BRISBANE SOUTH REGIONAL HEALTH AUTHORITY ..... APPELLANT;
RESPONDENT,

AND

TAYLOR ..... RESPONDENT;
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

H C OF A
1996
BRISBANE
June 18
1996
CANBERRA
Oct 2
1996
Dawson, Toohey, McHugh, Gummow and Kirby JJ

Limitation of Actions — Personal injury — Limitation period — Extension — Whether discretion to refuse once statutory conditions fulfilled — Onus of proof — Limitation of Actions Act 1974 *(Q), s* 31.

Section 31(2) of the *Limitation of Actions Act* 1974 (Q) provided: "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."

Held, by Dawson, Toohey, McHugh and Gummow JJ, Kirby J dissenting, that an applicant for an extension of time under s 31(2) does not have a presumptive right to an order once the conditions in s 31(2)(a) and (b) have been satisfied. An applicant still bears the legal onus of showing that the justice of the case requires the discretion to be exercised favourably, and to do so must prove that an extension beyond the limitation period would not result in significant prejudice to the prospective defendant. Section 31(2) does not require a weighing process between the potential prejudice to the applicant and prospective defendant.

Decision of the Supreme Court of Queensland (Court of Appeal) reversed.

APPEAL from the Supreme Court of Queensland.

Sharon Annette Taylor alleged that the Brisbane South Regional Health Authority was vicariously liable for the conduct of a doctor in 1979 in failing to explain the choices available to her when she was faced with a decision whether to undergo a hysterectomy. She alleged the doctor told her the operation was necessary to relieve severe pain

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and bleeding. She applied for an extension of time in which to bring an action under s 31(2) of the *Limitation of Actions Act* 1974 (Q) on the ground that in 1994 access to her medical records disclosed that the diagnosis made in 1979 was pelvic inflammatory disease, a non-operative disease not treatable by hysterectomy. Her application under s 31(2) was supported by affidavit evidence and there was no cross-examination. In the District Court, Judge McLauchlan held that the Health Authority would be placed in a position of serious prejudice having regard to the lapse of time particularly since it was possible that the doctor may not be located and in any event it seemed unlikely he would have any recollection of the conversations alleged by the applicant. He therefore declined to grant an extension of time. The Court of Appeal of the Supreme Court of Queensland (Davies JA and Ambrose J, Fitzgerald P agreeing) allowed an appeal by the Health Authority on the basis that once an applicant has satisfied the conditions in s 31(2) there was an evidentiary onus on the respondent to demonstrate prejudice, which in this case the respondent had not discharged. The Health Authority was granted special leave to appeal to the High Court by Toohey, McHugh and Kirby JJ. The Health Authority conceded before the Court of Appeal and the High Court that the applicant had satisfied the two conditions in s 31(2).

P A Keane QC, Solicitor-General for the State of Queensland, (with him *P A Freeburn*), for the appellant. The purpose for which the discretion in s 31(2) of the *Limitation of Actions Act* 1974 (Q) is conferred is to lift a bar on bringing an action and to permit a trial on the merits. Therefore the improbability of a fair trial is a relevant consideration in exercising the discretion. An applicant for an extension not only must prove the facts which found the discretion but also must show good reason for its exercise. There is no justification for reversing the established onus of persuasion in relation to the exercise of statutory discretions (1). The respondent to an application under s 31(2) bears an evidentiary onus to raise issues such as prejudice but the ultimate onus remains with the applicant (2). In *Kosky's Case* (3) the evidence was largely documentary and therefore there was no prejudice to the possibility of a fair trial on the merits. The strength of a plaintiff's claim is a relevant factor in assessing the

(1) *William Crosby & Co Pty Ltd v The Commonwealth* (1963) 109 CLR 490 at 496; *Australian Broadcasting Commission v Industrial Court (SA)* (1985) 159 CLR 536 at 541; Burt, "The Tort Liability of Local Government Bodies", *University of Western Australia Law Review*, vol 10 (1971) 99, at p 114.

(2) *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465 at 474; *Posner v Roberts* [1986] WAR 1 at 6.

(3) *Kosky v Trustees of Sisters of Charity* [1982] VR 961; *Dempsey v Dorber* [1990] 1 Qd R 418 at 420.

prejudice to the plaintiff in losing the cause of action (4). Assessing prejudice before the expiration of the limitation period and comparing that with prejudice suffered after the expiration of the limitation period is not an exercise supported by the terms of s 31(2).

M A Wilson QC (with her *D C Rangiah*), for the respondent. Although there is no presumption how the discretion will be exercised, once the statutory conditions are satisfied it is expected to be exercised positively where no countervailing factors are raised (5). The respondent bears an evidentiary onus of satisfying the court that prejudice will be suffered if an extension is granted (6). The evidence of prejudice to the Authority here was illusory because the nature of the case meant there would always be reliance on the doctor's notes. The comparison made by the Court of Appeal between prejudice suffered in an action commenced towards the end of the limitation period and one instituted after the expiration of limitation period was appropriate because in exercising the discretion under s 31(2) the relevant prejudice is that which had been suffered by a defendant since the expiration of the limitation period. Therefore, the exercise of that discretion differs from the discretion found in other limitation statutes (7). If it is held that the Court of Appeal erred in the exercise of the discretion, the High Court should exercise it afresh since the evidence is on affidavit and thus the Court is in the same position as the primary judge (8). Further, his approach was wrong because he failed to weigh any prejudice to the appellant against prejudice to the respondent if the extension is refused (9). The prejudice to the respondent is serious if her application is refused since she has been denied an opportunity to agitate her claim, despite satisfying both conditions in s 31(2). [She also referred to *Hall v Nominal Defendant* (10).]

P A Keane QC, in reply.

Cur adv vult

(4) *William Crosby & Co Pty Ltd v The Commonwealth* (1963) 109 CLR 490 at 496.
(5) *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419 at 440; *Randel v Brisbane City Council* [1984] 2 Qd R 276 at 286.
(6) *Cowie v State Electricity Commission (Vict)* [1964] VR 788 at 793; *Posner v Roberts* [1986] WAR 1 at 6; *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465 at 478-480; *Ulowski v Miller* [1968] SASR 277 at 284-285.
(7) *Donovan v Gwentoys Ltd* [1990] 1 WLR 472; [1990] 1 All ER 1018; *Koumorou v Victoria* [1991] 2 VR 265; *Repco Corporation Ltd v Scardamaglia* [1996] 1 VR 7; *S & B Pty Ltd v Podobnik* (1994) 53 FCR 380; *Napolitano v Coyle* (1977) 15 SASR 559.
(8) *House v The King* (1936) 55 CLR 499 at 505.
(9) *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 at 514.
(10) (1966) 117 CLR 423.

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Toohey J Gummow J

2 October 1996

The following written judgments were delivered: —

DAWSON J. I agree with McHugh J, for the reasons which he gives, that s 31 of the *Limitation of Actions Act* 1974 (Q) does not confer upon an applicant for an extension of time a presumptive right to an order once the two conditions laid down by sub-s (2)(a) are satisfied. The section confers a discretion upon a court to extend time and that discretion should only be exercised in favour of an applicant where, in all the circumstances, justice is best served by so doing. The onus of satisfying the court that the discretion should be exercised in favour of an applicant lies on the applicant. To discharge that onus the applicant must establish that the commencement of an action beyond the limitation period would not result in significant prejudice to the prospective defendant. I agree with McHugh J that, once the legislature has selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the defendant who would otherwise have the benefit of the limitation. For the reasons given by McHugh J, the Queensland Court of Appeal was in error. The order of that Court should be set aside and the order of the judge at first instance restored.

TOOHEY AND GUMMOW JJ. The District Court of Queensland dismissed an application by the respondent for an extension of time in which to bring an action against the appellant. The Court of Appeal allowed an appeal against that refusal and granted an extension of time (11); the appellant seeks to reinstate the order of the District Court.

The application

Part 2 (ss 9-28) of the *Limitation of Actions Act* 1974 (Q) (the Act) prescribes periods of limitation for different classes of action. Section 11 provides that the period in respect of an action for damages for negligence or breach of duty in respect of personal injury is three years from the date on which the cause of action arose. It is that section which applies to the respondent's cause of action. However, Pt 2 operates subject to Pt 3 (s 9). Part 3 (ss 29-40) provides for extensions of periods of limitation. Section 31 applies to the respondent's cause of action.

The respondent sought an extension of time under s 31(2) of the Act, which reads:

"Where on application to a court by a person claiming to have a

(11) The formal order of the Court of Appeal is simply "that the Appeal be allowed with costs" but an extension of time was sought in the notice of appeal.

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.''

The action which the respondent wishes to bring is evidenced by the plaint exhibited to her affidavit in support of the application. She proposes to claim damages for negligence and/or breach of statutory duty by reason of an alleged failure by Dr Chang, a gynaecologist in the employ of the appellant, to give her proper medical advice.

On 29 May 1979 (that is, just over seventeen years ago) the respondent attended the appellant's hospital for review following a laparoscopy which, it is said, revealed pelvic inflammatory disease. She alleges that Dr Chang recommended a hysterectomy, telling her that without such an operation ''she was at risk of death''. On 5 June 1979 she underwent a hysterectomy and has experienced pain ever since. She alleges negligence on the part of Dr Chang, for which the appellant is vicariously responsible, by reason of the doctor's failure to explain the options available to her when her condition was in no way life threatening. The hysterectomy, she says, was neither necessary nor appropriate to deal with her condition. It must be appreciated that the respondent's case in support of her application was by way of affidavit. Likewise the appellant resisted the application by affidavit evidence. None of the deponents of the affidavits on either side were cross-examined.

The appellant's inquiries revealed that in 1979 Dr Chang was Professor in Gynaecology at the University of Queensland, undertaking clinical duties at the appellant's hospital. He now lives in Hong Kong. An employee of the appellant's solicitors has deposed: ''My attempts to contact Dr Chang have been unsuccessful.''

An affidavit sworn by Dr Wilson, a Senior Consultant Gynaecologist at the appellant's hospital, speaks of the respondent's condition and treatment as appears from hospital records. Dr Chang's notes, as transcribed by Dr Wilson, relevantly read:

''long discussion re alternatives of
— do nothing
— hormonal therapy
— hysterectomy

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patient prefers hysterectomy after discussion in relation to risks etc.''

Dr Wilson adds:

> ''My interpretation of the material in the medical record is that the Applicant's hysterectomy was to treat menorrhagia and dysmenorrhoea and not pelvic inflammatory disease.''

It is apparent that if the proposed action proceeds to trial the crucial issue will be the conversation between the respondent and Dr Chang which is the subject of Dr Chang's notes. That this is so is all the more evident when it is appreciated that no negligence is alleged against the appellant on the footing that there should have been extensive counselling of the respondent before a hysterectomy was performed. In answer to a question from the Bench, counsel for the respondent accepted that this was not part of the respondent's case.

Before the Court of Appeal and this Court the appellant conceded that the respondent had established each of the requirements in pars (a) and (b) of s 31(2). Thus the appellant accepts that a material fact of a decisive character relating to the right of action was not within the respondent's means of knowledge until a date after the commencement of the year last preceding the expiration of the limitation period. The relevant limitation period is three years. It also follows that, absent a defence of limitations, there is evidence to establish the respondent's right of action. But that is not to say that the respondent will necessarily make good her claim if the matter proceeds to trial.

The Court of Appeal

The appeal to the Court of Appeal was upheld unanimously. Davies JA and Ambrose J delivered a joint judgment with which Fitzgerald P agreed while adding some observations of his own.

The challenge to the Court of Appeal's decision turns principally on the meaning and scope of the expression ''may order'' in sub-s (2). The respondent eschewed an argument that ''may'' connotes a power rather than a discretion, thereby rejecting the proposition that if a prospective plaintiff makes good the requirements of pars (a) and (b), he or she is necessarily entitled to an extension of the limitation period. Although the proposition has some attractions (12), the concession was properly made. The whole purpose of limitation periods, namely, to preclude stale claims which a defendant would find it hard to resist by reason of effluxion of time, tells against such a construction of the sub-section. In this context the words ''may order'' in sub-s (2) logically import an element of discretion on the part of the court.

However, the question remains: on what principles is the discretion

(12) See *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135; *Mitchell v The Queen* (1996) 184 CLR 333 at 345-346.

to be exercised? The appellant's complaint is directed chiefly at the approach taken by Davies JA and Ambrose J in the following passage:

> "The scheme of the section, in our view, is that, upon compliance with paras (a) and (b), the applicant is entitled to an extension of time unless there is some matter justifying the exercise of a discretion against the granting of an extension. Once that is accepted, the evidentiary onus on this question is plainly on the respondent [that is, the present appellant] and, for the reasons we have given, was not discharged here."

With respect to their Honours, that passage does not truly reflect the meaning and operation of s 31(2). The discretion conferred by the sub-section is to order an extension of the limitation period. It is a discretion to grant, not a discretion to refuse, and on well established principles an applicant must satisfy the court that grounds exist for exercising the discretion in his or her favour (13). There is an evidentiary onus on the prospective defendant to raise any consideration telling against the exercise of the discretion. But the ultimate onus of satisfying the court that time should be extended remains on the applicant. Where prejudice is alleged by reason of the effluxion of time, the position is as stated by Gowans J in *Cowie v State Electricity Commission (Vict)* (14) in a passage which was endorsed by Gibbs J in *Campbell v United Pacific Transport Pty Ltd* (15):

> "It is for the respondent to place in evidence sufficient facts to lead the Court to the view that prejudice would be occasioned and it is then for the applicant to show that these facts do not amount to material prejudice."

In the District Court Judge McLauchlan outlined the facts as they emerged from the material before him. He then referred to the judgment of Tadgell J in *Kosky v Trustees of Sisters of Charity* (16) which concerned an application for extension of time under the *Limitation of Actions Act* 1958 (Vict). Tadgell J referred to the discretion under the Victorian Act and continued (17):

> "There are no doubt some cases in which a lapse of fourteen years from the time of allegedly negligent conduct until the commencement of an action in respect of it would of itself render a fair trial of the issues impossible or so unlikely that a trial ought not to be countenanced. In such a case it would presumably be right to refuse

(13) See *Main v Main* (1949) 78 CLR 636 at 643, though the discretion there was not a discretion to grant, but to refuse, a decree for dissolution of marriage.
(14) [1964] VR 788 at 793.
(15) [1966] Qd R 465 at 474.
(16) [1982] VR 961.
(17) *Kosky* [1982] VR 961 at 969.

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to make an order . . . even if the applicant were otherwise entitled to ask for one."

Judge McLauchlan referred to the difficulties confronting the respondent: the uncertainty of locating Dr Chang and the unlikelihood of him having any recollection of the conversation. His Honour recognised that the respondent bore the onus of proof in any action against the appellant and that the contemporary medical records would appear to make the discharge of that onus a difficult task for her. "Nevertheless", he concluded, "I think that the respondent [the present appellant] is placed in a position of serious prejudice having regard to the lapse of time which has occurred". It was open to his Honour to take a different view on the facts but there can be no quarrel with the general approach he took.

Davies JA and Ambrose J accepted that prejudice may justify the refusal of an extension, though in putting the matter that way they did not approach the question of onus in accordance with established principles. They continued:

> "However, in order to determine whether the defendant would suffer prejudice in consequence of an order extending time, what must be compared is an action instituted within time, but perhaps towards the end of the period of limitation, and one instituted now. It may be thought to be unlikely that, say, two and a half years after the above conversation, and many operations later, Dr Chang would have had any independent recollection of it. In any event there was no evidence from which it could be inferred that, by reason of the expiration of time between the end of the limitation period and the date of the application before the learned primary Judge, the defendant suffered any prejudice which would have decreased the likelihood, as against it, of a fair trial. The respondent accepted the evidentiary onus on this question."

In other words their Honours approached the question of prejudice by reference to the theoretical situation of an action commenced two and a half years after the conversation between the respondent and Dr Chang. But s 31(2) neither speaks of nor warrants such a comparison. Once an applicant satisfies pars (a) and (b), the Court has a discretion to extend the time for the bringing of an action. A material consideration (the most important consideration in many cases) is whether, by reason of the time that has elapsed, a fair trial is possible. Whether prejudice to the prospective defendant is likely to thwart a fair trial is to be answered by reference to the situation at the time of the application (18). It is no sufficient answer to a claim of prejudice to say that, in any event, the defendant might have suffered some

(18) *Akermanis v Melbourne and Metropolitan Tramways Board* [1959] VR 114 at 116-117; *Posner v Roberts* [1986] WAR 1 at 6.

prejudice if the applicant had not begun proceedings until just before the limitation period had expired.

It follows that the approach taken by Davies JA and Ambrose J to the operation of s 31(2) was in error and also that their assessment of prejudice to the appellant was on a false basis. Fitzgerald P seemed to agree with the basis of assessment adopted by their Honours. He added:

> "Further, I do not consider that the primary judge was correct in concluding that a fair trial was impossible or improbable. On the contrary, as the [appellant] contended in another (inconsistent) part of its argument, in support of a proposition that the [respondent's] version of her discussion with Dr Chang was unlikely to be believed, the lapse of time will make it more difficult for the [respondent] to have her version accepted."

What should this Court do?

The Court of Appeal erred in the approach it took to s 31(2), and thus erred in the basis upon which it set aside the decision of the primary judge. It follows that the appeal to this Court should be allowed. The question then arises as to what orders should be made in place of those made by the Court of Appeal. This Court is presented with something of a dilemma. Should it reinstate the decision of the District Court, or is this a case in which, as the respondent argued, the primary judge fell into error for reasons other than those advanced by the Court of Appeal, and this Court should exercise the discretion for itself?

Certainly, the material before the primary judge was in the form of affidavits and exhibits which were not the subject of cross-examination. In that respect this Court is in as good a position as the primary judge if it were to deal with the application. But it would not be appropriate for this Court to exercise the discretion favourably to the respondent unless it considered that the exercise of discretion by the District Court miscarried in a material respect (19).

In this regard we have difficulty with the notion of weighing prejudice to an applicant against prejudice to the respondent (20). In one obvious sense the prejudice to the present respondent is absolute if her application is refused. She can never litigate her claim. But that cannot be enough of itself to warrant an extension of time; in truth there would be no discretion to be exercised. For that reason we do not accept the respondent's argument that the District Court fell into error in failing to balance the prejudice to the appellant against the prejudice against the respondent. It may be appropriate to temper that approach

(19) See *House v The King* (1936) 55 CLR 499 at 505.

(20) cf *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 at 514, per Kirby P.

and to say that because the respondent has satisfied par (b) of sub-s (2), there is therefore evidence to establish her right of action. Even then, a weighing process is not called for. The real question is whether the delay has made the chances of a fair trial unlikely. If it has not there is no reason why the discretion should not be exercised in favour of the respondent. The respondent says that it may still prove possible to locate Dr Chang, that in any event he would have to rely on his notes and furthermore that if he cannot be located the medical records would be admissible in evidence pursuant to s 92 of the *Evidence Act* 1977 (Q). But the extent to which Dr Chang must rely on his notes must relate to the lapse of time involved. In all the circumstances it can hardly be gainsaid that there would be some prejudice to the appellant by reason of the delay that has ensued.

Do any of these considerations show that Judge McLauchlan's exercise of discretion miscarried? We are not persuaded that they do. His Honour concluded his judgment in these terms:

> "It is true that the applicant will bear the onus of proof in any action brought against the respondent and the contemporary documentary evidence would appear to make that a difficult task for her. Nevertheless, I think that the respondent is placed in a position of serious prejudice having regard to the lapse of time which has occurred. It is not certain that the respondent will be able to locate Dr Chang and even [if] it can it would seem most unlikely that Dr Chang would have any recollection of the conversation which the applicant alleges. The circumstances of this case are quite unlike those of *Kosky* and in my opinion are such that the lapse of time between the allegedly negligent conduct and the action, if it were to be commenced now, would render a fair trial of the issues highly improbable."

Judge McLauchlan did not err in his understanding of s 31(2). Nor did he err in the way in which he dealt with the question of prejudice even though it was open to him to reach a different conclusion. To dismiss the appeal by reference to the exercise of the discretion would be for this Court to substitute its own exercise of discretion. This is not warranted.

We would allow the appeal and restore the order of the District Court.

McHUGH J. In my opinion, the Court of Appeal of Queensland erred in allowing the present respondent's appeal against the refusal by the District Court of Queensland to grant her an extension of time in which to commence an action against the appellant.

The facts of the case and the legislative provisions are set out in other judgments. There is no need for me to repeat them. The issue in the case is a simple one. It is whether the Court of Appeal erred in setting aside the exercise of the discretion which s 31 of the *Limitation*

of Actions Act 1974 (Q) (the Act) invested in the District Court Judge. But lurking behind this question is another, a question that made this case one for the grant of special leave to appeal. It is whether an applicant who has adduced evidence to establish that she had a right of action against the defendant and that a material fact of a decisive character relating to that right was not within her means of knowledge during the period specified in s 31 of the Act is entitled "to an extension of time unless there is some matter justifying the exercise of a discretion against the granting of an extension". In the Court of Appeal, Davies JA and Ambrose J held that the scheme of s 31 indicated that it did. Fitzgerald P agreed with this judgment although he added some observations of his own.

With great respect to their Honours, s 31 should not be read as giving an applicant a presumptive right to an order once he or she satisfies the two conditions laid down in s 31(2) of the Act. An applicant for an extension of time who satisfies those conditions is entitled to ask the court to exercise its discretion in his or her favour. But the applicant still bears the onus of showing that the justice of the case requires the exercise of the discretion in his or her favour.

The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates". (21) Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo* (22), "what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.

Even before the passing of the *Limitation Act* 1623 (Imp), many

(21) *R v Lawrence* [1982] AC 510 at 517, per Lord Hailsham of St Marylebone LC.
(22) (1972) 407 US 514 at 532.

civil actions were the subject of time limitations (23). Moreover, the right of the citizen to a speedy hearing of an action that had been commenced was acknowledged by Magna Carta itself (24). Thus for many centuries the law has recognised the need to commence actions promptly and to prosecute them promptly once commenced. As a result, courts exercising supervisory jurisdiction over other courts and tribunals in their jurisdictions have power to stay proceedings as abuses of process if they are satisfied that, by reason of delay or other matter, the commencement or continuation of the proceedings would involve injustice or unfairness to one of the parties (25).

The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost (26). Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed (27). Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them (28). Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period (29). As the New South Wales Law Reform Commission has pointed out (30):

> "The potential defendant is thus able to make the most productive use of his or her resources (31) and the disruptive effect of unsettled

(23) Bacon, *New Abridgment of the Law*, 5th ed (1798), vol 4, pp 461 et seq.
(24) cap 40, Magna Carta.
(25) *Walton v Gardiner* (1993) 177 CLR 378.
(26) *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 at 704.
(27) *RB Policies at Lloyd's v Butler* [1950] 1 KB 76 at 81-82
(28) New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims* (1986) LRC 50, p 3; Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper (1992) Project No 36, Pt II, p 11.
(29) In *Limitation of Actions for Latent Personal Injuries* (1992) Report No 69, p 10, the Law Reform Commissioner of Tasmania said: "The need for certainty can be justified in many cases. For example, manufacturers need to be able to 'close their books' and calculate the potential liability of their business enterprise with some degree of certainty before embarking on future development. Under modern circumstances, an award of damages compensation may be so large as to jeopardise the financial viability of a business. The threat of open-ended liability from unforeseen claims may be an unreasonable burden on business. Limitation periods may allow for more accurate and certain assessment of potential liability."
(30) New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims* (1986) LRC 50, p 3.
(31) Kelley, "The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience", *Wayne Law Review*, vol 24 (1978) 1641, at p 1644.

claims on commercial intercourse is thereby avoided (32). To that extent the public interest is also served."

Even where the cause of action relates to personal injuries (33), it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible (34).

In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this background, 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. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case. The purpose of a provision such as s 31 is "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." (35) But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the

(32) "Developments in the Law, Statutes of Limitations", *Harvard Law Review*, vol 63 (1950) 1177, at p 1185.

(33) The vast majority of defendants in personal injury actions are insured. Consequently, the amount of the verdict will not be met by the defendant. Nevertheless, it is a charge on the revenue of the insurer for the relevant year and is ultimately met by the shareholders of the insurer or the individual proprietors of the insurance business if the insurer is not incorporated. Although the burden of the plaintiff's claim is spread in such cases, the consequences for the proprietors of the insurance business can be significant. When a large number of claims are allowed to be brought out of time, as has been the case in respect of some types of injuries or in some industries in recent years, the financial consequences for an insurer can be drastic.

(34) New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50, p 3; Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, (1992) Project No 36, Pt II, p 11.

(35) *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at 635.

State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension.

The scheme of the Act is that s 11 forbids the bringing of an action for damages for negligence after the expiration of three years from the date on which the cause of action arose unless leave is given under s 31. It follows that an applicant for extension must show that justice will be best served by excepting the particular proceedings from the general prohibition which s 11 imposes (36). In this context, justice includes all the relevant circumstances relating to the application including the various rationales for the enactment of the limitation period involved. That the applicant had a good cause of action and was unaware of a "material fact of a decisive character relating to the right of action" (37) does not alter the burden on the applicant to show that the justice of the case favours the grant of an extension of time. Those facts enliven the exercise of the discretion, but they do not compel its exercise in favour of the applicant. Without them, the applicant has no right to call for the discretion to be exercised in his or her favour. Proof of them does not give the applicant a presumptive right to the exercise of the discretion, as Davies JA and Ambrose J held. As Wells J has pointed out, "to qualify is not to succeed" (38). The object of the discretion, to use the words of Dixon CJ (39) in a similar context, "is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case". In determining what the justice of the case requires, the judge is entitled to look at every relevant fact and circumstance that does not travel beyond the scope and purpose of the enactment authorising an extension of the limitation period.

In the present case, the learned District Court Judge held that the present respondent was "placed in a position of serious prejudice having regard to the lapse of time which has occurred". That being so, his Honour, quite naturally, took the view that an extension of time should not be granted. The learned Judges of the Court of Appeal met the prejudice point by holding that the test for prejudice was whether an order extending time would make the defendant any worse off than it would have been if the action had been commenced within, but towards the end of, the limitation period. But this analysis, with respect, treats the limitation period as little more than a point of

(36) cf *William Crosby & Co Pty Ltd v The Commonwealth* (1963) 109 CLR 490 at 491; *Australian Broadcasting Commission v Industrial Court (SA)* (1985) 159 CLR 536 at 541.
(37) s 31(2)(a) of the Act.
(38) *Lovett v Le Gall* (1975) 10 SASR 479 at 486.
(39) *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473.

reference. It suggests that all that is ordinarily relevant is the marginal prejudice created by the delay. It downplays, if it does not overlook, the second, third and fourth rationales of limitation periods to which I have referred. It treats the parties, subject to the question of prejudice, as if they were on an equal footing. The analysis gives no weight to the fact that the defendant's potential liability expired at the end of that period and that to extend the period may result in the imposition of a new legal liability on the defendant. Indeed, it seems to indicate that a limitation period is a provisional rather than a rigid limit.

If the action had been brought within time, it would have been irrelevant that, by reason of the delay in commencing the action, Dr Chang might have had little independent recollection of his conversation with the applicant and that the defendant might have had difficulty in fairly defending itself. But once the potential liability of the defendant had ended, its capacity to obtain a fair trial, if an extension of time were granted, was relevant and important. 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.

Legislatures enact limitation periods because they make a judgment, inter alia, that the chance of an unfair trial occurring after the limitation period has expired is sufficiently great to require the termination of the plaintiff's right of action at the end of that period. When a defendant is able to prove that he or she will not now be able to fairly defend him or herself or that there is a significant chance that this is so, the case is no longer one of presumptive prejudice. The defendant has then proved what the legislature merely presumed would be the case. Even on the hypothesis of presumptive prejudice, the legislature perceives that society is best served by barring the plaintiff's action. When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice. In such a situation, actual injustice to one party must occur. It seems more in accord with the legislative policy underlying limitation periods that the plaintiff's lost right should not be revived than that the defendant should have a spent liability reimposed upon it. This is so irrespective of whether the limitation period extinguishes or merely bars the cause of action.

In my opinion, the learned Judges of the Court of Appeal erred in

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finding that the District Court Judge had wrongly exercised his discretion. Once the learned judge had made a finding of actual prejudice, his decision to dismiss the application was inevitable. Besides the proved prejudice, the long delay gave rise to a general presumption of prejudice. In the ordinary course of events, it is probable that the plaintiff discussed her operation and the reasons for it with various people — friends, relatives and perhaps even the nursing staff. If Dr Chang's notes are accurate and the action had been commenced within the limitation period, one or more persons in this group may have been able to provide evidence or information favourable to the defendant. By the time the application for extension was made, it is likely that such conversations, if they took place, would be no longer within the memory of the participants. The finding of actual prejudice and the possibility of other prejudice to the defendant gave the defendant a strong — in my view overpowering — case for resisting the application.

However, the learned District Court Judge dismissed the application solely on the ground of actual prejudice. That was a course well open to him on the evidence. He did not act upon any wrong principle. I cannot accept the argument that the use of the words "the period of the limitation for the action be extended" in s 31 required the primary judge to consider only the additional prejudice suffered by the defendant after the expiry of the limitation period. For the reasons I have given, that construction would make the expiry date a mere reference point setting a provisional limit on the commencement of an action. It overlooks the rationales that have persuaded legislatures for more than four centuries that, generally speaking, civil actions should be commenced within fixed periods. Furthermore, the learned judge did not fail to consider or fail to give sufficient weight to any matter that he was required to consider. Nor did he consider any irrelevant matter or give undue weight to a matter that he properly considered. Finally, his conclusion was not so "unreasonable or plainly unjust" (40) that an appellate court can infer that somehow or by some means he failed to properly exercise the discretion that s 31 invested in him.

In my opinion, the Court of Appeal should have dismissed the present respondent's appeal to that Court. It follows that this appeal must be allowed, the order of the Court of Appeal set aside, and the appeal to that Court dismissed.

KIRBY J. This appeal from orders of the Court of Appeal of the Supreme Court of Queensland concerns the operation of the *Limitation of Actions Act* 1974 (Q) (the Act). The Court of Appeal unanimously

(40) *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627.

upheld an appeal to it against an order of Judge McLauchlan, in the District Court of Queensland, refusing an extension of time to a plaintiff within which to bring an action for damages for personal injuries. The facts are not disputed. Nor is it contested that the preconditions for the favourable consideration of the respondent's application were made out. What is in issue is the suggested error of approach on the part of the Court of Appeal in justifying its disturbance of the orders of the primary judge.

A belated claim for damages

Ms Sharon Taylor (the respondent) wishes to prosecute an action for damages against the Brisbane South Regional Health Authority (the appellant). The appellant operates the Princess Alexandra Hospital in Brisbane. On about 16 April 1979, the respondent, then aged twenty years, attended the casualty department of the hospital complaining of severe period pain and heavy bleeding. Two days later a laparoscopy was performed. On 29 May 1979, because the pain had not subsided, the respondent was seen by a gynaecologist at the hospital, Dr A Chang. At the relevant time, he was the Professor of Gynaecology at the University of Queensland. He undertook clinical duties at the hospital. His precise relationship with the hospital is undisclosed. However, no question arises, at this stage of the proceedings, concerning the appellant's liability for the acts or defaults of Dr Chang if the respondent were able to prove that he was negligent (41).

According to the respondent, Dr Chang told her that she was bleeding internally and needed a hysterectomy as soon as possible. He allegedly told her that this was the only way to stop the pain and that she might die if she did not have the operation. She was told that she would not be able to have children after the operation. The appellant agreed to undergo the operation. She needed time to arrange for the care of her two young children. Having done this, she returned to the hospital on 4 June 1979, signing a consent form to submit to the operation the following day. The respondent says that she signed this form with little understanding of the meaning of the operation, apart from what she had been told by Dr Chang.

Despite the hysterectomy, the respondent continued to experience pain during the ensuing fifteen years. Numerous medical practitioners failed to diagnose its cause. In January 1994, on the advice of a friend, she obtained the hospital records concerning her treatment pursuant to a statute entitling her to access. The record referred to "PID" or pelvic inflammatory disease. Because of comments by her local medical practitioner, the respondent then researched this condition at the State Library in Brisbane. As a result of her research she came to the conclusion that her condition had not been one requiring the urgent

(41) cf *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 562, 596.

and drastic operation that had been performed upon her. Nevertheless, the hospital records did contain a note, apparently in the handwriting of Dr Chang, which read:

"Long discussion re alternatives . . .
— do nothing
— hormonal therapy
— Hyst
Pt [patient] prefers Hyst after discussion re risks etc-W-L [waiting list] Hyst."

The respondent denies that she was informed of any alternative treatments or that she expressed a preference for hysterectomy. In her affidavit she swore that she was "given to understand that it [hysterectomy] was essential". She states that, had she been fully informed about the reasons for, consequences and effect of the operation, as well as about alternative treatment, she would not have elected to undergo the hysterectomy. By that operation she was denied her wish to have a large family. She also believed that her continuing abdominal pain was linked to the surgery.

An affidavit filed in the District Court by the solicitor for the appellant revealed that Dr Chang now resides in Hong Kong but that the solicitor's attempts to contact him at the time had been unsuccessful. Conversations with another medical practitioner mentioned in the hospital notes revealed that, without benefit of the notes, he was unable to recall anything of the incidents alleged by the respondent. The only other affidavit filed for the respondent was by a Senior Consultant Gynaecologist now employed by the hospital. On the basis of his reading of the hospital records he disputed the suggested diagnosis of pelvic inflammatory disease, interpreting the record as disclosing conditions involving menorrhagia and dysmenorrhoea which occasion painful and heavy menstrual periods.

The primary decision and the appeal

Although well outside the ordinary limitation period, the respondent brought proceedings under the Act for an extension of time within which to proceed against the appellant. Judge McLauchlan recounted the foregoing facts. He identified the respondent's application under the Act as resting on her alleged conversation with Dr Chang fifteen years earlier. He noted that this conflicted with the objective record of the hospital notes. He referred to the difficulty which the respondent would face in establishing the facts as she stated them. He mentioned other matters not now material.

Assuming that the respondent had satisfied the provisions of the Act, Judge McLauchlan held that there was still a general discretion vested in the Court to make an order, or not, as the justice of the case required. Drawing on the remarks of Tadgell J in the Supreme Court

of Victoria in *Kosky v Trustees of Sisters of Charity* (42), his Honour concluded:

> "[T]he respondent points to the lapse of time of nearly sixteen years between the conversation upon which the applicant would rely to make out her case and the present time. They submit with some force that it is difficult to imagine that there can be a fair and satisfactory trial in relation to a conversation which occurred so long ago. Moreover, the respondent has not been able to locate Dr Chang although it appears that he now resides somewhere in Hong Kong. It is, to say the least, unlikely that he would now have any recollection of the conversation with the applicant . . .
>
> It is true that the applicant will bear the onus of proof in any action brought against the respondent and the contemporary documentary evidence would appear to make that a difficult task for her. Nevertheless, I think the respondent is placed in a position of serious prejudice having regard to the lapse of time which has occurred. It is not certain that the respondent will be able to locate Dr Chang and even if it can it would seem most unlikely that Dr Chang would have any recollection of the conversation which the applicant alleges. The circumstances of this case are quite unlike those of [*Kosky*] and in my opinion are such that the lapse of time between the allegedly negligent conduct and the action, if it were to be commenced now, would render a fair trial of the issues highly improbable."

It was from the consequential dismissal of the application that the respondent successfully appealed to the Court of Appeal.

In that Court, the principal reasons for judgment were those of the joint opinion of Davies JA and Ambrose J. Like the primary judge, their Honours concluded that a general residual discretion existed which they described as one "to refuse an extension of the period of limitation notwithstanding that [the Court] is satisfied as to the matters contained in paras (a) and (b) of [s 31(2)]". They accepted that prejudice to a defendant, making a fair trial highly improbable, could justify refusal of the extension. But they went on, in the passage attacked by the appellant:

> "However, in order to determine whether the defendant would suffer prejudice in consequence of an order extending time, what must be compared is an action instituted within time, but perhaps towards the end of the period of limitation, and one instituted now. It may be thought to be unlikely that, say, two and a half years after the above conversation, and many operations later, Dr Chang would have had any independent recollection of it. In any event there was no evidence from which it could be inferred that, by reason of the

(42) [1982] VR 961 at 968.

expiration of time between the end of the limitation period and the date of the application before the learned primary Judge, the defendant suffered any prejudice which would have decreased the likelihood, as against it, of a fair trial. The respondent accepted the evidentiary onus on this question.

Whilst it appeared from its oral submissions that it accepted the evidentiary onus on this question, the respondent, in written submissions made after the conclusion of the hearing of this appeal, submitted that the onus on this question lay on the appellant.

The scheme of the section, in our view, is that, upon compliance with paras (a) and (b) [of s 31(2) of the Act], the applicant is entitled to an extension of time unless there is some matter justifying the exercise of a discretion against the granting of an extension. Once that is accepted, the evidentiary onus on this question is plainly on the respondent and, for the reasons we have given, was not discharged here.

The learned primary Judge, in our view applied the wrong test.''

Fitzgerald P, in a separate opinion, agreed in the result. He accepted that it was for an applicant to demonstrate why the discretion should be exercised in his or her favour, once the statutory preconditions under the Act were satisfied. He pointed out that mere delay could not necessitate the dismissal of an application since it was inherent in every application that there would have been delay. He held that the Court was left with ''the standard judicial discretion, that is, to do what is just and equitable in all the material circumstances''. He pointed out that the Court, hearing the application, was obliged to determine it without finally passing upon the crucial question of whether the applicant had a good cause of action. He accepted the view of the other members of the Court that the delay in question had to be measured ''from the position which would have existed towards the end of the statutory limitation period''. He considered that the primary judge had erred in concluding that a fair trial was impossible or improbable. The lapse of time would strengthen the appellant's attack on the accuracy and reliability of the respondent's alleged recollection of her conversation with Dr Chang.

The Court of Appeal therefore extended the limitation period. From its orders, by special leave, the appellant has appealed to this Court.

The statutory provisions

The *Limitation of Actions Act* 1974 (Q) (the Act) follows the often criticised language derived, ultimately, from the *Limitation Act* 1963 (UK). The legislation, in its various Australian manifestations, has been considered on a number of occasions by this Court (43). However, it is important to note that there are significant variations

(43) See, eg, *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234; *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628.

from State to State. Care must be exercised in seeking assistance from legal authority based upon different statutory language (44).

The applicable provisions of the Queensland Act are to be found in ss 11 and 31. Section 11 is a general provision which governs the bringing of actions in respect of personal injury. Relevantly it is provided:

> "Notwithstanding any other Act or law or rule of law, an action for damages for negligence ... or breach of duty ... in which damages claimed by the plaintiff consist of or include damages in respect of personal injury to any person ... shall not be brought after the expiration of 3 years from the date on which the cause of action arose."

This basic rule is, however, subject to the provisions in Pt 3 of the Act providing for extensions of the normal periods of limitation. The relevant provision is s 31:

> "(1) This section applies to actions for damages for negligence ... or breach of duty ... where the damages claimed by the plaintiff ... consist of or include damages in respect of personal injury to any person ...
> (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."

The issues

The attack of the appellant on the reasoning of the Court of Appeal targeted principally the joint opinion of Davies JA and Ambrose J. Two express criticisms were made and another by inference:

1. The court had erred in effectively reversing the burden of proof for the exercise of the residual discretion reposed in the court. Once compliance with pars (a) and (b) of s 31(2) was established, instead of

(44) This is noted in *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628. See also *Forbes v Davies* [1994] Aust Torts Reports 61,392.

asking whether the applicant had affirmatively shown that an extension should be granted, the court had asked whether "some matter [would] justify the exercise of a discretion *against* the granting of an extension".

2. In judging whether to provide the extension, their Honours addressed attention not to the entire period of delay from the accrual of the cause of action until the application but only to the period which had elapsed "between the end of the limitation period and the date of the application".

3. The court had disturbed the decision of the primary judge, which was of a discretionary character, without a proper foundation in law for doing so.

Fitzgerald P certainly adopted the same view as the other members of the Court of Appeal as to the identification of the time which was relevant in judging whether the order of extension should be made. He too measured the "consequences of delay to the respondent" by reference to what its position would be "towards the end of the statutory limitation period" compared with its position when the matter was before the court. However, his Honour's discussion of this point occurred in the context of evaluating whether, in the light of all of the evidence (including that available to be called at trial for the appellant), any specific additional prejudice to it was shown, other than that which is usually involved in delay in the initiation of any legal claim. There is no reference in Fitzgerald P's reasons to the suggested reversal of the obligation to justify the exercise of a discretion to one "*against* the granting of an extension". On the contrary, Fitzgerald P accepted the existence of the discretion and that it was for the present respondent "to demonstrate why the discretion should be exercised in her favour".

The two principal arguments of the appellant therefore failed when addressed to the reasons of Fitzgerald P. But are they made good in the case of the majority opinion which sustains the orders of the Court of Appeal?

The residual discretion

A question arose during argument of the appeal as to whether, properly construed, s 31(2) of the Act did provide a residual discretion to the judge deciding an application for extension under its provisions. All the judges below held that it did. The appellant contended, and the respondent did not contest, that it did. Nevertheless, in the light of the matters mentioned during argument, and in order to clarify the nature of the residual discretion, it is useful to say something on the point. The Court is not bound to accept assumptions or concessions by parties which would constitute an error of law.

The question is whether the proper approach to the application of s 31(2) of the Act involves acceptance that, once an applicant has established the preconditions in pars (a) and (b), he or she has a right to the order, such that the Court has no real discretion but is bound to

make it. In such a context the word "may" has a compulsory meaning, after the preconditions to the exercise of the power are fulfilled.

This question has arisen in several contexts, including recently. Although interpretation is always a matter for judgment, established authority points to the approach which is to be taken. The guiding principle is to ascertain the purpose of the legislative provisions (45). Where the word "may" is used, one begins "with the prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning" (46). The Court looks to the general scope and objects of the enactment conferring the power (47). Where the power is "deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised" (48). This principle is regularly applied by this Court (49) and by other Australian courts (50).

Behind the idea that "may" can, in some circumstances, afford an applicant a right to have the power exercised favourably is the notion that, when it is used in respect of a person having an official position, it is "a word of permission, an authority to do something which otherwise he could not lawfully do" (51). In such a case, the preconditions being established, the beneficiary has the entitlement to have the power exercised in favour of the application. The problem is thus one of identifying the purpose of the legislation and how it is to operate in the particular instance.

In this case, it is true that the proof of the two conditions in pars (a) and (b) of s 31(2) is comparatively exhaustive and demanding. Once an applicant has proved the facts necessary to establish them, it is difficult to see what more an applicant could do in order to gain the benefit of the extension provided for by the Act. The overall purposes of the extension provisions, as an exception to the ordinary limitation

(45) *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131 at 145-148; *Ward v Williams* (1955) 92 CLR 496 at 505.

(46) *Ward v Williams* (1955) 92 CLR 496 at 505.

(47) *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 235.

(48) *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 225.

(49) *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 88; *Mitchell v The Queen* (1996) 184 CLR 333 at 345-346.

(50) See, eg, *Wamba Wamba Local Aboriginal Land Council v Minister Administering Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989) 23 FCR 239; *Department of Industrial Relations v Forrest* (1990) 21 FCR 93; *Grech v Heffey* (1991) 34 FCR 93; *Queensland Housing Commission v Caloundra City Council* [1992] 1 Qd R 99.

(51) *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134.

bar, must be taken into account in determining how the sub-section is intended to operate.

Apart from much authority which supports the conclusion, two considerations lead me to the view that the proper opinion is that a residual discretion exists. The first is that the repository of the power is a judge whose functions generally and under this and other like legislation, often require the exercise of discretions according to the justice of the case. The second is that, by providing for an extension of the period of limitation, the Act affords an exceptional entitlement, the exercise of which may expose an alleged tortfeasor to liability long after it would have been reasonable to assume that all liability was terminated by the descent of the limitation bar. True, the applicant might be innocent of fault, upon the ground that a material fact of a decisive character relating to the right of action was not within his or her means of knowledge until shortly before the application for extension was made. But there are other rights and privileges which have a legitimate claim to consideration in an application for an extension of the period of limitation long after it has otherwise expired. These include those of the proposed defendant that it should not be subjected to a trial upon a completely stale claim. The applicant may well be able to make out the two preconditions provided in s 31(2) yet the court may properly refuse the extension either because the proposed defendant affirmatively establishes that irreparable injustice would be done by requiring it to face a belated trial or because, in balancing the material placed before the court, the judge is not convinced that an extension order would be just.

The holdings in the District Court and in the Court of Appeal that a residual discretion remained to be exercised were therefore correct (52). So were the arguments of the parties in this Court. Accordingly, it is necessary to consider whether the discretion was correctly exercised. That task is made easier for this Court because, whatever were the disputes in the courts below, the appellant made it clear that it accepted that the matter was to be approached on the footing that the respondent had established each of the preconditions laid down in pars (a) and (b) of s 31(2).

Matters of approach

It is now useful to say something about the approach which is proper to the residual discretion to be exercised in this case:

1. Like any other discretion provided by statute, that conferred by the use of the word "may" in s 31 of the Act must be exercised to achieve the purposes for which Parliament provided it. This requires

(52) See *Posner v Roberts* [1986] WAR 1 at 6 in the context of the equivalent Western Australian legislation.

the identification of its intended operation (53). Fixed limitation periods are the creature of statute. At common law there was no time limit upon a person's right to bring an action for tort (54). Accordingly, a limitation statute, at least of the kind illustrated by the Act, is a law which, after the expiry of a time which Parliament specifies, prevents the bringing of an action otherwise viable and meritorious (55). Whatever might otherwise have been the development of the common law had legislation not intervened to govern extensions of time for later discovered facts (56), the complex and particular extension provisions of the kind found in Pt 3 of the Queensland Act oblige a court determining an application for an extension of time to consider and apply the scheme which Parliament has enacted for the giving of extensions in the cases which qualify.

2. The purposes of the particular legislation here in question are neatly encapsulated in two passages from decisions of this Court (57) and of the House of Lords (58). The two passages state the competing policies which lie behind, respectively, the general rule of the limitation bar (s 11 of the Act) and the exceptions affording power to provide an extension (s 31 of the Act). In *Donovan v Gwentoys Ltd* (59), Lord Griffiths explained the general rule behind the limitation bar (60): "The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal." On the other hand, this Court explained the purposes of provisions such as s 31 in *Sola Optical Australia Pty Ltd v Mills* (61) thus (62): "[T]he 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." The residual discretion invoked in this case was therefore to be exercised in a way that gave effect to the exception but in the context of a statute designed also to uphold the general rule.

3. In some Australian limitation statutes, the provision for an extension has referred explicitly to criteria which must be taken into account, for example whether it is "just" or "just and reasonable" or

(53) cf *Hall v Nominal Defendant* (1966) 117 CLR 423 at 434; *Castlemaine Perkins Ltd v McPhee* [1979] Qd R 469 at 473.
(54) *Thompson v Brown* [1981] 1 WLR 744 at 749; [1981] 2 All ER 296 at 300.
(55) *Thompson v Brown* [1981] 1 WLR 744 at 749; [1981] 2 All ER 296 at 300.
(56) See Lord Reid in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 772; cf *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419 at 430.
(57) *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628.
(58) *Donovan v Gwentoys Ltd* [1990] 1 WLR 472; [1990] 1 All ER 1018.
(59) [1990] 1 WLR 472; [1990] 1 All ER 1018.
(60) *Donovan* [1990] 1 WLR 472 at 479; [1990] 1 All ER 1018 at 1024.
(61) (1987) 163 CLR 628.
(62) *Sola Optical* (1987) 163 CLR 628 at 635.

"fair and equitable" to provide the extension (63). In the Queensland Act no such formulae are used. Instead, the word "may" is used as a word of perfect generality. But it cannot be doubted that similar broad notions of justice to the parties are introduced by the use of that word. It is unnecessary to explore the question whether the Court must explicitly weigh the suggested disadvantages to the applicant and the proposed defendant respectively, if an extension were refused or granted (64). Nor is it necessary in this case to consider another controversy, viz, whether time alone, if "inordinate", might, without more, oblige a court to refuse an extension (65). It is correct to observe (as Fitzgerald P did in the Court of Appeal) that the Act presumes some lapse of time. By the terms of s 31(2)(a) of the Act an application for extension may not be brought "until a date after the commencement of the year last preceding the expiration of the period of limitation for the action". Ordinarily (as in this case) it is not brought until after, even long after, the normal limitation period has expired. It will be rare that the passage of time does not cause at least some disadvantages to a prospective defendant (eg, the erosion of memory; the loss of documents; and the death, departure or disappearance of witnesses). But precisely what that disadvantage is in a particular case is better determined on evidence than on the basis of judicial generalities about time, the importance of finality and the usual desirability of prompt action for the fair trial of contested issues.

4. It is always open to a proposed defendant, resisting an application for extension of time, to call evidence of any specific detriment it would suffer if an order were made. The appellant did so in the present case. If any such evidence is called, a court must consider it carefully in exercising its residual discretion (66). If a defendant does not call evidence, or calls evidence which is unpersuasive or insignificant, provided it is reasonable to infer that some evidence was available to it in the circumstances the defendant cannot complain if the court concludes that no particular prejudice, over and beyond the generalities, could have been established by it. This is simply another way of saying that, because a prospective defendant has an interest in

(63) See, eg, s 60G(2) of the *Limitation Act* 1969 (NSW); cf *Thelander v C D Townsend (Eng) Pty Ltd* (1993) 32 NSWLR 358 at 359; *Forbes v Davies* [1994] Aust Torts Reports 61,392. See also s 48 of the *Limitation of Actions Act* 1936 (SA); cf *Napolitano v Coyle* (1977) 15 SASR 559 at 560-561.

(64) As suggested in *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 at 514; cf *Napolitano v Coyle* (1977) 15 SASR 559 at 571, per Bray CJ.

(65) On this point see *Noja v Civil & Civic Pty Ltd* (1990) 26 FCR 95; *Tavsanli v Philip Morris (Australia) Ltd* (unreported; Supreme Court of NSW (Young J); 18 September 1989) at 11; *Soper v Matsukawa* [1982] VR 948 at 951; *Hristofis v Kanellos* (1992) 163 LSJS 142; *Thompson v Brown* [1981] 1 WLR 744; [1981] 2 All ER 296; cf *Repco Corporation Ltd v Scardamaglia* [1996] 1 VR 7 at 15.

(66) cf *Braedon v Hynes* (1986) NTJ 885 cited in *Forbes v Davies* [1994] Aust Torts Reports 61,392 at 61,397-61,399.

keeping the limitation bar in place and in resisting an extension that lifts it, it may be inferred that he or she would ordinarily place before a court evidence of specific prejudice pertinent to the exercise of the court's discretion. If the prospective defendant does not do so, he or she cannot justly complain if the court infers, and then holds, that the defendant has failed to demonstrate such prejudice. This is not to shift the burden in the application from the applicant to the defendant. It is simply to recognise that the burden of persuading a court on the particular issue of specific prejudice lies on the party making any such suggestion. This is what is meant by the "evidentiary onus" resting on a proposed defendant in relation to such an issue. The Court of Appeal held, and the appellant accepted, that it bore such an "evidentiary onus" (67).

5. Nevertheless, the legal burden of establishing that the residual discretion should be exercised in favour of an extension order undoubtedly rests throughout the proceedings on the applicant (68). It is a burden to convince the court, affirmatively, that an order should be made. It is not one of showing that it would not be unreasonable to make the order. Still less, the preconditions being established, is it for the defendant to show why it would be unreasonable to make the order. In *Klein v Domus Pty Ltd* (69), this Court considered an appeal from the Supreme Court of New South Wales (70) refusing an application for an extension of the prescribed period within which a worker might sue his employer pursuant to the proviso to s 63(3) of the *Workers' Compensation Act* 1926 (NSW). For the worker it was complained that the usual course was to grant an extension and that it was unusual to refuse it. The Act was expressed in very general terms (71). But Dixon CJ (72) observed that there was "one thing perfectly clear" about the statutory phrase there under consideration: "that is that the burden is upon the applicant to satisfy the condition that those words express. The applicant has got to show that there is a reason, within the expression which I have read, for extending the time, and it is a positive burden on the applicant, not of any great severity perhaps, but it is a positive burden which the applicant must discharge as he must discharge any other matter in which the burden of proof lies on him ... [W]ithin that very general statement of the

(67) cf *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465 at 478, 481; *Ulowski v Miller* [1968] SASR 277 at 284; *Hall v Motor Vehicle Insurance Trust* [1984] WAR 111 at 113.

(68) See *Australian Broadcasting Commission v Industrial Court (SA)* (1985) 159 CLR 536 at 541; *Thompson v Brown* [1981] 1 WLR 744 at 752; [1981] 2 All ER 296 at 303.

(69) (1963) 109 CLR 467.

(70) *Klein v Domus Pty Ltd* (1962) 80 WN (NSW) 515.

(71) "... if he is satisfied that sufficient cause has been shown, or that having regard to all the circumstances of the case, it would be reasonable so to do ..."

(72) *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 472-473, with the agreement of McTiernan and Windeyer JJ.

purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case." It may be established that the applicant was completely unaware of a material fact of a decisive character relating to the right of action until very recently and that there is evidence to establish the right of action, if only the limitation bar could be overcome. Yet the countervailing evidence called by the proposed defendant and a consideration of all of the circumstances of the case might, as a matter of justice, result in the conclusion that the application for extension should be refused. As in *Klein*, once the preconditions are made out, the positive burden on the applicant would not be one of any great severity. But if, weighing the countervailing evidence, the judge is uncertain or unconvinced that the provision of an extension would be just, it should be refused. Dixon CJ took a similar approach in another decision in the same volume of the Commonwealth Law Reports (73).

6. A controversy has arisen in the authorities, and in this case, as to whether, in the exercise of the residual discretion, regard should be had to the period of time which has elapsed between the expiry of the limitation period and the date of the application. Or whether the entire time from the accrual of the cause of action to the date of the application must be considered. Some decisions favour the view that the only time relevant is that after the limitation period has expired (74). This opinion is often explained on the footing that limitation periods are arbitrary; that they involve acceptance that some interval of time (however prejudicial to a defendant) must be tolerated; and that, accordingly, the attention of the Court should be focused only upon the marginal increase in prejudice occasioned once the normal limitation period has elapsed. This view of the legislation is also supported by reference to the argument that what is under consideration is an *extension* of the ordinary limitation period so that the decision maker should consider only the time of the extension, not the initial time during which no extension was required. The contrary argument is that, a broad discretion being invoked, without relevant words of limitation, the generality should not be glossed by excluding

(73) *William Crosby & Co Pty Ltd v The Commonwealth* (1963) 109 CLR 490 at 495. cf *Aiken v Kingborough Corporation* (1939) 62 CLR 179; *Australian Broadcasting Commission v Industrial Court (SA)* (1985) 159 CLR 536 at 541; *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465 at 468, per Gibbs J. In *Lovett v Le Gall* (1975) 10 SASR 479 at 486 it was said: "The short answer is that to qualify is not to succeed; there is ample scope in the discretionary power conferred ... to reject applications that are without real and honest merit."

(74) cf *Daroczy v B & J Engineering Pty Ltd (In liq)* (1986) 83 FLR 423 at 437; *Tointon v H W Greenham & Sons Pty Ltd* [1986] VR 666 at 668; *William Cable Ltd v Trainor* [1957] NZLR 337 at 346; *Sparrow v Grimmer* [1959] NZLR 516 at 519.

the earlier interval which has elapsed. Its expiry also involved elements of prejudice which could, and should, be taken into account in judging where the justice of the case lies (75). To some extent the resolution of this controversy depends upon the language of the Act in question (76). Thus, where an Act refers to "the delay" it may be taken to mean "the delay after the primary limitation period expired" (77). But in weighing any suggested prejudice to the intended defendant which is relevant to the residual discretion, a wider range of considerations is called for. Whereas the applicant could have sued without hindrance within the primary limitation period, if he or she fails to do so the case falls to be considered outside that classification. Prejudice must be considered in the context of an application for extension where the residual discretion is expressed in a word of complete generality ("may"). True, that word is used in a statutory context where what is involved is an "extension". This can only mean an extension beyond the date of the ordinary limitation period.

7. In an appellate review of a primary decision granting or refusing an extension under s 31(2) of the Act, the appellate court is bound to observe the ordinary rule which requires restraint in the interference in decisions of a discretionary character (78). The mere fact that the Court of Appeal might have disagreed with the decision of Judge McLauchlan did not authorise it to disturb the primary judge's order, and to substitute its own, unless one of the ordinary bases justifying appellate interference in a discretionary decision was shown (79). This requirement was recognised by the Court of Appeal. The given basis for disturbing the order of the District Court was that the primary judge had not applied the correct test, in that he had sought to compare a trial at, or shortly after, the conversation between the appellant and Dr Chang and a trial conducted on an action instituted pursuant to the order of extension.

8. Although attempts have been made to spell out the criteria to be taken into account in judging whether or not an order extending time should be made (80), care must be taken in the use of such criteria because of the different expression of the relevant provisions of

(75) *Koumorou v Victoria* [1991] 2 VR 265 at 272. cf *S & B Pty Ltd v Podobnik* (1994) 53 FCR 380 at 389, 395, 408; *Ulowski v Miller* [1968] SASR 277 at 281.

(76) See discussion in *Donovan v Gwentoys Ltd* [1990] 1 WLR 472 at 478; [1990] 1 All ER 1018 at 1023.

(77) *Thompson v Brown* [1981] 1 WLR 744 at 751; [1981] 2 All ER 296 at 302.

(78) *House v The King* (1936) 55 CLR 499 at 504-505; *Lovell v Lovell* (1950) 81 CLR 513 at 532-534; *Paterson v Paterson* (1953) 89 CLR 212; *Mace v Murray* (1955) 92 CLR 370; *Gronow v Gronow* (1979) 144 CLR 513 at 519-520; *Tasmanian Pulp & Forest Holdings Ltd v Woodhall Ltd* [1971] Tas SR 330 at 350; *Avco Financial Services Ltd v Abschinski* [1994] 2 VR 659.

(79) As was stated, eg, by Smith J in *Repco Corporation Ltd v Scardamaglia* [1996] 1 VR 7 at 10.

(80) See, eg, *Forbes v Davies* [1994] Aust Torts Reports 61,392 at 61,402-61,406.

limitation statutes. Furthermore, the factual circumstances of cases are infinitely various. The discretion conferred by s 31(2) of the Act is controlled only by the terms of the Act and the achievement of its purposes, as elaborated above.

9. In performing the appellate task, a court will address itself to the substance of the reasons under consideration, avoiding an over-nice attention to infelicitous expressions. Whilst the reasons under challenge are usually the only means by which the parties and the appellate court have to decide whether incorrect or irrelevant considerations have intruded into the exercise of a statutory discretion, the ultimate concern of an appellate court is with the correctness or otherwise of the order under appeal. If that order appears to be correct, although some of the reasoning which supports it is imperfect, the appellate court will withhold interference, for its function is to correct orders, not to rewrite judicial reasons.

Conclusion: the Court of Appeal's order is correct

I turn to apply these principles to the present case. All of the judges of the Court of Appeal correctly accepted that a residual discretion existed. All correctly accepted that the only basis for disturbing the order of Judge McLauchlan was an established error in the exercise of his discretion. All correctly viewed the suggested prejudice to the proposed defendant (the appellant) as a matter relevant to the exercise of the residual discretion. That question was specifically presented for evaluation by the affidavits filed on behalf of the appellant calling attention to the terms of the hospital notes, the departure of Dr Chang for Hong Kong, the difficulty in contacting him, the lack of specific memory of the other medical practitioner and the proper interpretation of the hospital records on their face.

The question is thus reached as to whether the judges of the Court of Appeal erred by confining attention to the additional prejudice suffered by the appellant after the expiry of the limitation period, as distinct from the entire period, upon an assumption that the respondent might have brought her claim soon after the contested conversation. At that early point it would certainly have been easier to contact Dr Chang, to take a statement from him and to gather evidence which would contradict the respondent's claims.

No error in the approach of the judges of the Court of Appeal has been shown on this point. The Act, it is true, provides for a general discretion which would require that all circumstances be taken into account. But it is a discretion addressed to the question whether "the period of limitation for the action [should] be *extended*" (emphasis added). That means extended beyond the ordinary limitation period during which a plaintiff might bring an action without legal bar, although there was deterioration in memory, destruction of records or loss of witnesses. Whatever might be the position under legislation

differently expressed (81), because the Act is stated in terms of a facility to order that the period be "extended", there is no error in addressing attention to what are the consequences of such an extension, that is, after the ordinary limitation period has expired.

To this extent, I agree with the reasons of all of the judges in the Court of Appeal. I also agree with the error which they identified in the decision of the primary judge who addressed his attention not to the marginal prejudice of the extension but to the inconvenience of requiring the appellant to face a belated trial at all. The Act is written upon an assumption that orders of extension will always or usually cause some measure of inconvenience. The issue for decision in each case under this Act is whether, given the power to order that the normal limitation period be extended, it is just that such an order should be made in the particular case.

These conclusions require rejection of the first and the third complaints of the appellant. But they leave the second, which is more substantial. With respect, I am of the opinion that Davies JA and Ambrose J erred in expressing the question before them as being whether the applicant was "entitled to an extension of time unless there is some matter justifying the exercise of discretion against the granting of an extension". Taken in isolation, that phrase appears to reverse the burden of securing the favourable exercise of the discretion. As I have held, that burden rests throughout upon the applicant. No such error appears in the reasons of Fitzgerald P who expressly recognised that the power was "to make, not refuse, an order" and accurately stated where the burden lay of securing a favourable exercise of that power.

For a time, I was inclined to agree with the appellant's submission that the order of the Court of Appeal, depending ultimately on the joint reasons of Davies JA and Ambrose J to sustain it, was affected by the error of expression which has been identified. Such a conclusion would require that the appeal be upheld. It could require that the matter be remitted for the proper exercise of the discretion according to the correct principles. However, I do not think that either course is necessary in this case.

The phrase in the joint judgment which has been criticised is to be read in the context of a paragraph which goes on to refer to "the evidentiary onus on this question" as being "plainly on the respondent". Both in the Court of Appeal and in this Court such evidentiary onus was accepted by the appellant as resting on it. An examination of other cases which have been placed before the Court reveals a similar looseness of expression in identifying how and why

(81) eg, the English legislation is expressed in terms of whether "it appears to the Court that it would be equitable to allow an action to proceed": see *Thompson v Brown* [1981] 1 WLR 744 at 748; [1981] 2 All ER 296 at 300 citing s 2D(1) of the *Limitation Act* 1939 (UK) as amended by s 1 of the *Limitation Act* 1975 (UK).

the discretion should be exercised for or against an applicant (82). I am inclined to read the words criticised as meaning that the respondent (as applicant), having made out (as is accepted) the preconditions in pars (a) and (b) of s 31(2) of the Act, and no sufficiently affirmative specific reason of prejudice having been shown by the intended defendant (appellant), a matter upon which it bore the evidentiary onus, the favourable discretion which would otherwise have been exercised in favour of the applicant to provide the extension of time would follow.

The order under attack is supported by the reasons of Fitzgerald P, which are unimpeachable. The order made by the Court of Appeal is scarcely a surprising order given that the respondent satisfied the preconditions, and in doing so demonstrated, quite powerfully the way in which, belatedly, she had come to have knowledge of facts which, she contends, show that the advice given to her was negligent. Moreover, in the reasons of Fitzgerald P an alternative basis is suggested upon which, at trial, the respondent might succeed. Even if the tribunal of fact were to prefer, as accurate, the contemporaneous notes of Dr Chang to the recollections of the respondent, she might still be able to show, by expert evidence, that at the relevant time a proper standard of care obliged Dr Chang to afford her further expert advice and further time for reflection, counselling and consideration before undergoing such an irreversible surgical intervention. In this alternative way, negligence might be established. The appellant argued that such a case was outside the respondent's claim as pleaded. This was not disputed for the respondent. But when the draft statement of claim is examined, it is expressed in the most general terms. The stated complaint (''the Plaintiff was not informed about the true nature of her condition or of alternative treatments available for it'') could mean that she was not properly and fully informed. In the preliminary nature of applications for extension of time, it is usually impossible, and even undesirable, that an extensive pre-trial hearing should be conducted into the applicant's cause of action (83). All that the Act requires is that the applicant should show ''that there is evidence to establish the right of action''. Of necessity, the full exploration of that evidence would have to await a trial, if an extension were granted. At trial, the applicant would bear the onus of establishing her case. In the present instance, her forensic task would not be made easier by the hospital records which would be admissible. This indicates that the case would be hard fought at trial. But it is not, necessarily, a reason

(82) See, eg, *Ulowski v Miller* [1968] SASR 277 at 285; *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419 at 440; *Randel v Brisbane City Council* [1984] 2 Qd R 276 at 286.

(83) cf *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 693-694; affd sub nom *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 740-741.

for denying the respondent the opportunity of a trial as the Court of Appeal considered she should have.

Certainly, some of the language used in the joint reasons of Davies JA and Ambrose J is less than ideal. However, I am not convinced that this warrants the intervention of this Court to substitute, or require, a different order. The lessons of the appeal, in my opinion, are two. The first is that the burden in law to secure a favourable order of extension under s 31(2) of the Act remains on the applicant throughout. This is so notwithstanding the establishment of the preconditions referred to in pars (a) and (b). Care should be taken not only to express that burden correctly but to understand that it is for the applicant to show that it is just that an order should be made. Any burden resting on the defendant is strictly of a forensic kind and limited to any issues of particular prejudice upon which the defendant might be expected to call evidence.

Secondly, the Act, in providing for extensions of time, has incorporated provisions which are protective and beneficial. In the specified circumstances, they afford a privilege to a person to bring a claim, notwithstanding the expiry of the normal limitation period. Such provisions should not be narrowly construed or applied. Although the burden remains on the applicant throughout, once the preconditions are established, that burden is not a heavy one. Most potential plaintiffs will face their real difficulties in establishing the preconditions.

Even when they do, it may still be just, in the particular case, to decline to order an extension having regard to any proved or inferred prejudice to the defendant or to all the circumstances of the case. In judging prejudice, for the purpose of considering the order extending time, the matter to be weighed is the increase of prejudice after the expiry of the ordinary period of limitation. Until that time the law, as expressed in the Act, envisages that the defendant must accept any prejudice or delay without complaint.

Orders

The appeal should be dismissed with costs.

1. *Appeal allowed with costs.*
2. *Set aside the order of the Queensland Court of Appeal and in lieu thereof order that the appeal to that Court be dismissed with costs.*

Solicitors for the appellant, *Minter Ellison.*

Solicitors for the respondent, *Biggs & Biggs.*

DSM