SUPREME COURT OF QUEENSLAND

CITATION:	*Patterson v Baptist Union of Qld & Anor* [2004] QCA 146
PARTIES:	**KAY ANNETTE PATTERSON** (applicant/respondent) **v** **THE BAPTIST UNION OF QUEENSLAND** (first respondent/applicant) **TIM HANNA (as representative of himself and all members of the Gateway Baptist Church as at 30 October 1999)** (second respondent/applicant)
FILE NO/S:	Appeal No 12018 of 2003 DC No 3652 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2004
JUDGES:	McMurdo P, Williams JA and White J Separate reasons for judgment of each member of the Court, Williams JA and White J concurring as to the orders made, McMurdo P dissenting
ORDERS:	**1. Grant leave to appeal** **2. Allow the appeal** **3. Set aside the order of the District Court of 28 November 2003, and in lieu thereof order the application of 31 October 2003 be dismissed** **4. Order that the respondent pay the applicants' costs of the appeal and of the application to be assessed**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – PRACTICE – PROCEDURE BEFORE TRIAL – COMMENCEMENT OF ACTION AND PLEADINGS – where respondent failed to commence action for personal injury in accordance with provisions of *Personal Injuries Proceedings Act* – where limitation period expired – where injury occurred prior to commencement of Act – where respondent did not give a 'complying notice of claim' before 18 June 2002 – where respondent applied for and was granted

leave to commence proceedings under s 18(1)(c) and s 77D(2)(b) of the Act – whether such leave could be granted where 'complying notice of claim' given after 18 June 2002

Personal Injury Proceedings Act 2002 (Qld), s 18(1)(c), s 77A, 77D(2)

Cuthbert v Adams [2003] QSC 320; SC No 8237 of 2003, 22 September 2003, cited
Earthrowl v State of Queensland [2003] QDC 441; DC No 3663 of 2003, 8 December 2003, considered
Miller v Nominal Defendant [2003] QCA 558; Appeal No 4398 of 2003, 15 December 2003, cited
Mutze v Townsville City Council [2003] QDC 448; DC No 4178 of 2003, 11 December 2003, not followed
Willey v Lush Hair Salon [2003] QDC 444; DC No 3665 of 2003, 9 December 2003, considered

COUNSEL: K N Wilson SC for the applicants
G D Beacham for the respondent

SOLICITORS: H B M Lawyers for the applicants
Astills Lawyers for the respondent

[1] **McMURDO P:** The respondent, a teacher at Redlands College, claims she was injured on 30 October 1999 at the Gateway Baptist Church, Wishart, when she was setting up for a Redlands College school show. She alleges that she tripped on an unmarked step causing her to injure her left foot and ankle. She consulted her solicitors about making a claim for damages on 3 January 2002 and first notified the applicants of her claim on 20 February 2002. The solicitors for the parties then corresponded about the case. The respondent, through her solicitors, appeared to cooperate with the applicants' insurers and investigators and expressed concern to the applicants about the pending expiry of the limitation period for her claim.

[2] On 18 June 2002, the *Personal Injuries Proceedings Act* 2002 (Qld) ("the Act") came into force, although the transitional provisions applicable to this case did not become operational until 29 August 2002.[1] Before 29 August 2002 the respondent could have commenced her action against the applicants in court. The limitation period for commencing the action expired on 30 October 2002. The Act effectively precluded her from commencing her action as of right between 29 August and 30 October 2002.

[3] On 31 October 2003, she filed an application in the District Court applying for orders under s 18(1)(c) and s 77D(2)(b) of the Act.

[4] On 28 November 2003 the learned primary judge allowed the application and declared that the respondent was authorised under s 18(1)(c)(ii) of the Act to proceed further with her claim against the applicants in respect of the matters set out in her notice of claim and gave leave under s 77D(2)(b) of the Act for the respondent to start a proceeding against the applicants in respect of the matters set

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1 *Personal Injuries Proceeding Amendment Act* 2002 (Qld), Act No 38 of 2002.

out in the notice of claim. He also ordered that the respondent pay half the applicants' costs of and incidental to the original application to be assessed.

[5] The applicants contend that the learned primary judge erred in granting those orders and apply for leave to appeal from them under s 118(3) *District Court Act* 1967 (Qld) claiming errors in statutory interpretation and in the exercises of discretion.

Should leave to appeal be given as to the interpretation of the Act?

[6] This case concerns the interpretation of a statute of reasonably wide application. Section 77D(2)(b) is not easy to comprehend and has not yet been considered at appellate level. Although it is a transitional provision which has now been superseded by the passage of time, its interpretation may well affect other similar cases already before the courts. For those reasons it is appropriate to grant leave to appeal on the grounds of appeal concerning statutory interpretation.

The relevant statutory scheme

[7] The purpose of the Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury[2] by providing a procedure for the speedy resolution of claims for damages for personal injury;[3] promoting settlement of claims at an early stage wherever possible;[4] ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for the resolution of the claim by settlement or trial;[5] putting reasonable limits on awards of damages based on claims;[6] minimising the costs of claims;[7] and regulating inappropriate advertising and touting.[8]

[8] Chapter 2, Pt 1, Div 1 of the Act sets out the procedure for giving notice of a claim under the Act.[9] The phrase "complying part 1 notice of claim" is defined[10] as:

> "part 1 of a notice of claim complying with section 9 and, if a respondent is added under section 14, section 14 that is given as required under chapter 2, part 1, division 1."

This definition replaced the earlier definition of the phrase, "complying notice of claim".[11]

Section 18 relevantly provides:

> "**Claimant's failure to give part 1 of a notice of a claim**
> **(1)** A claimant's failure to give a complying part 1 notice of claim prevents the claimant from proceeding further with the claim unless –
> …
> (c) the court, on application by the claimant –
> …

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2 The Act, s 4(1).
3 Above, s 4(2)(a).
4 Above, s 4(2)(b).
5 Above, s 4(2)(c).
6 Above, s 4(2)(d).
7 Above, s 4(2)(e).
8 Above, s 4(2)(f).
9 Above, s 9.
10 Above, Sch, Dictionary, s 8.
11 *Civil Liability Act* 2003 (Qld), Act No 16 of 2003, s 110, operational from 9 April 2003.

(ii) authorises the complainant to proceed further with the claim despite the noncompliance.

… "

[9] Section 20(2) of the Act relevantly provides:

"If part 1 of a notice of a claim is not a complying part 1 notice of claim, a respondent is taken to have been given a complying part 1 notice of claim when –

…

(b) the court makes a declaration that the claimant is taken to have remedied the noncompliance, or authorises the claimant to proceed further with the claim despite the noncompliance."

[10] Section 77D of the Act relevantly provides:

"**Alteration of limitation period for personal injury arising out of an incident happening before 18 June 2002**

(1) This section applies in relation to a personal injury arising out of an incident happening before 18 June 2002 if –

… [circumstances which, it is common ground, apply to the respondent]

(2) If the period of limitation has ended, the claimant may start a proceeding in a court based on the claim –

(a) if a complying notice of claim is given before 18 June 2003 – before or on 18 June 2003; or

(b) at a later time, not more than 6 months after the complying notice of claim is given and not later than the end of 18 December 2003, with the court's leave.

(3) If a proceeding is started under subsection (2) without the claimant having complied with chapter 2, part 1, the proceeding is stayed until the claimant complies with the part or the proceeding otherwise ends.

… "

[11] It is not contended that the phrase "complying notice of claim" in s 77D(2) does not mean "complying part 1 notice of claim".

Does s 77D(2)(b) of the Act require as a precondition to the grant of leave that a complying notice of claim be given on or before 18 June 2003?

[12] The applicants contend that s 77D(2)(b) of the Act should be construed so as to require that it is a precondition to the grant of leave under that sub-section for the respondent to have given a complying notice of claim before 18 June 2003; as the respondent did not, she cannot apply for leave. The applicants emphasise the following points to support that contention. The latest date within which to obtain the court's leave under s 77D(2)(b) is 18 December 2003 and six months before this date is 18 June 2003. The Act provides for a time frame to enable those in the applicants' position to ascertain whether they are the proper respondents under the Act to the claim;[12] to advise if the notice is compliant[13] and six months to

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12 Above, s 10.

13 Above, s 12.

investigate the claim, attempt to resolve it and make a decision on liability.[14] Once a respondent under the Act accepts the claim is compliant or waives non-compliance, the Act sets out procedures for the exchange of information,[15] the examination of the claimant,[16] and the holding of a compulsory conference,[17] ordinarily within six months after the notice of claim has been given, with time frames for commencing proceedings after the conclusion of the compulsory conference.[18] The applicants contend that their suggested interpretation of s 77D(2)(b) of the Act is more consistent with this legislative scheme and that the primary judge's interpretation favours those who delay applying for leave, something inconsistent with the scheme under the Act. They also emphasise that the respondent could have applied for leave to start a proceeding where there is an urgent need under s 43(1) of the Act. They contend there is a rational distinction between sub-sections 77D(2)(a) and (b): the former gives a right to start a proceeding whilst the latter allows for an application for leave to start a proceeding.

[13] As Williams JA points out in his reasons, the applicants' contention gains considerable strength if the word "or" linking s 77D(2)(a) and (b) is read as "and". I am not persuaded the legislature has mistakenly used "or" in this context.[19] The legislature only recently amended s 77D(2)(a), which contains the linking word "or", by s 108 of Act No 16 of 2003. Although it re-considered that subsection, it did not alter "or" to "and". This very strongly suggests the legislature intended to use the disjunctive "or", not the conjunctive "and". In my view the word "or" should be given its ordinary meaning.[20] That also seems to be the construction given to the sub-section in *Cuthbert v Adams*.[21]

[14] Section 77D(2) is unclear and confusing and invites argument as to its meaning but I am not persuaded that the learned primary judge erred in his construction. If the applicants' contention were correct, there would be no need for the words in s 77D(2)(b) "and not later than the end of 18 December 2003" because that is six months after 18 June 2003. The use of those quoted words and of the disjunctive "or" between s 77D(2)(a) and (b) strongly suggest that the legislature intended in enacting s 77D(2)(b) that a claimant could give a complying notice of claim between 18 June 2003 and 18 December 2003 and start a proceeding in a court based on that claim with the court's leave. Additionally, a claimant who did not start a proceeding in court by 18 June 2003 but who had given a complying notice of claim before 18 June 2003 could also apply for leave to start a proceeding in court under s 77D(2)(b). As his Honour Judge McGill SC, in *Mutze v Townsville City Council*[22] pointed out, if the legislature intended to restrict transitional claims to those where a complying notice of claim was given before 18 June 2003, the words of s 77D(2)(a) would have been inserted in the introduction to s 77D(2). I agree with that observation.

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14 Above, s 20.
15 Above, s 22 and s 27.
16 Above, s 25.
17 Above, s 36.
18 Above, s 42.
19 cf *R v Oakes* [1959] 2 QB 350.
20 cf *Colon Peaks Mining Co NL v Wollondilly Shire Council* (1911) 13 CLR 438, 451 and 452.
21 [2003] QSC 320; SC No 8237 of 2003, 22 September 2003 at [5] and [6], QLR 20.3.2004.
22 [2003] QDC 448; DC No 4178 of 2003, 11 December 2003.

[15] I cannot see that the fact that the respondent could have made an application under s 43(1) to start a proceeding affects the meaning of s 77D(2) of the Act.

[16] The interpretation I give to s 77D(2) is consistent with the purpose of the Act. Section 77D(3) of the Act protects the applicants because the proceeding is stayed until the respondent, (the claimant under the Act), complies with the pre-court procedures under Pt 1 of Ch 2 of the Act.

[17] The applicants' contention fails.

Has the respondent given a complying notice of claim under the Act?

[18] The applicants next contend that, accepting a court can grant leave after 18 June 2003 and not later than the end of 18 December 2003 to start a proceeding in a court for a claim in relation to a personal injury arising out of an incident happening before 18 June 2002, the respondent has not given a complying notice and cannot rely on s 77D(2)(b) of the Act.

[19] As the applicants recognise, that is why on 28 November 2003 his Honour made the declaration under s 18(1)(c)(ii), that the respondent was authorised to proceed further with her claim despite non-compliance, before giving leave to start the proceeding under s 77D(2)(b). Section 20(2) of the Act provides that once that declaration was made, the applicants, (respondents under the Act), are deemed to have been given a complying part 1 notice of claim.[23] When his Honour gave leave under s 77D(2)(b) of the Act the respondent had immediately beforehand given a complying part 1 notice of claim under the Act because of His Honour's declaration under s 18(1)(c)(ii). This contention is also without substance.

[20] The grounds of appeal as to the construction of the Act fail.

Should leave to appeal be given as to whether the learned primary judge erred in the exercises of discretion under s 18(1)(c)(ii) or s 77D(2)(b) of the Act?

[21] The applicants' remaining proposed grounds of appeal concern the judge's exercise of discretion under s 18(1)(c)(ii) and s 77D(2)(b) of the Act.

[22] The learned primary judge noted that the delay was not the fault of the respondent but of her lawyers. His Honour gave the following reasons for exercising his discretion to make the declaration in favour of the respondent under s 18(1)(c)(ii) of the Act. There was no evidence that the respondent enquired about the progress of her claim but the delay did not seem to be inordinate. The applicants were not prejudiced by it. If the respondent's claim is meritorious, the prejudice to her in being barred from pursuing it would be great. His Honour gave the same reasons for exercising his discretion to grant the respondent leave to start a proceeding under s 77D(2)(b) of the Act.

[23] The applicants contend the learned primary judge wrongly exercised these discretions in that the respondent did not explain the delay, especially prior to 3 January 2002, and nor did his Honour consider her prospects of success in her claim. These points were not emphasised by the applicants at first instance and that seems to be why his Honour did not deal specifically with them. In any case, a satisfactory explanation for delay is but one factor relevant to the exercise of

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23 The Act, s 20(2)(b).

discretion.[24] Nor does the material suggest the respondent's prospects of success in her action are so slim as to render the grant of leave futile.

[24] Leave to appeal from a judicial exercise of discretion is not lightly given. The fact that another District Court judge exercised the discretion under s 77D(2)(b) of the Act differently in *Earthrowl v State of Queensland*[25] and in *Willey v Lush Hair Salon*[26] on different factual scenarios does not necessarily mean the exercise of discretion in this case was so plainly unjust as to warrant the granting of leave to appeal here.

[25] The applicants have not demonstrated any sound reason for granting leave to appeal from the learned primary judge's exercises of discretion under the Act. I would refuse leave to appeal as to those proposed grounds of appeal.

[26] I would grant the application for leave to appeal, limited to the grounds of appeal dealing with the construction of the Act, but, for the reasons given earlier, dismiss the appeal with costs to be assessed.

[27] Orders

1. Grant the application for leave to appeal, limited to the grounds of appeal as to the construction of the Act.

2. Dismiss the appeal with costs to be assessed.

[28] **WILLIAMS JA:** The respondent, then a 45 year old teacher at Redlands College, was injured on 30 October 1999 when she tripped on what is alleged to be an unmarked step in the Gateway Baptist Church at Wishart of which the applicants are the owners-occupiers. No action claiming damages for personal injury had been started in a court prior to the end of the ordinary three year limitation period which expired on 30 October 2002. The *Personal Injuries Proceedings Act* 2002 ("the Act") commenced operation on 18 June 2002 and the respondent sought to rely on s 77D thereof (which was introduced by way of amendment on 29 August 2002) in order to obtain leave of the court entitling her to commence proceedings notwithstanding the expiration of the limitation period. That application was made to the District Court on 31 October 2003; orders were sought pursuant to s 18(1)(c) and s 77D(2)(b) of the Act. The order of the District Court dated 28 November 2003 was to the following effect:

> 1. Pursuant to s 18(1)(c)(ii) of the Act the respondent was authorised to proceed further with her claim in respect of matters set out in a Notice of Claim dated 27 November 2002.
> 2. Leave was granted pursuant to s 77D(2)(b) of the Act for the respondent to start a proceeding in respect of matters set out in the Notice of Claim.

[29] The applicants have sought leave to appeal against that decision. I agree with the reasons of the President in concluding that leave should be granted and that the issues raised should be considered on the merits.

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24 *Cuthbert v Adams*, above, [12].
25 [2003] QDC 441; DC No 3663 of 2003, 8 December 2003.
26 [2003] QDC 444; DC No 3665 of 2003, 9 December 2003.

[30] It was clearly established that the respondent first consulted solicitors in connection with the matter on 3 January 2002. A letter was written shortly thereafter advising the applicants of the respondent's intention to institute proceedings claiming damages and inquiring as to the identity of the relevant insurer. In March 2002 investigators appointed by the insurer sought information as to the circumstances of the incident. There was further contact between those solicitors and the investigators in May 2002. Then in June 2002, shortly after the Act commenced, solicitors were appointed to act on behalf of the applicants and they notified the solicitors for the respondent of that.

[31] Apparently the respondent's solicitors were awaiting further medical reports in June 2002 and in consequence on 26 June wrote to the applicants' solicitors a letter saying, inter alia:

> "We are, of course, concerned about the expiration of the limitation period. Our client might be prepared to defer issuing proceedings in return for an undertaking from your client to the effect that it does not require the issue of proceedings before the expiration of the limitation period and will not raise any point about the limitation period if proceedings are issued within 1 month of our receipt of notice that your client requires proceedings to be issued."

[32] The response was dated 8 July 2002; relevantly it said:

> "We appreciate your proposal with respect to the limitation period issue. However, it is not our client's practice to provide undertakings in this respect. Accordingly, it is a matter for your client as to whether she issues the Court proceedings."

[33] Clearly in July 2002 the respondent's solicitors were aware that the ordinary limitation period was to expire in about three months time. But, so far as is revealed by the material before the court, not only were proceedings not commenced, but there was no further communication with the solicitors for the applicants prior to the expiration of the limitation period.

[34] As already noted about a month after that limitation period expired a Notice of Claim, purportedly complying with the requirements of the Act, was signed, but it was not served until 22 May 2003. Service was by way of post on the insurer under cover of a letter dated 20 May 2003. That letter contained the following:

> "An explanation for the delay in giving the notice late is required. To be frank, all we can say is that the fault rests with us and not in any way with our client. Regrettably, our employee responsible for the file gave assurances that all was in order when, obviously, it was other than so. A recent audit of the files brought the real position to light.
>
> An investigation of the facts, we submit, has not been prejudiced.
>
> …
>
> With respect, it seems to us that if the notice of claim is labelled non-complying only because of the time factor, an application by our client for relief against non-compliance would inevitably succeed, and any such application would only attract further delay and cost."

[35] The applicants responded within one month as required by s 12 of the Act. Their letter of 18 June 2003 drew attention to a number of matters on which an assertion was based that the notice was not compliant. It was specifically pointed out that the respondent was under an obligation to serve a compliant notice of claim on a proper respondent by 29 December 2002 [see para 11 hereof]. The letter also asserted that the applicants did not consider "the excuse given by your firm as to the reason for the delay is a reasonable excuse". It is not necessary in these reasons to detail any further the particulars of the asserted non-compliance.

[36] There was a response from the respondent's solicitors by letter of 9 July 2003, and then apparently on 2 October 2003 an intimation was given that the respondent would apply for relief under the Act. As already noted that application was not filed until 31 October 2003.

[37] The explanation for delay contained in the letter of 22 May 2003 is very unsatisfactory. On one reading the explanation is limited to the delay between 27 November 2002 (the date of the notice) and 20 May 2003 (when the notice was forwarded to the applicants). There is no explanation for the failure to commence proceedings within the ordinary three year limitation period. As already noted the respondent's solicitors were acutely aware in June 2002 of the pending expiration of the limitation period and proceedings could have been commenced until 29 August 2002 without any need to comply with the provisions of the Act.

[38] In the circumstances outlined above s 77A of the Act applied to this matter; the incident happened before 18 June 2002 and the period of limitation had not ended on 29 August 2002 when the section came into force. In consequence by operation of sub-section (2) the incident giving rise to the claim for personal injury was taken to have happened on 1 August 2002 for purposes of s 9(3)(a) of the Act. That subsection determines the time within which the requisite notice must be given. By virtue of s 77A(3) the respondent was taken to have consulted a lawyer on 29 November 2002 for purposes of s 9(3)(b). By operation of those provisions the respondent was required to give a notice of claim on or before 29 December 2002. That of course was not done, but the obligation to give such a notice continued and s 9(5) imposed an obligation on the respondent to give "reasonable excuse for the delay".

[39] Section 77D is of critical importance for present purposes; the relevant subsections thereof are as follows:

> "**(1)** This section applies in relation to a personal injury arising out of an incident happening before 18 June 2002 if—
>
> (a) the period of limitation for a proceeding based on a claim for the personal injury ends during the period starting 18 June 2002 and ending at the end of 18 December 2003; and
>
> (b) a proceeding based on the claim has not been started in a court, including in a court outside Queensland or Australia.
>
> **(2)** If the period of limitation has ended, the claimant may start a proceeding in a court based on the claim—

> (a) if a complying notice of claim is given before 18 June 2003—before or on 18 June 2003; or
> (b) at a later time, not more than 6 months after the complying notice of claim is given and not later than the end of 18 December 2003, with the court's leave.
>
> **(3)** If a proceeding is started under subsection (2) without the claimant having complied with chapter 2, part 1, the proceeding is stayed until the claimant complies with the part or the proceeding otherwise ends."

[40] There is no doubt this matter comes within s 77D(1). It is also clear that the period of limitation has ended therefore, if the respondent had given a complying notice before 18 June 2003 she could have started a proceeding "before or on 18 June 2003" without leave of the court. 18 June 2003 was obviously selected because that was the date 12 months after the principal Act commenced. As already noted s 77A, which has the effect of extending the limitation period, operated so that on the facts of this case the respondent had until 29 December 2002 to serve a complying notice. As the respondent did not serve a complying notice by 29 December 2002 she could arguably have utilised s 18(1)(c)(ii) before 18 June 2003. No complying notice was served before 18 June 2003 nor was any order pursuant to s 18(1)(c)(ii) made prior to that date; once the court makes an order pursuant to s 18(1)(c)(ii) by virtue of s 20(2)(b) the notice is taken to be a complying one. There it is clear that the respondent cannot rely on s 77D(2)(a). The critical question for present purposes is whether or not the respondent can bring herself within s 77D(2)(b).

[41] To bring s 77D(2)(b) into play there must be a complying notice of claim. Here the notice given did not satisfy that requirement. To get around that the respondent has sought to rely on s 18(1)(c)(ii) which relevantly provides:

> "A claimant's failure to give a complying part 1 notice of claim prevents the claimant from proceeding further with the claim unless … the court, on application by the claimant … authorises the claimant to proceed further with the claim despite the noncompliance."

[42] The respondent's application to the District Court clearly relied on s 18(1)(c)(ii) in conjunction with s 77D(2)(b) in order to obtain the necessary relief. If it was permissible to rely on that combination of provisions it would follow that at first instance the exercise of two separate discretions was called for. Firstly, a discretion whether to authorise the respondent to proceed with her claim despite the non-compliance with the requirements relating to notice of claim, and secondly, a discretion whether to grant leave under s 77D(2)(b).

[43] In his reasons the learned District Court judge set out in some detail the history of the matter and then turned to the provisions of the Act. He first noted, from s 4, that the purpose of the Act was "to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury." He went on to note the criticisms made of the respondent's conduct with respect to the matter and her failures to follow the requirements of the Act. He then, appropriately, recorded that counsel for the applicants conceded that his clients were not prejudiced by the respondent's conduct of the proceedings to that point of time.

[44] His Honour then rejected a number of the grounds on which the applicants had contended that the respondent's notice of claim was non-compliant, but nevertheless concluded that it was "not a complying notice of claim". He noted the explanation for the delay contained in the letter dated 20 May 2003, and said that nothing was alleged against the respondent personally but accurately observed that the evidence did not indicate that the respondent had made inquiries of her solicitors as to the progress of the claim. He concluded that the delay was not "inordinate" and went on to say that "in so far as the delay needs to be excused it should be".

[45] Shortly thereafter followed the two critical paragraphs in the reasons:

> "In my view I should authorise the applicant to proceed further with her claim despite her noncompliance with the requirements relating to the notice of claim. The principal factors which lead me to that conclusion are the absence of any suggestion of prejudice to the respondents occasioned by the noncompliance, and the significant prejudice which the applicant would suffer if she were to be prohibited from pursuing her claim.
>
> That authorisation having been given, there is no impediment to my giving leave pursuant to the provisions of section 77D(2)(b). The same factors as I found persuasive when dealing with the application under section 18 are equally relevant and persuasive when dealing with the leave application under section 77D(2)(b). I give the leave contemplated by the section."

[46] The primary submission of counsel for the applicants is that on its proper construction s 77D(2) requires that a complying notice of claim be given on or before 18 June 2003 before the court could give leave extending the time for starting proceedings to 18 December 2003. It was submitted that though the word "or" was used between paragraphs (a) and (b) they were not true alternatives. That seems to me to be undoubtedly correct. It would be an absurdity to construe the provision so that a person giving a complying notice prior to 18 June 2003 could not obtain the court's leave to start proceedings after that date but before 18 December 2003, whereas a claimant who did not give a complying notice until after 18 June 2003 could obtain the court's leave to start proceedings prior to 18 December 2003. Clearly paragraph (b) must be construed so that it catches the situation where a complying notice was given prior to 18 June 2003 but proceedings had not been started by that date.

[47] If one omits for the moment the words "and not later than the end of 18 December 2003" subsection (2) can be sensibly construed. The period of six months is made significant by a number of provisions of the Act; reference can be made in that regard to s 10, s 12, s 20, s 22, s 25, s 36, and s 42. On that basis if a complying notice has been given prior to 18 June 2003, and the six month period has elapsed by that date, proceedings can be commenced on or before 18 June 2003 notwithstanding the fact that the period of limitation has ended. If a complying notice has been given prior to 18 June 2003 and the six month period has not elapsed by that date then the court's leave is necessary to start proceedings after that date. In other words once the six month period has elapsed proceedings could be commenced with the court's leave.

[48] On that construction the introduction of the words "and not later than the end of 18 December 2003" are essentially superfluous, but their insertion is, in my view, intended to made it abundantly clear that that is the final cut off date for the starting of proceedings where a claimant has to rely on s 77D in order to overcome the expiration of a limitation period.

[49] Counsel for the respondent argued, relying on the decision of McGill DCJ in *Mutze v Townsville City Council* [2003] QDC 448 that a contrary construction should be preferred. That learned judge recognised that the "scheme of the Act would work effectively if the power in s 77D(2)(b) was restricted to a situation where there had been a complying notice of claim given before 18 June 2003". He also said that he did "not criticise the general analysis of the scheme of the Act" which preferred that construction. However, McGill DCJ reached a contrary conclusion primarily because if that argument was "correct" then the words "and not later than the end of 18 December 2003 in paragraph (b) would be unnecessary." He also pointed out that if the legislative intention was that a complying notice had to be given before 18 June 2003 "the appropriate place to insert that restriction was in the introductory words to subsection (2) rather than in paragraph (a)."

[50] Counsel for the respondent relied on the approach of McGill DCJ and it has to be said that there is some force in that approach; but ultimately the question has to be which construction best fits with the overall legislative intention as disclosed by a reading of the statute as a whole. In my view the scheme of the Act works most effectively if the operation of s 77D(2)(b) is restricted to the situation where there has been a complying notice given prior to 18 June 2003. In my view the intention of the legislature was not that a claimant could wait until December 2003 and in the days leading up to 18 December 2003 obtain an order under s 18(1)(c)(ii) authorising the claimant to proceed despite non-compliance and also get an order pursuant to s 77D(2)(b) granting leave to start proceedings by 18 December 2003.

[51] On the construction I prefer no complying notice was given before 18 June 2003 and in consequence no court had jurisdiction pursuant to s 77D(2) to grant leave to start proceedings no later than 18 December 2003.

[52] Counsel for the applicants also contended that the learned District Court judge did not give proper consideration to the factors relevant to the exercise of a discretion under s 18(1)(c)(ii). There was no affidavit material filed by the respondent herself and that had some significant consequences. There was no substantive material indicating the respondent's prospects of success on the issue of liability should the litigation proceed. There was no explanation as to why the respondent waited from the date of the accident until 3 January 2002 to consult solicitors. As pointed out in *Miller v Nominal Defendant* [2003] QCA 558, in a case such as this the whole period of delay should be explained. Arguably there was no basis for the finding by the learned judge at first instance that the delay was not inordinate. The fact is that the notice of claim was not given until more than three and a half years after the incident. In the circumstances I have grave doubts as to whether or not if an exercise of discretion under s 18(1)(c)(ii) was called for there was sufficient material on which a court could exercise its discretion in favour of the respondent.

[53] Counsel for the applicants also submitted that the learned judge at first instance did not properly exercise a discretion under s 77D(2)(b). As noted above he merely said that the same considerations which warranted his exercising a discretion under

s 18(1)(c)(ii) also warranted his exercising a discretion under the later section. It seems clear that the learned judge at first instance did not give any weight to the fact that no attempt to comply with the requirements of the Act had been made prior to the expiration of the ordinary limitation period. No adequate reason was given for failing to start proceedings before either 29 August 2002 or 18 June 2003. Here there was not even a purported notice of claim given within the limitation period.

[54] All of those matters are of some significance and would justify this court in concluding that there had been a wrong exercise of discretion if the matter properly called for an exercise of discretion under the sections referred to. But as pointed out above on the proper construction of s 77D(2) no exercise of discretion was called for.

[55] It follows that the following orders should be made:

(i) grant leave to appeal and allow the appeal;

(ii) set aside the order of the District Court of 28 November 2003, and in lieu thereof order the application of 31 October 2003 be dismissed;

(iii) order that the respondent pay the applicants' costs of the appeal and of the application to be assessed.

[56] **WHITE J:** I have had the advantage of reading the reasons for judgment of both the President and Williams JA where the material and relevant legislative provisions are set out. As their Honours recognise there are competing constructions available for s 77D(2) of the *Personal Injuries Proceedings Act* 2002 ("the Act") both of which give rise to some reservation.

[57] The construction of the Act as proposed by Williams JA means that the words "and not later than the end of 18 December 2003", are, essentially, superfluous. This is unattractive in a modern statute, particularly one that has been subject to amending review in its short life. But it is clear that s 77D(2)(a) and (b) are not true alternatives, as recognised by Williams JA. It would be an odd result to construe those provisions so that a person giving a complying notice of claim prior to 18 June 2003 could not obtain the leave of the court to start proceedings after that date but before 18 December 2003, whereas a claimant who did not give a complying notice until after 18 June 2003 could obtain the leave of the court to start proceedings prior to 18 December 2003. I agree with his Honour that s 77D(2)(b) must be construed so that it catches the situation where a complying notice of claim was given prior to 18 June 2003 but proceedings had not been started by that date.

[58] As his Honour notes, if the words "and not later than the end of 18 December 2003" are omitted then s 77D(2)(b) can sensibly be construed. Accordingly, if a complying notice of claim has been given prior to 18 June 2003 and the six month period has elapsed by that date proceedings can be commenced on or before 18 June 2003 notwithstanding the fact that the period of limitation has ended. If a complying notice of claim has been given prior to 18 June 2003 and the six month period has not elapsed by that date then the leave of the court is necessary to start proceedings after that date.

[59] A construction that gives effect to the overall intention of the legislation is one that is to be preferred. I agree with Williams JA that if the operation of s 77D(2)(b) is restricted to the situation where there has been a complying notice of claim given

prior to 18 June 2003 the scheme of the Act works most effectively. I agree with him that the intention of the legislature cannot be that a claimant could wait until December 2003 and in the days leading up to 18 December 2003 obtain an order under s 18(1)(c)(ii) authorising the claimant to proceed despite non-compliance and also get an order pursuant to s 77D(2)(b) granting leave to start proceedings by 18 December 2003.

[60] Accordingly, since no complying notice of claim was given before 18 June 2003 no court had jurisdiction pursuant to s 77D(2) to grant leave to start proceedings no later than 18 December 2003.

[61] I agree with his Honour that there was little material available to the learned primary judge on which to exercise his discretion under s 18(1)(c)(ii). There was little basis to warrant his exercising the discretion favourably towards the applicant.

[62] I agree with the orders proposed by Williams JA.