SUPREME COURT OF QUEENSLAND

CITATION:	*Bermingham v Priest & Nominal Defendant* [2002] QSC 057
PARTIES:	**JUSTINE EILEEN BERMINGHAM** (Plaintiff) **MELISSA PRIEST** (First Defendant) **NOMINAL DEFENDANT** (Second Defendant)
FILE NO/S:	114 of 2001
DIVISION:	Trial
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	19 March 2002
DELIVERED AT:	Cairns
HEARING DATE:	3 December 2002
JUDGE:	Jones J
ORDER:	**1. The application of the defendants is dismissed.** **2. Leave is granted to the plaintiff nunc pro tunc to commence the proceedings commenced by claim filed on 6 August 2001.** **3. The defendants are to pay the plaintiff's costs of and incidental to both applications on the standard basis.**
CATCHWORDS:	INSURANCE – MOTOR ACCIDENT INSURANCE – CLAIMS – CLAIMS PROCEDURES – COURT PROCEEDINGS – where the claimant has filed a complying s 37 notice, but has commenced proceedings before six months have elapsed and the insurer has not advised the claimant of its position on liability – whether the claimant has contravened the provisions of s 39(5)(a) – whether the claimant should have applied for leave under s 39(5)(c) to bring proceedings within 6 months of the complying s 37 notice having been filed - whether the Court has discretion to grant leave to proceed under s 39(5)(c) or generally – whether leave to commence the action can be granted nunc pro tunc. STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – OPERATION AND EFFECT OF STATUTORY PROVISIONS – MOTOR ACCIDENT INSURANCE ACT 1994 ss 39 and 57 – where a complying s 37 notice has been filed – whether the operation of s 57 is

subject to s 39(5) or whether the operation of s 39(5)(1)(a) is subject to s 57

Motor Accident Insurance Act 1994 (Qld) (Reprint 3) ss 37(1), 37(4), 39(1), 39(5), 57(1), 57(2)
Uniform Civil Procedure Rules Rule 660(3)

*Aydar v Pashen (*2001) QDC 292 not followed
Emanuele v Australian Securities Commission (1996-7) 188 CLR 114 followed
Horinack v Suncorp Metway Insurance Ltd (2001) 2 QdR 266 distinguished
McKelvie v Page (1999) 2 QdR 2569 discussed
Project Blue Sky v ABA (1998) 194 CLR 355 followed
Young v Keong (1999) 2 QdR 335 discussed

COUNSEL: Mr. P. Ambrose for the plaintiff
Mr. M. Glen for the defendant

SOLICITORS: Kyle Spina & Waldon for the plaintiff
Gadens Lawyers for the defendants

[1] Before me are two applications which raise an issue of general importance for persons seeking to claim damages where the provisions of the *Motor Accident Insurance Act* 1994 ("the Act") apply and where proceedings are brought close to the expiration of the statutory limitation period.

[2] The first application is made by the defendants for the plaintiff's claim to be struck out or, alternatively, that judgment be entered for the defendants. The second is by the plaintiff for leave, nunc pro tunc, to commence these proceedings. Both applications can conveniently be heard together.

Background facts

[3] The plaintiff, who was born on 12 July 1973, was injured on 12 August 1998 when the motor vehicle in which she was a passenger collided with another vehicle on the Normanton-Burketown Road in North Queensland.

[4] The licensed insurer of one of the vehicles at the time of the incident was FAI Insurance Limited whose obligations were later undertaken by the Nominal Defendant, the present second defendant. For convenience I will refer to both these entities simply as "the insurer".

[5] The plaintiff gave notice pursuant to s 34 of the Act on 16 November 2000 and the insurer's response to that notice was received by the plaintiff's solicitors on 23 November 2000.

[6] Notice of claim pursuant to s 37 of the Act was given to the insurer on 6 April 2001. On 23 April 2001 the insurer accepted the plaintiff's notice of claim as complying with the Act, signifying its acceptance of the plaintiff's explanation for

late notification. The insurer had not admitted liability, wholly or in part, prior to the institution of the proceedings.

[7] The plaintiff commenced proceedings in this Court on 8 August 2001, just within the normal three year period of limitation provided under the *Limitation of Actions Act* 1974 ("the Limitation Act"), but only four months after the giving of the notice of claim.

[8] The defendants argue that by commencing these proceedings just four months after giving that notice, the plaintiff has contravened the provisions of s 39(5). These provisions preclude the taking of such a step for six months. Thus she can no longer maintain the action. They argue that this Court has no discretion to grant leave to proceed under s 39(5)(c) or generally and rely particularly on the Court of Appeal decision in *Horinack V Suncorp Metway Insurance Ltd*[1] and an unreported decision of the District Court in *Aydar v Pashen & Nominal Defendant*[2].

[9] The plaintiff argues that in the circumstances of this case *Horinack* is not authority for the proposition that the Court cannot grant leave. It is submitted that insofar as the issue raised in *Aydar* is the same, the decision of the learned district Court Judge is incorrect because he felt himself bound by the authority of *Horinack* when, in fact, that case was distinguishable.

[10] The resolution of this dispute depends on the proper construction of various provisions of the Act to which terms I shall now refer.

Statutory provisions

[11] The relevant terms of the three statutory provisions which need to be considered are:

> "**Notice to be given by claimant**
> **37.(1)** Before bringing an action in a court for damages for personal injury arising out of a motor vehicle accident, a claimant must give written notice of the claim to the insurer…against which the action is to be brought –
> (a) Containing a statement, sworn by the claimant, of the information required by regulation; and
> (b) Containing an offer of settlement, or a sworn statement of the reasons why an offer of settlement cannot yet be made; and
> (c) Accompanied by the documents required by regulation.
> …
> **(4)** If the notice is not given within the time fixed by this section, the obligation to give the notice continues and the notice, when given, must contain an explanation of the delay…"
> **Response to the notice of claim**
> **39.(1)** If a notice of claim is given to an insurer under this division or purportedly under this division-

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1 (2001) 2 QdR 266
2 (2001) QDC 292 delivered 16 November 2001

(a) the insurer must, within 1 month after receiving the notice of claim (even though the notice may have been given out of time), give the claimant written notice –

(i) stating whether the insurer is satisfied that the notice has been given as required under this division; and

(ii) if the insurer is not satisfied – identifying the noncompliance and stating whether the insurer waives compliance with the requirements; and

(iii) if the insurer does not waive compliance with the requirements – allowing the claimant a reasonable period (at least 1 month) specified in the notice either to satisfy the insurer that the claimant has in fact complied with the requirements or to take reasonable action specified in the notice to remedy the noncompliance; and

(b) if the insurer is not prepared to waive compliance with the requirements in the first instance – the insurer must, within 1 month after the end of the period specified under paragraph (a)(iii), give the claimant a written notice –

(i) stating that the insurer is satisfied the claimant has complied with the relevant requirements, is satisfied with the action taken by the claimant to remedy the noncompliance or waives the noncompliance in any event; or

(ii) stating that the insurer is not satisfied that the claimant has taken reasonable action to remedy the noncompliance, with full particulars of the noncompliance and the claimant's failure to remedy it.

…

(5) A claimant may bring a proceeding in a court for damages based on a motor vehicle accident claim only if –

(a) the claimant has given notice to an insurer who may be liable on the claim under the statutory insurance scheme as required under this division or the insurer has waived compliance with the requirement and –

(i) at least 6 months have elapsed since the notice or the waiver was given; or

(ii) the insurer has denied liability on the claim; or

(iii) the insurer has admitted liability but only in part and the claimant has given the insurer written notice that the extent of liability is disputed; or

(b) the court, on application by a claimant dissatisfied with the insurer's response to a notice of a claim under this division, declares that –

(i) notice of claim has been given as required under this division; or

(ii) the claimant is taken to have remedied noncompliance with this division; or

(c) the court gives leave to bring the proceeding despite noncompliance with requirements of this division."

Alteration of period of limitation
57.(1) If notice of a motor vehicle accident claim is given under division 3 (Claims procedures), or an application for leave to bring a proceeding based on a motor vehicle accident claim is made under division 3, before the end of the period of limitation applying to the claim, the claimant may bring a proceeding in court based on the claim even though the period of limitation has ended.
(2) However, the proceeding may only be brought after the end of the period of limitation if it is brought within 6 months after the day on which the notice is given or leave to bring the proceeding is granted."

[12] The scheme of the Act provides for early notice of a motor vehicle accident to be given to an insurer by the driver and by a person who proposes to claim damages for personal injuries. (Section 34)

[13] In the case of an identified motor vehicle, before a claimant can commence court proceedings, a written notice of claim must be given to the insurer, or one of the insurers, within nine months of the accident. That notice must contain a statement sworn by the claimant of certain prescribed information. If such notice is not given within nine months of the accident then the notice must contain an explanation of the delay. (Section 37)

[14] The insurer is then required, within one month of its receipt of the notice of claim to respond, stating either –

(i) its satisfaction with the notice;
(ii) identifying any non-compliance with the requirements and stating whether the non-compliance is waived; or
(iii) if not waiving non-compliance, allowing time for further action by the claimant.

For convenience I will refer to a notice, where non-compliance has been waived or where the court has made s 39(5)(b) declarations, as a "complying notice". The only point of distinction – fixing the commencement of the six month period before bringing proceedings – has no relevance to the issues in dispute here.

[15] The importance of having a complying notice is demonstrated by the terms of s 39(5) which imposes restrictions on the bringing of court proceedings for damages. Paragraph (a) of the subsection provides a temporal restraint, except where there is a denial or partial denial of liability by the insurer. This temporal restraint applies to all claimants. Paragraphs (b) and (c) provide remedies for claimants whose notices, the insurer says, are non-complying.

[16] The evident purpose of the temporal restraint on a claimant with a complying notice is to give effect to s 41 of the Act, which imposes an obligation on the insurer to attempt to resolve the claim. This section requires the insurer, within a six month

period, to undertake reasonable inquiries, to make an estimate of damages, to consider the plaintiff's offer to settle and if appropriate, to make a counter offer.

[17] A consequence of the provision requiring the elapse of six months before the commencement of proceedings is the potential conflict between that provision and a right of action being barred by the effects of the Limitation Act. This tension is met by s 57 of the Act which extends the time within which proceedings can be commenced to a date six months after the day on which a complying notice is given.

[18] By s 57(2), a proceeding commenced after the expiration of the limitation period must be commenced **within** that six month period or upon leave of the court.

[19] By requiring a proceeding to be commenced "within the six months period" there cannot be any realistic compliance with the requirements of s 39(5)(a)(i) that a proceeding can be commenced only if six months have elapsed. A suggestion that there could be compliance with both sections if the action was commenced on the single day of grace arising from the words "six months after the day on which notice is given" would, in my view, be an absurd and unintended result of this legislation.

The issues

[20] Mr. Glen of counsel, who appeared for the defendants, argued that compliance with s 39(5)(a) is a mandatory requirement relating to the institution of proceedings; that it was a pre-condition to their commencement; that it breached a substantive, rather than a procedural, provision; and consequently, that proceedings commenced in contravention of the condition are a nullity.

[21] The defendants further argue that leave to proceed can only be sought prior to the commencement of the proceedings. In this argument, reliance was placed on the prefatory expression "only if" as it appears in s 39(5). The leave there being referred to is leave pursuant to s 39(5)(c) – to commence despite non-compliance with the requirements of division 3. What requirements are identified by this expression is open to some question which will be dealt with later.

[22] The defendants further argue that the plaintiff's application for leave cannot be entertained after the period of limitations, as extended by s 57(1) of the Act, has expired.

[23] Section 57 alters the ordinary period of limitation only if one of two alternative events has occurred before the expiration of the ordinary period of limitation. Such an event is –

(i) Where a complying notice of claim has been given; or
(ii) Where an application for leave is made under division 3.

It is worth reiterating that these events are presented as alternatives. This at least suggests that leave would not ordinarily be sought where there is a complying notice of claim.

Resolving the arguments

[24] The defendants' argument is based on the premise that the plaintiff is in the position of the second alternative – having to apply for leave pursuant to s 39(5)(c) of the Act. This is why the defendants contend that the decision of *Horinack* (supra) determines the outcome of this application. In *Horinack* the claimant had not given a complying notice. The claimant had not given notice of claim within the nine months prescribed by s 37 and her notice of claim did not contain any explanation for her delay as was required by s 37(4). Those deficiencies were not overcome by the fact that a solicitor's letter set out some relevant detail. The claimant in *Horinack* was in the position of the second alternative and the terms of s 57(1) expressly require a non-complying claimant seek leave "before the end of the (ordinary) period of limitation". That distinction between a claimant with a complying notice of claim and a claimant with a non-complying notice was clearly made by the Court of Appeal in passages at paragraphs [8], [19], [20] and [21]:-

> "[8]. The period of limitation of three years provided for in the *Limitation of Actions Act* 1974 in respect of Ms Horinack's personal injury claim expired on 30 January 1999. <u>If her notice of claim complied with the requirements of s 37 of the Act then the limitation period applicable to her claim, by virtue of s 57(1) and (2) of the Act, was extended to 4 (or 6) July 1999.</u> (my emphasis)
> …
> [19]. This means that a claimant may bring a legal proceeding based on a motor vehicle accident of the kind covered by the Act in one of two circumstances:
> - If a notice of claim has been given under the claims procedure in division 3 (and this must be a reference to a complying claim), or
> - An application for leave to bring the legal proceeding based on such a claim is made (which must be a reference to an application made pursuant to s 39(5)(c)….
>
> This six-months provision is reflected in s 39(5)(a)(i) which permits a claimant to bring proceedings in a court only when six months have elapsed after the claimant has given notice of the claim or the insurer has waived compliance with the notice requirements. That six-month period is further reflected in s 57(2) which extends the limitation period by six months when an application for leave to bring a proceeding is made within the period of limitation.
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> [20]. It follows that s 39(5)(c) does not confer a general discretion on a court to give leave to bring a proceeding in a court despite non-compliance, if the application to do so is brought outside the period of limitation. There is, therefore, no basis as a matter of construction for making such an order *nunc pro tunc* and it follows that the statement in *McKelvie v Page* [1999] 2 QdR 259 that leave can be granted *nunc pro tunc* cannot stand.
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> [21] … Suffice it to comment that s 57(2) extends the period of limitation by six months if there is a *conforming* notice of claim, but the legal proceeding must be commenced within that six months."

[25] Thus in *Horinack* it was the application for leave relative to a non-complying notice which could not be made after the ordinary period of limitation had expired. As the Court of Appeal was not considering the case where the claimant had given a complying notice of claim, the comment in paragraph [21] is not necessarily authoritative. The reference to the overruling of *McKelvie v Page* in paragraph 20 above was made on the basis that the relevant notice in *McKelvie* was non-complying at the time[3] the period of limitation expired. The subsequent declaration of compliance could not relate back to the notice because of s 41(3)(b) of the Act.

[26] Many of the arguments raised before me were rehearsed in *Aydar*'s case where the issue was identical with the one for determination here. The learned District Court Judge in that case identified the difficulties in construing the statutory provisions together as appears in the following passage: -

> "Nevertheless if an order for leave *nunc pro tunc* can never be made under s 39(5)(c), it does pose a serious difficulty for a claimant within the last six months of the ordinary period of limitation. If a complying notice of claim is given, and the insurer does not oblige by denying liability or denying liability in part, it seems that proceedings cannot be commenced at all: if they are commenced in the first six months after the notice then they will be struck out for breach of s 39(1)(a)(i), and if they are commenced subsequently they will be statute barred. If an application is made under s 39(1)(c) prior to commencing proceedings, there has been at that stage no noncompliance with the requirements of the division, so there is no basis for giving leave to commence proceedings notwithstanding noncompliance. There will be noncompliance which can found the jurisdiction under s 39(5)(c) if the proceedings are commenced first, but if that occurs, an application for leave will be futile, even if made within the limitation period, if leave cannot be given *nunc pro tunc*."[4]

[27] His Honour then took the view that, notwithstanding that the period of limitation was extended by virtue of the claimant's complying notice, there could be no compliance with s 39(5)(a)(i) – the elapse of six months after the giving of notice. Consequently, the learned judge felt this inevitably led to "non-compliance with the requirements of this division"[5] i.e. **Division 3 – Claims Procedures.** His Honour concluded this gave rise to a need to seek leave under paragraph (c) s 39(5). If this were the correct interpretation it would necessarily follow that <u>in every instance</u> where notice of claim, complying or otherwise, is given within six months of the expiration of the ordinary limitation period, it would be necessary to make application to the court for leave.

[28] Such an interpretation, in my respectful view, renders worthless the important right given by s 57 to commence proceedings "within six months after the day when notice is given". It also makes otiose the distinction in the terms of s 57(1) between a complying notice of claim and an application for leave.

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3 See *McKelvie v Page* (1999) 2 QdR 259 at p 261[8]

4 *Aydar* (supra) at para 16.

5 See *Aydar* (supra) at para 11

[29] The policy underlying such provisions as ss 37 and 39 of the Act is to encourage early resolution of claims and to force a claimant towards negotiating a settlement before bringing an action for damages. To that extent, the purpose or effect of those provisions is procedural or forensic. See *Young v Keong*[6] per McPherson JA at p 337. To the extent that the terms of s 39(5)(1)(a) takes away a right by reducing the period of limitation, s 57 restores that right, but subject to compliance with requirements as to the giving of notice. In my view, therefore, the effect of s 39(5)(1)(a) must be read subject to the terms of s 57 which allow proceedings to be brought within six months of a complying notice. If leave to bring the proceeding is necessary, that leave is granted pursuant to s 57(2).

[30] The defendant argues to the contrary asserting that, because s 39(5) is couched in mandatory terms, s 57 must be read subject to those provisions. In my view it is not helpful, in the context of the tension between these competing provisions, to speak in terms of whether a provision is mandatory or directory. In *Project Blue Sky v ABA*[7] the judgment of the majority (McHugh, Gummow, Kirby and Hayne JJ) said:-

> "In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* (71) in criticising the continued use of the "elusive distinction between directory and mandatory requirements" (72) and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning (73). That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales (74). In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute"(75)."

[31] The relevant object of the Act is to provide the speedy resolution of personal injury claims. If the purpose of s 57 is to retain the right for a complying claimant to bring proceedings for damages, which right would otherwise be lost in meeting the policy requirements referred to above, then the principal object would be defeated. Proceedings commenced pursuant to that right should not, in my view, be dismissed for non-compliance with forensic provisions.

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6 (1999) 2 QdR 335/337

7 (1998) 194 CLR 355 at 390

[32] There is no difficulty in reconciling the apparently conflicting provisions, if the non-compliance referred to in paragraph (c) of s 39(5) is limited to the non-compliance with the notice provisions in Division 3. Then the uncertainties which were identified by the learned District Court Judge in *Aydar* (supra) are avoided.

[33] The next question is whether the leave to commence the action in non-compliance with the six month restraint can be granted nunc pro tunc. Counsel for the defendants argued that leave could, and necessarily should, have been sought before proceedings were instituted. He was suggesting this in the context of leave being sought pursuant to s 39(5). But at the time of making any such application there would be no existing non-compliance to found the application, merely prospective non-compliance. That problem would not arise if s 57(2) is the source of the right to seek leave, as I consider to be the case. Leave could certainly be sought prior to commencement of proceedings which were to be commenced within the period of extended limitation. But a failure to do so does not, in my view, render the proceedings a nullity.

[34] The Court has power, pursuant to Rule 60(3) of the *Uniform Civil Procedure Rules,* to order that the grant of leave can "take effect as of an earlier date". The principles which determine whether such power can be exercised with respect to requirements of particular statutes were considered in *Emanuele v Australian Securities Commission*[8]. There the High Court considered the power of a court to grant leave nunc pro tunc to ASC to apply for the winding-up in an insolvency of a group of companies pursuant to s 459P(2) of the *Corporations Law.* In so doing, the High Court resolved a difference between two streams of authorities which had arisen in various jurisdictions in Australia. In his reasons, Kirby J identified seven characteristics[9] which led to his conclusion that in respect of the relevant provisions of the Law the Court had power to grant leave nunc pro tunc. I draw from some of those characteristics which are of general application. Kirby J (at p 152) said:-

> "It is trite to say, but worth repeating, that the power of a court, such as the Federal Court, to correct obvious slips by orders in appropriate cases nunc pro tunc is one granted by legislation and the rules and implied in the express powers of the Court to avoid injustice (122). There is a reason for the tendency in the series of cases cited by McHugh JA in *Woods v Bate* (123) and in other cases to like effect, for the reluctance of courts in recent times to invalidate acts done pursuant to a statutory provision because of a failure to comply with a prior procedural condition. Courts today are less patient with meritless technicalities. They recognise the inconvenience that can attend an overly strict requirement of conformity to procedural pre-conditions."

He further stated (at p. 156):-

> "The general rule is that an irregularity of procedure does not invalidate or make void orders otherwise within the jurisdiction of such a court (135). It is not obvious why the Full Federal Court, having jurisdiction, would not enjoy the large powers expressly conferred upon it, as well as those implied in the establishment of

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8 (1996-7) 188 CLR 114

9 at pp 152-7

> the Federal Court as a court, to correct obvious procedural slips where justice required that course."

These remarks have equal application to this Court.

[35] I not detected anything in the provisions of the Act which militate against those general propositions. Although s 39(5) of the Act is couched in emphatic language, which prompted the counsel for the defendant to speak in terms of its provisions being mandatory, that language probably reflects the different style of drafting which modern legislation appears to have adopted. I do not regard the terms of the subsection as indicating a reduced scope for the right conferred by s 57 of the Act. More significantly, it would have been open to the legislators to provide explicitly for the time at which the leave referred to in s 57(2) had to be sought. This was not done and so there is no reason for the Court to take the view that its ordinary power has in anyway been constrained.

[36] Moreover, having regard to the purpose of the six month restraint on the commencement of proceedings as being one of a forensic nature, there would be a serious injustice to a person, who had complied with the notice requirements of the Act and had commenced an action within the ordinary period of limitation, to be denied his or her right to sue. By contrast, the reason for the six month restraint does not support any underlying principle dealing with substantive rights which would lead to the adoption of strict approach contended for by the defendants.

[37] For these reasons I would dismiss the defendant's application and grant the leave sought in the plaintiff's application.

Orders

[38] My orders are as follows:-

1. The application of the defendants is dismissed.

2. Leave is granted to the plaintiff nunc pro tunc to commence the proceedings commenced by claim filed on 6 August 2001.

3. The defendants are to pay the plaintiff's costs of and incidental to both applications on the standard basis.