SUPREME COURT OF QUEENSLAND

CITATION:	*SG v State of Qld; VG v State of Qld; NY v State of Qld; SD v State of Qld; AO v State of Qld; JO v State of Qld* [2004] QCA 215
PARTIES:	**SG** (applicant/appellant) **v** **STATE OF QUEENSLAND** (respondent/respondent) **VG** (applicant/appellant) **v** **STATE OF QUEENSLAND** (respondent/respondent) **NY** (applicant/appellant) **v** **STATE OF QUEENSLAND** (respondent/respondent) **SD** (applicant/appellant) **v** **STATE OF QUEENSLAND** (respondent/respondent) **AO** (applicant/appellant) **v** **STATE OF QUEENSLAND** (respondent/respondent) **JO** (applicant/appellant) **v** **STATE OF QUEENSLAND** (respondent/respondent)
FILE NO/S:	Appeal No 376 of 2004 Appeal No 377 of 2004 Appeal No 378 of 2004 Appeal No 379 of 2004 Appeal No 380 of 2004 Appeal No 381 of 2004 SC No 11319 of 2003 SC No 11321 of 2003

	SC No 11295 of 2003 SC No11287 of 2003 SC No 11299 of 2003 SC No 11301 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2004
JUDGES:	Williams and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeals dismissed with costs**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – PERSONAL INJURY CASES – where appellants' claims for damages for personal injury out of time – where appellants failed to comply with notice provisions under s 9 *Personal Injuries Proceedings Act* 2002 (Qld) within the time prescribed by the Act - where appellants refused leave to start proceedings pursuant to s 43 *Personal Injuries and Proceedings Act* 2002 (Qld) - where appellants lacked grounds demonstrating a basis for a court order granting extensions to the limitation periods under *Limitation of Actions Act* 1974 (Qld) - whether urgent need to start proceedings *Personal Injuries Proceedings Act* 2002 (Qld), s 9, s 18, s 43, s 59 *Limitation of Actions Act* 1974 (Qld), s 30, s 31 *Motor Accident Insurance Act* 1994 (Qld), s 39(5)(a) *Grove v Bestobell Ind Pty Ltd* [1980] Qd R 12, cited *Taylor v Stratford & Ors* [2003] QSC 427, considered *Thomas v Transpacific Industries Pty Ltd* [2002] QCA 160; [2003] 1 Qd R 328, cited *Tiernan v Tiernan* SC No 39 of 1992, 22 April 1993, considered *Wilson v Horne* [1999] TASSC 33, cited
COUNSEL:	G R Mullins for the appellants M Grant-Taylor SC, with K Philipson, for the respondent
SOLICITORS:	Quinn & Scattini for the appellants Crown Law for the respondent

[1] **WILLIAMS JA:** The background to these six appeals is set out in the reasons for judgment of Jerrard JA which I have had the advantage of reading. Each appeal essentially calls for the construction of s 43 of the *Personal Injuries Proceedings Act* 2002 ("the Act"). Section 59 and s 77D of that Act provide that in certain circumstances there may be an alteration of the limitation period otherwise applying to the relevant proceeding pursuant to the *Limitation of Actions Act* 1974, but neither of those sections was invoked by the appellants in this case. In each of the six cases with which the court is currently concerned the statutory limitation period applicable to the claim had expired by 8 December 2003 when each of the six applications pursuant to s 43 of the Act was filed. Each application was dismissed by a judgment delivered on 17 December 2003.

[2] Relevantly s 43 provides:

> "(1) The court, on application by a claimant, may give leave to the claimant to start a proceeding in the court for damages based on a liability for personal injury despite noncompliance with this part if the court is satisfied there is an urgent need to start the proceeding.
>
> (2) The order giving leave to start the proceeding may be made on conditions the court considers necessary or appropriate having regard to the particular circumstances of the case."

[3] When that provision of the Act is read in conjunction with the limitation statute it is clear, in my view, that "an urgent need to start the proceeding" would encompass the situation where the relevant limitation period would expire before the claimant had the opportunity of complying with the other requirements of the Act. The relevant limitation period could either be the ordinary limitation period applying to the claim or that limitation period extended by virtue of an order made pursuant to s 30 and s 31 of the *Limitation of Actions Act*. [An "urgent need" may be established by other considerations (such as imminent death of the claimant) but it is not necessary for present purposes to define the limits of the expression.]

[4] Here, as already noted, the limitation period applicable in each case had already expired when the application under s 43 was made. Further, the material relied in support of the application under s 43 did not establish that any of the appellants was in possession of material which would provide the basis for the court making an order under s 30 and s 31 of the *Limitation of Actions Act*.

[5] In effect the appellants were seeking to obtain an extension of the applicable limitation period by obtaining an order under s 43. In my view s 43 on its proper construction does not empower the court to do that. On its proper construction s 43 can only operate where the original or extended limitation period has not expired.

[6] The learned judge at first instance was clearly correct in dismissing each application, and for these and the reasons of Jerrard JA each appeal should be dismissed with costs.

[7] **JERRARD JA:** These proceedings are the hearing of six separate appeals, heard together by agreement, from a judgment given 17 December 2003 in which a learned judge of this court dismissed applications brought pursuant to s 43 of the

Personal Injuries Proceedings Act 2002 (Qld) (the *PIPA*). Each appellant had sought leave to start proceedings against the respondent for damages despite non-compliance with Chapter 2 Part 1 of that Act. All six were adults who, when children, had been under the care of the Director or CEO of the Department of Families (by whatever name at differing times) and all had given notices pursuant to Part 9 of the Act describing years of abuse of them as children, when in foster care in which the Director had then placed them. The appeals raise questions of the construction of some of the provisions of the Act.

[8] Three of the s 9 notices are dated 12 November 2003, one is dated 18 November 2003, and one 17 December 2003. The statutory limitation period applicable to each claim expired on the following dates, namely 17 May 1995, 1 September 1998, 20 January 2001, 24 August 2001, and there were two each expiring on 21 February 2003. The latter two were ones to which s 77A of the Act applied, and the notices from those two appellants were due on 29 December 2002.

[9] The s 9 notices all describe serious and lengthy abuse of the relevant child. Three were in the care of the same foster parents or group of foster parents; the others were each in quite separate foster care. All are young adults, and the information in the appeal record describes their now living difficult and perhaps dysfunctional lives. Four are described as having no fixed place of abode, one is in an abusive relationship, and at least two are experiencing medical handicaps and receiving treatment including counselling from psychologists. The affidavit evidence from their solicitor describes considerable difficulty in obtaining instructions, including difficulty in locating any of them with ease; and difficulty from the necessity to have counsellors present at all interviews in which instructions about their past are taken, simply because of the distress caused to each appellant by describing her or his childhood experienced in foster care.

[10] The event ultimately provoking each application for leave, all filed on 8 December 2003, was the publication on 18 June 2003 of articles and an editorial in *The Courier-Mail,* describing what was said to have been years of abuse of fostered children by a particular fostering family. Three of the appellants were fostered with that family, and it is abuse by that family which their notices describe. The appeal record informs that around the time of that publication each appellant separately approached the Brave Hearts Organisation to secure its services by the provision of psychological and social support from its trained counsellors. It appears that before the *The Courier-Mail* publications at least some of the appellants may have been assisting investigating police officers into inquiries about the complaints of abuse made by those appellants.

[11] Their legal advisors have drawn Statements of Claim, pleading the asserted abuse as happening in breach of a duty of care owed to each. The problem for all appellants is that his or her relevant limitation period expired before the publication of that article. Its publication resulted in each consulting with the solicitor acting in common for all of them. Those consultations first happened in September, October, and November 2003; after the date by which the limitation period applicable to any potential claim had expired.

[12] The appellants' solicitor foresaw the possibility of extensions to those periods of limitation being granted pursuant to Part 3 of the *Limitation of Actions Act* 1974, provided that a "material fact of a decisive character" as required by s 31(2)(a) of

that Act could be established, not within the means of knowledge of the respective appellant until a date after the commencement of the year last preceding the expiration of the period of limitation. However, the appellants' solicitor was concerned when consulted in late 2003 at the prospect that time might already be running against each appellant, in respect of the one year prescribed in s 31(2) by which the period of limitation might be extended from the date when that material fact of a decisive character did relevantly come within the means of knowledge of the client. The solicitor's goal in the applications filed on 8 December 2003 was to obtain an order the effect of which would be to stop time in that potentially existing one year period running any further.

[13] The factual difficulties the solicitor faced are established by the candidly made concession that no appellant is presently in a position to establish on an application brought under Part 3 of the *Limitation Act* that there is any material fact of a decisive character upon which that appellant could rely for an order extending the limitation period. The submission made on appeal was that it might be that for some appellants the publication of the newspaper article, with its extensive description of widespread abuse of children in foster care and the consequences including psychiatric injury of that abuse, could be the material fact. For one or more it might be advice given before that publication by police officers conducting investigations in the past; for others the material facts might not yet have occurred. At the time the applications were heard in December 2003 none of the appellants had been assessed by a psychiatrist, because of unavailability until February 2004 of the experienced forensic psychiatrist of the solicitor's choice. That meant that no appellant could even point to the fact of a diagnosis of a particular psychiatric condition as a material fact not previously within the knowledge of that appellant.

[14] The *PIPA* as amended came into force on 18 June 2002 and applies in relation to all personal injury, other than that excluded by the Act, arising out of an incident whenever it happened. Certain personal injury is excluded, including that as defined under the *Motor Accident Insurance Act* 1994 and in relation to which that Act applies, or injury as defined under the *Workers' Compensation and Rehabilitation Act* 2003; and personal injury in relation to which a proceeding was started in a court before 18 June 2002 is excluded, as is personal injury that is a dust related condition. The Act imposes requirements of the same kind upon claimants wanting to litigate in relation to personal injuries covered by the Act, and on the respondents to those claims, as are imposed on the like parties by the *Motor Accident Insurance Act* and the *Workers' Compensation and Rehabilitation Act*.

[15] The provisions directly applicable on this appeal are s 9 and s 43, and s 18 and s 57 are of interest. Section 9 as amended by the *Civil Liability Act* 2003 (No 16, 2003 in force on 9 April 2003) requires that before starting a proceeding in a court based on a claim for damages based on a liability for personal injury including psychological or psychiatric injury[1], a claimant must give written notice of the claim in the approved form to the person against whom the proceeding is proposed to be started. That approved form must be in two parts, Part 1 and Part 2. Part 1 of the notice must be given within the period specified in s 9(3) being, in general terms, the earlier of either the day nine months after the day the incident giving rise to when the personal injury happened (or the first appearance of symptoms of that

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[1] I am interpolating the relevant definitions of "claim" and "personal injury" in the dictionary in the schedule to the Act

injury) or else the day one month after the claimant first instructed a lawyer to act on the person's behalf in seeking damages for that personal injury. Part 2 of the notice must be given within two months after the events specified in s 9(3A), those being events occurring by definition after the Part 1 notice is given. (I am omitting here any reference to the provisions of s 9A, which makes particular provision for notice of a claim procedure for medical negligence cases). Section 9(5) contains the important provision that if Part 1 of the notice is not given within the periods prescribed under s 9(3) [or s9A(9)(b) in medical negligence cases], the obligation to give the notice under subsection (1) continues and a reasonable excuse for the delay must be given in Part 1 of the notice or by separate notice to the person against whom the proceeding is proposed to be started.

[16] Section 18 of the Act provides as follows:

> "**(1)** A claimant's failure to give a complying part 1 notice of claim prevents the claimant from proceeding further with the claim unless -
>
> (a) the respondent to whom part 1 of a notice of a claim was purportedly given –
>
> (i) has stated that the respondent is satisfied part 1 of the notice has been given as required or the claimant has taken reasonable action to remedy the noncompliance; or
>
> (ii) is conclusively presumed to be satisfied it is a complying part 1 notice of claim under section 13; or
>
> (b) the respondent has waived compliance with the requirement; or
>
> (c) the court, on application by the claimant –
>
> (i) declares that the claimant has remedied the noncompliance; or
>
> (ii) authorises the claimant to proceed further with the claim despite the noncompliance.
>
> **(2)** An order of the court under subsection (1)(c) may be made on conditions the court considers necessary or appropriate to minimise prejudice to a respondent from the claimant's failure to comply with the requirement."

[17] Section 43, relied on by the appellants, provides:

> **"**Need for urgent proceeding
>
> **(1)** The court, on application by a claimant, may give leave to the claimant to start a proceeding in the court for damages based on a liability for personal injury despite noncompliance with this part if the court is satisfied there is an urgent need to start the proceeding.

> **(2)** The order giving leave to start the proceeding may be made on conditions the court considers necessary or appropriate having regard to the particular circumstances of the case.
>
> **(3)** However, if leave is given, the proceeding started by leave is stayed until the claimant complies with this part or the proceeding is discontinued or otherwise ends.
>
> …"

[18] Finally s 59 provides:

> "Alteration of period of limitation
>
> **(1)** If a complying part 1 notice of claim is given before the end of the period of limitation applying to the claim, the claimant may start a proceeding in a court based on the claim even though the period of limitation has ended.
>
> **(2)** However, the proceeding may be started after the end of the period of limitation only if it is started within –
>
> (a) 6 months after the complying part 1 notice is given or leave to start the proceeding is granted; or
>
> (b) a longer period allowed by the court.
>
> **(3)** Also, if a proceeding is started under subsection (2) without the claimant having complied with part 1, the proceeding is stayed until the claimant complies with the part or the proceeding otherwise ends.
>
> **(4)** If a period of limitation is extended under the *Limitation of Actions Act 1974*, part 3, this section applies to the period of limitation as extended under that part."

[19] Although the provisions of s 77A were applicable to two appellants their counsel's argument on the appeal was specifically limited to the application made under s 43 and he advanced no grounds of appeal or argument concerning s 77D(2) or any of the transitional provisions in Chapter 4 Part II of the Act. The learned trial judge held that s 43 of the Act appeared to be aimed principally, or at least as an example, at the situation where a limitation period was about to expire, and that it was not intended to be a means of extending a limitation period. The judge held that in respect of each appellant it could only be speculation on the material presented as to whether he or she would eventually succeed in an application under s 31 of the *Limitation of Actions Act*. The judge noted that in the *PIPA* s 59, and s 77D (not the subject of submissions on the appeal) make specific provisions for the circumstances where proceedings might be started after the end of a limitation period but did not consider that s 43 could be construed by implication to convey a similar power.

[20] The learned judge considered that either the proceedings each appellant wished to bring were out of time, in which case there was no urgency shown as required by s 43, or else might become a proceeding which could be proceeded with successfully

if leave was given under s 31 of the *Limitation Act*. The judge held that it could not be predicted on the material available whether it was likely any application under that latter Act would be successful and a limitation period extended to any particular date, and that what each applicant showed was that an investigation was being conducted to determine whether there was evidence to warrant an extension of the period of limitation. In those circumstances the judge was not satisfied that any applicant had shown there was an urgent need to start the proceeding. The judge also noted that no appellant had provided a reasonable excuse for the delay in providing the s 9 notice and that it was claimed by the respondent that the notices were non-complying in various other respects.

[21] Mr Mullins, counsel for the appellants, submitted that the *PIPA* should be construed beneficially and s 43 not construed in what he submitted would be a restrictive way and one which would result in applicants losing rights previously available for exercise. In *Grove v Bestobell Ind Pty Ltd* [1980] Qd R 12 at 16, Dunn J had held that nothing in the *Limitation Act* suggested that the discretions granted by that Act could be exercised only with respect to actions not yet commenced, and that the applicant in that matter had proceeded correctly in issuing his writ in October 1977 and making a subsequent application for an order extending the period of limitation. Mr Mullins contended that that was a practical and responsible way in which solicitors, at least since that decision, had protected their clients by commencing proceedings to stop the relevant 12 month period provided by s 31(2) of the *Limitation Act* potentially running out. He submitted that here there were certainly matters requiring and deserving investigation for each applicant and the combination, of a serious case to be investigated and inability to demonstrate now whether the date on which the material fact was known had or had not yet arrived, required immediate action to stop that time running. Mr Mullins' submission was that "urgent" meant requiring immediate attention; and the fact that the preliminary investigations conducted by the solicitors had not revealed a clear material fact of a decisive character had the consequence that proceedings did need to be commenced as soon as possible. A prudent solicitor would stop that 12 month period running out and it was precisely the fact the date of any possible material fact of a decisive character was simply unknown at the time of the application which provided the necessary urgency.

[22] Mr Mullins also submitted that it was essential for courts hearing applications under s 43 to recognise the factual and legal complexities of cases of the present kind. Appropriate recognition had been given to such matters before the *PIPA* was enacted; and by way of example Mr Mullins referred the court to the decision of Byrne J in *Tiernan v Tiernan* (unreported, Qld Supreme Court No 39 of 1992, decision given 22 April 1993). In that decision His Honour gave a sympathetic consideration to that applicant in a careful judgment which established an authoritative analysis of s 30(b)(1) and (2) of the *Limitation Act.* Mr Mullins referred too to the decision in *Wilson v Horne* [1999] TASSC 33. I respectfully observe that what those prior decisions, which command respect, establish are applicable principles when construing the *Limitation Act* provisions, that may assist in establishing that a material fact of a decisive character was not within the means of knowledge of a particular appellant until a particular date. Those decisions do not assist in determining whether any appellant has satisfied the court that there is an urgent need to start proceedings.

[23] Mr Grant-Taylor SC submitted for the respondent State of Queensland that s 43 simply did not empower a court to grant relief of the like sought; and that if it did the threshold issue of demonstrating that there had been an urgent need to commence proceedings had not been established. Section 43 requires satisfaction that there is that urgent need, not that there exists a possibility of that need. The respondent also submitted that if the present application succeeded then it would be difficult not to grant every application made under s 43 where the limitation period had expired and the possibility existed that a material fact known at the time of the s 43 application would be identified by investigations conducted after the s 43 order was made. This result would treat all out of time claims of this kind for damages as urgent.

[24] The difficulty facing each appellant is that s 43 requires that a court hearing an application, from an applicant who has suffered injury from the negligence of another but who may experience problems establishing either or both the existence of a material fact of a decisive character and when that fact came to the knowledge of that applicant, can only exercise the unfettered discretion granted in s 43 if satisfied that there is an urgent need to start the proceedings. I respectfully consider that no error has been shown in the approach taken by the learned trial judge in determining that question; and that, as the judge held, the most obvious application of the section is in circumstances where time is about to expire under either an ordinary or already extended limitation period. I consider that the relevant urgency may also be demonstrated where the court is satisfied on a s 43 application brought before a *Limitation Act* application that the applicant has an argument to advance for the extension of a limitation period in which, if successful, time would be running out when the s 43 application was brought. The learned trial judge was sympathetic to that construction as well.

[25] None of the appellants had shown grounds for such an argument to the learned judge below, and nothing further was put before this court on the appeal. If investigations by the solicitor do result in establishing a material fact of a decisive character in any one or more or all of the cases, not known to that appellant until after the expiry of the ordinary limitation period, the material put before the learned judge and this court made it just as likely that those investigations would show that even a notionally extended limitation period had already expired by December 2003, as that they would show time was then running; and even possible that they would show the material facts had not come to the relevant appellant's knowledge by then. Each appellant accordingly lacked in December 2003 both the grounds to show that appellant had an argument to advance for the extension of a limitation period in which time would then be running in December 2003, and lacked grounds on which the learned judge could find the required urgency.

[26] Although it does not strictly fall for consideration in this appeal, I observe that if any of the appellants succeed in obtaining an order extending the limitation period, that appellant would also need to obtain orders made pursuant to either s 18 or s 59 of the *PIPA* to give efficacy to the order under the *Limitation Act*. If the expression "complying Part 1 Notice of Claim" in those sections is construed similarly to the construction of a "notice given as required under this Division" in s 39(5)(a) of the *Motor Accident Insurance Act* 1994 in *Thomas v Transpacific Industries Pty Ltd* [2003] 1 Qd R 328 at 338, then it is difficult to envisage any more than very limited circumstances in which s 59 of the *PIPA* could operate. This is because it is assumed by the drafting of the section that a complying Part 1 Notice of Claim can

be given within six months of the end of either an ordinarily applying or an extended period of limitation. The only obvious situation where that could occur would be where a claimant only became aware of the existence of an injury less than nine months before the end of the original or an extended limitation period. For that section to be capable of application in any meaningful way in any other circumstances it would seem necessary to construe it as Wilson J did in *Taylor v Stratford & Ors* [2003] QSC 427 at [25]-[27]. Her Honour therein expressed an inclination to the view that a notice would be a complying notice if its contents satisfied the requirements of s 9, that timeliness was an aspect of the giving of the notice, and that where the lateness of a notice made it a non-complying one, such non-compliance would be remedied if the relevant claimant gave a reasonable explanation for the delay. That reasonable explanation would convert the notice to a complying Part 1 notice.

[27] I am satisfied the appeals must be dismissed with costs.

[28] **MUIR J:** Generally, for the reasons given by Jerrard JA, I agree that no error in the reasoning or order of the primary judge has been shown and that the appeal should be dismissed with costs. I express no views on the construction of s 59 of the *Personal Injuries Proceedings Act* 2002 or on the ambit of operation of s 43 of that Act.