SUPREME COURT OF QUEENSLAND

CITATION:	*Perdis v Nominal Defendant* [2003] QCA 555
PARTIES:	**ANDREA ATHENA PERDIS** (applicant/respondent) v **THE NOMINAL DEFENDANT** (respondent/appellant)
FILE NO/S:	Appeal No 5233 of 2003 DC No 1492 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2003
JUDGES:	Davies and Williams JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Leave to appeal granted** **2. Appeal dismissed** **3. Appellant to pay respondent's costs of the appeal**
CATCHWORDS:	INSURANCE - MOTOR VEHICLES - COMPULSORY INSURANCE LEGISLATION - WHERE IDENTITY OF VEHICLE CANNOT BE ESTABLISHED - QUEENSLAND - GENERALLY - where respondent injured in motor vehicle accident in September 2002 - where other vehicle involved in accident was unidentified - where respondent consulted a solicitor in November 2002 - where solicitor failed to advise respondent that notice of motor vehicle accident must be given to the Nominal Defendant within three months of the accident or that reasonable excuse for delay must also be given - where notice given to the Nominal Defendant outside three month period but did not include excuse for the delay as required by s 37(3) *Motor Accident Insurance Act* 1994 (Qld) - where full explanation for the delay given within nine months - where negligence of solicitor was cause of the delay - where respondent's own conduct was reasonably excusable - whether necessary to consider only whether claimant's own actions were reasonably excusable or whether actions of solicitor need also to be reasonably excusable

Motor Accident Insurance Act 1994 (Qld), s 37, s 39

Black v City of South Melbourne [1963] VR 34, considered
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, considered
Quinlivan v Portland Harbour Trust [1963] VR 25, considered

COUNSEL: K N Wilson SC, with K F Holyoak, for the appellant
D B Fraser QC for the respondent

SOLICITORS: O'Shea Corser & Wadley for the appellant
Gilshenan & Luton for the respondent

[1] **DAVIES JA:** This is an application for leave to appeal by the Nominal Defendant against a declaration made in the District Court that the respondent had given reasonable excuse to the Nominal Defendant, as required by s 37(3) of the *Motor Accident Insurance Act* 1994 ("the Act"), in respect of the failure by the respondent to give, within three months of a motor vehicle accident on 6 September 2002, a written notice of her accident claim to the Nominal Defendant. The sole question which arises in the appeal if leave is granted, as identified by Mr Wilson SC for the Nominal Defendant, is whether, in deciding whether a reasonable excuse has been provided within the meaning of s 37(3), it is necessary to consider only whether the claimant's own personal actions were reasonably excusable in the light of what has occurred, or whether, in circumstances where the claimant retained a solicitor in connection with the giving of the notice, it is also necessary for the actions of the solicitor, insofar as they contributed to the delay, to be reasonably excusable. That question arose before the learned primary judge and his Honour concluded that, in deciding that question, it was necessary to consider only whether the claimant's own personal actions were reasonably excusable. He then made the declaration to which I have referred.

[2] In case a different view should be taken on appeal, his Honour went on to reach a precautionary conclusion that, in any event, he would have granted the claimant leave to proceed pursuant to s 39(5)(c)(ii) of the Act. The Nominal Defendant did not seek to contest that conclusion in this Court. The possibility that, in that event, the question sought to be argued might be hypothetical was raised in argument by this Court. However as that possibility was not sought to be relied on by the claimant, that she was, in any event, likely to be protected by a costs order and that the question was common to at least one of the other appeals heard with this one (*Piper v Nominal Defendant*), it is unnecessary to consider it further. Nevertheless it will be necessary to say something later about the appropriate relief which should be granted.

[3] In my opinion the question identified by Mr Wilson SC is a question of general importance and consequently one which, subject to any question of costs, in my opinion justified the grant of leave. The argument before this Court proceeded on the assumption that leave was granted. The circumstances in which the above question arose were as follows.

[4] The respondent, to whom I shall refer as the claimant, was injured in a motor vehicle accident on 6 September 2002. She alleges that she took action to avoid a red utility motor vehicle which moved into her path whilst she was driving along Ivory Street towards the Story Bridge. As a result of taking such evasive action, her vehicle was struck from behind by a silver motor vehicle which has remained unidentified.

[5] The claimant consulted a solicitor on 14 November 2002 well within three months of her accident. However the solicitor failed to advise her that notice was required to be given within the time stipulated by s 37(2)(a) of the Act, that is, within three months after the accident. In fact he advised her, wrongly, that such notice was required to be given only within one month after she first consulted a solicitor about the possibility of making a claim.[1] The notice was in fact given on 13 December 2002 and no excuse was then given in or with the notice for the short delay (seven days).

[6] A full explanation for the delay was given to the Nominal Defendant by new solicitors for the claimant on 10 April 2003. In short, the explanation was that the cause of the delay was the negligence of the claimant's former solicitor. The explanation, which was provided by statutory declaration by the claimant, showed, as the Nominal Defendant conceded, that the claimant's own personal conduct was reasonably excusable. She consulted a solicitor within time, followed him up, and did everything else that was reasonably required of her. Thus the sole cause of the failure to give the notice within three months after the date of the accident was the negligence of the solicitor. Hence the identification of the sole question before this Court in the above way.

[7] The relevant provisions of s 37 are as follows:

> "(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 motor vehicle accident claim to the insurer … against which the action is to be brought –
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> …
>
> (2) The notice must be given –
>
> (a) if it is to be given to the Nominal Defendant because the motor vehicle can not be identified - within 3 months after the motor vehicle accident; …
>
> …
>
> (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."

[8] It can be seen from the above statement of facts that no notice of claim was given within the period specified in s 37(2)(a), a notice of claim but no excuse for the delay was given outside the period specified in s 37(2)(a) but within the period of

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[1] See s 37(2)(b)(ii) of the *Motor Accident Insurance Act* 1994.

nine months specified in s 37(3) and an excuse for the delay, that it was the fault of the claimant's solicitors, was also given within that period.

[9] There is nothing in s 37 or in any other relevant provision of the Act which assists in determining what is a reasonable excuse for the delay. The Nominal Defendant contends that such an excuse must exculpate not only the claimant but also any person acting relevantly on her behalf. The learned primary judge held to the contrary. His Honour thought that the conclusion which he reached was consistent with what was implicit in the judgment of Wilson J in *Piper v Nominal Defendant* (2003) 12 ANZ Insurance Cases 61-558 and with the judgment of Fryberg J in *Miller v Nominal Defendant* (2003) 38 MVR 416, which he thought he should follow. Appeals from each of those judgments were heard with this appeal and judgments in those appeals will be delivered immediately following this judgment.

[10] Two other considerations also influenced his Honour's conclusion. The first was the change in the form of the legislation from the *Motor Vehicles Insurance Act* 1936, s 4F(4)(b) to s 37 of the Act. The former required that the failure to give notice within the period of three months "was not occasioned by any act or omission of the claimant or any person acting on his behalf". As his Honour pointed out, it would have been easy enough to repeat that form of words in the Act if it had been intended to encompass also any act or omission of a person acting on behalf of a claimant.

[11] The other consideration which influenced his Honour was that, in respect of somewhat analogous provisions, the view had been taken by courts that the fault of his or her solicitor ought not, or ought not generally be ascribed to a claimant.[2] An analogy may also be found in the terms of the *Limitation of Actions Act* 1955 (Vic) considered in *Quinlivan v Portland Harbour Trust*[3] and *Black v City of South Melbourne*.[4] The question under s 34 of that Act was whether failure to give notice within the time fixed was due to "reasonable cause". In each case the claimant had left the matter in the hands of his solicitor who had failed to give the notice within time. In the first of those cases Sholl J thought that there was reasonable cause if the following question were answered in the affirmative: "whether the applicant has done what a reasonable man might have been expected to do in leaving the matter to an apparently competent agent, who has 'let him down'". In the second case the Full Court held that that was the correct test to apply.

[12] In my opinion that is the way in which s 37 should be construed. That is, the claimant gives a reasonable excuse for the delay if the excuse is that, in sufficient time, he or she entrusted the matter to a person who was reasonably believed to be competent to do whatever was necessary. On the application of that test to the facts here the claimant had on 10 April 2003 given to the Nominal Defendant a reasonable excuse for the delay.

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2 His Honour referred, in particular, to *Re Tonks* [1999] 2 QdR 671 at 678, *Sophron v Nominal Defendant* (1957) 96 CLR 469 and *Manderson v Ellis* (2002) 37 MVR 214 at 219, 226; [2002] NSWCA 289 at [18], [58] - [60]. Reference may also be made, in this respect, to *Hall v Nominal Defendant* (1966) 117 CLR 423 at 435, *Kaats v Caelers* [1966] QdR 482 and *Diaz v Truong* (2002) 37 MVR 158; [2002] NSWCA 265.

3 [1963] VR 25 at 30 - 31.

4 [1963] VR 34 at 38 - 39.

[13] It may be necessary to qualify that general proposition where, after a claimant has entrusted the matter to his or her solicitor, there is something which would cause a reasonable person in the position of the claimant to make further inquiry or take other steps but it is unnecessary to consider any such qualification here for the claimant here did all that could reasonably have been expected of her.

[14] I should, for completeness, add that a question was raised during the course of argument as to whether "the delay" in s 37(3) means the delay from 6 December 2002, the expiry of the three months period specified in s 37(2)(a), which was after the claimant had consulted her solicitors, or from 6 September 2002, the date of the motor vehicle accident. Although not conceding the point, Mr Wilson SC, for the Nominal Defendant, did not argue strongly for the second possibility. His apparent reluctance to do so was, in my opinion well founded. There could have been no delay which required any excuse before 6 December 2002.[5] On the other hand, the whole of the period from 6 September 2002 may be relevant when considering the exercise of discretion under s 39(5)(c).[6]

[15] It is then necessary to consider whether, the claimant having within the period specified in s 37(3) given a reasonable excuse for that delay, the court should have exercised its discretion under s 39(5)(c) in favour of the claimant. In my opinion it was appropriate to do so as his Honour did. Indeed it was not contended by the Nominal Defendant that, on any discretionary basis, an order should be refused and it conceded that it would have been appropriate to make an order under s 39(5)(c)(ii).

[16] It remains to consider the form of order appropriate in those circumstances. The order which his Honour made was a declaration that the claimant had given reasonable excuse to the Nominal Defendant as required by s 37(3) of the Act in respect of the failure by the claimant to give, within three months of the motor vehicle accident on 6 September 2002, a written notice of her accident claim to the Nominal Defendant. That was, it seems to me, a declaration made under s 39(5)(c)(i) though it might have been better had his Honour stated the declaration in terms of that provision.

[17] It is arguable that, the claimant having failed to give a notice within the period specified in s 37(2)(a), that failure was incapable of being remedied because, once that period had passed, that failure was incapable of being remedied. I am inclined to think, however, that the intention of s 37 and s 39 was that a court could declare that a claimant had remedied a failure to comply with s 37(2)(a) by complying with s 37(3).[7] Accordingly I think that the order was appropriately made.

Orders

1. Leave granted to appeal.
2. Dismiss the appeal.
3. Order that the appellant pay the respondent's costs of the appeal.

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5 Cf *Thomas v Transpacific Industries Pty Ltd* [2003] 1 QdR 328 at [29], [1], [47].

6 Cf *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 548, 554 - 555.

7 The requirements of s 37(2)(a) and of s 37(3) are cumulative in the sense that a notice not complying with s 37(2)(a) and not containing a reasonable excuse for the delay would fail to comply with the requirements of Division 3 in two respects: *Thomas* at [19].

[18] **WILLIAMS JA:** The critical question raised by the appeal in this matter is the extent to which, if at all, it is necessary to consider conduct of persons other than the claimant in determining whether the claimant has provided "reasonable excuse for the delay" as provided for by s 37(3) of the *Motor Accident Insurance Act* 1994 ("the Act") (Reprint 4B is the relevant version for present purposes).

[19] The essential facts are as follows:

(i) the motor vehicle accident giving rise to the claim occurred on 6 September 2002;

(ii) no notice of claim was given to the Nominal Defendant within three months of the accident as required by s 37(2)(a) of the Act;

(iii) a notice of claim, but without any excuse for the delay, was given on 13 December 2002, being a date outside the three month period provided for by s 37(2)(a) but within the nine month period provided for by s 37(3) of the Act;

(iv) an excuse for the delay was provided on 10 April 2003, just over seven months after the accident, and being a date within the nine month period provided for by s 37(3) of the Act;

(v) the excuse or explanation provided for the delay was that it was occasioned by the negligence of the claimant's initial solicitor.

[20] In the course of argument the question was raised whether the "delay" referred to in s 37(3) referred to the whole of the period from the date of the accident to the date when the notice together with reasonable excuse was given, or whether it merely related to the period after the expiration of the three months provided for by s 37(2)(a). My understanding of submissions was that counsel for the Nominal Defendant primarily contended that the "delay" referred to the whole of the period from the date of the accident, but accepted that for purposes of the case in hand it was sufficient for him to concentrate on the period after the expiration of the three month period provided for by s 37(2)(a).

[21] In my view the "delay" for which a reasonable excuse must be provided is not limited to the period after the expiration of the three month period provided for by s 37(2)(a). If notice was given one day after the expiration of that three month period then the notice was "not given within the time fixed by this section", and explanation for the delay had to be given. In other words, the claimant would have to explain why notice was not given within the prescribed three month period. The fact that notice was given only one day after the expiration of that period could provide a strong ground for the insurer (including the Nominal Defendant) being satisfied "that the notice has been given as required under this division" within s 39(1)(a)(i) and (5)(a)(i).

[22] Where there is a more significant lapse of time between the expiration of the initial three month period and the giving of the notice, the excuse, in my view, must firstly provide a reasonable explanation why notice was not given within the initial three month period, and secondly, give a reasonable explanation for the delay thereafter. In my view the reasoning of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 554-5 supports that approach. The

claimant may have acted with contemptuous disregard for the right of the insurer to be informed of the potential claim during the three month period, but then have taken reasonable steps after the expiration of that period to give notice. It would make a mockery of the legislative provisions for a court to ignore, or place no significant weight on, such conduct during the initial period.

[23] When all of those considerations are given due weight it seems to me clear that the claimant must advance reasonable excuse for not giving notice within the three month period and also provide reasonable excuse for any delay thereafter.

[24] Here, the claimant consulted a solicitor on 14 November 2002, well within the initial three month period. Failure to give notice during that three month period was due solely to the fact that that solicitor held a mistaken belief as to the relevant law. That remained the position until there was a change of solicitors in about February 2003. After the claimant changed solicitors a full explanation, both for the failure to give the notice within the initial three month period and the delay thereafter, was provided, namely the negligence of the claimant's former solicitor.

[25] The remaining question is whether or not that amounted to "reasonable excuse". Is it sufficient that the conduct of the claimant was reasonably excusable, or must the conduct of solicitors acting on the claimant's behalf also be reasonably excusable? In that regard it is significant, in my view, that the Act in s 37 departed significantly from s 4F(4)(b) of the *Motor Vehicles Insurance Act* 1936, the provision which operated prior to 1994. In the 1936 Act a claimant had to show that the failure to give notice within the three month period "was not occasioned by any act or omission of the claimant or any person acting on his behalf". The omission of the words "or any person acting on his behalf" was obviously deliberate and I am not persuaded that the language used in the 1994 Act can be construed so as to include other persons acting on behalf of the claimant, such as a solicitor.

[26] The question will always be whether or not the claimant had "reasonable excuse" for the failure to comply with the statutory requirement. It may not always be sufficient simply to say that a solicitor was engaged during the relevant period. Where the solicitor appears to have knowledge of the relevant law, and gives specific advice (though incorrect) to the claimant, it would be difficult to conclude that the claimant acted unreasonably in relying on that advice. If it was obvious to a reasonable person in the position of the claimant that the solicitor retained was not acting appropriately, then it may well be that it would not be sufficient for the claimant to explain away the failure to comply with the statutory requirement by saying a solicitor was retained. Here it is obvious that the claimant was misled by incorrect advice given by the initial solicitor, and in consequence she had reasonable excuse for the failure to comply with the requirements of the Act.

[27] Subject to what I have said herein I agree with the reasons of Davies JA, and specifically with the orders he proposes.

[28] **MACKENZIE J:** This application for leave and two other appeals, *Piper v Nominal Defendant* and *Miller v Nominal Defendant* were heard sequentially by the court. Each required consideration of the application of the provisions relating to claims against the Nominal Defendant in the *Motor Accident Insurance Act* 1994 (Qld) ("the Act") to the particular facts of each case.

[29] The facts in *Perdis* are set out fully in the reasons for judgment of Davies JA and summarised in the reasons for judgment of Williams JA. Since they are uncontroversial there is no need for me to repeat them. The case is one where notice of the motor vehicle accident claim was not given within the three month period referred to in s 37(2)(a) of the Act but was given, together with an excuse for not doing so, within the nine months prescribed by s 37(3).

[30] The Nominal Defendant seeks leave to appeal to argue that the excuse must justify not only the conduct of the claimant but also that of a person acting on her behalf. This proposition was rejected by the Judge below partly in reliance on the decisions in the Trial Division in *Piper* and *Miller* but also on a construction of s 37 of the Act and analogy with the principle applied in other statutory contexts that fault of a solicitor should not be attributed to the client.

[31] What follows is my view of the operation of s 37. It will, of course, always be necessary to pay close attention to the facts of individual cases. What appears in the following paragraphs is not intended to be, nor could it be, a comprehensive statement that can be mechanically applied to resolve every case. The generality of the discussion dictates this; but what is said is intended to indicate what are, in my view, the kinds of factors that may influence decisions. They are also, of course, not necessarily exhaustive.

[32] Under s 37(1) of the Act, before bringing an action for damages for personal injury arising out of the motor vehicle accident, a claimant must give written notice of the accident to the insurer containing certain information required under a regulation. Under s 37(2), if the notice was to be given to the Nominal Defendant because the motor vehicle could not be identified it must be given within three months after the accident. Under s 37(3), if notice of a motor vehicle accident claim was not given within the period of three months (in the case of the Nominal Defendant) the obligation to give the notice continued and a reasonable excuse for the delay had to be given in the notice or by separate notice. If the motor vehicle could not be identified and the notice was not given to the Nominal Defendant within nine months after the motor vehicle accident, a claim against the Nominal Defendant was barred.

[33] Section 39(8) provides that if a claim against the Nominal Defendant is barred because the claim relates to personal injury caused by, through or in connection with a motor vehicle that can not be identified, and the claimant failed to give notice of the claim in accordance with Division 3 of Part 4 of the Act within nine months after the motor vehicle accident, the Nominal Defendant cannot waive compliance with the requirement to give notice within the time allowed by Division 3. Nor can the court give leave to bring a proceeding in a court despite the noncompliance (s 39(8)). The last-mentioned concept relates back to s 39(5)(c)(ii) which allows the court on application by the claimant to authorise further proceedings based on the claim despite noncompliance with Division 3. In my opinion the provisions of s 37(3) require both the notice and a reasonable excuse for the delay in giving the notice to be given before nine months have elapsed from the date of the accident. In my opinion it is not sufficient compliance with that provision if a notice in the required form is given within the nine month period but the excuse for the delay is not given until after the nine month period has elapsed. If a determination by the Court whether an excuse given within nine months is a reasonable one has not been made within that period, it would not conflict with s 39(8) if a determination was

made after nine months had elapsed since the excuse has been given within time. Only the question whether it was reasonable needed to be established.

[34] "A reasonable excuse for the delay" implies the existence of circumstances explaining why notice was not given to the Nominal Defendant until more than three months had elapsed from the date of the accident. In referring to the "delay", the provision is referring to the state of affairs which has contributed to the notice not being given until the period of three months + x months has elapsed, not only x months. Setting a period of three months for giving notice without any need to account for the claimant's actions within that period, provided the notice is given within that period, represents a policy determination that three months strikes a balance between the interests of the claimant and the Nominal Defendant. In my view the intention of prescribing the brief period for giving notice is to allow the Nominal Defendant to make its own inquiries into the accident at the earliest opportunity to assist it to ensure that claims are *bona fide* and, perhaps more infrequently, to increase its chances of identifying the other vehicle. In my opinion focusing only on the period after three months has elapsed is too narrow an approach.

[35] While a claimant has three months in which to make a claim, there is no reason why, if notice is not given within that period, the claimant's actions within the whole of the period prior to notice being given are not relevant matters of inquiry. There is no reason why, in this particular statutory context, the first three month period should be free from scrutiny.

[36] In my view, the conduct of the person who wishes to make the claim should be the primary focus of the inquiry. Where a person appreciated that there may be some requirements governing the making of a claim but did not take steps that should reasonably be taken to ascertain what the requirements of the law were, that factor, throughout the first three months and subsequently until the notice was given, would be a legitimate area of inquiry.

[37] Taking advice from a properly qualified person would be the obvious way of ascertaining what had to be done. If a person took advice from a solicitor and gave instructions to act to advance the claim, and the solicitor did not do so, it would be harsh to attribute failure to give notice in a timely way to the claimant. The analogy with cases such as *Re Tonks* [1999] 2 Qd R 671 at 678, *Quinlivan v Portland Harbour Trust* [1963] VR 25 at 30-31 and *Black v City of South Melbourne* [1963] VR 34 at 38-39 is persuasive, especially in conjunction with the construction issue referred to in the next paragraph. But if, for example, it was alleged that instructions had been given to progress the claim but it appeared that the claimant had failed to respond to requests by the solicitor to take appropriate steps or provide information for the purpose of enabling the claim to be advanced, it would in my view be legitimate to take that into account in deciding whether reasonable excuse had been given.

[38] In my view the failure to reproduce the provisions in s 4F(4)(b) of the *Motor Vehicles Insurance Act* 1936 (Qld) which was in operation until 1994 is also a cogent reason for thinking that, as a general proposition, negligence on the part of a solicitor should not be attributed to the claimant. For this reason, if the client had not been guilty of default of the kind recently mentioned and entrusted the carriage of the claim to the solicitor and the solicitor negligently failed to advance it in a

timely way, the likelihood is that the excuse advanced should ordinarily be accepted as a reasonable excuse. If the solicitor gave advice that was demonstrably wrong but there was no reason for the claimant to believe that it was incorrect advice, a claimant acting on that advice would ordinarily have a reasonable excuse. A claimant would be in a particularly strong position if he or she had done properly what was required of him or her by the solicitor or, not having been asked to do anything themselves, inquired about the progress of the matter from time to time.

[39] In cases where the solicitor's default was the cause of the failure to give the notice in a timely way, the client would ordinarily have a viable action against the solicitor. However the existence of that possible basis of liability is not relevant in deciding the question of whether, in a particular case, a reasonable excuse for the delay has been given. In the absence of a very clear legislative intention to cost shift by transferring liability from the Nominal Defendant to the insurer of the solicitor in cases where the claimant may have a right of action against the solicitor, there is no compelling reason to infer that the prospective claimant was intended to be limited to taking proceedings against the solicitor for negligent action or inaction that is wholly or substantially the fault of the solicitor.

[40] Application of these principles leads to the conclusion that reasonable excuse for the delay was given by the respondent in this case. I agree with the orders proposed by Davies JA.