SUPREME COURT OF QUEENSLAND

CITATION:	*Morrison-Gardiner v Car Choice P/L & Anor*; *Crain v Crocker & Anor*; *O'Dare v Vitanza & Ors* [2004] QCA 480
PARTIES:	**JANE MORRISON-GARDINER** (applicant/respondent) **v** **CAR CHOICE PTY LTD** ACN 056 831 693 (first respondent/appellant) **ALLIANZ AUSTRALIA INSURANCE LIMITED** ACN 000 122 850 (second respondent/appellant) **GILDA CRAIN** (applicant/respondent) **v** **BOBBY ALLAN CROCKER** (first respondent/applicant) **ALLIANZ AUSTRALIA INSURANCE LIMITED** ACN 000 122 850 (second respondent/applicant) **WARREN DALKEITH O'DARE** (applicant/respondent) **v** **VINCE VITANZA** (first respondent/not a party to the appeal) **BRISBANE CITY COUNCIL** (second respondent/applicant) **TOM BROWN** (third respondent/applicant) **ALLIANZ AUSTRALIA INSURANCE LIMITED** ACN 000 122 850 (fourth respondent/applicant)
FILE NO/S:	Appeal No 5494 of 2004 Appeal No 5576 of 2004 Appeal No 7409 of 2004 SC No 1183 of 2004 DC No 1303 of 2004 DC No 2462 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	Supreme Court at Brisbane District Court at Brisbane

DELIVERED ON: 17 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 6 October 2004

JUDGES: McMurdo P, Williams JA and Chesterman J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **In Appeal No 5494 of 2004 it is ordered that the appeal be dismissed**
2. **In each of Appeal No 5576 of 2004 and Appeal No 7409 of 2004 it is ordered that leave to appeal be granted but that the appeal be dismissed**
3. **The appellants/applicants are to pay the respondents' costs of the appeal and the applications to be assessed on the standard basis**

CATCHWORDS: LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – POWER OF COURT TO EXTEND TIME – where each of the respondents were involved in separate motor vehicle accidents – where each of the respondents complied with the requirements of s 37 *Motor Accident Insurance Act* 1994 (Qld) – where each of the respondents did not comply with the requirements of Part 4, Division 5A of the *Motor Accident Insurance Act* 1994 (Qld) – where the limitation period in which each of the respondents could commence proceedings expired – where each of the respondents applied to the Court under s 57 of the *Motor Accident Insurance Act* 1994 (Qld) and were granted leave to commence proceedings within 60 days after a compulsory conference was held – whether the learned primary judges were correct in granting leave – whether s 57(2)(b) confers a general discretion on the Court to extend the period of limitation for the commencement of proceedings for damages arising out of motor vehicle accidents – whether some limitation should be read into s 57(1) to restrict the apparent scope of the power conferred on the Court by s 57(2)(b)

Limitation of Actions Act 1974 (Qld), s 11
Motor Accident Insurance Act 1994 (Qld), s 37, s 39(1), s 39(2), s 39(3), s 39(5), s 39(6), s 41, s 51A, s 51B, s 51C, s 51D, s 57
Motor Accident Insurance Amendment Act 2000 (Qld)

Archie v Archie; Smythe third party [1980] Qd R 546, discussed
Aydar v Pashen [2003] 1 Qd R 601, cited
Bermingham v Priest [2003] 1 Qd R 623, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Cheney v Spooner (1929) 41 CLR 532, cited

Forrest v Kelly (1991) 32 FCR 558, cited
Herbert Berry Associates Ltd v IRC [1978] 1 All ER 161, cited
Horinack v Suncorp Metway Insurance Ltd [2001] 2 Qd R 266, discussed
Kash v S M & T J Cedergren Builders [2004] 1 Qd R 643, discussed
Perdis v Nominal Defendant [2003] QCA 555; Appeal No 5233 of 2003, 15 December 2003, cited
Thomas v Transpacific Industries Pty Ltd [2003] 1 Qd R 328, discussed

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[1] **McMURDO P:** I agree with Chesterman J that in *Morrison-Gardiner v Car Choice Pty Ltd & Anor* (Appeal No 5494 of 2004) the appeal should be dismissed with costs and in each of *O'Dare v Vitanza & Ors* (Appeal No 7409 of 2004) and *Crain v Crocker & Anor* (Appeal No 5576 of 2004) leave to appeal should be granted but the appeal dismissed.

[2] The facts, issues and relevant statutory provisions are set out in Chesterman J's reasons so that I need not repeat them in full.

[3] Before the *Motor Accident Insurance Act* 1994 (Qld) ("the Act") a person claiming damages for personal injuries arising out of the fault of another in a motor vehicle accident had the right to issue proceedings in a court within the three year limitation period. The Act now makes that impossible before meeting certain statutory prerequisites.

[4] The objects of the Act include the continuing improvement of the system of compulsory third party motor vehicle insurance and of the scheme of statutory insurance for uninsured and unidentified vehicles operating in Queensland;[1] to establish a basis for assessing the affordability of insurance under the statutory insurance scheme and to keep the costs of insurance at a level the average motorist can afford;[2] to encourage the speedy resolution of personal injuries claims resulting

1 Section 3(a) of the Act.
2 Section 3(aa) of the Act.

from motor vehicle accidents;[3] to promote and encourage as far as practicable the rehabilitation of claimants who sustain personal injury because of motor vehicle accidents;[4] and to promote measures directed at eliminating or reducing causes of motor vehicle accidents and mitigating their results.[5]

[5] The Act establishes a scheme which required the claimants here to give written notice of their motor vehicle accident claims to their insurers under Pt 4 Div 3 of the Act before bringing their actions in a court.[6] Unless the insurer waives compliance with the notice provisions under the Act[7] or the insurer is presumed to be satisfied notice has been given under the Act,[8] a claimant who has failed "to give notice of a motor vehicle accident claim as required under" Pt 4 Div 3 of the Act is prevented from proceeding further with the claim unless the claimant successfully applies to the court for a declaration "that the claimant has remedied the noncompliance"[9] or "authorises further proceedings based on the claim despite the noncompliance".[10]

[6] The scheme next provides that the insurer is obliged to take steps to resolve the claim within six months after receiving notice of it under Pt 4 Div 3[11] and is taken to receive that notice either when the insurer waives compliance with any requirement that has not been met or is satisfied the claimant has taken reasonable action to remedy the non-compliance[12] or when the court makes a declaration or gives leave[13] in the terms set out in the previous paragraph. The notices in the appeal and applications were all considered by the insurers to be notices which complied with the relevant provisions of the Act.

[7] Since the 2000 amendments to the Act[14] in addition to the notice requirements, (also amended at that time), a claimant is required before bringing the action in court to comply with Pt 4 Div 5A of the Act. This requires the claimant and the insurer to have a compulsory conference within six months after the claimant gives notice of the claim[15] or, if that date has passed, at a reasonable time and place nominated by the party calling the conference.[16] The parties may for good reason agree to dispense with the compulsory conference or may apply to a court for an order either fixing the time and place for it or dispensing with it for good reason and for other appropriate orders.[17] By the time of the compulsory conference each party is expected to be ready for trial, to have prepared a certificate of readiness to that effect[18] and to have supplied the other party with all material relevant to the claim and its costs.[19] The parties are to exchange mandatory final offers if the claim is not

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3 Section 3(c) of the Act.
4 Section 3(d) of the Act.
5 Section 3(f) of the Act.
6 Section 37 of the Act.
7 Section 39(1) of the Act.
8 Section 39(3) of the Act.
9 Section 39(5)(c)(i) of the Act.
10 Section 39(5)(c)(ii) of the Act.
11 Section 41 of the Act.
12 Section 41(3)(a) of the Act.
13 Section 41(3) of the Act; see also s 39(5)(c) of the Act.
14 *Motor Accident Insurance Amendment Act* 2000 (Qld).
15 Section 51A(3) of the Act.
16 Section 51A(2)(b) of the Act.
17 Section 51A(5) of the Act.
18 Section 51B(5)(d) of the Act.
19 Section 51B(6)(a)-(e) and (7) of the Act.

settled at the conference[20] although the court may on application dispense with that obligation.[21] An action for damages is to be started in court within 60 days after the compulsory conference[22] or within a further period agreed by the parties within that 60 day period[23] or fixed by the court on the claimant's application within that period.[24] Failure to commence the action within that time does not prevent the claimant from starting an action[25] unless the court makes an order fixing a time limit within which the action must be started.[26]

[8] The essence of the appeal and applications is the meaning of s 57(1) and (2) of the Act which provides:

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

[9] The ordinary meaning of the words in s 57(1) of the Act, is that, subject to s 57(2), it empowers a claimant who has, before the end of the limitation period, given a notice under Pt 4 Div 3 or is given leave to bring a proceeding based on a motor vehicle accident claim under Pt 4 Div 3[27] to bring a proceeding in court based on the claim after the limitation period has expired.

[10] The ordinary meaning of the words in s 57(2)(a) of the Act is that a claimant within s 57(1) of the Act may bring the proceeding in court as of right within six months of the notice being given or leave being granted. As can be seen by my précis of the legislative scheme, this will not be useful to a claimant unless the insurer acts more quickly than obliged under the Act[28] so that the usual time requirements under the Act are shortened. Ordinarily it can be expected that the many steps necessary to achieve compliance with the Act will take more than six months from the date the claimant gives notice or leave to bring the proceeding is granted. The plain meaning of the words in s 57(2)(b) of the Act gives the court a general discretion to

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20 Section 51C(1) of the Act.
21 Section 51C(11) of the Act.
22 Section 51D(1)(a) of the Act.
23 Section 51D(b)(i) of the Act.
24 Section 51D(b)(ii) of the Act.
25 Section 51D(4) of the Act.
26 Section 51D(4)(b) and (5) of the Act.
27 Section 39(5) of the Act.
28 See, for example, s 41(1) and s 51A of the Act.

extend the necessary time for a claimant within s 57(1) but who is not assisted by s 57(2)(a) to bring a proceeding after the expiration of the limitation period.

[11] I am confident the legislature intended the words of s 57(1) and (2) of the Act to have their plain meaning. It makes sense that the legislature enacted this section recognising that in setting up the scheme a claimant's rights to bring an action in the courts for personal injuries arising from a motor vehicle accident within the limitation period have been diminished, and so intending that where a claimant, before the end of the period of limitation, gives notice or applies for leave to bring a proceeding based on a motor vehicle accident claim under Pt 4 Div 3, a court should have a discretion to extend the time for bringing the proceeding, notwithstanding the expiration of the limitation period. In exercising that discretion, a court would, of course, be cognisant of the objects of the Act and of the general considerations apposite to any extension of a limitation period as discussed in *Brisbane South Regional Health Authority v Taylor*.[29]

[12] Section 57 of the Act does not, in my view, entirely supersede the operation of the *Limitation of Actions Act* 1974 (Qld). The latter deals with extensions of the limitation period when a claimant becomes aware of a new material fact near to or after the expiration of the limitation period. Section 57 of the Act allows a judge to give leave to a claimant to start a proceeding in a court after the expiry of the limitation period when the claimant has given a complying notice of claim within the limitation period in circumstances where, but for the Act, the claimant could be expected to have commenced the proceeding in a court within the limitation period.

[13] It follows that each of the learned primary judges was empowered under s 57(2)(b) of the Act to make the orders the subject of this appeal and applications.

[14] Chesterman J gives two answers to the insurer's claim that s 39(5)(c)(ii) of the Act cannot confer power on a court to permit the institution of proceedings because any such order would be frustrated by Pt 4 Div 5A of the Act and in particular the requirement that there must be a compulsory conference of the parties before the claimant can bring an action in court for damages for personal injuries arising out of a motor vehicle accident.[30] I agree with those answers but would add that where there is no proper reason for dispensing with the compulsory conference and, perhaps, the obligation to make final offers under Pt 4 Div 5A of the Act, then an order under s 39(5)(c) of the Act (that the court authorises further proceedings despite the non-compliance with the notice provisions under Pt 4 Div 3), may direct that such proceedings not issue until the claimant has complied with the provisions of Pt 4 Div 5A of the Act or further order. That is another reason why the enactment of Pt 4 Div 5A of the Act does not have the unattractive result contended for by the appellants/applicants of rendering s 39(5)(c) of the Act meaningless.

[15] Despite the appellants'/applicants' contrary submissions, the words "further proceedings based on the claim" in s 39(5)(c)(ii) plainly include an action in a court for damages. The traditional legal interpretation of "proceeding" is "the invocation of the jurisdiction of a court by process other than writ"[31] or "some method permitted by law for moving a Court or judicial officer to some authorized act, or

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29 (1996) 186 CLR 541, McHugh J at 551-554.

30 See [70] and [71] of Chesterman J's reasons.

31 *Herbert Berry Associates Ltd v IRC* [1978] 1 All ER 161, Lord Simon at 169-170.

some act of the Court or judicial officer"[32] and "includes any application by a suitor to a Court in its civil jurisdiction for its intervention or action".[33] The word "proceeding" or "proceedings" can also have an expanded meaning beyond this traditional legal interpretation. Its dictionary definition includes not only the institution or carrying on of an action at law but also a legal step or measure.[34] In that wider sense, the term "proceedings" used in s 39(5)(c)(ii) includes not only the authorisation of the commencement of the action in a court but also the taking of the necessary prerequisite steps to that action in court prescribed under the Act, including those set out in Pt 4 Div 5A.[35]

[16] As Chesterman J has indicated, the insurer did not attack any of the orders the subject of the appeal and applications on the basis of a wrongful exercise of discretion. I do not share his Honour's reservation as to the exercise of discretion in Mr O'Dare's case.[36] Mr O'Dare clearly contacted his solicitor very soon after the accident. The solicitor gave notice of the accident to the insurer about three months later, years before the expiration of the limitation period. The learned primary judge rightly observed:

> "The significant facts are these. The Notice was given promptly to the insurer. The delay on the plaintiff's part is explained by changes in staff in the offices of the solicitors for him. They failed to prepare a file memoranda and establish and maintain a 'limitation diary'. In the circumstances, that delay should not be attributed to Mr O'Dare."

The letter of 22 April 2004 received by Mr O'Dare's solicitor on 28 April 2004 did not seem to me to be a serious invitation to Mr O'Dare to commence proceedings within 14 days; he had not complied with the provisions of Pt 4 Div 5A of the Act and the letter makes no offer to waive any of the statutory requirements; rather, its purpose seems to have been to inform Mr O'Dare that his claim was now statute barred. As the learned primary judge noted, the delay in this matter cannot be attributed to Mr O'Dare personally but was the fault of his lawyer. In those circumstances courts tend to be more prepared to exercise a discretion of this type in favour of a claimant: see *Perdis v Nominal Defendant*.[37] Nothing in the material before this Court causes me to doubt that the discretion in Mr O'Dare's case was rightly exercised.

[17] Subject to these further comments and minor reservations on incidental matters, I agree with the reasons of Chesterman J. I also agree with the orders he proposes.

[18] **WILLIAMS JA:** The background facts and matters relevant to the resolution of the appeal and applications for leave to appeal in these matters are fully set out in the reasons for judgment of Chesterman J and there is no need for me to repeat them.

[19] Prior to the passing of the *Motor Accident Insurance Act* 1994 a person injured in a motor vehicle accident had three years (s 11 of the *Limitation of Actions Act* 1974)

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32 *Cheney v Spooner* (1929) 41 CLR 532, Isaacs and Gavan Duffy JJ at 536-537.
33 Above, Starke J at 538-539.
34 Macquarie Dictionary Federation Edition.
35 See *Forrest v Kelly* (1991) 32 FCR 558, 568-569.
36 See Chesterman J's reasons at [83].
37 [2003] QCA 555; Appeal No 5233 of 2003, 15 December 2003, [10] and [11].

within which to commence an action claiming damages for personal injury. Prior to 1994 no notice before action was required to be given.

[20] The 1994 Act introduced a new statutory regime regulating proceedings against licensed insurers with respect to claims for damages for personal injury arising out of a motor vehicle accident. The first requirement was that a notice be given by a claimant to the relevant insurer "within 9 months after the motor vehicle accident or the first appearance of symptoms of the injury": s 37 of the 1994 Act. It is sufficient to say that the 1994 Act provided a complex procedure to be followed by a claimant before proceedings could be commenced in a court. The claimant could no longer commence proceedings in court and deal with the licensed insurer subsequently. From 1994 onwards there had to be compliance with the statutory requirements, or an order obtained from the court relieving the claimant from non-compliance, before proceedings could be commenced in court; but the proceedings still had to be commenced within the three year limitation period, subject to some specific qualifications contained in the legislation. However, as demonstrated by the decisions of this court in *Aydar v Pashen* [2003] 1 Qd R 601 and *Bermingham v Priest* [2003] 1 Qd R 623, there were statutory restrictions on the court's power to permit the commencement of proceedings in court after the expiration of the three year limitation period.

[21] No doubt in response to those two decisions, amendments were made to the 1994 Act in 2000. The court is now primarily concerned with provisions inserted into the principal Act by those amendments in 2000.

[22] Difficulties usually arise when such a complex procedure as contained in the 1994 Act is amended. Notwithstanding careful drafting an amendment can frequently have unforeseen flow-on consequences. And, as demonstrated by the 2000 amendments here, removing a perceived tension between two provisions may create tensions between others. It is sufficient to note as an example that, after the amendments in 2000, s 57(1) refers to "an application for leave to bring a proceeding based on a motor vehicle accident claim ... under division 3" when the provision empowering the court to grant leave (found as s 39(5)(c) of the 1994 Act) was deleted by the amendments.

[23] Given the requirements imposed on a claimant by the legislation it can be said that the most important step required is the giving of a notice pursuant to s 37. To be a complying notice it has to be given (according to the Act after the 2000 amendments) within "9 months after the motor vehicle accident or, if symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury"; or, if given later, the insurer must have waived non-compliance or, because of the failure of the insurer to respond to the notice, it is deemed to be compliant. Once notice is given, whilst no proceeding claiming damages can be commenced in a court until other statutory requirements have been satisfied, the court is given jurisdiction by the Act to make orders with respect to the claim.

[24] Relevantly, after the 2000 amendments, the court has, inter alia, the following powers:

(i) declare the claimant has remedied non-compliance with the notice provision: s 39(5)(c)(i);

(ii) authorise further proceedings based on the claim despite non-compliance with the notice provision: s 39(5)(c)(ii);

(iii) fix a time and place for holding a compulsory conference or dispense with the compulsory conference for good reason: s 51A(5);

(iv) appoint a mediator to be involved in the compulsory conference: s 51B(4);

(v) exempt a party from the obligation to disclose material: s 51B(8);

(vi) dispense with the obligation on a party to make a mandatory final offer: s 51C(11);

(vii) fix a further period, on an application made within 60 days of a compulsory conference, within which an action for damages should be started: s 51D(1)(b)(ii);

(viii) fix a further period within which an action for damages should be started on an insurer's application brought pursuant to s 51D(4)(b).

[25] It can thus be seen that the court has extensive jurisdiction to make orders facilitating the progress of the claim through the statutory pre-trial requirements. As is evident from some of those provisions there is a strict time limitation on when such application can be brought. Further, as is evidenced by s 51D(5), the statute on occasions provides that failure to comply with the court's direction bars the starting of a proceeding in a court claiming damages.

[26] It is in that context that this court is now called upon to determine the scope of operation of s 57(1) and (2) of the Act after the amendments in 2000; it provides as follows:

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

[27] It has already been noted that the reference in each subsection to "leave to bring the proceeding" is superfluous because the subsection conferring power on the court to give such leave has been repealed.

[28] The section is clearly predicated on the proposition that the three year limitation period imposed by s 11 of the *Limitation of Actions Act* continues to apply to claims of the type in question. That is the basic rule. But in two situations the proceeding may be started in a court after the expiration of that limitation period. The first situation is where the proceeding is commenced within six months after the notice required by division 3 was given. That would be a rather unusual situation. The

notice would have had to be given well outside the nine month period primarily provided for by s 37; but as already indicated such a notice could become complying because the insurer waived non-compliance. But even then it would be difficult to complete the necessary pre-trial requirements within a six month period; that could only be done if, for example because of a situation of urgency, both sides agreed to abbreviate the times for taking the necessary steps. Section 57(2)(a) appears to be a carryover from the 1994 Act without careful consideration as to how it would operate given the new regime requiring the holding of a compulsory conference. But, as pointed out, there are possible situations in which it could apply.

[29] It is really with s 57(2)(b) that the court is now primarily concerned. I can see no reason why the provision ought not be given its clear and ordinary meaning. If a notice pursuant to division 3 is given before the end of the three year limitation period the court is given a general discretion to extend the three year limitation period for the starting of proceedings in the court to enforce the claim.

[30] The policy underlying statutes of limitation was summarised by Hoare J (Kniepp J agreeing) in *Archie v Archie; Smythe third party* [1980] Qd R 546 at 559 as follows:

> "From time to time the Courts have expressed several separate and in some ways differing reasons supporting the existence of statutes of limitations, *viz*:
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> 1. Those who go to sleep upon the claims should not be assisted by the courts and that protection should be afforded against stale demands (*R.B. Policies v. Butler* [1950] 1 K.B. 76 at pp. 81-82). An old authority spoke of 'long dormant claims have often more of cruelty than of justice in them.'
> 2. A defendant may have lost the evidence to disprove a stale claim (*Jones v. Bellgrave Properties* [1949] 2 K.B. 700, *per* Lord Goddard C.J. at p. 704).
> 3. Persons with good causes of action should not stand by and omit to enforce them (*Board of Trade v. Cayzer* [1927] A.C. 601, *per* Lord Atkinson at p. 628)."

[31] Pursuant to the provisions of the *Motor Accident Insurance Act* potential defendants are made fully aware of the nature of the claim once the notice pursuant to division 3 is given. In a broad sense proceedings are commenced against the licensed insurer on the giving of notice pursuant to division 3 of the Act. Thereafter a potential defendant is not likely to be prejudiced by the loss of evidence. The remaining principle underlying the limitation statute which needs to be enforced is that a good cause of action should be prosecuted diligently. As already noted, once the notice is given the court can exercise substantial control over the future conduct of that claim.

[32] In my view, given all the provisions of the *Motor Accident Insurance Act*, conferring a discretion on the court to permit proceedings to be started in a court after the end of the ordinary three year limitation period does not infringe the basic principles underlying the statute of limitations. The provisions of s 57(1) and (2) are no more than a recognition of the fact that a claimant has to comply with a complex set of pre-trial requirements and, for example, on occasions it may not be possible to comply with all of those requirements and still commence the

proceeding in court within the limitation period. Provided a claimant is able to establish an explanation for the failure to commence the proceeding within the ordinary limitation period, and provided there is no prejudice to the defendant, there is no reason why a court ought not grant an indulgence by extending the limitation period. The discretion would, of course, have to be exercised judicially and would have to recognise the usual considerations governing the exercise of such a discretion. Amongst other considerations the court would have to have regard to the explanation for the delay, the length of the delay, possible prejudice to the defendant, and the general interest of the court in having such proceedings prosecuted expeditiously.

[33] In my view the submissions on behalf of the appellants and applicants concentrate too heavily on the provisions of the Act prior to the 2000 amendments. The submissions are primarily based on the situation created by the 1994 Act and seek to construe the amendments made in 2000 in the light of those earlier provisions. In my view such an approach is not justified. The court must construe the Act in its entirety after the 2000 amendments without being hamstrung by what was in earlier versions of the legislation. Section 57 must be given full force and effect.

[34] In the circumstances I can see no practical problems created by construing s 57 as I have suggested. Before a claimant could obtain an extension of the limitation period it must be shown that notice pursuant to division 3 was given within the limitation period and it must be demonstrated that there are sound discretionary reasons for extending the period.

[35] I agree generally with what is said by Chesterman J in his reasons and with the orders he has proposed.

[36] **CHESTERMAN J:** The outcome of this appeal and the two applications for leave to appeal, which were heard together, depends upon the proper construction of s 57 of the *Motor Accident Insurance Act* 1994 (Qld) ('the Act') as amended by the *Motor Accident Insurance Amendment Act* 2000 (Qld) ('the amending Act'). Relevantly the amending Act repealed and replaced s 37 and s 39(1), (2), (3), (5) and (6) as well as adding Division 5A, comprising s 51A to s 51D. It also amended s 57(2). The amendments took effect from 1 October 2000. The motor vehicle accidents out of which the three actions, which are the subject of the appeal and applications for leave to appeal, all occurred after 1 October 2000 so that the Act as amended applies: s 108 of the Act as amended.

[37] The point of interest in the applications and the appeal can be appreciated from the chronology of each action.

[38] In the appeal, *Morrison-Gardiner v Car Choice P/L & Anor*, the sequence was:

21 November 2000	Date of accident
21 May 2001	Notice of claim served on the insurer
28 May 2001	Insurer accepted that the notice complied with the requirements of the Act and admitted liability
20 September 2002 - 18 July 2003	Change of solicitors representing the plaintiff
25 September 2003	The plaintiff gave the insurer an Additional Information Form

29 October 2003	Claim and statement of claim filed
21 November 2003	The three year limitation period expired
3 February 2004	The plaintiff applied for orders under s 51A(5)(a) and s 57(1) of the Act for an order extending the time to commence proceedings and for an order fixing the date for the compulsory conference
11 June 2004	Justice Holmes ordered that the plaintiff might bring proceedings no later than 60 days after the date on which a compulsory conference was held pursuant to the Act and ordered that the conference be held within 30 days of her Honour's order or any decision of the Court of Appeal dismissing an appeal from the order.

[39] The sequence of events in *O'Dare v Vitanza & Ors* was:

4 April 2001	Date of accident
12 July 2001	Notice of accident given to the insurer
24 July 2001	The insurer accepted that the notice complied with the Act and admitted liability
17 September 2003 - 29 March 2004	Discussions and negotiations concerning medical examination of the plaintiff
4 April 2004	Limitation period expired
22 April 2004	The insurer invited the plaintiff to commence proceedings within 14 days
13 July 2004	The plaintiff filed an application for an order pursuant to s 57(2) of the Act extending time to allow the plaintiff to commence proceedings
13 August 2004	Judge Brabazon gave the plaintiff leave to bring proceedings within 60 days after a compulsory conference was held and made subsequent orders for the medical examination of the plaintiff and the convening of the compulsory conference.

[40] The relevant sequence in *Crain v Crocker & Anor* was:

16 April 2001	Date of accident
15 May 2001	Notice of claim given to the insurer
25 May 2001	The insurer accepted that the notice complied with the Act
3 October 2001	The insurer accepted a percentage of liability for the accident
13 June 2002	The insurer requested the plaintiff to complete an Additional Information Form

21 November 2003	The parties agreed to participate in a compulsory conference on 22 December 2003 'by way of mediation'
18 December 2003	The plaintiff provided the Additional Information Form to the insurer. The plaintiff advised that she could not sign a Certificate of Readiness for the compulsory conference because of a need to obtain further medical evidence
19 January 2004	The insurer accepted that the additional information complied with the Act
25 March 2004	The insurer's solicitors wrote to the plaintiff's solicitors advising that the limitation period would soon expire and enclosed a draft consent for an order to be made by the court dispensing with the compulsory conference to allow the plaintiff to commence her action
6 April 2004	The plaintiff's solicitors sent the signed consent to the Registrar of the District Court
7 April 2004	The insurer's solicitors advised the plaintiff's solicitors that the insurer would consent to the draft order
8 April 2004	A claim and statement of claim were filed in the District Court
16 April 2004	The three year limitation period expired
13 May 2004	The insurer applied to have the action struck out on the ground that it had been improperly commenced
26 May 2004	Judge McGill ordered that the action be struck out
3 June 2004	Judge McGill ordered that the plaintiff have leave to commence proceedings in the District Court within 60 days after the compulsory conference was held and ordered the conference to be held within 30 days of the order or of an order of the Court of Appeal dismissing an appeal from the order.

[41] The applicants/appellants challenge the orders made pursuant to s 57(2)(b) giving the respondents leave to commence proceedings for damages. They submit the subsection was not an available source of power for the order, and that there is no other. It will be seen that the applications and the appeal have several features in common. In all of them the notice of claim given by the plaintiffs complied with s 37 of the Act. In *Morrison-Gardiner* and *O'Dare* the insurer admitted liability. In *Crain* the insurer admitted a percentage of liability and the plaintiff did not dispute the percentage. In all three cases the application for an extension of time was made after the expiration of three years. In *Morrison-Gardiner* and *Crain* proceedings were actually commenced before the expiration of three years from the accident.

The proceedings in *Crain* were struck out by Judge McGill. In *Morrison-Gardiner* the parties accepted that the proceedings commenced were a nullity. *O'Dare* did not commence proceedings before making the application for the extension of time.

[42] The object of the Act and the provisions by which it is meant to be achieved are well known and have been the subject of a substantial number of decisions of this Court. Section 37 requires one who is injured in a motor vehicle accident and who intends to claim damages for those injuries to give notice of the accident and of the intended claim within nine months of the accident, or the first appearance of symptoms or, where a lawyer is consulted, within one month of that consultation. After the notice is given s 39 requires the insurer to indicate within 14 days that it is satisfied that the notice was properly given, or identify any respects in which the notice does not comply with the Act. The insurer must state whether it waives non-compliance or must give the claimant reasonable time to make good the defect. If the insurer does not respond as required it is presumed to be satisfied that notice was given as required. Section 39(5) of the Act, before and after the amending Act, imposed restrictions on a claimant's rights to commence proceedings. The restrictions, and the changes to them, are important to the arguments of the parties and, rather than attempt a summary, I will shortly set out the subsection in full.

[43] By s 41 the insurer must, within six months of receipt of the notice, enquire into the circumstances of the accident and notify the claimant whether it accepts liability, in whole or part, for the claimant's injuries. As soon as practicable after the insurer receives notice it must make a written offer to settle the claim. Subsection 3 determines when the insurer is deemed to have received the notice. Section 45 and s 47 require an exchange of relevant information.

[44] Division 5A, inserted as I mentioned in the Act with effect from 1 October 2000, added new and significant restrictions on a claimant's right to commence proceedings. Section 51A obliges the claimant and the insurer to confer, and forbids the commencement of proceedings until a conference has occurred. It commences:

> '**(1)** Before the claimant brings an action in a court for damages for personal injury arising out of a motor vehicle accident, there must be a conference of the parties (the "**compulsory conference**").'

Either claimant or insurer may call the conference, or they may agree 'for good reason' to dispense with it. The Court may on the application of either party fix the time and place for the conference, or dispense with it. Section 51B specifies the procedure to be followed before and during the conference. It may not be held unless each party is ready in all respects, not just for the conference, but for the trial of the action which, it will be recalled, cannot be commenced until the conference has been held or dispensed with. The detailed respects in which the parties must have prepared for trial, and be ready for it, are set out in s 51B(5). Compliance with the subsection will be onerous. Section 51C requires the parties to exchange written final offers of settlement at the conference or, if it has been dispensed with, within 14 days from the date of the agreement or order dispensing with the conference. The offers must remain open for acceptance for 14 days. Proceedings may not be commenced 'while the offer remains open.' By subsection 11 the Court is empowered to dispense with the obligation to make mandatory final offers.

[45] Section 51D makes provision for the times by which an action may be commenced if it does not settle at the conference or by acceptance of a mandatory final offer. Generally speaking proceedings are to commence within 60 days from the compulsory conference or, if there is no conference, within 60 days from the date which is six months after the notice of claim was given, or any further information requested by the insurer, was given. Non-compliance with these times does not preclude a claimant commencing proceedings within the limitation period, but the Court is given power, on the insurer's application, to fix a time within which the action must be commenced, or to order a claimant to pay costs occasioned by delay in commencing proceedings.

[46] At the heart of the insurer's submission are the terms of s 39(5)(c) and s 57(1) and (2). To appreciate the submissions it is necessary to have regard to the sections before and after the amending Act.

[47] The earlier version was:

> '**39.(1)** If a notice of claim is given to an insurer under this division or purportedly under this division –
>
> (a) the insurer must, within 1 month after receiving the notice of claim (even though the notice may have been given out of time), give the claimant written notice –
>
> (i) stating whether the insurer is satisfied that the notice has been given as required under this division; and
>
> (ii) …
>
> (iii) …
>
> (b) if the insurer is not prepared to waive compliance with the requirements in the first instance … give the claimant a written notice …
>
> **(2)** if an insurer to which a notice of claim is given under this division or purportedly under this division is not … the insurer …
>
> **(3)** If the notice of claim is given to an insurer under this division … and the insurer does not respond … within 1 month … the insurer is conclusively presumed to be satisfied that the notice has been given as required … .
>
> **(4)** …
>
> **(5)** A claimant may bring a proceeding in a court for damages based on a motor vehicle accident claim only if –
>
> (a) the claimant has given notice to an insurer … and –

(i) at least 6 months have elapsed …; or

(ii) the insurer has denied liability …; or

(iii) the insurer has admitted liability … in part; or

(b) …; or

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

[48] Section 57 of the Act provided:

'**(1)** If notice of a motor vehicle accident claim is given under division 3 … or an application for leave to bring a proceeding based on a motor vehicle accident claim is made under division 3, before the end of the period of limitation applying to the claim, the claimant may bring a proceeding in court based on the claim even though the period of limitation has ended.

(2) However, the proceeding may only be brought after the end of the period of limitation if it is brought within 6 months after the day on which the notice is given or leave to bring the proceeding is granted.

…'

Division 3 (of Part 4) is entitled 'Claims procedures' and is concerned with the giving of notice. Sections 37 to 44 are in the division.

[49] The amending Act did not make substantial changes to s 39(1) to (3) although it did halve the time the insurer is given to respond to a notice of claim. There were more substantial changes made to subsection 5. It now provides:

'**(5)** A claimant's failure to give notice of a motor vehicle accident claim as required under this division prevents the claimant from proceeding further with the claim unless –

(a) the insurer –

(i) has stated that the insurer is satisfied notice has been given as required … or the claimant has taken reasonable action to remedy the noncompliance; or

(ii) is presumed to be satisfied …; or

(b) the insurer 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 further proceedings based on the claim despite the noncompliance.'

[50] Section 57(1) was untouched by the amending Act. Section 57(2) was changed. It now reads:

'**(2)** However, the proceeding may only be brought after the end of the period of limitation if it is brought within –

(a) 6 months after the notice is given or leave to bring the proceeding is granted; or

(b) a longer period allowed by the court.'

[51] The issue to be determined is the meaning and effect of s 57(2)(b). The point, more particularly, is whether it confers a general discretion on the Court to extend the period of limitation for the commencement of proceedings for damages arising out of motor vehicle accidents, or whether some limitation should be read into s 57(1) to restrict the apparent scope of the power conferred on the Court by s 57(2)(b).

[52] The changes made to s 39(5) of the Act are central to the insurer's submissions. It will be recalled that subsequent to the amendments the subsection provided that a claimant's failure to give notice of a motor vehicle accident claim prevented the claimant from 'proceeding further with the claim' unless, relevantly, the Court authorises 'further proceedings based on the claim' despite the non-compliance. Prior to the amendment s 39(5)(c) had provided that a claimant may bring 'a proceeding in a court for damages' only if, relevantly, the Court gave 'leave to bring the proceeding'.

[53] The insurer's submission is that s 39(5)(c) no longer empowers the court to give leave to an applicant to commence proceedings when the requirements for notice specified in division 3 have not been complied with. The power now conferred on the Court, it is submitted, to authorise 'further proceedings based on the claim' is limited to permitting a claimant to 'proceed to the next stage of pre-trial procedures', notably those contained in the new division 5A.

[54] The insurer supports its argument that the amended s 39(5)(c) does not allow the Court to permit a claimant to bring proceedings by submitting that such an order would be futile. A claimant is precluded from commencing legal proceedings before the conclusion of the compulsory conference, or the dispensation with the conference. An order made pursuant to s 39(5)(c), to commence proceedings would, it is said, be defeated by the clear legislative prohibition in s 51A(1).

[55] It should be noted that Holmes J who decided *Morrison-Gardiner* did not accept the submission that the amendment to s 39(5) had removed the second pre-condition from s 57(1). Her Honour noted:

> 'Counsel on this application submitted that the removal of the latter expression ["leave to bring the proceeding despite non-compliance"] meant that it was no longer possible for the court to give leave to bring the proceeding; so that references to applications for or the granting of such leave in s 41(3)(b) and s 57(2)(a) were now rendered meaningless. It is not necessary for the purposes of this application to determine whether that is so.'

[56] In *Crain*, McGill DCJ did accept the submission. His Honour said:

> 'Unfortunately the legislature when considering the need to amend s 57 appears to have overlooked that it was also amending s 39 at the same time, to replace the former subsection (5) with a new subsection (5) which … removed the provision formerly in s 39(5)(c) under which a court might give leave to bring a proceeding despite non-compliance with the requirements of that division. … On the face of it therefore s 57 was amended … preserving its operation in two situations notwithstanding that one of them can now no longer apply.'

[57] The abolition of the Court's power to permit a curial proceeding to commence is said to have significance for s 57(1), which provides that a claimant may bring a proceeding after the expiration of the limitation period if:

- notice of a motor vehicle accident claim is given under division 3; or
- an application for leave to bring a proceeding is made under division 3

if, in each case, the notice is given, or the application is made, before the expiration of the limitation period.

The insurer argues that (i) the second circumstance, or pre-condition, for the extension of time no longer exists because the court has been deprived of the power to give leave to bring a proceeding; (ii) the parliamentary draftsman overlooked the need to amend s 57(1) to make it consistent with the amendment to s 39(5)(c); (iii) s 57(2)(b) is the product of oversight and confusion and is not to be regarded as the deliberate expression of Parliament that the courts are to have a general discretion to extend the time for the bringing of proceedings.

[58] The argument did not stop there. It was pointed out that there are now two sets of restrictions on a claimant's right to commence legal proceedings. The first is found in division 3 which prevents the initiation of proceedings unless notice has been given and dealt with in accordance with (principally) s 37, s 39 and s 41. The second is found in division 5A which forbids the commencement of proceedings before the compulsory conference, the preparation for which requires that a claimant be fully prepared as though for imminent trial. Section 57(1) is concerned only with the first of these restrictions: the giving of notice and response. The subsection does not address the restrictions based upon the need to comply with the provisions of division 5A. From this observation the insurer argues that the power given to the Court by s 57(2)(b) is a power to be exercised only with respect to the first kind of restriction.

[59] The importance of this point is that in each of the applications, and in the appeal, the claimants had given notice as required by the Act and had received the insurer's response. Division 3 of the Act posed no obstacle to any of the claimants filing a claim. The difficulty for each claimant was that none had complied with the provisions of division 5A. The insurer's submission was that s 57 did not permit the Court to extend the limitation period to allow a claimant to comply with division 5A, or to extend time where it has not complied with that division.

[60] The insurer accordingly submits that s 57(1) can only operate subject to compliance with division 5A. Indeed the insurer submits that the subsection should be read as though it included those words, i.e.:

> 'If notice of a motor vehicle accident claim is given under division 3 (claims procedures), … before the end of the period of limitation applying to the claim, the claimant may bring a proceeding in court based on the claim, *subject to compliance with division 5A*, even though the period of limitation has ended.'

[61] The insurer builds on this foundation by arguing that the only circumstance in which a claimant may be prevented by division 3 from commencing proceedings within three years of the accident is where notice of the claim is given within six months of the expiration of the limitation period. From this the insurer moves to the contention that the power given to the Court pursuant to s 57 is limited to situations in which a claimant gives notice more than two and a half years after the accident. In no other circumstance, it is submitted, can a claimant be prejudiced by the statutory bar on commencing proceedings by the requirement to give notice to the insurer. The corollary to the submission is that s 57 does not confer a power to extend the limitation period in cases where a claimant's inability to commence proceedings in accordance with the Act arises from the provisions of division 5A. The submission, bluntly put, is that the Court has no power to extend the time for commencing proceedings where the need for the extension is that the claimant had not complied with division 5A in time to institute proceedings within three years from the accident.

[62] Indeed the insurer goes so far as to contend that by reason of the amendments to s 39(5) the giving of a complying notice of claim no longer entitles a claimant to bring proceedings even after a lapse of six months. The submission proceeds:

> 'The introduction of Division 5A makes this clear. There is … a tension between section 57(1) which permits the bringing of a legal proceeding in one of two circumstances … (one of which can never arise …) and Division 5A which prohibits the commencement of proceedings until … compliance with sections 51A and 51C. Given that division 5A is … a later enactment, … section 57(1) should … be regarded as redundant and incapable of application.'

[63] This is essentially for the reason that division 3 is no longer the source of a claimant's inability to commence proceedings within six months of giving the notice of claim. Prior to the amending Act s 39(5) prohibited a claimant from bringing a proceeding in a court before six months had elapsed from the notice or the insurer's waiver of the requirement that notice be given. There is no such time limit in s 39(5) as amended. Section 41 does not contain a restriction on the

commencement of proceedings. It gives the insurer six months to answer the notice but does not, itself, forbid the claimant from filing a claim in court. The time limit is now found in division 5A. Section 51A provides that either party may call the compulsory conference at a time and place they agree. Failing such agreement either party may call a conference but only if 'the relevant date has passed'. The relevant date is defined in s 51A(3) as the date falling six months after the claimant gave notice to the insurer or, if the insurer required additional information, one month after the claimant gives any additional information.

[64] I do not accept the insurer's basic contention. It is founded upon a misunderstanding of the change wrought to s 39(5)(c). The power to authorise 'further proceedings based on a claim' extends to the making of an order allowing a claimant to commence legal proceedings. I think there is no doubt about this. Section 4 of the Act defines 'claim' to mean a 'motor vehicle accident claim'. This term is defined to mean 'a claim for damages based on a liability for personal injury …'. A motor vehicle accident claim must therefore include that part of the claim for damages which involves invoking the jurisdiction of the court. No doubt it also includes those procedures, described and regulated by the Act, which are to precede the commencement of legal proceedings. There is no warrant in the definition of 'motor vehicle accident claim' to restrict such a claim to the pre-litigation procedures.

[65] When s 39(5) speaks of 'proceeding further with a claim', or the judicial authorisation of 'further proceedings based on the claim', the phrase must extend to the statutory procedures as well as steps involved in litigation. They are both aptly described as proceedings 'based on a claim for damages.' This construction of the phrase 'further proceedings' is supported by the definition of 'court'. That is defined to mean the Court hearing the proceeding, 'if a proceeding based on the claim has been brought', or the Court having jurisdiction to hear the claim, 'if no proceeding based on the claim has been brought'. These definitions recognise that a curial proceeding is a proceeding based on a claim for damages arising out of a motor vehicle accident. They form part of the class of 'proceedings' or 'further proceedings' referred to in s 39(5)(c).

[66] The change in expression was necessary to accommodate the fact that after the amending Act the procedures described in division 3 were to be followed by those in division 5A, as well as litigation in some instances. Section 39(5) as amended gave the Court power to allow a claimant who had not given notice as required to move to the next stage of pre-litigation proceedings, or legal proceedings. The changes of expression allow either order to be made.

[67] As Holmes J recognised s 41(3)(b) is also relevant to the question. That subsection provides that if a notice of claim is not given as required the insurer is, nevertheless, deemed to have received the notice when, relevantly, the court 'gives leave to bring a proceeding based on a claim despite the noncompliance.' This subsection was not altered by the amending Act. On its face the subsection contemplates that the court, after 1 October 2000, has power to give leave to bring a proceeding though notice had not been given as required by s 37. The only source of such a power is s 39(5)(c), as amended.

[68] Moreover s 57(1) which was left untouched by the amending Act also contemplates that a grant of leave to bring a proceeding may be made 'under division 3', which can only mean s 39(5)(c).

[69] There are two answers to the insurer's complaint that s 39(5)(c), as amended, cannot confer power on the Court to permit the institution of proceedings because such an order would be frustrated by the prohibition contained in s 51A(1).

[70] The *first* answer is that if the Court thought it appropriate to give leave to bring a proceeding it could, at the same time, exercise the power given by s 51(5)(b) and, perhaps, that given by s 51C(11). By dispensing with the compulsory conference and, perhaps, the obligation to make final offers, the barrier to commencing an action, namely compliance with the provisions of division 5A, would be removed.

[71] The *second* answer is that s 51A should be construed as being inapplicable in a case where an order has been made under s 39(5)(c). This requires reading s 51A as being 'subject to an order of the court made pursuant to s 39(5)(c)'. In my opinion it should be so understood. Unless that limitation is read into division 5A there is a conflict between s 51A and s 39(5)(c). If it be correct, as I think it is, to regard the latter provision as conferring power on the Court to order that proceedings may start, s 51A would countermand any order made by the Court pursuant to the express power. It is not a proper construction of the Act that it should grant power on the Court to make an order that, by subsequent provision, cannot be effective. For the conferral of power to be effective the authority given to the Court by s 39(5)(c) must be exercisable notwithstanding the prohibition contained in s 51A(1).

[72] It should be noted that the prohibition contained in s 51A(1) is necessarily subject to a qualification. The section is absolute in its terms:

> 'Before the claimant brings an action in a court for damages … there must be a conference of the parties …'

but subsection 4 allows the parties to dispense with the conference and subsection 5 provides that the court may dispense with the compulsory conference. Subsection 1 must be read with the implicit qualification 'subject to subsections 4 and 5'. It is no more difficult to read into s 51A(1) the qualification that it is also subject to an order made pursuant to s 39(5)(c).

[73] The insurer's accusation that the draftsman ignored or neglected to deal with the requirement to make consequential amendments to s 41(3)(b) and s 57(1) should be rejected. It is true that the drafting of the Act has been the subject of judicial criticism but it is a bold submission that significant provisions of the Act have been rendered meaningless by the amendment to s 39(5)(c) but were allowed to remain in the Act because of parliamentary indolence or incomprehension.

[74] In my opinion those sections continue to have meaning and purpose and were intended to operate according to their terms.

[75] Section 39(5) of the Act as amended prevents a claimant taking any steps to prosecute the claim, whether by undertaking pre-litigation procedures or commencing legal proceedings, subject to any order made by the Court pursuant to s 39(5)(c), so that division 3 still has potential to delay or prevent a claimant commencing proceedings. Nevertheless the requirement that a claimant delay for

six months before moving to a compulsory conference, and therefore the right to commence proceedings, does not appear in division 3. Section 57, to be efficacious, must operate with respect to the provisions of division 5A. It is important that s 57(2)(b) was amended at the same time as division 5A was added to the Act. It is not to be supposed that Parliament did not also intend to confer on the Court power to allow proceedings to be brought outside the limitation period when the restriction on commencing proceedings was an inability to comply with division 5A within the limitation period. The obstacles in that path constituted by the requirement to give notice to the insurer occur at an earlier stage. It would be an odd construction of the Act that allowed the Court to extend time to a claimant who had not been able to comply with the notice requirements but could not extend the time for a claimant who had successfully negotiated that stage but had been unable to prepare the action for trial in time to convene a compulsory conference, and allow time to elapse for the acceptance of final offers, before the expiration of the limitation period.

[76] Before the amending Act s 57 contained limited relief to a claimant who did not start proceedings within three years of the accident because of the need to comply with the requirements of division 3. The limited scope of the relief afforded by the section can be seen by such cases as *Aydar v Pashen* [2003] 1 Qd R 601 and *Bermingham v Priest* [2003] 1 Qd R 623. No doubt s 57(2)(b) was amended to allow the Court to extend time beyond the six months from notice or obtaining leave to bring proceedings which the Court lacked in *Aydar* and *Bermingham* – but it is not limited to that case.

[77] Section 57(2)(b) is clear in its terms. On its face it is an express grant of power to the Court to extend time to a claimant to bring proceedings notwithstanding more than three years have elapsed since the accident. The only pre-conditions expressed by the Act for the exercise of the power is that a notice of claim be given 'under division 3', or an application for leave to bring proceedings be made under the division, in each case before the end of the limitation period. No sensible reason can be discerned for imposing limitations on the express grant of power. To limit the power to circumstances in which the difficulty in commencing proceedings has been brought about by the requirements of division 3 only, makes no sense when the more likely cause of difficulty for a claimant commencing proceedings in time will be the need to comply with division 5A.

[78] To give the words of s 57(2)(b) their natural meaning, that the Court is given an unfettered discretion to extend a limitation period subject to the existence of one of the two pre-conditions found in s 57(1), is not likely to prejudice or even inconvenience an insurer. The requirements of division 3 will mean that an insurer has early detailed notice of any claim for damages. It will be given information concerning all aspects of the motor vehicle accident and the claimant's injuries. It will receive such notice in the ordinary case within six months of the accident. A claimant will be unable to proceed with a claim for damages without having given timely notice to the insurer unless it obtains an order pursuant to s 39(5)(c). In that event the insurer will have notice of the application to proceed further with the claim and can resist it if it has some sufficient ground for complaint. An insurer who is dissatisfied with the pace at which a claimant prosecutes the claim can seek an order from the Court pursuant to s 51D that the action be started within a specified time and/or that the claimant pay the insurer's costs occasioned by any delay in commencing proceedings. By the time a compulsory conference is held, the insurer will have had revealed to it the claimant's case including experts'

reports, disclosure of documents, medical reports and any additional information it sought. With this early provision of detailed information it is difficult to see how an insurer could be prejudiced by an extension of the limitation period to allow a claimant to comply with the pre-litigation requirements of the Act.

[79] There are, essentially, three reasons why statutes of limitation have been thought to be appropriate. The first is that claims which are allowed to lie dormant for long periods 'have more of cruelty than of justice in them'. Secondly, it is realised that a defendant may lose evidence necessary to disprove a stale claim, notice of which comes very late. The third, least persuasive reason is that persons with good causes of action should pursue them with reasonable diligence. None of these reasons would support giving to s 57(2)(b) an application narrower than its expression suggests. No insurer liable to compensate a claimant for personal injuries caused in a motor vehicle accident will be visited with a stale or long dormant claim. Nor will it lose necessary evidence through the passage of time. On the contrary it will be given prompt detailed information of the claim. Nor is there any prospect that a claimant with a good cause of action will delay its prosecution. The insurer is given a statutory right to force the pace.

[80] In reality the provisions of the Act have superseded the operation of the *Limitation of Actions Act* 1974 (Qld) as it applies to claims for damages of personal injuries caused by motor vehicle accidents. The statutory obligation to commence such actions within three years is an additional requirement to those imposed by the Act. It is the Act which imposes more, and more immediate, limitations on the times within which a claimant must make a claim for damages and proceed with that claim. It is not surprising that Parliament should, as part of the legislative scheme governing the processes for making a motor vehicle accident claim, confer power on the Court to extend the period imposed by the *Limitation of Actions Act* whose application to the claim has been largely supplanted.

[81] This is not to say that the discretion conferred by s 57(2)(b) is to be exercised without proper attention to the context in which it is conferred. Section 3 of the Act explains that its objects include keeping 'the costs of insurance at a level the average motorist can afford' and encouraging 'the speedy resolution of personal injury claims'. Its provisions are designed to achieve the prompt assessment of claims by an insurer who is given, for that purpose, comprehensive information by the claimant relatively soon after the accident. There are inducements and penalties to encourage both claimants and insurer to compromise the claim by making realistic and timely offers of settlement. The Act lays down procedures which the parties must follow to produce a settlement or a case which is ready for trial without delay.

[82] The discretion to permit the commencement of proceedings after the expiration of a limitation period is to be exercised in this context. It is clearly meant to ameliorate the plight of a claimant who is unable to comply with the requirements of the Act in time to commence proceedings and who, if justice is to be done, should be given the extension. The discretion is likely to be exercised favourably only in those cases where a claimant's circumstances make it difficult to comply with the requirements of the Act and commence proceedings within three years or where, despite making conscientious efforts to comply with the requirements of the Act, a claimant nevertheless does not do so within three years of the accident. Any delay on the part of a claimant in complying with the Act's requirements or in applying for an

extension of time will be relevant to the exercise of the discretion. Claimants who ignore the obligations imposed on them by the Act or who make no conscientious effort to comply with them are unlikely to obtain an extension of time though, of course, each case must be decided on its individual merits.

[83] The insurer expressly disavowed any attack on the exercise of discretion in the matters argued. This may be fortunate for Mr O'Dare who appears to have been quite dilatory in proceeding with his claim, to the extent of ignoring the insurer's invitation to commence proceedings on 22 April 2004. Given the insurer's concession, however, it is inappropriate to consider the discretion exercised in either application or in the appeal.

[84] Holmes J said about the power conferred by s 57(2)(b) (paragraphs 18-26 of her Honour's reasons for judgment):

> '… Section 57(1) remains the sub-section which has the effect of extending the limitation period … . … Sub-section (2) then sets the time frames within which that benefit may be exercised; that is, within six months after the giving of the notice or leave to bring the proceeding is granted, or the longer period allowed by the court. And that is where the discretion to enlarge the time frame, not available when *Bermingham* was decided, comes in.
>
> …
>
> Section 57 is, plainly enough, designed to alleviate claimants' difficulties in meeting the limitation period, caused by the procedural hurdles that the Act puts in their way. It is difficult to see why a claimant who is prompt in giving … notice … but falls at later hurdles, should be in a worse position in seeking indulgence than a claimant who does not manage to clear even the first hurdle, the giving of notice, until the limitation period is close to its end.
>
> …
>
> I conclude that the giving of the notice of claim within the limitation period is the only condition (putting aside questions of leave to bring proceedings) which must be met to enliven the discretion under s 57(2)(b) to extend the time …'.

[85] I agree with her Honour's analysis and conclusion, with the exception that I consider that the Court has power under s 39(5)(c), as amended, to give leave to bring proceedings so that the second pre-condition mentioned in s 57(1) is still relevant.

[86] In his reasons for judgment McGill DCJ said (reasons paragraphs 20-24):

> 'On the other hand, the power to extend the six month period in the first situation remains of considerable significance. Although there is no longer a six month prohibition on proceedings being commenced, there is a good deal to be done after the point has been reached where a claimant has given a complying notice of claim … .

> … It may be that all of these things could occur within the six month period, but the situation could easily arise where they do not occur within that period.
>
> If that situation does arise, one way of dealing with the problem is in the manner suggested initially by the … defendant; dispensing with the requirement for a compulsory conference and the exchange of mandatory final offers. That has the disadvantage … that there is no power … to postpone those requirements.
>
> …
>
> But on the face of it an alternative way exists of overcoming the problem, by making an order under s 57(2)(b) extending the six month period, to give time to enable the parties to complete the pre-litigation procedures … . That would have the practical advantage of giving the parties all the time that is necessary in order to enable all the relevant information to be gathered … so that the parties can … conduct a compulsory conference on a fully informed basis … . …
>
> In these circumstances it can be seen to be consistent with the purpose of the Act for the parties to be allowed time to complete all of the pre-litigation procedures before they have to commence a proceeding in a court, and only commence a proceeding if all of those procedures fail to resolve the matter. It can be seen to be consistent with the objectives of the legislation for the completion of the pre-litigation procedures to take priority over the need to commence a proceeding prior to the expiration of the limitation period specified in the *Limitation of Actions Act* … .
>
> Whatever the problems associated with the drafting of s 57, it has always been an attempt to deal with the fact that difficulties can arise where there is a conflict between the statutory imposition of pre-litigation procedures and the expiration of the limitation period, and to ensure that claimants were not prejudiced, in terms of the requirements of the *Limitation of Actions Act*, by the imposition of the obligation to comply with the pre-litigation procedures. It did this by extending the limitation period. Initially the extension was for a fixed period of six months, which no doubt the legislature expected would be an effective and appropriate concession. Once it emerged that it was not, the legislature conferred on the court a power to extend that period of six months. … Plainly the purpose of that grant of power is to enable the pre-litigation procedures to be completed before a claimant has to commence a proceeding.'

[87] I agree with his Honour's reasons save for the exception mentioned earlier. I also consider that the need to complete pre-litigation procedures is not the only purpose for which an extension of time might be granted under s 57(2)(b). A Court might extend time and, in addition, dispense with the conference or the exchange of offers though ordinarily the pre-litigation procedures should be observed.

[88] There remains the question whether the general power to extend time given by s 57(2)(b) can be exercised after the expiration of the three year limitation period. Both Holmes J and McGill DCJ thought it could. Their Honours were influenced by the judgment of McMurdo J in *Kash v S M & T J Cedergren Builders* [2004] 1 Qd R 643 in which his Honour was concerned with an application brought under s 59 of the *Personal Injuries Proceedings Act* 2002 (Qld) ('PIPA') which is in the very same terms as s 57(2)(b) of the Act. *Kash* involved 'one of several attempts by the applicant to find his way through the labyrinth which is the *Personal Injuries Proceedings Act* …'. He had given notice of his claim and injuries to the putative defendants and their insurers, and had attempted to commence an action but it was invalid for non-compliance with the provisions of the PIPA. The applicant then sought leave to commence fresh proceedings relying on the power given by s 59(2)(b). McMurdo J said (648-9):

> '[20] The respondents' argument seems to be based on a suggested unfairness from a defendant's losing a good defence. But that is also the effect of an order made under s. 59 within the limitation period. In each case, the effect of the order is to permit the proceeding to be commenced out of time and to deprive the defendant of the limitation period defence. The potential unfairness to a defendant, in a particular case, … could be greater where the order is made after the expiry of the period, if a defendant has by then in some way relied upon that expiry to its detriment. That is a consideration which would affect the exercise of the discretion … but it does not require the section to be interpreted as precluding an order beyond the limitation period in every case.
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> [21] The interpretation advanced by the respondents would leave the power under s. 59 so limited that it would be difficult to see much purpose for its existence. The power can only be exercised where a complying notice of claim has been given, at which point the claimant knows enough of the proposed case to supply the particulars … required … . ... The cases where a claimant, … within time to sue without leave, would for some reason still need an extension of the limitation period, will be comparatively rare. To confine the s. 59 power … to persons who are still within time to sue would be contrary to its apparent purpose.
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> [22] There is no express limitation on the power under s. 59 … and in my view, nor should it be implied. It follows that the power … can be exercised before or after the date within s. 59(2)(a).
>
> [23] … This interpretation does not effectively deny defendants the benefit of a period of limitation, because the scope for the operation of s. 59 is limited by the requirements for a complying notice within the period and for the court's discretion to be exercised judicially by due consideration of

> the relevant circumstances including any relevant prejudice to the defendant.'

[89] I respectfully endorse his Honour's analysis and would apply it to s 57(2)(b). The power it confers is a salutary one to be exercised in an appropriate case. The section conferring the power contains no limitation on the circumstance of its exercise and none should be implied. To do so would reduce its efficacy in addressing injustice brought about by the need to comply with the onerous obligations imposed on claimants by the Act.

[90] In *Horinack v Suncorp Metway Insurance Ltd* [2001] 2 Qd R 266 it was held that an application made under s 39(5)(c) for leave to commence proceedings could not succeed if brought after the expiration of the limitation period. The Court was concerned with s 39 as it appeared prior to the amending Act. It did not, of course, consider s 57(2)(b) as it is of no assistance in the construction of that subsection. *Horinack* also decided that s 57(2) in its earlier manifestation did not confer on the Court an independent source of power to grant leave to bring proceedings outside the limitation period. Again, the case says nothing with respect to the power which is conferred on the Court by s 57(2)(b).

[91] The first pre-condition to the power to extend time found in s 57(1) is that notice of a motor vehicle accident claim be 'given under division 3'. During the course of argument the parties debated whether a notice, to be 'given under the division', must be one which complies with the requirements of the division as to content and time. It was held by this Court in *Thomas v Transpacific Industries Pty Ltd* [2003] 1 Qd R 328 at 338 that, to be a notice 'given as required under this division', the notice must so comply. We were not asked to disagree with that conclusion and there is no need to do so. The point is of no importance for either of the applications, or for the appeal, with which we are concerned. In each proceeding the notice was given 'as required under' division 3. There is no doubt that in the applications and the appeal the pre-condition in s 57(1) has been satisfied.

[92] There may arise cases in which what is called a non-complying notice has been given when it will be necessary to decide whether the giving of such a notice will satisfy the pre-condition. It is not necessary to express a concluded opinion but there is, I think, much to be said for the affirmative view. Section 39 appears to draw a distinction between notices 'given under the division' and notices 'given as required under the division'. The section commences that 'if notice is given under the division' the insurer must respond in writing stating whether the notice has been given 'as required under this division'. The same distinction appears in s 39(3). Section 37 compels a would-be claimant to give written notice of the claim before bringing an action. The notice must contain the information contained in the regulations and be given within set times. Section 37(3) recognises that a notice may not be given within the specified time but imposes an obligation to give the notice, though late, together with a reasonable excuse for the delay. A notice thus given will not be one given as required under the division but will nevertheless be given under the division. Accordingly I would conclude that the choice of language in s 57(1) is deliberate. The pre-condition is satisfied if notice is given to the insurer. It does not have to be given 'as required'. That is, to use the idiom of those who practice in this field of law, it does not have to be a complying notice.

[93] In my opinion the insurer has not made good its attack upon the existence of the power to extend time which each of the judgments attacked exercised in favour of the claimants. In my opinion Appeal No 5494 of 2004 (SC No 1183 of 2004) should be dismissed. In each application for leave to appeal, Appeal No 5576 of 2004 (DC No 1303 of 2004) and Appeal No 7409 of 2004 (DC No 2462 of 2004), there should be leave to appeal because of the general importance of the point considered. Both appeals should, however, be dismissed. The appellants/applicants should pay the respondents' costs of the appeal and the applications, to be assessed on the standard basis.