(ii) of the Queensland Act)[60]:

> "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 for a relatively short period. If the injured person has received workers' compensation, the bringing of an action might in substance (after allowance for solicitor and client 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."

88 The Commission continued[61]:

> "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.

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59 New South Wales Law Reform Commission, *Report of the Law Reform Commission being the first report on the limitation of actions*, Report No 3, (1967).

60 New South Wales Law Reform Commission, *Report of the Law Reform Commission being the first report on the limitation of actions*, Report No 3, (1967), at par 296.

61 New South Wales Law Reform Commission, *Report of the Law Reform Commission being the first report on the limitation of actions*, Report No 3, (1967), at par 297.

Section 57 (1) (c) (ii) would allow circumstances such as these to be taken into account."

89 In 1972, the Queensland Law Reform Commission recommended the enactment of legislation substantially equivalent to the *Limitation Act* 1969 (NSW), ss 57 and 58[62]. The *Limitation of Actions Act* 1974 (Q), ss 30 and 31, followed the draft which the Commission had recommended. No material changes have been made to this day[63].

Issues on the appeal

90 The issues in this appeal are of two kinds.

91 The first relates to the question whether, where it is established that a material fact is within an applicant's means of knowledge before the critical date, but it only becomes of a decisive character after the critical date, the applicant satisfies s 31(2)(a). In the courts below, McMurdo J and Holmes J were the principal advocates of the view that the applicant did not; Davies JA was the principal advocate of the view that the applicant did.

92 The second group of issues, to be dealt with later, turn not on questions of statutory construction but on whether or not particular facts that came into existence after the critical date were material facts.

Section 31(2)(a): the issues of construction

93 *Arguments of the defendant.* The principal arguments advanced by the defendant were those employed by McMurdo J and Holmes J. They may be summarised as follows.

(a) There is only one point of time when a fact comes within the applicant's means of knowledge.

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62 Queensland Law Reform Commission, *A Report of the Law Reform Commission on a Bill to amend and consolidate the law relating to limitation of actions*, Report No 14, (1972), at 6-8.

63 In *Wrightson v State of Queensland* [2005] QCA 367 at [42]-[43] Jerrard JA, after noting that s 58(2)(a) of the New South Wales Act refers to "any of the material facts of a decisive character", while s 31(2)(a) refers to "a material fact of a decisive character", concluded by saying that the Queensland alteration was unnecessary and that s 31(2)(a) meant the same thing as s 58(2)(a).

(b) A fact of which the applicant was already aware before the critical date which was not of a decisive character at that time 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 within the meaning of sub-par (ii) of s 30(1)(b).

(c) If s 31(2)(a) had been intended to mandate a search, as a possible application of the provision, for a material fact which was within the applicant's means of knowledge before the critical date, but the decisive character of which did not arise until after the critical date, it would have had to have been worded very differently.

94 Various authorities were relied on, the only authority of this Court being *Do Carmo v Ford Excavations Pty Ltd*[64].

95 *Arguments for the plaintiffs' construction.* The plaintiffs relied principally on the reasoning of Davies JA and other judges following his point of view:

(a) The first step of the reasoning of McMurdo J and Holmes J is correct: "It may be accepted that there is but one point when a fact comes within the applicant's means of knowledge."[65]

(b) However, the relevant "fact" is not simply a "fact" or "material fact". The subject of the verb "was" in s 31(2)(a) is not "material fact" but "material fact of a decisive character relating to the right of action".

(c) This is the ordinary meaning of the language. That meaning is supported by the New South Wales Law Reform Commission Report[66].

96 It was submitted that this construction is supported by the "decision" in *Wrightson v State of Queensland*[67], "[d]icta and the decision" in *Royal North*

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64 (1984) 154 CLR 234 at 256 per Dawson J.

65 *Stephenson v State of Queensland* [2004] QCA 483 at [12] per Davies JA.

66 New South Wales Law Reform Commission, *Report of the Law Reform Commission being the first report on the limitation of actions*, Report No 3, (1967), at par 297 quoted in *Stephenson v State of Queensland* [2004] QCA 483 at [18] per Davies JA.

67 [2004] QSC 218.

Shore Hospital v Henderson[68], the "decision and reasoning" in *Tiernan v Tiernan*[69] and "a dictum" in *Broken Hill Pty Co Ltd v Waugh*[70].

97 *Remedial legislation?* It is desirable to deal at the outset with a number of preliminary matters said to be relevant to construction. Counsel for the plaintiffs submitted that legislation permitting the extension of limitation periods should be seen as remedial legislation, to be given the widest interpretation which the language will permit[71]. Of the authorities cited, one did not relate to the legislation[72], one did not support the submission[73], and some preceded[74] or did not take account of[75] what McHugh J said (Dawson J concurring) in *Brisbane South Regional Health Authority v Taylor*[76]:

> " ... I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it."

That is, with respect, the correct approach.

98 *Utility of the New South Wales Law Reform Commission Report.* The New South Wales Law Reform Commission was not directing itself to the

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68 (1986) 7 NSWLR 283.

69 [1993] QSC 110.

70 (1988) 14 NSWLR 360 at 368-369, per Clarke JA, Kirby P and Hope JA concurring.

71 In *Wrightson v State of Queensland* [2005] QCA 367 at [10] McMurdo P preferred this approach.

72 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260-261 per McHugh J, Brennan and Deane JJ concurring.

73 *Ditchburn v Seltsam Ltd* (1989) 17 NSWLR 697 at 703-704, where Kirby P did not advocate the widest interpretation, but merely said it was inappropriate to give the legislation a "strict" interpretation.

74 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549.

75 *Watters v Queensland Rail* [2001] 1 Qd R 448 at 457 per Thomas JA, McPherson J and Byrne J concurring.

76 (1996) 186 CLR 541 at 553.

present issue in the passages relied on by the plaintiffs. Those passages bear on the construction of s 30(1)(b)(ii) but not s 31(2)(a). In consequence, it is not surprising that the language of the Commission does not assist in resolving the present problem.

99 *The authorities: general.* The same is true of the authorities relied on by either side. The factual circumstances to which the language of ss 30 and 31 is to be applied can be very diverse. There was a tendency in argument before this Court to over-emphasise, and seek to apply to the present appeals, the particular phrases which were used in past cases not concerned with the precise problems raised by the facts of these appeals and which were directed to particular features of those cases. That is an undesirable approach. Rather, it is appropriate in each individual case to apply to the specific facts of that case the words of the legislation. In particular, some of the cases cited dealt with the emergence of wholly new facts, and inquired about their materiality or decisiveness. None deals with the fact which is known and the materiality of which is clear before the relevant period, but which only becomes decisive during that period.

100 *Wrightson v State of Queensland.* In *Wrightson v State of Queensland*, Helman J did not employ the specific reasoning which Davies JA adopted, although his conclusion is consistent with it.

101 *Royal North Shore Hospital v Henderson.* In *Royal North Shore Hospital v Henderson*[77] a material fact was discovered two months before the applicant commenced the action – namely, that the excess radiation which the applicant had received, initially causing him scarring and stiffness but much later giving him radicular myelopathy, an extremely grave disease, was the result of a lack of proper care. Any observations favourable to the plaintiffs' submissions here were dicta only, not directed to the present problem.

102 *Tiernan v Tiernan.* In *Tiernan v Tiernan*[78] a material fact was discovered less than 12 months before proceedings began: a causal relationship between the applicant's psychiatric condition and the abuse to which she had been subjected by her adoptive father. In *Stephenson v State of Queensland*[79], Davies JA quoted some passages from Byrne J's reasons for judgment in *Tiernan v Tiernan*, and said that Byrne J "adopted the construction of ... s 31(2)(a) which I have adopted". However, those passages only discussed s 30(b)(ii), the equivalent to the present s 30(1)(b)(ii), and said nothing about s 31(2)(a).

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77 (1986) 7 NSWLR 283 at 297 per Mahoney JA.

78 [1993] QSC 110.

79 [2004] QCA 483 at [24].

103 *Broken Hill Pty Co Ltd v Waugh.* In *Broken Hill Pty Co Ltd v Waugh*[80] the outcome turned on: (i) the holding that less than 12 months before the proceedings began, the applicant had learned of a material fact – that he had an asbestos related lung disease; and (ii) the conclusion that his earlier suspicions about it, amounting to a perception of a possibility, were not equivalent to a material fact. Davies JA quoted a passage from Clarke JA's reasons for judgment[81], but it cannot be said to support Davies JA's reasoning because it was not written with the present problem in mind.

104 *Conclusion.* Like many questions of statutory construction, the question of which view is correct is finely balanced, and explanation of the reasons for a particular conclusion is not susceptible of much elaboration. The opinion of McMurdo J and Holmes J is to be preferred.

105 The definitions to be found in ss 30(1)(a) and 30(1)(b) suggest that one key conception in s 31(2) is "material facts relating to a right of action" and another is the possession by those facts of a "decisive character". Section 30(1)(c) in turn suggests that yet another key conception in relation to what is within a person's means of knowledge as described in s 31(2)(a) is whether it is a "fact" which is not known, despite all reasonable steps having been taken to find it out. Section 30(1)(c) identifies as the crucial integer the "fact", not its character as a material fact relating to the right of action, and not its decisive character.

106 Section 30(1)(c) suggests that the inquiry under s 31(2)(a) into the date when a material fact of a decisive character relating to the right of action is within the applicant's means of knowledge is an inquiry centring on knowledge of the fact by itself, independently of whether the fact is a material fact relating to the right of action or whether the fact is of a decisive character. That view is also supported by a comparison of the terms of pars (a), (b) and (c) of s 30(1). The "materiality" of a fact is to be judged by reference to the factors in s 30(1)(a): these are impersonal factors, not related to the perceptions of the applicant. The "decisive character" of a fact is to be judged by the criteria in s 30(1)(b): these too are impersonal, and in addition they are to be based on the assessment of a reasonable person. In contrast, the inquiries on which s 30(1)(c) turns, whether the applicant knew the fact or took all reasonable steps to find it out, are limited to the actual mental state – what did the applicant know? – and the actual behaviour – what steps did the applicant take? – of the applicant in relation to the

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80 (1988) 14 NSWLR 360 per Clarke JA.

81 (1988) 14 NSWLR 360 at 368-369: see *Stephenson v State of Queensland* [2004] QCA 483 at [25].

existence of a fact. The inquiries on which s 30(1)(c) turns are not related to the character of the fact as one which is material to the right of action, or one which is of a decisive character.

107 Where, as here, a material fact relating to the cause of action was known before the critical date but its decisive character was not known until after the critical date, it is awkward, to the point of being misleading and false, to speak of it as a fact which was not within the applicant's means of knowledge until after the critical date. If it is a fact which was not within the applicant's means of knowledge at the critical date, by definition it is a fact which the applicant did not know at that time, and which the applicant had taken all reasonable steps to find out before that time. Yet, where, as in the circumstances postulated, the applicant did know the fact at the critical date, the applicant's mental state is not one of a lack of knowledge of the fact, but rather a lack of appreciation of one of its characteristics.

108 Here, for each plaintiff, the relevant fact was that for all practical purposes his career with the QPS was over in the sense that the formalities necessary to achieve that result would shortly take place. Each plaintiff knew that fact before the critical date, or should have known it if he had taken all reasonable steps. In each case that fact was a material fact relating to the right of action and in each case the courts below held or assumed that the plaintiff knew or had access to information which should reasonably have caused him to know that the end of his career with the QPS would have adverse financial effects. In each case the fact did not take on a decisive character until after the critical date. In those circumstances it cannot be said of the fact that it was a material fact of a decisive character relating to the right of action which was not within the means of knowledge of each plaintiff before the critical date: the truth is that the fact was within the means of knowledge of each plaintiff before the critical date.

109 The plaintiffs advanced the general argument that what ss 30 and 31 required was demonstration of a reason why proceedings were not brought within the limitation period of a kind showing that an applicant was not at fault or blameworthy. For ss 30 and 31 to have achieved either that general outcome, or the more specific outcome favoured by the judges who have applied Davies JA's reasoning, it would have been necessary for quite different language to have been employed.

110 It follows that the arguments of each plaintiff fail so far as each relies on a material fact which, though known before the critical date, was not of a decisive character until after that date.

Additional material facts

111 It is necessary to turn to the plaintiffs' contentions that there were facts not within their means of knowledge until after the critical date, being material facts

which related to the right of action and which were of a decisive character. Before the respective primary judges, each plaintiff relied on the actual cessation of his employment. In addition Mr Reeman and Mr Wrightson, directly, and Mr Stephenson, indirectly, relied on an improvement in their health.

112 *Improvement in health.* In all three cases there was in fact no improvement in health. In the case of Mr Stephenson, McMurdo J was not directly invited to find one and did not find one. The evidence relied on in this Court did not establish anything more than a favourable fluctuation likely to be followed by a fluctuation in the opposite direction. In the case of Mr Reeman, Holmes J found that the evidence indicated no significant recovery in health. Williams JA said, and Davies JA and Chesterman J did not disagree, that no basis had been established in the argument before the Court of Appeal for setting that finding aside. The same is true of the argument in this Court. In the case of Mr Wrightson, Helman J made no finding of an improvement in health – all he stated was that if Mr Wrightson brought his action after his retirement he would not further injure his health. The reason assigned for substituting for that finding the finding which counsel for Mr Wrightson urged in this Court is that Mr Wrightson obtained a job after leaving the QPS. That is not sufficient.

113 Even if the evidence had established an improvement in health, that is incapable, as Holmes J said, of being a material fact relating to a right of action, as distinct from a matter relevant to determining whether a material fact relating to a right of action was of a decisive character.

114 *Termination of employment: the argument for the plaintiffs.* The argument for the proposition that the retirement of each plaintiff from the QPS was a material fact of a decisive character relating to the right of action which was not within the means of knowledge of each plaintiff until it actually happened, in each case after the critical date, was put most clearly by Jerrard JA[82]:

> "Mr Wrightson's prospect of success in a claim for future economic loss considerably brightened when he was directed to retire on the ground that he was unfit for any duty within the [QPS], even of a staff nature. Before that direction was given he had a good arguable prospect of success in obtaining an award of damages sufficient to justify the bringing of an action, but he had a much more reasonable prospect of success in achieving an award of that sort once it was rendered almost impossible to challenge the claim that he had been deprived of the prospect of future service as a police officer."

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82 *Wrightson v State of Queensland* [2005] QCA 367 at [50]. See also at [13] per McMurdo P.

115 *Termination of employment: the crucial issue.* It is true that a fact tending to increase damages significantly, while not mentioned in the five sub-pars of the definition of "material fact" in s 30(1)(a), may be a material fact taken up by the word "include". However, where a tort causing personal injury to the victim and impairing the victim's capacity for work is committed, it is necessary to remember the basis on which that element of damages compensating for that impaired capacity is calculated. Damages calculated by reference to that element, both in the period from injury to trial and in the post-trial period, are damages to compensate for that loss of capacity, not to compensate for loss of earnings simpliciter. But since damages for lost earning capacity are awardable only to the extent that the lost earning capacity has been or may be productive of financial loss, it is necessary to consider what monies could have been produced by the exercise of the former earning capacity[83]. Sometimes those damages are calculated by reference to the rate of earnings being paid to the victim by an employer before the injury and the rate which the victim might earn from that employer in the future. In the present circumstances it would be likely that each plaintiff would have claimed the difference between what he would have earned in the QPS had his employment not been terminated and what lesser figure he would be likely to earn in the open market otherwise than as a police officer. If, after the injury had been inflicted and developed in the period up to the critical date, it became inevitable that each plaintiff would have to leave the QPS, the precise date of departure was immaterial. The injury to capacity, which on each plaintiff's case was severe, was the same whatever the date. The facts relevant to computing the monetary sum needed to compensate the plaintiff for that injury, which on each plaintiff's case was large, were the same whatever the date. The only thing that could differ by reason of the date would be the precise amount actually recovered as damages, for the longer each plaintiff was employed by the QPS on full pay, the lower that precise amount.

116 On each of the plaintiffs' cases, what the tort did to each plaintiff was to damage his capacity to work: it annihilated his capacity to work as a police officer, and significantly impaired his capacity to work in other respects. Each plaintiff submitted that he had suffered no economic loss until he left the QPS, but the timing of the departure was immaterial both to him and to the QPS. The earlier he went, the less he would receive in ordinary pay or sick pay, but the more he would receive in damages. The receipt of ordinary pay or sick pay merely mitigated the loss he suffered.

117 The crucial issue, then, was whether before the critical date each plaintiff did not know, despite taking all reasonable steps to find out, a fact which he learned after that date – that his departure from the QPS was inevitable because

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83 See the cases discussed in *CSR Ltd v Eddy* (2005) 80 ALJR 59 at 69 [30] per Gleeson CJ, Gummow and Heydon JJ; 222 ALR 1 at 10.

of having been permanently incapacitated for police work. If that fact was within a plaintiff's knowledge before the critical date, it would be impossible to contend that it was a fact satisfying s 31(2)(a). In each case the fact was within the plaintiff's knowledge.

118 *Termination of employment: Mr Stephenson.* At the material time, the process by which police officers left the QPS on medical grounds depended on the officer applying to retire or on the QPS serving a notice on the officer. On 26 October 2000, before the critical date of 20 December 2000, Mr Stephenson signed an application to retire on grounds of post traumatic stress syndrome, and that application was supported by a psychiatrist and three police officers. This was formally submitted in November 2000. McMurdo J found that Mr Stephenson knew by the end of November 2000 that he was permanently incapacitated for police work. He found that from that date Mr Stephenson knew, or should have known, that he would have to leave the QPS.

119 Those conclusions were not criticised in the Court of Appeal. Nor were they successfully attacked in this Court. Accordingly, the fact that on 16 February 2001 Mr Stephenson was advised that his application for retirement on medical grounds had been accepted and would be effective from 23 February 2001 made no difference to his prospects of success in litigation and did not satisfy s 31(2)(a).

120 *Termination of employment: Mr Reeman.* Mr Reeman's critical date was 22 July 2001. On 16 August 2000, he went on sick leave. In March 2001, he told a representative of the QPS that while he was not prepared to seek retirement on medical grounds of his own accord, he would not oppose it. On 15 March 2001, the notes of his treating psychiatrist described him as "agreeable" to retirement on medical grounds. On 19 April 2001, he reported that he had started telling people he would not be returning to the police force. On 10 May 2001, the QPS wrote to him indicating that it suspected he was unfit for duty and that he was required to attend for psychiatric examination. On 6 June 2001, he signed an authority to release medical information to the QPS in that regard. On 11 July 2001, the QPS psychiatrist gave an opinion that he was permanently unfit for duty. Holmes J concluded that Mr Reeman had known for some months before his retirement on medical grounds in August 2001 that his career in the police force was at an end. Her Honour said: "... 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."

121 No judge in the Court of Appeal disagreed with the reasoning leading to that conclusion, which, with respect, is correct.

122 *Termination of employment: Mr Wrightson.* On 4 October 2000, before the critical date of 20 December 2000, Mr Wrightson signed a similar application

to that which Mr Stephenson signed, and it was similarly supported. He had been diagnosed as suffering from post traumatic stress disorder in September 1997, and from a major depressive disorder in February 1999. He was treated with medication and psychotherapy, but contrary to expectations, he did not recover, and from late 1999 to April 2000 his condition deteriorated. From 29 April 2000 to 9 March 2001, he was on continuous sick leave as unfit for duty. His treating psychiatrist had been advising him to apply for retirement on medical grounds since mid-2000, and eventually he accepted the psychiatrist's advice that despite his eagerness to remain the QPS, it was in his best interests to retire.

123 Helman J's acceptance of the "possibility – admittedly faint – that [Mr Wrightson] might be able to continue his police career" is negated by his Honour's findings in relation to the evidence about Mr Wrightson's health and circumstances. Helman J accepted that "a very large majority" of applications to retire on medical grounds from the QPS are successful. It does not take much knowledge of the world to understand why those which fail are made and why they fail. But whatever the reason for Mr Wrightson's application, his conduct could not, on his case, be described as that of a malingerer seeking an unmerited advantage from retirement. His departure from the QPS, while regrettable, was inevitable. It was a fact which was either known to him or could have been found out by taking reasonable steps. Accordingly, s 31(2)(a) was not satisfied in Mr Wrightson's case.

Chesterman J's construction of s 30(1)(b)(ii)

124 Chesterman J argued that s 30(1)(b)(ii) did not call for an examination of an applicant's personal circumstances beyond those affecting the economic consequences for an applicant of commencing an action. On this view it is irrelevant whether starting an action would be injurious to an applicant's health, and the reliance of all three primary judges on the risk to the health of each plaintiff of suing before the critical date would have been erroneous[84].

125 It is not necessary to decide the question whether that view is correct. There is something to be said on either side of the question. However, it has not been critically considered by the other judges. Nor was it specifically advocated in these appeals by the defendant (which did not challenge the conclusions of the three primary judges that s 30(1)(b)(ii) had not been satisfied before each critical date), or made the subject of specific argument by the plaintiffs in these appeals. In these circumstances, and in view of the reasoning adverse to the plaintiffs set out above, since it is not necessary to decide the point, it is desirable not to do so.

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84 *Stephenson v State of Queensland* [2004] QCA 483 at [92]-[123].

Orders

126 The following orders should be made.

State of Queensland v Stephenson (B59 of 2005)

1. The appeal be allowed with costs.

2. The orders of the Court of Appeal be set aside and in lieu thereof it be ordered that the appeal to that Court be dismissed with costs.

Reeman v State of Queensland (B60 of 2005).

That the appeal be dismissed with costs.

State of Queensland v Wrightson (B91 of 2005).

1. That special leave be granted to the applicant to appeal from the whole of the judgment and order of the Court of Appeal.

2. That the appeal be allowed with costs.

3. That the orders of the Supreme Court and of the Court of Appeal be set aside and in lieu thereof it be ordered that :

   (a) the plaintiff's application and action be dismissed and that there be judgment for the defendant in the action;

   (b) the plaintiff pay the defendant's costs of the action and of the appeal to the Court of Appeal.