Is time on your side?

Applications under section 31 of the Limitation of Actions Act 1974 (Qld)

Presentation to the Downs & South Western Qld Law Association

28 June 2018

Elizabeth Gaffney[1]

Introduction

1. Section 31 of the *Limitation of Actions Act 1974* (Qld) (**the Act**) provides a means by which a person (**the applicant**) who has an action for damages for personal injuries or wrongful death may sue outside of the limitation period. Such relief is only available in limited circumstances. These are described in the tortuous provisions of s 31 and s 30 of the Act.

2. This paper looks at the terms of s 31, examines its elements in light of s 30 and applicable case law, and finally, gives what I hope will be practical advice on the material which a practitioner should put before the court on the hearing of an application.

3. For the sake of brevity, and to avoid over-complication, I will not canvass pre-court procedures or other means by which a limitation period may be extended.[2]

Section 31 of the Act

4. I turn now to the terms of s 31 of the Act, titled 'Ordinary actions'. It consists of three subsections:

   (a) first, s 31(1), which identifies the causes of action for which an extension of the limitation period may be sought under s 31(2);

   (b) secondly, s 31(2), which empowers the court to extend the limitation period; and

[1] B. Bus, LLB (Hons), Barrister, egaffney@qldbar.asn.au. Liability limited by a scheme approved under Professional Standards legislation.

[2] See for example s 59 of the *Personal Injuries Proceedings Act 2002* (Qld), s 57 of the *Motor Accident Insurance Act 1994* (Qld) and s 302 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld).

(c) thirdly, s 31(3), which allows applications to be brought despite the expiry of the limitation period.

Section 31(1): application

5. Looking first at s 31(1) of the Act, this section permits an application under s 31(2) to be brought in respect of actions in negligence, trespass or nuisance or for a breach of duty, including a contractual or statutory duty. The common denominator is that the relief sought by those actions must include damages for personal injury or damages in respect of injury resulting from a person's death.

6. Section 31(1) provides:

> '(1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.' (underlining added)

Section 31(2): the court's power to extend the limitation period

7. It is s 31(2) of the Act which is the focus of this paper. Section 31(2) empowers a court to extend the limitation period. It 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.' (underlining added)

8. To determine the 'period of limitation for the action' which is referred to in s 31(2), one looks to s 11(1) of the Act. Section 11(1) prescribes the limitation period for the causes

of action to which s 31(2) applies, that is, a period of 3 years from the date on which the cause of action arose. Section 11(1) provides:

> '(1) Notwithstanding any other Act or law or rule of law, an action for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) in which damages claimed by the plaintiff consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person shall not be brought after the expiration of 3 years from the date on which the cause of action arose.' (underlining added)

9. It should be noted that s 11(1) does not set the limitation period for all personal injuries actions. For example, pursuant to s 11(2) of the Act, there is no limitation period for a right of action relating to personal injury resulting from a dust-related condition (as defined in Schedule 2 of the *Civil Liability Act 2003* (Qld)) (s 11 (4)). Pursuant to s 11A of the Act, there is no limitation period for an action for damages relating to the personal injury of a person resulting from sexual abuse he or she suffered as a child (s 11A (1)).

Section 31(3): the application can be brought after the limitation period has expired

10. Before returning to dissect s 31(2), s 31(3) of the Act should be mentioned in passing. Section 31(3) makes it clear that an application under s 31(2) can be made after the limitation period has expired. It provides:

> '(3) This section applies to an action whether or not the period of limitation for the action has expired—
>
> (a) before the commencement of this Act; or
>
> (b) before an application is made under this section in respect of the right of action.'

11. An application for an extension of the limitation period may also be brought whether or not a proceeding has been commenced.[3]

12. Pursuant to s 33 of the Act, if the application is granted, the prior expiration of the limitation period will be ineffective.

The elements of s 31(2)

13. To summarise the requirements of s 31(2) briefly but accurately is to attempt what judges of the highest courts in the land have struggled to do, and which I submit is impossible.

[3] *Grove v Bestobell Industries Pty Limited* [1980] Qd R 12, 16.

A more worthwhile (but still difficult) exercise is to break down the convoluted terms of s 31(2) into separate elements, and then discuss these in turn.

14. First, the applicant must isolate a '***material fact***' relating to a right of action on which to base the application.

15. Secondly, the applicant must show the material fact to be of a '***decisive character***'.

16. Thirdly, timing is everything. The applicant must establish that it was not until a date falling after the start of the last year of the limitation period that the material fact of a decisive character came within his or her '***means of knowledge***'.

17. Fourthly, there must be ***evidence to establish the applicant's right of action***.

18. A fifth 'element', which is not expressed in s 31(2), but which has been imposed by the courts, is that there must be a ***good reason*** to grant the extension.

19. Other matters are also important. The grant of an extension of the limitation period is discretionary.[4] This is the effect of the words 'the court may order'. The discretion is enlivened when it 'appears to a court' that the elements set out in s 31(2) are satisfied. Thus, the applicant bears the evidentiary and persuasive onus on the application.[5] This means that if an applicant fails to adduce evidence of any of the factual elements of s 31(2), the application must be dismissed.

20. If the discretion is exercised, the limitation period may only be extended so that it expires at the end of 1 year after the date on which the material fact of a decisive character came within the applicant's means of knowledge.

The first element: isolating a 'material fact' for the application

21. Turning now to the first element of s 31(2), the applicant must isolate a 'material fact… relating to a right of action' on which to base the application. For brevity I'll refer to this concept as a 'material fact'. The phrase 'material facts relating to a right of action' is defined in s 30(1)(a) of the Act. It provides, relevantly:

[4] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 ('*Taylor'*), 546 -547 (Toohey and Gummow JJ), 551 (McHugh J).
[5] *Wolverson v Todman* [2016] 2 Qd R 106 ('*Wolverson'*) 124 [30] (Gotterson JA).

'(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.' (underlining added)

22. On a first reading of s 30(1), 'material facts' appear to be the facts necessary to establish a cause of action. But the case law demonstrates that 'material facts' may extend beyond these.[6]

23. The availability of evidence which establishes an aspect of a claimant's case may be a material fact relating to a right of action (*Greenhalgh v Bacas Training Limited*[7] ('*Greenhalgh'*)).

24. In *Davison v Queensland*[8] the applicants claimed damages in respect of abuse suffered while in foster care and while under the supervision and care of the State of Queensland. The applicants wished to argue that a 'material fact of a decisive character' became known to them when the Courier Mail published an article suggesting that there had been widespread abuse of children in State care.[9] The State 'cast doubt' on whether the facts relating to widespread abuse were material facts. Gummow, Hayne, Heydon and Crennan JJ held:

> '…That doubt is without foundation. If the abuse of children in foster care were extensive…it would be more likely that [the State] would have suspected it or known about it. If it did suspect it or know about it, the prospects of establishing a breach of duty would be improved. That supports the existence of a "material [fact] relating to a right of action" of the kind defined in s 30(1)(a) of the Limitation of Actions Act.'[10] (underlining added)

[6] *Re Sihvola* [1979] Qd R 458, 463. See also *Castlemaine Perkins Limited v McPhee* [1979] Qd R 469, 471.
[7] [2007] QCA 327 [18] (Keane JA).
[8] (2006) 226 CLR 234.
[9] Ibid 238–239 [2] (Gummow, Hayne, Heydon and Crennan JJ).
[10] Ibid 244 [22].

Ignorance of the law is no excuse…

25. Although it might seem an unfair distinction, the legal consequences of certain facts do not amount to 'material facts' for the purpose of s 30(1)(a). This is the effect of the High Court's decision in *Do Carmo v Ford Excavations Pty Ltd*.[11] Accordingly, it will not be sufficient for an applicant to argue that his or her delay in commencing an action was due to ignorance of his or her rights at law.

26. An excoriating dismissal of Counsel's attempt to argue the contrary position can be found in *Hodgson v Dimbola Pty Limited t/as Towers Removals*.[12]

The second element: the 'material fact' must be of a 'decisive character'

27. The applicant satisfies the second element of s 31(2) by showing that the 'material fact' is of a 'decisive character'. 'Decisive character' is defined in s 30(1)(b) of the Act:

> '(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;' (underlining added)

28. 'Appropriate advice' is defined in s 30(2) to mean, in relation to facts, *'*...the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.'

29. In determining whether a material fact is of a decisive character (I'll refer to this as a 'decisive' material fact), the entrenched approach of Queensland courts[13] is to compare

[11] (1984) 154 CLR 234, 245 (Wilson J), 249-250 (Deane J), 254 (Dawson J, Brennan J agreeing) (Murphy ACJ dissenting).
[12] [2010] ACTCA 22.
[13] See *Taggart v The Workers Compensation Board of Queensland* [1983] 2 Qd R 19, 23–24, *Sugden v Crawford* [1989] 1 Qd R 683 ('*Sugden'*) 685–686 (Connolly J, Shepherdson J agreeing), 690–691 (Vasta J), *Moriarty v Sunbeam* [1988] 2 Qd R 325, 329–331 (Kelly SPJ), 333 (Macrossan J), *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 ('*Wood*'), 437 (Macrossan J), 453–454 (Ambrose J), *Hintz v WorkCover Queensland* [2007] QCA 72, [39] (Keane JA, Williams JA and Helman JA agreeing), *Castillon v P&O Ports Limited (No. 2)* [2008] 2 Qd R 219, 231– 232, [35]–[36], 233–234 [41] (Keane JA, Holmes JA and Wilson J agreeing).

liability and/or quantum before and after the emergence of the material fact relied on by the applicant and ask whether an applicant could and should have commenced a proceeding based on his or her previous state of knowledge. If the answer to that question is 'yes', the material fact will *not* be of a decisive character. This 'before and after' comparison is not an approach which is invoked by the words of s 30(1)(b). It might be described as an example of judicial gloss.

30. The judgment of Connolly J in *Sugden v Crawford*[14] ('*Sugden'*), redolent of an era in which lawyers were paid by the word, sets out the position as it concerns both liability and quantum:

> 'Implicit in the legislation is a negative proposition that time will not be extended where the requirements of s.30(b) are satisfied without the emergence of the newly discovered fact or facts, that is to say, where it is apparent, without those facts, that a reasonable man, appropriately advised, would have brought the action on the facts already in his possession and the newly discovered facts merely go to an enlargement of his prospective damages beyond a level which, without the newly discovered facts, would be sufficient to justify the bringing of the action.
>
> …Where, on the other hand, the decisive character of the newly discovered fact goes to the prospect of establishing liability, similar but not identical concepts are involved. Section 30(b)(i) focusses on the prospect of success and whether that can be described as *reasonable* whereas s.30(b)(ii) calls for an enquiry whether the applicant *ought*, in his own interests and taking his circumstances into account to bring the action. The basic assumption of the scheme is that if both those conditions were already satisfied without the new evidence, its discovery will not warrant an extension of time. It follows that an order will be justified where there is such an enhancement of the prospect of success as, for example, would suffice to raise it from a possibility to a real likelihood. Thus a prima facie case of actionable negligence may already exist but it may well seem to the applicant's legal advisers to be, on balance, too risky until the newly discovered fact emerges.'[15] (underlining added)

31. In determining 'decisiveness', the Court of Appeal has also considered whether a newly discovered fact has made the action 'worthwhile'. The following passage of Macrossan J in *Wood v Glaxo Australia Pty Ltd*[16] (*'Wood'*) was cited with approval by Keane JA in *Greenhalgh*:[17]

> 'The body of evidence which a plaintiff collects or…his assemblage of "material facts", will only constitute a "decisive" collection when an appropriately advised reasonable

[14] [1989] 1 Qd R 683.
[15] Ibid 685–686.
[16] [1994] 2 Qd R 431.
[17] [2007] QCA 327 ('*Greenhalgh'*) [21].

man in his position is possessed or would, if he had enquired in an appropriate fashion, be possessed of what he would regard as reasonable and worthwhile litigation prospects…'[18] (underlining added)

Where the newly discovered fact goes to quantum

32. Despite the *Sugden* formulation, Queensland courts appear to have struggled with cases in which an applicant relies upon new evidence as to the *extent* of an injury as a material fact. As Thomas JA in *Pizer v Ansett Australia Limited*[19] observed:

> '…when the material fact concerns the nature and extent of personal injury, questions of degree are necessarily involved. At one end of the spectrum, a case of latent symptoms of apparently trivial injury, followed by eventual discovery of a serious condition will plainly justify an extension...At the other end of the spectrum, cases of patently serious orthopaedic injury productive of observable economic loss followed by belated realisation that the consequences are likely to be worse than had been contemplated, will not justify an extension...Somewhere between these extremes there is a range of cases where different minds might reasonably form different assessments of the level of the plaintiff's knowledge and as to whether the reasonable person contemplated by s 30(b), endowed with such knowledge and having taken appropriate advice, would have brought proceedings.'[20] (footnotes omitted)

33. The decisions in *Sugden* and *Greenhalgh* indicate that, if a material fact which goes to the quantum of a claim can be characterised as the catalyst for a worthwhile claim, and not merely one which substantiates an 'enlargement of damages', it is more likely such a fact would be regarded by a court to be of a decisive character.

34. For example, in *Sugden*, the court held that objective medical evidence of a vertebra fracture not previously available to the applicant to be a material fact of a decisive character. Until that evidence was obtained, the applicant's symptoms were described as merely subjective, such that a claim would be viewed with scepticism and might result in only a modest award of damages. The majority of the Full Court characterised the new evidence as 'transformative' going to the prospect of success, rather than to the quantum of damages.[21]

[18] *Wood* [1994] 2 Qd R 431, 437.
[19] [1998] QCA 298.
[20] Ibid [20], cited by Keane JA in *Greenhalgh* [2007] QCA 327 [23].
[21] *Sugden* [1989] 1 Qd R 683, 686 (Connolly J, Shepherdson J agreeing).

35. In *Greenhalgh,* Keane JA declined to set aside a finding that new medical evidence which established unequivocally that the applicant's future as a mechanic was compromised[22] was of a decisive character.[23] His Honour held it was the new evidence which made an action for damages worthwhile.[24] This was despite the fact that, over a year earlier, expert medical evidence had found that the applicant had a 5% whole of person impairment.[25]

The third element: timing and 'means of knowledge'

36. Having isolated a material fact of a decisive character, an applicant faces another hurdle. This relates to the time at which the decisive material fact comes within his or her 'means of knowledge'.

37. The grant of an extension under s 31(2) depends upon the applicant proving that the decisive material fact was not within his or her 'means of knowledge*'* until a particular 'date' (sometimes called the 'critical date') which must fall 'after the commencement of the year last preceding the expiration of the period of limitation for the action' (or in simpler terms, 'after the start of the last year of the limitation period').

38. How does an applicant show that the decisive material fact was not within his or her means of knowledge until a particular date? The answer is provided by s 30(1)(c) of the Act.

39. Section 30(1)(c) provides:

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

40. Keane JA in *NF v Queensland*[26] ('*NF'*) offered the following analysis of s 30(1)(c):

> 'It is to be emphasized that s 30(1)(c) does not contemplate a state of knowledge of material facts attainable in the abstract, either by the exercise of "all reasonable steps",

[22] *Greenhalgh* [2007] QCA 327 [19].
[23] Ibid [20].
[24] Ibid [24].
[25] Ibid [12].
[26] [2005] QCA 110 ('*NF*').

> or by the efforts of a reasonable person. It speaks of a state of knowledge attainable by an actual person who has taken all reasonable steps. The actual person … is the particular person who has suffered particular personal injuries….' [27]

41. Thus the knowledge of an agent, including a solicitor, cannot be imputed to the applicant for the purpose of 30(1)(c).[28]

42. Subject to two other considerations to which I will return, the practical consequence for applicants is that:

    (a) first, they must point to a 'critical date': the date on which they say that the decisive material fact first came within their means of knowledge, which must be in or after the last year of the limitation period. Generally, this will be the date on which an applicant first becomes aware of the decisive material fact;

    (b) secondly, they must show that they did not know the fact before that date; and

    (c) thirdly, they must show that they took all reasonable steps to find out the fact before that date.

What consists of taking 'all reasonable steps'? s 30(1)(c)(ii)

43. The last of these matters has been a subject of some consternation. What amounts to reasonable steps will vary according to the circumstances of the applicant.

44. For example, a court may impose a lesser burden on an applicant who has suffered a psychiatric injury. *NF* concerned an application for an extension of the limitation period by a plaintiff who claimed to have suffered psychiatric injury as a result of her treatment whilst in an institution, Karrala House, operated by the Department of Children's Services.[29]

45. The plaintiff submitted that, until she consulted a particular psychologist, the fact that her treatment at Karrala House had caused or contributed to her psychiatric condition was a fact which was not within her means of knowledge.[30]

---

[27] Ibid [29] (Williams and Holmes JJA agreeing).
[28] *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419, 423 (Macrossan J), 431 (McPherson J), 439 (Thomas J), approved in *Wolverson* [2016] 2 Qd R 106, 134 [63] (Gotterson JA, Holmes JA agreeing).
[29] Ibid [5] [7] [10].
[30] Ibid [10].

46. The State contended that this fact came within her means of knowledge many years before when she had been treated for depression by a psychiatrist.[31]

47. The evidence of the plaintiff's medical expert supported the view that the plaintiff did not press on with therapy which might have led to the discovery of the causal nexus between Karrala House and her condition because the avoidance of pain of confronting that fact was an aspect of her condition.[32]

48. Keane JA posited that s 30(1)(c)(ii) involved a subjective assessment of the applicant's conduct:

> '…Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant…' [33]

49. His Honour, with whom Williams JA and Holmes J agreed, declined to set aside the decision of the primary judge, who granted the extension of time.[34] It is implicit in Keane JA's judgment that he considered the plaintiff's failure to press on with therapy did not disqualify her from satisfying the requirement to have taken 'all reasonable steps' within the meaning of s 30(1)(c)(ii).[35]

Is it enough for an applicant to rely on a solicitor?

50. An issue which should be of concern for practitioners is that applicants may not be found to have taken 'all reasonable steps…' even if they retain a solicitor to handle their case. In *Neilson v Peters Ship Repair Pty Ltd*[36] McPherson J held:

> 'Placing the matter in the hands of apparently competent solicitors with adequate instructions including information relevant to the cause of action would ordinarily amount to taking all reasonable steps to ascertain the relevant facts, <u>provided that the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action</u>.'[37] (underlining added)

---

[31] Ibid [11].
[32] Ibid [19].
[33] Ibid [29].
[34] Ibid [32].
[35] Ibid [27] – [32].
[36] [1983] 2 Qd R 419.
[37] Ibid 431, referred to with approval in *Wolverson* [2016] 2 Qd R 106, 134 [68] (Gotterson J).

51. McPherson J's proviso suggests that solicitors should advise their clients to take a pro-active role in the pursuit of their claim.

52. The case of *Wolverson v Todman*[38] ('*Wolverson'*) illustrates the disastrous consequences of inaction by a solicitor and client, although seemingly taken in the client's best interests.

53. *Wolverson* was a case in which the plaintiff commenced a proceeding against a neurologist,[39] and a separate proceeding against four radiologists and the radiologists' employer.[40] In the case of the neurologist, the plaintiff claimed (amongst other things) that he had negligently or in breach of contract failed to diagnose properly her condition as one caused by a Chiari Type 1 Malformation (the **malformation**) and misdiagnosed her condition as multiple sclerosis.[41] In the case of the radiologists, the plaintiff claimed that they had negligently or in breach of contract failed to diagnose the malformation which was depicted on MRI scans.[42]

54. The plaintiff sought an extension of the limitation period, based on the receipt of medical evidence, including a radiological opinion, which could assist in proving a causal link between the plaintiff's surgery to treat the malformation and the reported alleviation of her symptoms. This was cast as a material fact of a decisive character and was not challenged on appeal.[43]

55. In relation to the claim against the radiologists, Gotterson JA considered the evidence to suggest that the radiological opinion could have been obtained nearly three years earlier than it had been.[44] His Honour considered whether the plaintiff had taken all reasonable steps to obtain the opinion before the critical date.[45]

56. According to the plaintiff's solicitor, the delay was due to the decision of herself and the plaintiff not to progress the proceeding against the neurologist because a Health Quality and Complaints Commission (**HQCC**) conciliation process arising from a complaint against the neurologist was on foot.[46]

---

[38] [2016] 2 Qd R 106
[39] Ibid 121 [11].
[40] Ibid 121 [16].
[41] Ibid 121 [11].
[42] Ibid 121-122 [16].
[43] Ibid 123 [23], 127 [37], 133 [57].
[44] Ibid 133 [57], 135 [69].
[45] Ibid 136 [71].
[46] Ibid 135 [66], 135 [67], 135 [70].

57. Gotterson JA considered that:

(a) the decision to defer obtaining the radiological opinion was one in which the plaintiff participated;

(b) the reason for the deferral did not concern the proceeding against the radiologists;

(c) the prospect that the deferral was motivated by expediency on the plaintiff's part – in that the HQCC process might result in her not wishing to progress the litigation against the radiologists – did not 'paint the decision to defer the opinion as reasonable'; and

(d) in circumstances where, to the plaintiff's knowledge, the radiological opinion was required for the proceeding against the radiologists and funding had been secured, it was not reasonable for the plaintiff to defer obtaining the opinion.[47]

58. His Honour held that the primary judge was correct to conclude that the plaintiff had not taken all reasonable steps to ascertain the causal link by the critical date, and was correct in refusing the extension of the limitation period.[48]

59. McMeekin J, in a compelling dissent on this point, took a different view in his assessment of what could reasonably be expected of the plaintiff, citing the analysis of Keane JA in *NF*.[49] Amongst other things, his Honour considered whether it was unreasonable for the plaintiff to decide not to pursue the legal action against the radiologists while the complaint against the neurologist was before the HQCC.[50]

60. His Honour considered that it was reasonable for the plaintiff to leave the pursuit of the legal action against the radiologists in abeyance.[51] His Honour took into account a number of factors, including:

(a) that a satisfactory resolution of the complaint against the neurologist would mean that the plaintiff would have no reason to pursue the radiologists, which would save the plaintiff expense and stress;[52]

[47] Ibid 136 [74].
[48] Ibid 136 [75].
[49] Ibid 141-147 [97]-[136].
[50] Ibid 143 [108].
[51] Ibid 143 [109].
[52] Ibid 143 [110].

(b) also, the fact that the plaintiff had suffered from very significant symptoms. His Honour expressed the view that he would 'well understand' that a person who had been subjected to symptoms of that seriousness and degree over a long period would not willingly incur unnecessary stress;[53]

(c) in addition, that the plaintiff was at all times being guided by an apparently competent solicitor on what were essentially legal issues.[54] His Honour stated that:

'…Ms Wolverson's participation in the decision was hardly on an equal footing with the solicitor. She was told what she ought to do and she did it…' [55]

(d) further, that the plaintiff kept in touch with her solicitors and that in doing so 'she did all that can reasonably be expected.'[56]

61. The unfortunate case of *Wolverson* is a cautionary tale for solicitors. It also highlights the fact that s 31 applications do not succeed as a matter of course.

Other considerations in selecting the critical date

62. I mentioned earlier there were some other considerations for applicants. These relate to the selection of the critical date.

Where a proceeding has been commenced

63. The first arises where the s 31 application is brought after a proceeding has been commenced. The critical date must fall within the 12 months preceding the commencement of the proceeding. This is because the allowable extension is only 1 year after that date. So, if the critical date occurred more than 12 months after the proceeding was commenced, the application would be futile – any extension would fall short of that required to bring the proceeding within the limitation period.[57]

Where a change in circumstances makes known material facts 'decisive'

64. The second consideration might be described as a 'free kick' for applicants. It arises where a change in circumstances occurring in or after the last year of the limitation period

[53] Ibid 143-144 [111]–[112].
[54] Ibid 144 [116].
[55] Ibid 145 [118].
[56] Ibid 145 [120].
[57] See for example *Queensland v Stephenson* (2006) 226 CLR 197 ('*Stephenson'*).

makes previously known material facts to be of a decisive character. An applicant is entitled to base the application upon the date of the change in circumstances.

65. In *Queensland v Stephenson*,[58] separate proceedings were brought by 3 former undercover police officers employed by the Queensland Police Service. Each claimed that they suffered a psychiatric condition as a result of their employment and sued the State in negligence.[59]

66. Mr Stephenson commenced a proceeding against the State on 20 December 2001, outside of the limitation period. For Mr Stephenson to succeed in his application under s 31(2) of the Act, he needed to show that a material fact of a decisive character was not within his means of knowledge until after 20 December 2000.[60]

67. It was found by the primary judge, McMurdo J,[61] that *before* 20 December 2000, Mr Stephenson knew sufficient of the material facts relating to his right of action to show a reasonable person, appropriately advised, that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify that action. However, McMurdo J also found that it was not until *after* December 2000 that Mr Stephenson's interests and circumstances would have showed that he *ought* to bring an action: in other words, the material facts within his means of knowledge were not of a 'decisive character' until after 20 December 2000.[62]

68. Nevertheless, McMurdo J refused to grant the extension of time, on the basis that a change of circumstances which made known facts decisive did not alter the date on which, for the purposes of s 31(2)(a) of the Act, the facts were within an applicant's means of knowledge.[63]

69. The majority of the High Court[64] took the opposite view, finding in favour of Mr Stephenson and the other plaintiffs. Gummow, Hayne and Crennan JJ cited with approval

[58] Ibid.
[59] Ibid 201 [2].
[60] Ibid 204 [15] (Gummow, Hayne and Crennan JJ).
[61] *Stephenson v Queensland* [2004] QSC 226.
[62] Ibid [3].
[63] Ibid [34] [44].
[64] *Stephenson* (2006) 226 CLR 197 (Gummow, Kirby, Hayne and Crennan JJ).

the following passage from the judgment of Davies JA in the Queensland Court of Appeal:[65]

> '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...' [66]

70. Their Honours held: [67]

> 'What must not have been within the means of knowledge of the applicant until the relevant date is not merely a material fact relating to a right of action in question. The material fact must be of a 'decisive character.'

71. The implications from *Stephenson* are that:

(a) if an applicant had within his or her means of knowledge a material fact before the start of the last year of the limitation period but the fact was not of a decisive character until after that point, the court may extend the limitation period from the point at which the material fact became decisive (assuming the other requirements of s 31(2) are satisfied); and

(b) conversely, if a material fact was within the applicant's means of knowledge and attained the quality of decisiveness *before* the start of the last year of the limitation period, the court cannot extend the limitation period.[68]

The fourth element: 'evidence to establish the right of action…'

72. I turn now to the next element of s 31(2), which is invoked by 31(2)(b). It requires that it must appear to the court that there is evidence to establish a right of action, apart from a limitation defence. Macrossan CJ's judgment in *Wood* describes the evidence required:

> '…It is nevertheless recognised as wrong to place potential plaintiffs in anything like a situation where they must on the probabilities show that it is likely they will succeed in their actions…
>
> A number of decisions in the past have endeavoured to make clear the onus which [under s 31(2)(b)] the applicant for extension must discharge… One way in which the onus has been expressed is that the applicant must demonstrate something like a prima facie case. The evidence need not at the stage at which the application is brought be in a form which would be admissible at trial and it may indeed be hearsay.

[65] [2004] QCA 483 [14].
[66] Ibid 205 [19].
[67] *Stephenson* (2006) 226 CLR 197, 206 [21].
[68] *Stephenson* (2006) 226 CLR 197. See esp. 208 [30] (Gummow, Hayne and Crennan JJ).

> It will not be possible to predict whether the plaintiff's evidence will prevail at trial when it will be subjected to challenge and forced to confront the opposing evidence of the defendant, but it is probably accurate enough to say that an applicant will meet the requirement imposed by s 31(2)(b) if he can point to the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his case.' [69] (underlining added)

73. This test was accepted in *Wolverson.*[70]

The fifth element: a good reason to grant the extension

74. And now to the last, but not least, element of s 31(2). As discussed, once it appears to a court that the circumstances referred to s 31(2)(a) and (b) exist, the court has a discretion whether to grant an extension of the limitation period. But there is no presumption that the discretion will be exercised in the applicant's favour.[71]

75. What has to be shown is a 'good reason' for exercising the discretion.[72] If the applicant can show that the grant of an extension is in the interests of justice this should favour the grant of the extension.[73] This may be the case where the applicant is without fault and no actual prejudice to the respondent is readily apparent. It is unlikely to be the case where a respondent is unable to fairly defend itself or is otherwise prejudiced by reason of delay in commencing the action (absent fraud, deception or concealment).[74]

76. The question arises: is it for the applicant to demonstrate an absence of prejudice, or does the onus rest with the respondent to show that prejudice would result from the extension?

77. In the seminal case of *Brisbane South Regional Health Authority v Taylor*[75] ('*Taylor'*), Toohey and Gummow JJ held that where a respondent alleges prejudice by reason of the effluxion of time, it is for the respondent to place in evidence sufficient facts to lead the court to the view that prejudice would be occasioned and then it is for the applicant to

---

[69] *Wood* [1994] 2 Qd R 431, 434.
[70] *Wolverson* [2016] 2 Qd R 106, 133 [56] (Gotterson JA, Holmes JA and McMeekin J agreeing).
[71] *Taylor* (1996) 186 CLR 541, 544 (Dawson J), 551, 554 (McHugh J).
[72] *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134 ('*Prince Alfred College'*), 164 [99] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[73] *Taylor* (1996) 186 CLR 541, 544 (Dawson J), 551, 554 (McHugh J).
[74] Ibid 555 (McHugh J, Dawson J agreeing), *Prince Alfred College* (2016) 258 CLR 134, 165 [100] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[75] (1996) 186 CLR 541.

show that such facts do not amount to material prejudice.[76] Dawson and McHugh JJ, however, held that there is a presumption of prejudice in favour of the respondent.[77]

78. Although the point was not specifically considered, the following passage from the judgment of French CJ, Keifel, Bell, Keane and Nettle JJ in *Prince Alfred College Incorporated v ADC*[78] (‘*Prince Alfred College’*) indicates that an applicant should demonstrate the absence of prejudice:

> ‘The onus is upon the party claiming an extension of time to show that a fair trial may be had now, notwithstanding the passage of time.’[79]

Prince Alfred College: a case of long delay

79. The case of *Prince Alfred College* illustrates the proper approach to the question of prejudice. It is an example of an ‘against the odds’ application which almost succeeded.

80. The plaintiff, ADC, commenced a proceeding against Prince Alfred College Incorporated (**PAC**) in the Supreme Court of South Australia in 2008 in respect of a claim that he had been sexually abused by a boarding housemaster, Bain, whilst a boarder at Prince Alfred College, Adelaide.[80] The abuse had occurred in 1962 when the applicant was 12 years old, including whilst Bain read stories to the students after ‘lights out’.[81]

81. On learning of the abuse, PAC dismissed Bain, but PAC instructed the boarders not to discuss the matter. Counselling was offered to boys who required it, but no counselling or assistance was rendered to ADC. PAC did not report Bain to the police.[82]

82. In 1996 ADC was diagnosed with post-traumatic stress disorder by a psychologist.[83] On receipt of legal advice in 1997, he decided not to sue PAC. Nevertheless, ADC in the same year sought an acceptance by PAC that the abuse had occurred, in addition to financial assistance. He accepted PAC’s offer to pay for medical and legal fees and to

[76] Ibid 547, citing Gowan J in *Cowie v State Electricity Commission (Vict)* [1964] VR 788, 793.
[77] Ibid 544 (Dawson J), 555 (McHugh J).
[78] (2016) 258 CLR 134.
[79] Ibid 167 [105].
[80] *Prince Alfred College* (2016) 258 CLR 134, 141 [1].
[81] Ibid 141 [1], *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 [162]–[163].
[82] *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 [58] - 60].
[83] *A, DC v Prince Alfred College Inc* [2015] SASC 12 [5].

meet his son's fees at PAC for the following three years. He then commenced a proceeding against Bain, which settled in September 1997.[84]

83. In the following years ADC suffered further symptoms and was admitted to a psychiatric clinic on a number of occasions.[85] He commenced a proceeding against PAC in December 2008,[86] on the basis that PAC breached its non-delegable duty of care, breached its duty of care and was vicariously liable for the acts of Bain.[87] ADC applied for an extension of the limitation period based upon a prognosis received in a doctor's report in the 12 months prior to instituting the proceeding.[88]

84. By the time the proceeding was commenced, a number of potential witnesses had died, including the headmaster, senior master and school chaplain. The senior housemaster was ill and unable to give evidence and the psychologist whom the applicant had first consulted had destroyed his notes.[89]

85. ADC argued that his failure to institute the action within time resulted from the conduct of PAC, and that PAC had not suffered significant prejudice through the delay.[90]

The decision at first instance

86. The primary judge, Vanstone J, rejected both arguments. Her Honour found that the length of the delay was 'extraordinary' and that there was actual prejudice to PAC 'of the greatest magnitude'.[91]

The Full Court decision

87. Despite this, the Full Court of South Australia overturned Vanstone J's decision.[92] Kourakis CJ's judgment on this point is noteworthy, as is its critique in the High Court.

---

[84] *Prince Alfred College* (2016) 258 CLR 134, 144 [17]–[19].
[85] Ibid 144–145 [20]-[23].
[86] Ibid 141 [1].
[87] Ibid 141 [2].
[88] *A, DC v Prince Alfred College Inc* [2015] SASCFC 161 [20].
[89] *Prince Alfred College* (2016) 258 CLR 134, 145 [24].
[90] *A, DC v Prince Alfred College Inc* [2015] SASC 12 [210].
[91] Ibid [216]-[231].
[92] *A, DC v Prince Alfred College Inc* [2015] SASCFC 161, [38] (Kourakis CJ), [148] (Gray J), [264] (Peek J).

88. His Honour accepted her Honour's finding that PAC suffered general prejudice.[93] Nonetheless, his Honour considered, amongst other things, that:[94]

(a) there was no real dispute that Bain's duties as a housemaster extended to going into the dormitory and settling the students;

(b) there was no material possibility that the passage of time had denied PAC the opportunity to show that Bain's discretion as to the care of the boarders did not extend to telling them bedtime stories; and

(c) there was no real dispute that the abuse had occurred in the course of Bain's ostensibly carrying out of his duties in settling students to sleep.

89. Kourakis CJ then considered the argument that the lapse of time made it more difficult to assess the extent and depth of ADC's post-traumatic stress disorder. His Honour held that the difficulty could sufficiently be addressed by taking a conservative approach to the assessment of damages rather than denying ADC any redress at all.[95]

90. As to ADC's acceptance of compensation from PAC in 1997, and failure to being proceedings at that time, his Honour held the reluctance to bring proceedings to be symptomatic of the injury caused by the wrong alleged against PAC.[96]

91. His Honour further held that PAC was in a position at the time to protect itself from ADC changing his mind, and from future litigation, by taking proper steps to investigate the claim and retain material in admissible form should proceedings later be brought. It was further able to insist on a discharge of liability from ADC but did not do so.[97]

92. Finally, his Honour held that the motivating circumstance that ADC decided to bring his action in 2008 because he had run out of money did not weigh heavily against the exercise of the discretion to extend time. This was because his financial position was at least in part a product of the illness caused by the wrongdoing.[98]

---

[93] Ibid [21].
[94] Ibid [22].
[95] Ibid [23].
[96] Ibid [24].
[97] Ibid.
[98] Ibid [25].

The High Court decision

93. The High Court[99] unanimously held that the extension of time should not have been granted. In coming to their decision, French CJ, Kiefel, Bell, Keane and Nettle JJ applied the principles in *Taylor*.[100] Their Honours stated:

> 'The loss of evidence which will tend against the prospects of a fair trial will usually be a fatal deficit in an argument that good reason has been shown to exercise the discretion to grant an extension. As McHugh J pointed out in *Brisbane South Regional Health Authority v Taylor*, 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 the delay, is unable to fairly defend itself or is otherwise prejudiced. His Honour had earlier observed that, in cases of long delay, prejudice may exist without the parties or anyone else realising that it exists.' [101] (footnotes omitted)

94. Their Honours held that, on the issue of vicarious liability, there was a real question about what the role of housemaster entailed, which could not fairly be answered given the loss of relevant evidence.[102]

95. They also held that Kourakis CJ did not take into account that the loss of the psychologist's notes significantly prejudiced a fair trial of ADC's claims against PAC, in that PAC sought to advance a case that the psychologist had inadvertently coached ADC.[103]

96. Further, their Honours held that the problems with PAC's evidence could not be 'ignored' by saying that the damages to be awarded may be reduced to reflect the delay during which evidence has been lost. Their Honours considered that to say that is to acknowledge that a fair trial is no longer possible.[104]

97. As to Kourakis CJ's consideration of PAC's failure to obtain a release from ADC, their Honours countered that the onus upon the party claiming an extension of time to show that a fair trial is possible is not discharged by saying that the putative defendant should have been more astute to conserve its own interests.[105] Their Honours considered that it

[99] French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.
[100] (1996) 186 CLR 541, 164-165 [99]-[100].
[101] Ibid 165 [100].
[102] Ibid 166 [102].
[103] Ibid 166 [103].
[104] Ibid 166-167, [104].
[105] Ibid 167 [105].

was reasonable for PAC to consider that ADC's decision to pursue Bain and not PAC would be adhered to.[106] They also considered that the oppression inherent in bringing proceedings after a long delay was aggravated where a party conveys the impression that proceedings would not be brought on certain terms, and then when the terms are met, changes his or her mind.[107]

98. Finally, their Honours rejected Kourakis CJ's view that ADC's failure to commence proceedings earlier was symptomatic of the injury he suffered, on the basis that this was unreconcilable with the fact that ADC commenced proceedings against Bain in 1997.[108]

Limiting the prejudice

99. Is there a way to mitigate the impact of prejudice in a case of significant delay?

100. It is worth noting that in *Prince Alfred College,* the High Court did not criticize Kourakis CJ's examination of whether or not a real factual dispute existed, so as to determine whether the absence of witnesses would bring about prejudice. Rather, the majority found that there was a real (factual) question to be answered on the role of housemaster.

101. It will therefore assist applicants if they can frame their case (to the extent possible) as a legal, rather than a factual, dispute, and thereby diminish the consequences of delay and a loss of evidence.

102. Another possible solution is to confine the particulars of negligence to those which would not result in prejudice to the respondent. An approach of this kind (although by the offer of an undertaking) was successfully taken in the case of *Coles Group Limited v Costin*.[109] Special leave to appeal against this decision was sought on the basis that it was not permissible to 'fillet' a cause of action in negligence. The High Court refused special leave.[110]

[106] Ibid 167 [105].
[107] Ibid 167 [106].
[108] Ibid 167 [108].
[109] [2015] QCA 165. See esp. [4], [11].
[110] *Coles Group Limited v Costin* [2016] HCATrans 58 (11 March 2016).

Application material: what should be put before the court?

103. Having dealt with the legal niceties of s 31 applications, I turn finally to practical considerations. What material should the practitioner put before the court?

104. Applicants need to comply with the *Uniform Civil Procedure Rules 1999* (Qld) with respect to applications. The relevant rules are contained in Chapter 2 Part 4 (where a proceeding has not been commenced) and Chapter 2 Part 5 (where a proceeding has been commenced). Under s 34(1) of the Act, an application may be made *ex parte* but the court may require that notice of the application be given to any person it thinks it proper. An *ex parte* application is therefore a risky enterprise. The ethical obligations of practitioners on *ex parte* applications must also be complied with.

105. Evidence given in applications is by affidavit (r 390(b)), and deponents should be prepared for cross-examination. The respondent's solicitors should be notified in advance if its witnesses will be cross-examined.

Affidavits

106. As the applicant bears the evidentiary onus, it is crucial that the affidavit evidence is sufficient to establish all of the elements of s 31(2). The 'right of action' on which the claim is based will also need to be defined with some particularity.[111]Affidavit evidence should comprise *at least* an affidavit of the applicant and of his or her solicitor. Affidavits may contain statements based on information and belief (they may contain hearsay) if the person making the statement states the sources of the information and the grounds for the belief.[112] However, the less this is occurs, the more persuasive the evidence.

The applicant's affidavit

107. An applicant's affidavit should contain at least the following factual information from which the solicitor's opinions can be based and submissions can be made.

108. First, the affidavit should set out the facts on which the cause of action is founded. For example, in the case of negligence, the affidavit should set out:

[111] *Coles Group Limited v Costin* [2015] QCA 165 [13].
[112] *Uniform Civil Procedure Rules 1999* (Qld) r 430(2).

(a) first, the relationship between the applicant and the respondent;

(b) secondly, the act or omission which is said to be negligent;

(c) thirdly, the time and other circumstances in which the act or omission occurred; and

(d) fourthly, the consequences of the act or omission for the applicant (physical, psychological and financial).

109. Secondly, if the application is based on recent awareness of a 'material fact' or the recent availability of new evidence, the affidavit should identify the fact or evidence, and the time and circumstances in which the applicant became aware of the fact or evidence. If new medical opinion is relied upon it should be exhibited to the affidavit.

110. Alternatively, if the application is based upon a recent change in circumstances which has made previously known facts to become of a 'decisive character', the affidavit should describe the change in circumstances.

111. In either case, the affidavit should describe any personal circumstances which show that it is only now, in light of the new fact, evidence or change in circumstances, that bringing the action is in the applicant's interests.

112. Thirdly, the affidavit should identify the steps which the applicant took to find out the new fact or obtain the new evidence before the time he or she became aware of the fact or evidence, and set out any circumstances which would explain any lack of diligence in taking such steps.

113. Fourthly, the affidavit should set out the reason for the applicant's delay in commencing a proceeding, including any circumstances which would indicate that the delay was caused by the respondent or was beyond the applicant's control.

114. Fifthly, the affidavit should set out the (factual) consequences for the applicant if an extension of time were refused.

The solicitor's affidavit

115. The solicitor's affidavit should be drafted based on and referring to the facts deposed to in the applicant's affidavit.

116. The affidavit should exhibit a draft Statement of Claim or, if a proceeding has already been commenced, refer to the Statement of Claim, so that the action may be defined.

117. It should also contain an opinion as to why the fact, evidence or change in circumstances referred to in the applicant's affidavit has 'transformed' his or her claim, such that:

    (a) the claim now has a reasonable prospect of success and would result in an award of damages sufficient to justify bringing an action; and

    (b) it is now in the applicant's interest to bring the action.

118. Additionally, the affidavit should refer to matters which indicate that there is a good reason to grant the extension. For example, that without the extension, the applicant will be left without legal redress. It should also identify, if it is the case, that witnesses and records are still available.

Outlines of argument and authorities, draft order

119. Practitioners must also comply with Practice Directions relating to the material which must be presented to the court on an application. These relate to, amongst other things, outlines of argument and authorities. An outline of argument should address, by reference to the affidavit evidence and case law, why the conditions in s 31(2) of the Act have been satisfied and the discretion should be exercised.

120. The relevant Supreme Court Practice Directions are 2004/06 (Applications jurisdiction – outline of argument, documents read, appearance slip), 2013/16 (Citation of Authority) and 2008/03 (Filing written submissions). The relevant District Court Practice Directions are 2017/01 (Applications List – Outline of Argument), 2013/11 (Citation of Authority) and 2008/02 (Filing written submissions)

121. A draft Order in Form 59 should be brought to court to hand up to the judge.

Conclusion

122. To conclude, I hope to have demonstrated that s 31 applications are not a case of 'lay down misere'. They not only require the facts to be in an applicant's favour but involve a significant amount of preparation. There is no guarantee that newly obtained evidence will be a sufficient basis for the grant of an extension and it is certain that the receipt of new or different legal advice will not be. What is needed are transformative facts, a diligent applicant, a timely application, a good reason to grant the extension and, ideally, the non-extinction of witnesses.