SUPREME COURT OF QUEENSLAND

CITATION:	*Weeks v Nominal Defendant* [2005] QCA 118
PARTIES:	**CHRISTOPHER HENRY WEEKS** (applicant/respondent) **v** **NOMINAL DEFENDANT** (respondent/applicant)
FILE NO/S:	Appeal No 11351 of 2004 DC No 2301 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2005
JUDGES:	McPherson and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal refused and application dismissed** **2. Applicant should pay the respondent's costs of the application, assessed on the standard basis**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – appeal required consideration of whether particular circumstances constituted a reasonable excuse for delay – no important questions of law raised on appeal – whether leave to appeal should be granted INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – WHERE IDENTITY OF VEHICLE CANNOT BE ESTABLISHED – QUEENSLAND – EXTENSION OF TIME – motor vehicle accident caused by unidentified vehicle – respondent did not submit notice of claim to the Nominal Defendant within three months as required by s 37(2)(a) of *Motor Accident Insurance Act* 1994 (Qld) – respondent gave excuse for the delayed notice within nine months of the accident – Nominal Defendant claimed the excuse was not reasonable – respondent sought and received declaration from District Court judge that he had remedied non-compliance with s 37(2)(a) by provision of a

'reasonable excuse' – whether on the facts it was open to the judge to make the finding that the excuse was reasonable

District Court of Queensland Act 1967 (Qld), s 118
Motor Accident Insurance Act 1994 (Qld), s 37, s 39

Hope v Bathurst City Council (1980) 144 CLR 1, applied
Miller v Nominal Defendant [2003] QSC 081; (2003) 38 MVR 416, considered
Miller v Nominal Defendant [2003] QCA 558; (2003) 39 MVR 548, applied
Perdis v Nominal Defendant [2003] QCA 555; [2004] 2 Qd R 64, applied
Piper v Nominal Defendant [2003] QCA 557; [2004] 2 Qd R 85, applied

COUNSEL: K N Wilson with R B Dickson for the applicant
G W Diehm with A Luchich for the respondent

SOLICITORS: Tress Cox for the applicant
Kelly & Agerholm for the respondent

[1] **McPHERSON JA:** This is an application by the Nominal Defendant for leave to appeal against a decision of Tutt DCJ declaring that pursuant to s 39(5)(c)(i) of the *Motor Accident Insurance Act 1994* the claimant Christopher Weeks (who is the respondent in this Court) had remedied his non-compliance with s 37(2)(a) of the Act in failing to give timely notice to the Nominal Defendant of the motor vehicle accident claim in respect of which he proposes to sue for personal injuries. The point was made that, correctly speaking, a contravention of s 37(2)(a) is not capable of being remedied; but it is not in doubt that his Honour found there was, within s 37(3), "a reasonable excuse" for the claimant's delay in giving the notice, and the only question on this application is whether he was correct in doing so.

[2] In relation to that question, I have read what Jerrard JA has written and I agree with his Honour's reasons. In particular, I agree with his Honour in saying that the application, or the appeal if leave to pursue it were given, raises no grounds of interpretation of the Act, as distinct from a consideration of whether particular circumstances can be described as providing a "reasonable excuse" for delay, and that leave to appeal should be refused. I do, however, wish to make some general remarks on applications of this kind for leave to appeal to this Court in cases of this kind.

[3] The reason why leave is necessary here is that s 118(2) of the *District Court of Queensland Act 1967* confers a right of appeal to this Court from a final judgment of the District Court in specified cases; but against any other judgment in the original jurisdiction of that court, leave to appeal is needed from this Court under s 118(3). Because the decision of Tutt DCJ here was interlocutory, or was certainly not final, leave to appeal is, as the applicant Nominal Defendant accepts, required in this instance.

[4] In providing that leave was required to appeal against a non-final judgment, s 92(2) of *The District Courts Act of* 1967, as it then was, contained a proviso that such leave was not to be granted "unless some important question of law or justice

is involved". In that respect, it accorded and may in part have adopted and reflected the practice followed in the Privy Council with respect to interlocutory appeals to that tribunal: see *Salisbury Gold Mining Company v Hathorn* [1897] AC 268, 274. In relation to appeals to the High Court from interlocutory judgments of State Supreme Courts, leave was originally required by s 35(1)(a) of the *Judiciary Act 1903*, but special leave might be given if the High Court thought fit to grant it: s 35(1)(b). In *ex p Bucknell* (1936) 56 CLR 221, 223, their Honours considered that the purpose of requiring leave was "in order to check appeals which will not result in final determinations of the parties' rights". That is plainly also the purpose of the present requirement in s 118(3).

[5] The statutory requirement that "an important question of law or justice" be involved before leave was granted to appeal from a non-final judgment of the District Court has now been repealed and omitted from s 118(3) of the *District Court Act*, leaving this Court with a complete discretion with respect to any such appeal. But it remains the case that appeals that are not finally determinative of the rights of the parties are and ought to be regarded as exceptional. By requiring leave, s 118(3) expressly recognises this to be so, and the present case is an instance of that kind. It might conceivably have been different if the decision of Tutt DCJ had been to the opposite effect; that is, that there was no reasonable excuse for the claimant's delay. Then the claimant would have been deprived of any prospect of enforcing his claim, which would have meant that the judgment, although in form interlocutory, was final in its effect. But here the claimant still has his right of action and the respondent Nominal Defendant retains its right to defend itself against his claim in the ordinary way, including doing so on the ground that no unidentified motor vehicle was involved in or causative of the injury said to have been sustained.

[6] In addition to this consideration, the matter which the Nominal Defendant seeks now to have determined finally in its favour is, in my view, entirely one of fact rather than of law. It involves the application of ordinary English words to the facts of the case. The question before his Honour was whether Christopher Weeks had, within the meaning of s 37(3), a "reasonable excuse" for failing to give notice to the Nominal Defendant at an earlier date. In *Hope v Bathurst City Council* (1980) 144 CLR 1, 6-8, Mason J, with the assent of Gibbs and Stephen JJ, said:

> "Many authorities can be found to sustain the proposition that the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law".

However, his Honour went on:

> "… special considerations apply when we are confronted with a statute which on examination is found to use words according to their common understanding and the question is whether the facts as found fall within those words."

Then, in reference to the judgment of Kitto J in *New South Wales Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509, 512, Mason J said that, having answered the critical question there in the negative, Kitto J noted that the "common understanding of the words has … to be determined" as "a question of fact": *Hope v Bathurst City Council* (1980) 144 CLR 1, 8.

[7] These remarks apply to the question in the present instance. The expression "reasonable excuse" is not a term of art but one to be applied according to the

common understanding of its meaning. No form of judicial exegesis is needed to clarify or make sense of it. No doubt it is possible when applying it on occasions to go beyond or outside its ordinary meaning, and so make a mistake of fact or even of law that might attract a grant of leave under 118(3). But as the reasons of Jerrard JA demonstrate, this is not an instance of that kind. The claimant Christopher Weeks, who is a man of modest education and income, had at first good reason to believe that he had not sustained any disabling injury of a serious kind. Like most ordinary people, he did not go hunting down members of the legal profession to advise him of his right to give notice under 37(3) or otherwise until the need to do so became pressing. It is difficult to accept that an entity like the Nominal Defendant would genuinely have it otherwise. It can hardly be supposed that it wishes to encourage a procedure in which everyone injured, however slightly, by what may be an unidentified or uninsured vehicle automatically gives a notice under s 37(3) to the Nominal Defendant whether he intends pursuing it or not. If that system were to prevail, s 37(3) would be deprived of much if not all of its intended purpose and efficacy, which we were informed is to enable the Nominal Defendant at the earliest opportunity to investigate claims being made against it.

[8] I agree with Jerrard JA in thinking that this is not a matter in which leave to appeal should be granted. The application should be dismissed with costs.

[9] **JERRARD JA:** In this application the Nominal Defendant seeks leave to appeal from a judgment delivered on 8 December 2004, in which a judge of the District Court declared pursuant to s 39(5)(c)(i) of the *Motor Accident Insurance Act* 1994 ("the Act") that the claimant (Christopher Weeks) had remedied non-compliance with s 37(2)(a) of that Act. The judge also made costs orders consistent with that declaration. Mr Weeks had sought a declaration that he had remedied non-compliance with s 37(2)(a) in that he had provided a "reasonable excuse" for his delay in not giving a Notice of Accident claim to the Nominal Defendant within three months after the accident, as required by that section where the allegedly offending other motor vehicle could not be identified. The learned judge found that Mr Weeks had given a reasonable excuse for his delay, and made the declaration accordingly. The Nominal Defendant contends on this application that the excuse which it argues he offered, being his ignorance of the requirement to notify the Nominal Defendant, was not reasonable; and that the application should be allowed and the decision overturned.

Background matters

[10] Mr Weeks was involved in a motor vehicle collision on 13 November 2002 when another vehicle struck his stationary car. That other vehicle did not remain at the scene of the collision and was unidentified. At the time of the collision Mr Weeks was engaged in the course of his employment and accordingly eligible to claim Workers' Compensation benefits for any incapacity to work. He did lodge an application for Workers' Compensation dated 14 November 2002, and subsequently received benefits.

[11] He had sustained injury in the collision and was conveyed to the Royal Brisbane Hospital by Ambulance. After x-ray examination he was discharged to the care of his general practitioner with a recommendation that he undergo physiotherapy. The injuries of which he was aware were to his left upper shoulder region and lumbar

support area of the back. He was advised that he had most probably torn ligaments in his back, and Panadol Forte was prescribed.

[12] He attended his general practitioner on 15 November 2002, and numbness in the neck and general pain and stiffness was noted. Later that week he telephoned a Queensland Police Officer, asking if the police had details of the vehicle causing the accident. This was because he thought he might be able to make "a claim" in respect to his injuries. He was told (in effect) that the other vehicle was still unidentified, and that he would be "all right" because he could make a WorkCover claim. Mr Weeks swore, in an affidavit in support of his application for the declaration, that he took that advice from the police officer to mean that he could not make a claim against anyone else; he had never heard of the Nominal Defendant until he (later) contacted his solicitors. His evidence on the application was that the "claim" he had then intended to make, and for which he had sought details of the other vehicle, was a WorkCover claim.

[13] He saw a solicitor for the first time on 18 July 2003. It appears he returned to work on 23 November 2002, and to his employment at the time of the collision, which was as a workshop supervisor and which involved physical activity in handling crates, including heavy lifting. He did not remain in that employment, and is recorded telling his treating physiotherapist he had been off work all that week, because he was still "very sore", and he described to his treating general practitioner in that same week that he had suffered from pain in his lower thoracic back. He took holidays and on 9 December 2002 began work with a new employer as an export clerk. He was still employed there as at the hearing date in August 2004. The evidence before the learned trial judge left it unclear whether his employment in an office position meant he received a lower, the same, or a higher, overall salary.

[14] He had been given a clearance to return to work by his general practitioners, and had continued to attend a physiotherapist until 10 January 2003. On 6 January 2003 the therapist recorded that his right lumbar spine was very sore, and on 9 January 2003 Mr Weeks complained to the physiotherapist of a "still very sore lumbar spine". It had settled on 10 January. He consulted a Dr Baer on 13 January 2003, complaining about the very sore spine "one week ago", and a CT scan and medication was recommended and prescribed. No abnormalities were detected on that CT scan, conducted on 14 January 2003. There were no more visits to a physiotherapist or medical practitioner until 18 July 2003 on the day he first saw a solicitor, and when he also sought treatment that day for thoracic pain from the physiotherapist. He then said that he had been sore over recent weeks, with thoracic pain, especially in the last few days; he told his general practitioners on 21 July 2003 that he had been suffering from lower back pain for the last few months, and had been "seeing a physiotherapist".

[15] The solicitors whom he consulted forwarded a Notice of Accident claim form with medical certificates to the Nominal Defendant, under cover of a letter dated 28 July 2003. That letter relevantly read as follows:

> "There has been a delay in submitting this claim because:-
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> 1. At the time of the accident our client was advised by one of the attending Police Officers that our client would be "alright" because although the other vehicle could not be identified he would have a claim for compensation through WorkCover. Our client took this to mean that a claim could

> not be made against anyone else. Our client had no knowledge of 'The Nominal Defendant.'
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> 2. Our client's injuries appeared to improve with time and were not therefore of more concern to our client, until approximately one month ago when his condition worsened."

That letter advances two reasons for the delay in providing the notice of claim, one being lack of knowledge of the Nominal Defendant together with the belief that a claim could only be made against WorkCover, and not against anyone else; the other being that the injuries had appeared to improve and were not of concern to Mr Weeks until they had worsened in approximately June 2003. The Nominal Defendant's submissions on this application contended that his first reason could not constitute a reasonable excuse, and that the evidence contradicted the second.

[16] That notice was given in purported compliance with the requirements in s 37(2)(a) of the Act, which requires that before bringing an action in a court for damages for personal injury arising out of a motor vehicle accident, a claimant must give written notice of the motor vehicle accident, if it is to be given to the Nominal Defendant because the motor vehicle cannot be identified, within three months after that accident. That three months expired on 13 February 2003, and Mr Weeks' Notice was given eight and a half months after the accident.

[17] Section 37(3) provides as follows:

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

[18] The Nominal Defendant replied on 4 August 2003 to the solicitor's letter of 28 July 2003, pointing out matters described as non-compliance with the Notice requirements. Mr Weeks' solicitors responded with a Statutory Declaration by Mr Weeks on 5 August 2003, in which Mr Weeks swore that he believed he could only claim against WorkCover and he had not heard of the Nominal Defendant until he consulted his solicitors in July 2003. He also swore that he had received physiotherapy "through until March/April 2003 two to three times per week" and that his condition had improved after the accident so that it was manageable; but had deteriorated "about a month ago" until it had become more than he could bear, and that he had accordingly sought further physiotherapy and other treatment.

[19] The Nominal Defendant contended on this application that the real reason for giving no notification was both ignorance of the existence of the Nominal Defendant as well as a belief a claim was available only against WorkCover, rather than – as Mr Weeks' counsel argued to the trial judge and this Court – that it was not until his injuries deteriorated that he had reason to seek legal advice. Unfortunately for it, the Nominal Defendant's cross-examination of Mr Weeks did not challenge the description in his statutory declaration that his condition had improved so that it was manageable, nor his description that it had deteriorated to the point where it had

become unbearable about a month before the statutory declaration was sworn, and that it was then that Mr Weeks had realised that he would need more treatment. That makes it very difficult for the Nominal Defendant to dispute at least that part of the excuse offered which asserted that the injuries had appeared to improve with time and were therefore not of concern to Mr Weeks until approximately one month before 28 July 2003. One cannot help but notice that visits to the physiotherapist ceased in January 2003, and not "March/April" 2003 as the statutory declaration (incorrectly) stated. The error was against Mr Weeks, not in his favour.

[20] The Nominal Defendant advised Mr Weeks in August 2003 that it would defer any decision in respect of a claim until this Court had delivered judgments in the pending matters of *Piper v Nominal Defendant* [2003] QCA 557; *Miller v Nominal Defendant* [2003] QCA 558; and *Perdis v Nominal Defendant* [2003] QCA 555.[1] On 19 December 2003 the Nominal Defendant told Mr Weeks' solicitors that it did not consider that Mr Weeks had provided a reasonable excuse, particularly in light of the decision of this Court in *Piper v Nominal Defendant*. On 30 June 2004 Mr Weeks filed an application for a declaration pursuant to s 39(5)(c)(i) of the Act that he had remedied his non-compliance with s 37(2)(a).

[21] Section 39(5) provides that:

> "**(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 –
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> (a) the insurer –
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> (i) has stated that the insurer is satisfied notice has been given as required under this division or the claimant has taken reasonable action to remedy the noncompliance; or
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> (ii) is presumed to be satisfied notice has been given as required under this division; or
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> (b) the insurer has waived compliance with the requirement; or
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> (c) the court, on application by the claimant –
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> (i) declares that the claimant has remedied the noncompliance; or
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> (ii) authorises further proceedings based on the claim despite the noncompliance."

[22] The Nominal Defendant's written outline contends that the relief sought and granted was probably incorrect, in that breach of s 37(2)(a) of the Act cannot be remedied. Once the notice is given late, it is a once and for all breach, although it was open to Mr Weeks to seek an order that he had provided a reasonable excuse.[2] In *Miller*, *Perdis* and *Piper*, this Court heard applications in matters in which claimants had likewise not given notice within the three month period specified in s 37(2)(a), but had supplied an excuse, or purported excuse, within the nine month period described in 37(3). In *Miller*, Davies JA[3] and Mackenzie J[4] construed s 37(3) to

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1 Those judgments were all heard on 21 October 2003 and judgment was delivered on 15 December 2003

2 The applicant relied on *Miller v Nominal Defendant* [2003] QSC 081 at [8] and [19], and *Perdis* at [16]-[17]

3 At [31]-[32]

4 At [52]

mean that a claim against the Nominal Defendant would be barred if each of a notice and a reasonable excuse were not both provided within nine months after the accident. That is, contrary to the decision of the trial judge in *Miller*, it was not sufficient if a notice was given within the nine months but a reasonable excuse offered after that period had elapsed. Mackenzie J repeated the same view in *Perdis*.[5] Davies JA held in *Perdis*[6], and repeated the view in *Piper*[7], that a claimant could seek a declaration pursuant to s 39(5)(c)(i) that a failure to comply with s 37(2)(a) had been remedied by compliance with s 37(3), and neither of the other two judges disagreed with that being the proper and only order available. The decision in *Miller* held that where neither a notice nor a reasonable excuse had been given in the nine month period, the effect of s 39(8) was that the Court not declare under s 39(5)(c)(ii) that the claimant could proceed further with the claim despite the non-compliance.

[23] The effect of those decisions, and of s 37(3) and 39(8) of the Act, is that the Nominal Defendant's submission must be in error where it contends that the relief sought and granted was incorrect. Those decisions have the effect that a declaration was correctly sought pursuant to s 39(5)(c)(i) that Mr Weeks had remedied his non-compliance with s 37(2)(a) by complying with s 37(3). As Mackenzie J observed in *Miller* at [54], where the dispute is whether an excuse that has been given was reasonable, the quality of the excuse as reasonable or not reasonable becomes fixed at the time it was given; and a determination that the excuse given within time was reasonable can be made outside the period of nine months. On the other hand, the bar imposed by s 39(8) applied to cases where the notice, which includes reasonable excuse, had not been given in that nine month period. In such a case where an application is made under s 39(5)(c)(ii) for an order permitting the claimant to proceed despite non-compliance, that order must be made within the nine months. Davies JA held likewise, at [33] and [40] in *Miller*.

The decision at first instance

[24] The learned trial judge cited and correctly applied those three decisions construing the relevant sections of the Act, holding that the claimant was obliged to give notice of his claim within three months, and if not, to give the notice and a reasonable excuse for his delay within nine months of the accident. Otherwise, his claim was barred. The judge held that the core issue in the application was whether Mr Weeks had provided a reasonable excuse within that nine months, holding that if the excuse provided was reasonable then it would follow that the claimant had remedied the earlier non-compliance, and that a declaration could then be made as sought. The judge correctly held that if the applicant had not given a reasonable excuse within the nine month period, he could not simply give one to the Court and thereby empower it to allow further proceedings pursuant to s 39(5)(c)(ii).[8] The learned judge correctly held that the question of whether an excuse was reasonable was one to be judged objectively in all the circumstances, which included Mr Weeks'

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5 At [33]

6 At [16]-[17]

7 At [23]

8 It is s 39(8) which restricts the court's power to authorise further proceedings despite non-compliance, a limitation not imposed when a court is exercising power pursuant to s 18(1)(c)(ii) of the *Personal Injuries Proceedings Act* 2002; see *Gillam v Queensland* [2003] QCA 566 at [27]-[29]; and [38]

personal characteristics, such as his age, intelligence and education and the nature of the injuries he had sustained.[9]

[25] The judge held that Mr Weeks had acted reasonably in contacting the police officer on or about the day after the collision to ascertain if any details of the offending driver had been discovered; Mr Weeks was then in the process of completing his Workers' Compensation application, and the judge thought it was common sense that information be included in that claim form if available. The judge found that Mr Weeks' injuries at that time were relatively minor, that he had a valid WorkCover claim for those injuries, that it was reasonable to assume his condition would continue to improve after his employment had changed, and that he did not seek further medical advice, or any legal advice, until his symptoms gradually worsened to the extent that he sought both more physiotherapy and legal advice in mid-July 2003. Those findings were all open on the evidence, if not unavoidable. The judge considered it relevant to whether Mr Weeks had a reasonable excuse that he had a grade 8 education, had further education only in the form of an apprenticeship in panel-beating and spray-painting, and that the onset of more severe symptoms had occurred in the weeks before the visit to the physiotherapist and to the lawyers. The learned judge expressly accepted that latter evidence from Mr Weeks, and also considered relevant Mr Weeks' ignorance of the existence of the office of the Nominal Defendant until he consulted those solicitors.

[26] It was open to the learned judge, considering those findings and circumstances, to find, as the judge held, that it was reasonable for Mr Weeks to delay seeking legal advice in respect of his rights until he did. It would have been an unnecessary financial burden on Mr Weeks to expect him to seek legal advice at a time when his injuries appeared both slight and adequately compensated for by his then quite modest WorkCover claim. In *Watters v Queensland Rail* [2001] 1 Qd R 448 this Court remarked[10] that it had consistently treated the consequences of injury, including economic consequences, as a potentially material fact of a decisive character relating to a right of action. Thomas JA wrote:

> "The fact that a plaintiff's injury was more serious than he or she had hitherto realised has long been recognised as being capable of being a material fact. …a fact of this kind going to enlargement of damages could be a material fact of a decisive character if it converted such a person's claim from one that was not worth bringing into one that was."

Those observations are equally valid in the circumstances of this application, and the trial judge held that it was reasonable for Mr Weeks to wait until such time as the symptoms from his injury had persisted or deteriorated to such an extent that he was entitled to conclude that they were not going to resolve in a relatively short period of time post-accident, thereby making it worth his while to pursue other means of compensation for his injuries than merely statutory Workers' compensation benefits.

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[9] See *Piper v Nominal Defendant* at [14], [30] and [46]. The learned trial judge cited those paragraphs.

[10] At pages 453-454 in the judgment of Thomas JA with whom McPherson JA agreed, the latter remarking (at 452) that "ordinarily…the quantum of damages likely to be recovered for economic loss is a relevant consideration in determining whether the limitation period should be extended. So much is implicit, if not explicit, in several of the Queensland decisions on the question."

[27] It follows that even if Mr Weeks had known both of the existence of the Nominal Defendant and the obligation to notify it of the accident if intending to bring a claim, Mr Weeks would have been acting reasonably in not giving any notice while he appeared to have been adequately compensated for injuries from which he was recovering. On the evidence presented, that was the position until about June 2003. It was therefore open to the judge to find that Mr Weeks had a reasonable excuse for not giving notice, to an entity of whose existence he was unaware, until his injuries seemed more serious and solicitors were consulted. Mr Weeks should not be in any worse position because he did not know of the Nominal Defendant's existence until his realisation that his injuries were apparently worsening made its existence relevant. Accordingly it was open to the learned judge to find that Mr Weeks had a reasonable excuse for his delay in giving a notice of claim in the period between the collision and the date in August 2003 on which it was given. Since the argument in this matter raised no actual grounds of construction of the Act, as opposed to the consideration of whether particular circumstances could be described as providing a reasonable excuse for delay, I would refuse leave to appeal, and dismiss the application. The applicant should pay the respondent's costs of the application, assessed on the standard basis.

[28] **PHILIPPIDES J:** I agree with the reasons for judgment of Jerrard JA and with the additional reasons for judgment of McPherson JA and with the orders proposed.