SUPREME COURT OF QUEENSLAND

CITATION:	*Miller v Nominal Defendant* [2003] QSC 081
PARTIES:	**HARRY ROBERT MILLER** (applicant) **v** **NOMINAL DEFENDANT** (respondent)
FILE NO/S:	SC No 10485 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 December 2002
JUDGE:	Fryberg J
ORDER:	**Further proceedings based on the applicant's claim conditionally authorised despite non-compliance with s 37 of the *Motor Accidents Insurance Act* 1994**
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – Where identity of vehicle cannot be established – Queensland – Generally – Separate notice under s 37(3) of the *Motor Accident Insurance Act* 1994 – Whether notice may be given after giving notice of claim – Whether notice may be given after the expiry of the nine month period specified in s 37(3) *Motor Accident Insurance Act* 1994, s 37(3), s 39(5) *Re Tonks* [1999] 2 Qd R 671, followed
COUNSEL:	R W Morgan for the applicant K N Wilson SC for the respondent
SOLICITORS:	Irish Hughes & Bentley for the applicant O'Shea Corser & Wadley for the respondent

[1] **FRYBERG J:** Mr Harry Miller wants to sue the Nominal Defendant. He applies for the following orders:

> "1. An order that the excuse provided by the Applicant is reasonable within the meaning of Section 37(3) of the Motor Accident Insurance Act; or
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> 2. In the alternative, that the Applicant be granted leave to file proceedings notwithstanding non-compliance with section 39(5)(c) of the Motor Accident Insurance Act."

[2] Mr Miller is a bus driver for the Brisbane City Council. On 18 February 2002 he was driving an empty bus along Ann Street, Brisbane in the course of his employment. He claims that at the intersection of Ann Street with George Street a car travelling in the lane immediately to his right (Ann Street is a one-way street) suddenly cut in front of his bus at high speed. He says that he had to swerve quickly to avoid a collision. The car did not stop and he was unable to get any particulars of it. He claims his shoulder was injured in the incident. He continued driving until the end of his shift using his uninjured arm but, he claims, only with difficulty. He then informed his supervisor of the injury and filled out a workers' compensation form.

[3] Overnight the pain worsened. Early the following morning he called his supervisor and advised that he was unable to do his run. He went to his local GP, Dr Zolte that morning and was given a medical certificate excusing him from work duties. On the following day his shoulder was x-rayed. He saw Dr Zolte again on 21 February and was given what he called a "WorkCover certificate". He remained off work for the next three months. Apparently he saw a physiotherapist named Morley about 12 April and on 8 May, at the behest of WorkCover, he saw Dr Martin. On 14 May Dr Martin reported to WorkCover, "I do not consider that Mr Miller is now suffering from any injury to his left shoulder resulting from the alleged event of 18 February 2002. I consider that Mr Miller is physically fit for his normal employment, namely bus driver." Doubtless as a result of that report, WorkCover ceased paying workers' compensation on about 18 May. On about 22 May, Mr Miller was (I infer) given reasons for the decision to cease the payments. By then, more than three months had elapsed since the alleged incident.

[4] On 23 May Mr Miller went to see his present solicitors, Messrs Irish Hughes and Bentley. On 10 July they sent a written notice of motor vehicle accident claim (which I shall call a notice of claim for short) to the Nominal Defendant, which received it the following day. The solicitors sent the notice because s 37(1) of the *Motor Accident Insurance Act 1994* requires a claimant to give such notice before bringing an action in a court for damages for personal injury arising out of the motor vehicle accident[1]. By the time the notice was received nearly five months had expired since the alleged incident. That meant Mr Miller had not complied with s 37(2), which required the notice to be given within three months. That in turn brought s 37(3) into play:

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[1] The notice did not fully comply with s 37(1) (see para [5]), but that difficulty has since been rectified and is not relevant to the present application.

> "(3) If notice of a motor vehicle accident claim is not given within the time fixed by this section, the obligation to give the notice continues and a reasonable excuse for the delay must be given in the notice or by separate notice to the insurer but, if a motor vehicle can not be identified and the notice is not given to the Nominal Defendant within 9 months after the motor vehicle accident, the claim against the Nominal Defendant is barred."

The first order which Mr Miller now seeks is an order that he has provided a reasonable excuse.

Attempts to provide a reasonable excuse

[5] Mr Miller did not attempt to give any excuse for the delay either in his notice of claim or concurrently by a separate notice. On 16 July the Nominal Defendant wrote to the solicitors and drew attention to that omission:

> "This notice has not been given within the time prescribed under Section 37(2) and accordingly, a reasonable excuse for the delay is required pursuant to Section 37(3). We expect that this separate notice would be submitted in a format approved by regulation, ie. signed by your client and appropriately witnessed, and returned within the time frames specified in Section 37(3).
>
> Also we take issue with the following:-
>
> - Your client has failed to supply proper notice pursuant to s34 of the Act and accordingly we consider his response to Question 4 on the NOAC unacceptable;
> - In response to Question 5 on the NOAC, your client has failed to indicate his weekly or annual income.
>
> We do not waive compliance and will allow until 16 August 2002 to remedy the non-compliance.
>
> Within 14 days of the date specified above we will further respond as required by Section 39(1).
>
> …
>
> We draw to your attention that for the purpose of compliance with Division 3 of Part 4 of the above Act, where a notice pursuant to Section 37 does not in the first instance comply with such Division, the date of the notice is deemed to be the date upon which the Nominal Defendant waives compliance by the claimant with the provisions of such Division or notifies the claimant that it is satisfied the claimant has taken reasonable action to remedy the non-compliance.
>
> …

> In addition, pursuant to Section 37A of the Act, we request that your client complete an Additional Information Form (AIF) and forward it to this office. We draw your attention to your client's obligations and to the timeframes prescribed under Section 37A(3) of the Act."

[6] There are several points to be made about that letter. To begin with, the author plainly accepts in the first paragraph quoted that the separate notice containing the reasonable excuse was not required to be given concurrently with the notice of claim. That position continued in later correspondence. Nothing in the section suggests the contrary, nor was it argued that the separate notice was required to be given concurrently. I hold that the section authorises the separate notice to be given after the notice of claim is given. Obviously it may instead be given at the same time as the notice of claim. Whether it may in some circumstances be given before the notice of claim I need not decide.

[7] Second, the non-compliance referred to in the third quoted paragraph (the time for remedying which is extended to 16 August) is that set out in the immediately preceding paragraph (the two dot points). It does not include the failure to give a reasonable excuse. That is evident from the reference in the first paragraph to the return of the separate notice "within the time frames specified in Section 37(3)", clearly something distinct from the time specified in the third quoted paragraph. In other words, the period until 16 August was not one "allowed" for delivery of the separate notice.

[8] Third, the letter did not require Mr Miller to remedy any non-compliance constituted by a failure to give the notice of claim within three months[2]. It simply drew attention to the need for a reasonable excuse to be provided. In that regard the omission of a requirement to remedy was quite correct. Providing an excuse does not remedy a non-compliance, it justifies it. Ordinarily, where non-compliance with a statute is constituted by a failure to do something required by the statute, it may be remedied by doing that thing; but where it is constituted by a failure to do something within a specified time or by a fixed date, it is impossible to remedy it after that time has elapsed or the date has passed. History cannot be reversed. A requirement to remedy the non-compliance with the time limit would be fatuous. In the present case however, the obligation to give a notice of claim is a continuing obligation. It was therefore capable of being satisfied by a later notice.[3] Mr Miller gave a notice on 10 July (or possibly 11 July). What was not satisfied by that notice was the obligation to give a reasonable excuse for the delay. That appears to be the attitude taken by the Nominal Defendant. When the Nominal Defendant received the notice it was correct not to require Mr Miller to remedy the non-compliance constituted by his failure to give it within three months. It was also entitled to insist upon being given a reasonable excuse.

[9] Fourth, the expectation expressed in the first quoted paragraph is difficult to understand. I was not referred by counsel to a format approved by regulation for the separate notice and I have been unable to find one. It appears from later

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2 See s 39(1)(a)(iii).

3 I am conscious that this might be thought to be contrary to a dictum of Davies JA in *Thomas v Transpacific Industries Pty Ltd* [2003] 1 Qd R 328 at p 338, para [28]. However it does not appear that his Honour's attention was drawn to the continuing nature of the obligation to give notice of claim; and in any event he was discussing the Act as it was before the amendments made by the *Motor Accident Insurance Amendment Act 2000*.

correspondence[4] that the author of the letter had s 10(4) of the *Motor Accident Insurance Regulation 1994* in mind. However, s 10 applies to a "notice of claim" and despite the definition of that term in s 3, it cannot sensibly be applied to a separate notice giving a reasonable excuse under s 37(3) of the Act. That approach gains support from the definitions of "claim" and "motor vehicle accident claim" in s 4 of the Act.

[10] The reference to the time frames specified in s 37(3) is also puzzling, since that section does not specify time frames. If the author had the additional information form in mind it may be that the reference is intended to be to s 37A(3); but the later correspondence just referred to suggests that it was the notice of claim form, not the additional information form, which was intended to be referred to. It is unnecessary to resolve that matter.

[11] Mr Miller's solicitors responded to that letter on 15 August. The response does not purport to provide any excuse for the late delivery of the notice of claim. On the contrary, it seems to assert that none can be given: "Due to a changeover in staff, it is unclear how the S37 Notice came to be given outside the prescribed time limit." It should be observed that there is no suggestion in the response that Mr Miller was under any misapprehension as to what the time limit was; and there was no suggestion before me that the solicitors failed to obtain proper instructions from him before the letter was sent.

[12] The Nominal Defendant replied to that letter on 26 August:

> "We refer to your letter of 15 August 2002.
>
> We are not prepared to accept that the notice complies with the requirements of the Act, particularly as your client has failed to supply the notice in a form approved by regulation and also, we have real reservations that the excuse so far supplied would be considered by a Court as being reasonable.
>
> We will allow you until 26 September 2002 to remedy the situation."

[13] There were then several telephone conversations between employees of the solicitors and the Nominal Defendant. Those conversations led the Nominal Defendant to write again to the solicitors on 29 August. That letter read (as far as is relevant):

> "With respect, we would have thought that the second paragraph of our letter of 16 July 2002 was unequivocal as to what was required. We reiterate that we do not think that your client has supplied a reasonable excuse for the delay in providing notice nor do we think that it has been provided in a format approved by regulation.
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> We will allow your client until 18 November 2002 to remedy the situation after which we will consider your client's claim statute barred."

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4 Exhibit LM5.

[14] At the behest of his solicitors, and in response to that letter, Mr Miller signed a statutory declaration on 11 September. This was sent to the Nominal Defendant on 17 September. It is a confused document and it will be necessary to refer to it in more detail later. For present purposes it is enough to refer to only part of it:

> "4. … I advise that I was on WorkCover benefits until 22nd May 2002, as I was deemed unfit for work.
>
> 5. Indeed during this time (between 18th February 2002 – 22nd May 2002), as advised by my doctor I concentrated all my efforts into recuperating and getting myself back on my feet.
>
> 6. It was my understanding, from my very limited knowledge of law, and the information I obtained from friends and family that I had nine months in which to lodge a Notice of Accident Claim Form. I was not aware that I had other obligations under the Act."

[15] The Nominal Defendant replied on 23 September:

> "…
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> It is our position that ignorance of the law does not constitute a 'reasonable excuse' for the delay in providing notice and that the statutory declaration does not indicate any reason why your client could not ascertain knowledge of his legal rights and provide appropriate notice within the three month period.
>
> We are not satisfied that your client's notice complies with the requirements of the Act with regard to s37(3), and are not prepared to waive compliance.
>
> As the nine month period from the date of accident has not yet expired, we are prepared to give your client until 18 November 2002 an opportunity to supplement the statutory declaration by providing any further relevant information in a notice in the form contemplated by s37(3).
>
> We again draw your attention to the fact that neither the Nominal Defendant nor a Court can waive compliance outside the nine month period."

[16] As a result, Mr Miller signed another statutory declaration, as he put it "at the instructions of my solicitors". As far as is presently relevant it stated:

> "I am advised that further particulars are requested with respect to why I did not lodge my Section 37 within 3 months of the accident, I advise as follows:
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> (a) Before the 18th day of May 2002, a friend advised me that they had searched the internet, in particular the Motor Accident Insurance Commission web site, and the information on that web site stipulated that I had either 3

months in which to notify the Nominal Defendant **or** alternatively 1 month from consultation with a solicitor.

(b) Accordingly I ensured that my Section 37 Notice was lodged within 1 month of first consulting my solicitor.

(c) I confirm that I relied on this information which was obtained from a government web site."

[17] The Nominal Defendant's response (as far as is relevant) was:

> "…
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> We have been unable to distil any clear reason from your client's statutory declarations of 11 September 2002 and October 2002 as to why your client did not give notice within three months. Notice is hereby given that the Nominal Defendant is not satisfied that your client has remedied the non-compliance with section 37(3), and is not prepared to waive that non-compliance.
>
> The Nominal Defendant will allow your client until 18 November 2002 to provide notice in the appropriate form (which by regulation 10(4) must be "signed and witnessed" by your client) containing a reasonable excuse for the delay in giving notice of the claim. If the non-compliance is not remedied within that time, then your client's claim will be statute barred".

[18] Mr Miller made no further attempt to provide the Nominal Defendant with a reasonable excuse and, after further correspondence between solicitors, the present application was commenced.

Did Mr Miller give a reasonable excuse for the delay?

[19] The first order which Mr Miller seeks is in the nature of declaratory relief. It relates not to the delivery of the notice of claim but to the provision of the separate notice giving a reasonable excuse. Both the terms of the order and the presentation of the argument in support of it suggest that it is not sought under s 39(5)(c) of the Act. The argument for Mr Miller is that he has complied with his obligation to give a reasonable excuse by providing that excuse in a separate notice to the Nominal Defendant. He does not seek a declaration that he has remedied a non-compliance; he seeks a declaration that he has complied. In my judgment it is open to him to adopt this procedure. Section 37 does not require the separate notice to be given concurrently with the notice of claim[5]. It prescribes no time within or by which a separate notice must be given. The obligation to give it attaches at the latest when the notice of claim is given, but no time is fixed for fulfilment of that obligation. In my judgment it was clearly open to him to fulfil it at least until the expiry of nine months from the date of the incident[6]. If the circumstances described above constitute giving a reasonable excuse, then Mr Miller is entitled to a declaration of compliance in the general jurisdiction of the court. He does not have to seek a declaration that he has remedied non-compliance under s 39(5).

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5 See para [6].

6 Whether it was open to him to do so thereafter is discussed below, para [38].

[20] The major difficulty in identifying whether Mr Miller gave a reasonable excuse to the Nominal Defendant is identifying precisely what he relies upon as constituting his excuse in the documents sent on his behalf to the Nominal Defendant. Until the application was brought the only documents in which such an excuse might conceivably be found were the two statutory declarations the relevant parts of which are quoted above. It was argued on behalf of Mr Miller first that Mr Miller concentrated all his efforts on recuperation throughout the relevant three-month period[7]. That is a very vague proposition when viewed as an attempt to satisfy the statutory requirement. I am unable to see how any such concentration would have prevented the submission of a notice of claim. Moreover Mr Miller did not in terms say that this concentration was the reason for his omission to submit the notice. The section seems to require a causal connection between the subject matter of the excuse and the omission to give the notice of claim. Given the vulnerability of the Nominal Defendant to fraudulent claims it is entitled to insist on the connection being clear. In my judgment the Nominal Defendant was correct in its view that para 5 of the first statutory declaration did not constitute giving an excuse within the meaning of s 37(3).

[21] The second matter of excuse relied upon by Mr Miller was that set out in para 6 of the same statutory declaration. There Mr Miller asserted that he understood that he had nine months in which to lodge the notice of accident. In this case one can infer an assertion that this understanding was the reason for non-lodgement. It is implicit in the paragraph that Mr Miller was aware of the possibility of making a claim against the Nominal Defendant and that a time limit applied for doing this. His assertion is simply that he was mistaken as to the length of that limit. However, he conceded that his understanding was based on "very limited knowledge of law and the information I obtained from friends and family". In my judgment it was not reasonable for Mr Miller to place reliance on information obtained from such fragile sources. He ought to have consulted a solicitor. A reasonable man in his position would have done so. Even assuming the truth of what Mr Miller said in para 6, it did not amount to a reasonable excuse.

[22] There is another difficulty in accepting that paragraph as constituting a reasonable excuse. It is that I am not satisfied that Mr Miller's assertion was true. In order to obtain a declaration Mr Miller must in my judgment satisfy the court of the truth of the excuse given to the Nominal Defendant. In assessing the truth of the excuse the court is not limited to the material given to the Nominal Defendant or otherwise known to it at the relevant time. It may assess the truth of the excuse in the light of all the evidence placed before it. I remain unsatisfied because of the inconsistency between the excuses put forward by Mr Miller in the two statutory declarations and because of the unsatisfactory nature of his evidence on this point during the hearing. I found that evidence, both in his affidavit and in the witness box, vague and at times evasive. I do not mean by this that he was a wholly unreliable witness; simply that his evidence on this point was unsatisfactory.

[23] That brings me to the third matter relied upon by Mr Miller as an excuse: his assertion in para 3 of his second statutory declaration that the reason he did not lodge "my Section 37" within three months was that at some unspecified date before 18 May a friend told him (as was the case) that the information on the Nominal Defendant's web site stipulated that he had either three months [from the accident]

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7 Para 5 of his first statutory declaration.

or one month from the date of consultation with a solicitor. He fixed that date by reference to his visit to Dr Martin but was unable to say precisely how long before that date the information was given to him. A belief in the truth of this information would be inconsistent with the earlier allegation of reliance on a belief that he had nine months to lodge the notice of claim. Moreover I was not impressed by his evidence, given for the first time in the witness box, that he had checked up on the information by viewing the web site himself. If that is true it is surprising that he mentioned the matter neither in the statutory declaration nor in his affidavits.

[24] The allegation of reliance on the web site led Mr Miller into deeper water during his evidence. It is implicit in this excuse that Mr Miller understood the web site to mean that he could rely on the later of the two options specified. Such an understanding makes little sense: it implies that the time limit can be extended by a claimant's consulting a solicitor whenever he or she chooses. And even on that understanding Mr Miller did not adhere to the limit. His first consultation with a solicitor regarding the incident was on 23 May and he was then given a notice of claim form. Another form was sent to him on 6 June. He returned the completed form and signed a retainer agreement on 18 June; but he did not allege he told the solicitors it had to be submitted by 23 June (or even that he then instructed them to submit it), nor did he give evidence of when he first put the solicitors in funds. In the event the solicitors did not send it to the Nominal Defendant until 10 July. These matters are hardly consistent with a belief that the form had to be submitted by 23 June.

[25] To overcome that inconsistency Mr Miller contended that his visit to his solicitor on 23 May was not a "consultation". It was submitted that the purpose of this visit was to discuss the termination of his WorkCover payments; that the meeting was a hasty after-hours meeting, as short as possible; and that at no time during the meeting did Mr Miller seek advice on suing the Nominal Defendant. The fact that he was given a notice of claim form was said to be neutral because it was the solicitor's standard practice to provide the form to anyone who had anything resembling a personal injury action. Finally, it was submitted that the visit was not a consultation because the solicitors could not act on his behalf until a retainer agreement had been signed "as required by the Queensland Law Society."[8]

[26] In assessing the explanation it is necessary to keep steadily in mind that the issue now under discussion is why, if he believed the information on the web site, Mr Miller did not ensure that his notice of claim form was submitted by 23 June. I accept that the primary purpose of the meeting on 23 May was to discuss the termination of Mr Miller's WorkCover payments. I do not accept that the possibility of an action against the Nominal Defendant was not discussed. The solicitor, Mr Bentley, was alive to that possibility (he wanted Mr Miller to speak to employed solicitors in his firm precisely because he personally was not familiar with actions involving the Nominal Defendant; and his practice was to provide the form to people who had something resembling a personal injury *action*). While he could not recall specifically whether he discussed the Nominal Defendant with Mr Miller, he did tell him that he personally had little or no experience in pre-litigation steps. Since the only possible litigation was against the Nominal Defendant, that statement

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[8] The solicitors sent such an agreement to Mr Miller on 6 June. He subsequently signed and returned it. Presumably it sets out the scope of the retainer as the solicitors saw it on that date. It was not put into evidence on the application. I infer that its contents would not have helped Mr Miller's case.

must have referred to such an action. Moreover Mr Miller did not in his affidavit suggest that the question of suing the Nominal Defendant was not discussed. All he said was, "At no time during the consultation did I seek advice on pursuing the Nominal Defendant and I was focused on obtaining advice on WorkCover benefits." Finally, a consultation is nonetheless a consultation though it be short and primarily directed to another topic; and it makes no difference whether a retainer agreement was signed or not. The question is what Mr Miller believed at the time. He plainly believed it was a consultation, for he specified 23 May as the date of his first consultation with a solicitor in the notice of claim form which he eventually submitted. Mr Miller's excuse was that he "ensured that my Section 37 Notice was lodged within 1 month of first consulting my solicitor"[9]. If it were true that he was relying on the web site, one would have expected him to have taken steps to ensure that the notice was lodged by 23 June.

[27] In his affidavit in the present application Mr Miller raised one further excuse not contained in the statutory declarations which he made for the Nominal Defendant. He swore that at the meeting with Mr Bentley, not only did he not seek advice about an action against the Nominal Defendant; but also he was not aware he might have such an action until after he retained Mr Bentley's firm on 18 June. Counsel did not address me on the question whether documents delivered after the commencement of the application could constitute performance of the obligation to give a reasonable excuse in order to support a declaration. I shall therefore not consider this question. I note however that in view of the matters already discussed there are formidable obstacles to accepting this further assertion as a reasonable excuse.

[28] The parties devoted considerable time during the hearing to arguing the proper interpretation of the expression "reasonable excuse". The argument involved consideration of questions of subjectivity and personal factors on the one hand and physical or practical impossibility on the other. I find no necessity to resolve these questions.[10] Whatever the expression means I am not satisfied that Mr Miller gave the Nominal Defendant a reasonable excuse for his failure to give notice of claim on time.

Authorisation of further proceedings despite non-compliance

[29] In sharp contrast to the vigour which infused their arguments in relation to the first order sought, both sides approached the alternative order with an almost cavalier attitude. It sometimes seemed that each was using the application only to justify positions adopted in correspondence between them regarding the reasonableness of the excuse. Only two paragraphs of 19 in the applicant's submissions and two of 21 in the respondent's submissions were devoted to the second order sought. Although that order was expressed as leave to file proceedings notwithstanding non-compliance with s 39(5)(c), it is apparent from the submissions made on Mr Miller's behalf that the order is in fact sought under that paragraph.

[30] The Nominal Defendant submitted that further proceedings were barred unless authorised by the Court.[11] It submitted that failing to give a reasonable excuse constituted "failure to give notice of the claim as required under [division three of

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9 Second statutory declaration, para 3(b).

10 See however *Piper v Nominal Defendant* [2003] QSC 039 at [19].

11 The application was brought within nine months.

the Act]". It submitted that a separate notice under s 37(3) is subsumed under the expression "notice of a motor vehicle accident claim" in s 39(5). Unless this meaning were adopted, went the argument, it would be open to a claimant to provide the separate notice after the expiry of the nine months period referred to in s 37(3); the claim would be barred only if the notice of accident under s 37(1) were not given within the nine-month period; and that result would destroy an integral part of a regime designed to discourage fraud[12]. It was necessary to apply this meaning particularly in ss 37(3) and 39(5) and (8).

[31] Counsel further argued that this was the approach taken by the Court in cases before the amendments made to the Act by the *Motor Accident Insurance Amendment Act 2000*; that the purpose of those amendments, insofar as they affected ss 37 and 39, was only to replace the requirement for an explanation of failure to deliver a notice of claim within time with the more onerous requirement of a reasonable excuse, and to remove the strict necessity for it to be contained in the notice of claim, thus avoiding the difficult case predicted by McPherson JA of the explanation attached by a paperclip rather than a staple[13].

[32] The amendments made in 2000 were extensive. They were recommended by a committee of review and were drafted after consultation with a number of interested parties. Their objective was to ensure the ongoing affordability and stability of the compulsory third party insurance scheme in Queensland[14]. Most of them dealt with financial aspects of the scheme. Some introduced a new claims process. Sections 34, 37 and 50 were completely replaced, s 37A was introduced and subsections (1), (2), (3), (5) and (6) of s 39 were also replaced. The new s 37 provided for the adoption of a simpler notice of accident claim form[15]. The previous form was, according to the Treasurer's second reading speech, "too complex for most claimants to complete without legal assistance"[16]. The changes to what is now s 37(3) were described as "minor alterations relating to the reason for the delay"[17]. There is no indication in either the Explanatory Notes or the second reading speech of an intention to preserve the existing case law on the section or those around it.

[33] I do not propose to describe in detail the particular effects of the foregoing changes to the claims process. It is sufficient to observe that while the new procedure is observably derived from the old, the total process is different. No one part of the new process can be considered in isolation from the whole process. When one looks to interpret the new provision relating to separate notice of reasonable excuse one must relate that provision to the new process, not to the old one. In other words, s 37(3) must be related to division three and s 50 as amended. In my opinion the Nominal Defendant's submissions do not adequately examine that relationship.

[34] Division three of the Act (ss 37-49) deals with claims procedures. These procedures apply to insurers generally; the Nominal Defendant is treated as an insurer. The central provision is the requirement in s 37(1) for a claimant to give a notice of

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12 *Brannigan v Nominal Defendant* [2000] 2 Qd R 116; *Re Tonks* [1999] 2 Qd R 671.

13 *Horinack v Suncorp Metway Insurers Ltd* [2001] 2 Qd R 266 at 267, para [2]. His Honour's prediction was actually made just after the amending Act came into force, but he was dealing with a case under the Act prior to its amendment.

14 Explanatory Note to the *Motor Accident Insurance Amendment Bill 2000*, *Queensland Explanatory Notes 2000*, vol 1, page 737.

15 *Ibid*, p 747.

16 Hon. D J Hamill, Treasurer (16 May 2000), *Queensland Parliamentary Debates*, vol. 355 at p 1039.

17 *Ibid*.

claim before bringing any action for damages for personal injury. The essential changes to the notice brought about by the amendment in 2000 was the removal of the requirement for the statement of information in the notice to be sworn and the addition of a requirement that the claimant authorise the insurer to have access to various records and sources of information. Time limits are prescribed for giving the notice: three months from the incident giving rise to liability in the case of an unidentified vehicle. In other cases the period is nine months from the incident or the appearance of symptoms or one month from consulting a lawyer about the possibility of making a claim, whichever is the earliest. The one month provision was added by the 2000 amendment.

[35] In no case is failure to give the notice within the prescribed time fatal to the claim. However such a failure does have consequences under the Act. These consequences were changed by the 2000 amendment. Before the amendment such a failure had the result that the notice when given was required to contain an explanation for the delay. "Contain" was interpreted literally[18]. A contrast was drawn with the requirement in s 37(1)(c) that the notice be "accompanied" by certain documents[19]. It was not enough for the explanation to accompany the notice of claim; it had to be in the notice of claim. In *Brannigan,* McPherson JA expressed some disquiet at that outcome[20]. It is reasonable to suppose that the amendment in 2000 was made in the light of that decision. The requirement for an explanation contained in the notice was replaced by a requirement for a reasonable excuse to be given either in the notice or by a separate notice to the insurer. Several points may be made about the section as amended.

[36] First, the claimant clearly has the option to choose whether to provide the excuse in the notice of claim or by a separate notice. Second, there is no requirement for the separate notice to accompany the notice of claim. If it had been intended that the notice should be given concurrently it would have been simple enough to have used the language of s 37(1)(c). On the contrary, the use of the word "separate" tends against such a construction. Third, no time limit is prescribed for giving the separate notice. It is understandable that the legislature (or Parliamentary Counsel) might decide that the policy reasons driving the imposition of time limits for a notice of claim have much less force when applied to the separate notice of reasonable excuse. Fourth, the Act as amended prescribes no specific consequence for failing to give the separate notice.

[37] These changes do not mean that a claimant can ignore his or her obligation to give the insurer a reasonable excuse. The Act of 2000 extended the power of the court under s 50 to order action to remedy default by a claimant to include a failure to comply with a duty imposed under division three.

[38] These changes have necessarily had an effect on the second limb of s 37(3). That limb has itself been the subject of some amendment. The main purpose of that amendment appears to have been to reduce circumlocution. One change however is the introduction of the words "the notice" in place of "notice of the claim". It is unlikely that the use of the definite article was accidental. This is not a context where the singular can be read as including the plural. "The notice" must refer to

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18 *Brannigan v Nominal Defendant* [2000] 2 Qd R 116; *Horinack v Suncorp Metway Insurers Ltd* [2001] 2 Qd R 266.

19 [2001] 2 Qd R at p 269, para [12].

20 [2000] 2 Qd R at p 124. The judgment of the Court of Appeal was delivered in August 1999.

one or other of the notice of claim or the separate notice. It cannot sensibly refer to both, collectively or disjunctively. It seems most improbable that it refers to the separate notice. It is the notice of claim which the Nominal Defendant needs in order to investigate the incident, not a notice giving an excuse for failing to lodge a notice of claim. Prior to the amendments, the section barred a claim in these circumstances where notice of claim was not given within nine months. There is no reason to think that the amendments intended any change to this. Moreover the words "the notice" where first and second used in s 37(3) clearly refer to the notice of claim and it is more natural that they should do the same when used the third time. It follows that provided a compliant notice of claim is given within nine months, failure to give the separate notice of reasonable excuse within that period does not bar the claim under the subsection. But the question remains: are further proceedings blocked by s 39(5)?

Application under section 39(5)

[39] The second order sought by Mr Miller is sought in the alternative, on the basis that it is found that he has not provided a reasonable excuse to the Nominal Defendant. I have so found. There are therefore two matters which arguably might constitute a "failure to give notice of a motor vehicle accident claim as required under this division" within the meaning of s 39(5): the failure to give the notice of claim on time; and failure to provide a notice giving a reasonable excuse for the delay. (I have already set out my reasons for the view that the obligation to give notice under s 37(3) was satisfied[21].) The parties did not in argument identify which of these matters enlivened the operation of s 39(5).

[40] The parties appear to have assumed that a claim made under s 37 is not made "as required under" that section if the claimant fails to provide a reasonable excuse as required by s 37(3). I am uncertain whether this assumption is correct. Its correctness cannot be demonstrated simply by reference to the meaning of the words. They are capable of supporting the assumed meaning, but they do not necessarily do so. On the one hand, the notice of excuse may be separate from the notice of claim and may be given subsequently to the notice; and such a separate notice is distinct in content from the notice of claim. On the other hand, the requirement for the separate notice is causally linked to the notice of claim by reason of the fact that the excuse is not given in that notice and also that the notice of claim is not given within the specified period. It does little violence to either language or logic to interpret the words either way.

[41] In the absence of argument I do not propose to determine the correctness of the assumption. To do so would require an examination of the phrase as used elsewhere in the Act, particularly elsewhere in s 39; and also to determine the consequences of a finding either way in the light of the objects of the Act. It is inappropriate to undertake this exercise without the benefit of argument. This is a reason to proceed on the assumption made by the parties that the requirements of the opening words of s 39(5) are satisfied in this case. I appreciate that the parties cannot empower the court to make an order which is otherwise beyond its power to make. However I do not think that acting on the assumption just mentioned amounts to doing this. Moreover, neither party's rights can be adversely affected by this course.

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21 Paragraph [19].

[42] I shall also refrain from deciding whether a failure to give notice of claim within the required time enlivens the opening words of s 39(5). If it does, an application under that subsection will be necessary even if a reasonable excuse has been provided, which might be thought an odd result.[22] Perhaps the oddity is removed if the insurer's power to waive is not limited to the circumstances set out in s 39(1)(a). Accepting the parties' assumption relieves me of the need to decide this point.

[43] Some of the factors relevant to a decision under s 39(5)(c)(ii) have been discussed in cases prior to the amendments made in 2000.[23] The amendments are not such as to affect the relevance of these factors. Others arise from the circumstances of the case.

[44] First, and obvious, is the extent of the delay in giving the notice of claim. In this case the delay was a little under eight weeks[24]. That is not much. Obviously there is no question of the ordinary limitation period having expired.

[45] Second is the reason for the delay in giving notice of claim. I have already found that Mr Miller advanced no satisfactory explanation to the Nominal Defendant for this delay[25]. Apart from his claim that he was not aware that he might have an action until after he retained Mr Bentley's firm on 18 June[26], he advanced no further reason for the delay in the evidence before me. Mr Miller knew of the Nominal Defendant's existence, even if he was confused as to the time limit for giving notice of claim to it; and he knew that the alleged incident involved an unidentified motor vehicle. He was given a notice of claim form by Mr Bentley when he first consulted his solicitors on 23 May and is probable that a possible action against the Nominal Defendant was then discussed, although the focus of his consultation was the withdrawal of his workers compensation payments. I am unable to accept his evidence that he was unaware that he might have an action until after he retained Mr Bentley's firm on 18 June.

[46] The delay from 18 May until 23 May is unexplained and is plainly Mr Miller's own responsibility. The delay from 23 May until 10 July is unexplained, but may be due to Mr Miller's solicitors rather than to him. Further findings in relation to the meeting on 23 May are set out above[27]. It seems that Mr Bentley was not alive to the fact that Mr Miller was already out of time for giving his notice of claim. He seems to have advised Mr Miller to obtain some medical reports, fill out the s 37 form and see some employees of the firm once both these tasks were complete. Mr Miller apparently completed the form as best he could and signed it that evening. In accordance with Mr Bentley's advice he saw Dr Hadwen on 28 May and Dr Robinson on 29 May. There was some delay in obtaining a report from Dr Hadwen. Meanwhile, on 6 June an employed solicitor advised Mr Miller that he had one month from his first consultation with the firm to submit the form. Mr Miller did not claim in his evidence before me to have relied upon this advice, but I am not confident that he had turned his mind to the letter; his attention does not seem to

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22 Although it is the result reached in relation to the unamended legislation in *Thomas v Transpacific Industries Pty Ltd* [2003] 1 Qd R 328 at p 338 para [28].

23 *Thomas v Transpacific Industries Pty Ltd* [2003] 1 Qd R 328; *Re Tonks* [1999] 2 Qd R 671.

24 The relevant period of delay is the period from the last date for giving notice until the date when notice was given: *Thomas v Transpacific Industries Pty Ltd* [2003] 1 Qd R 328 at p 338, para [29].

25 Paras [20] and [21].

26 Para [27].

27 Para [26].

have been drawn to it. Perhaps he felt it was inconsistent with his claim that he was not aware of the possibility of serving the Nominal Defendant until after he retained his solicitors on 18 June.

[47] Mr Miller obtained a medical report on the notice of claim form on 14 June and gave the completed form to his solicitors on 18 June. There is no explanation of why they did not send it to the Nominal Defendant until 10 July, but a handwritten note made by Mr Bentley on 26 June suggests that he thought the appropriate course was to submit the notice six months after Mr Miller saw a Medical Assessment Tribunal for the purposes of workers' compensation. It is regrettable that these matters were not fully explored in the evidence. It is to be hoped that the reason for this omission is unconnected with any conflict of interest.

[48] A third factor is prejudice to the insurer. In this case, the Nominal Defendant conceded that the delay had not caused it any prejudice. The circumstances of the claim were such that it was unlikely that the Nominal Defendant could have usefully carried out any investigations even if the notice of claim had been lodged earlier.

[49] Fourth is the applicant's prospects of success. There is little evidence before me to enable a judgment to be made on this question. Obviously much will depend upon Mr Miller's credibility. I did not find him a convincing witness. I have expressed my reservations above[28]. Whether the injury is consistent with the circumstances alleged by Mr Miller it is impossible to say in the absence of appropriate expert evidence. There is also the allegation which emerged for the first time in the late affidavit of Mr Bentley[29] that Mr Miller had the telephone number of an elderly lady whom he had helped off the bus shortly after the alleged incident. One might have thought that she would have been in a position to give evidence of Mr Miller's condition at the material time, but nothing from her was put before me (let alone before the Nominal Defendant) and there is nothing to show that she has even been contacted. On the material before me, Mr Miller's prospects are shadowy.

[50] A fifth factor is whether there is a reasonable explanation for Mr Miller's failure to give the Nominal Defendant a reasonable excuse for the delay in lodging his notice of claim and for the inconsistent and largely irrelevant attempted excuses given on his behalf. There was substantial affidavit evidence relevant to this factor. On the one hand, two affidavits by Ms Kaska Leszczuk were read. Ms Leszczuk described herself as "a Para-Legal with the firm Irish Hughes & Bentley Lawyers". She was involved in the daily conduct of the matter on behalf of Mr Miller under the supervision of Mr Bentley. On the other hand were affidavits by Lawrence Meteyard, the claim manager who handled the matter for the Nominal Defendant and Lesley Kilmartin and Robin Lee, the manager and assistant manager of the Nominal Defendant. They give radically different versions of what occurred between them. None of them was cross-examined, perhaps because the matter was heard in the applications list in the last week of the year and may not have got on if they had been. As a result it is impossible to resolve the controversies between them.

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28 Paras [22]-[24].

29 Para 3(g).

[51] Despite this impossibility some conclusions can be drawn. In June, Mr Bentley probably thought that Mr Miller had nine months to give notice of claim[30]. By the end of August, Ms Leszczuk believed that the time allowed was one month from when Mr Miller first consulted solicitors. The source of this belief is unknown. It was apparently shared by Ms Surman, an employed solicitor, who signed exhibit KBL6 and presumably by Mr Bentley. It is tempting to speculate about whether they relied for their law on the Internet, particularly the web site of the Nominal Defendant; but there is insufficient evidence to support an inference to this effect. The first statutory declaration was evidently drafted on that assumption as to the law. It paid no attention to the critical issue: giving a reasonable excuse for the delay from 18 May to 11 July. Even after the Nominal Defendant's letter of 23 September, Ms Leszczuk continued to have telephone conversations with officers of the Nominal Defendant[31] on the basis of her incorrect understanding She appears to have realised (or been told) what s 37 actually required by 11 October, when she had a telephone conversation with Mr Kilmartin, the manager of the Nominal Defendant. She then attempted to justify Mr Miller's position by reference to the Nominal Defendant's web site, claiming that it "outlined the time frames which our client relied upon"[32].

[52] Nowhere in the material filed on behalf of Mr Miller do his solicitors expressly admit to having misapprehended the requirements of s 37 or accept responsibility for failing properly to lodge the notice of reasonable excuse. Nonetheless it seems to me more likely than not that it was their neglect which led to this omission. For the Nominal Defendant, it was submitted that Mr Miller should be fixed with the acts and omissions of his solicitors. In *Re Tonks*[33], White J held that the failure of the applicant's solicitors to attend on her behalf to her obligations under the Act did not deprive her of her right to litigate against the insurer. I am content to follow that decision and not attribute Mr Miller's failure to file a notice giving reasonable excuse to him personally.

[53] Finally, there is a factor which is of particular importance in this case. It is that legally it is still possible for Mr Miller to comply with his obligation under s 37 to give a reasonable excuse. That seems to have been obscured by the controversy between Mr Miller's solicitors and the Nominal Defendant over whether what was provided to the latter constituted a reasonable excuse and whether officers of the latter dealt properly with the solicitors, and in particular, with Ms Leszczuk. Moreover there would appear to be no factual impediment to this being done except, perhaps, a possible conflict of interest on the part of Mr Miller's present solicitors. If there is any such conflict no doubt steps can be taken to overcome that problem.

[54] In these circumstances, should I authorise further proceedings based on Mr Miller's claim despite his non-compliance with s 37? I think I should. Non-compliance constituted by the late lodgment of the notice of claim was not serious: the delay was less than eight weeks. It is conceded that the Nominal Defendant has suffered no prejudice by the delay. Moreover this is not a case where the incident alleged to give rise to the claim was kept secret. It was the foundation of a claim for workers' compensation and the documentation in relation to that is available to the Nominal Defendant. It is true that I have found the claim to be shadowy and have serious

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30 Para [47].
31 Exhibit KBL4 (second affidavit).
32 Exhibit KBL5 (second affidavit).
33 [1999] 2 Qd R 671 at p 678.

doubts about Mr Miller's credibility. However, these are matters best assessed at trial in the light of all the available evidence. While they are relevant for present purposes, it is, I think, necessary to guard against any temptation to decide the claim on the merits. I have no doubt that there is a good deal more to be said about those merits than was presented in evidence on this application.

[55] However, I do not think I should authorise further proceedings unconditionally. Mr Miller's failure to give a reasonable excuse for the delay in lodging his notice of claim from 18 May to 11 July might cause prejudice to the Nominal Defendant. Any such prejudice would probably be minimised by requiring Mr Miller to comply with the obligation to provide a notice. Having regard to my findings in paras [46], [47] and [52] above, it is quite possible that Mr Miller will be able to provide a reasonable excuse. He should be given a further opportunity to do this within a reasonable time. If the Nominal Defendant regards the excuse as reasonable it will doubtless waive compliance with the time requirements for lodging the notice of claim.[34] If it does not so regard the excuse Mr Miller will have to consider whether he wishes to have this authorisation varied in the light of the circumstances then obtaining. To this end there should be liberty to apply.

[56] The parties should bring in a draft order. I shall hear the parties on costs.

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[34] Unless it decides to depart from the assumption referred to in para [44].