

BEYOND THE 3 YEAR LIMITATION PERIOD

Regardless of whether a person is injured at work, or in a motor vehicle accident or in a public place, there is a myriad of complex pre-court procedural steps that need to be completed, before the injured person can commence proceedings in court. This arises from the different pieces of legislation that now exist, namely the Motor Accident Insurance Act 1994, Workers' Compensation and Rehabilitation Act 2003 and Personal Injuries Proceedings Act 2002.

This legislation details when proceedings can be commenced as a matter of procedure and dictates the procedural steps that need to be taken to protect a person's right to sue. The Limitations of Actions Act Qld 1974 details when is the last day to sue or the steps should be taken to protect that right.

Section 11 of the Limitations of Actions Act 1974 requires an injured person to commence proceedings within 3 years of when the cause of action arises. When an injury occurs on a particular day then the last day to sue is easy to calculate. For example if the accident and injury occur on 30 June 2006, then the last day to commence the claim or take steps to protect a person's interests is 30 June 2009.

However when a person is injured over a prolonged period of time extending in excess of 3 years, and has no symptoms until many years later, can that person sue and recover damages for those negligent events causing injury that occurred more than 3 years ago? This situation often arises in the case of stress claims where a person has been subjected to a stressful work environment for say 10 years, and has developed stress type symptoms in the last few years. Or in cases where a person is exposed to a harmful substance over many years, and has recently discovered that they have a lung or skin condition.

The Limitations of Actions Act allows an injured person an extended period of time in which to sue in certain types of cases; including claims for damages for personal injuries. The Act gives the injured person a further period of 1 year to commence proceedings from the time that person becomes aware of a material fact of a decisive character relating to a right of action, that was not within their means of knowledge, until a date after the commencement of the year last preceding the expiration of the limitation period. See s.31(2).

The courts have been asked for many years to give meaning to the phrase "a material fact of a decisive character relating to a right of action". Once the injured person knows the point in time in which they

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have become aware of a material fact of a decisive character relating to a right of action (this will be referred to as the *critical date*), then they have 1 year from that date (the *critical date*) to commence the claim.

So what does this phrase mean? Does it mean that the critical date is the date when: -

- (a) the person became aware of any material fact, or
- (b) the material fact became decisive, or
- (c) the person became aware of a material fact that relating to a right of action, or
- (d) the person became aware of a material fact, of a decisive character, relating to a right of action.

The Limitations of Actions Act gives some assistance as it provides definitions for some of these terms. For example s.30(1)(a) details when a material fact is said to relate to a right of action. The type of facts that relate to a right of action are facts that: -

- Identify the person against whom the right of action can be brought
- Refer to the nature and extent of the injury
- Identify the occurrence of the negligent act... etc.

S.30(1)(b) sets out when/how the material fact relating to a right of action becomes decisive. A fact becomes or is of a decisive character when, a person becomes aware or should have become aware from taking appropriate advice on those facts, that the possible claim has reasonable prospects of success, there is likely to be a sufficient award for damages that justifies commencing the claim and it is in the persons own interests and circumstances to commence the claim.

The terms *means of knowledge* and *appropriate advice* are also defined in s.30(1)(c) and s.30(2) respectively.

The High Court has recently been asked to interpret this phrase in the cases of REEMAN –v– STATE OF QLD, STEPHENSON –v– STATE OF QLD (17 May 2006). In these cases the Court was required to look at a couple of different facts that were put forward as being material facts of a decisive character relating to a right of action. If these facts were known to each plaintiff, after the critical date, then the proceedings that had already been filed to protect each plaintiff's interests were not statute barred and the plaintiffs were able to proceed.

The majority of the High Court confirmed that the term is a composite one, which cannot be dissected. The question one asks is not when all material facts came within the means of knowledge of the plaintiff. It is when all material facts of a decisive character relating to a right of action came within the knowledge of the plaintiffs.

Their Honours referred to the phrase as having objectively

ascertainable criteria and subjectively ascertainable criteria. The objectively ascertainable criteria are the facts and circumstances that are referred to in s.30(1)(a), - namely the fact of the occurrence of the omission upon which the right of action is founded, the identity of the tortfeasor, the fact that the breach caused the personal injury, the nature and extent of the injury.

The subjectively ascertainable criteria determine when the facts become of a decisive character. It looks to a response of a reasonable person in the manner described in S.30(1)(b). This means that you have to look to those facts that are relevant to the *plaintiff's own interests and taking the persons circumstances into account*.

The practical result is that a plaintiff has one year from when his/her knowledge of a material fact as defined by sub- paragraph (a) coincides with the circumstances that a reasonable person with that knowledge would regard the facts as justifying and mandating that an action be brought in the plaintiff's own interests as referred to in sub-paragraph (b).

Therefore from a practical perspective you look at all the facts that are relevant to the plaintiffs claim and the date on which these facts occurred. The material fact you ultimately rely on must relate to right of action and be decisive by character. The material fact can occur at one point in time and it may become decisive at another point in time. If the material fact relied on occurred before the critical date, and became decisive after the critical date, then the plaintiff has 1 year from the point in time the material fact relating to a right of action becomes decisive in which to commence the claim. The reason for this is that therm is conjunctive one, that cannot be dissected.

The practical result of this decision is that all the relevant facts of the plaintiff's case need to be considered, for example whether that be a termination of employment, a change in the health of the plaintiff, a worsening of a condition, the diagnosis of a new condition etc. However you also look at the circumstances and interests that were particular to the plaintiff and relevant to any decision previously made by the plaintiff not to sue. In the case of *Reeman and Stephenson*, their reason for not commencing their claims sooner was that to do so would have potentially put in jeopardy their applications to retire on the grounds of ill health which would have had a significant negative financial impact to each of them. The material fact, namely their employment was going to be terminated, was known to each plaintiff before the critical date. However the determination of the application for retirement on the grounds of ill health was also relevant and gave the material fact the character of being decisive. Therefore it was the latter point in time, namely when the material fact relating to a right of action became decisive, which occurred after the critical date that was relevant for the purpose of extending the time period in which to sue.

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COMMENT

These cases now have the potential to give the plaintiff a wider opportunity to commence a claim in circumstances where that claim may have previously been considered fruitless - statute barred. In saying that, as a plaintiff, one should not delay in consulting a solicitor and seeking legal advice on whether their particular claim can still be brought.