SUPREME COURT OF QUEENSLAND

CITATION:	*Saltner v Watson & Anor* [2007] QSC 191
PARTIES:	**KEVIN JOSEPH SALTNER** (applicant) v **LEE CHARLES WATSON** (first respondent) and **RACQ INSURANCE LIMITED** (second respondent)
FILE NO:	BS4930 of 2007
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	8 August 2007
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	4 July 2007
JUDGE:	Wilson J
ORDER:	**THE ORDER OF THE COURT IS THAT:**

1. The compulsory conference of the Applicant and the Second Respondent required by subsection 51A(1) of the *Motor Accident Insurance Act 1994* ("MAIA") in respect of the Applicant's claim for damages for personal injury arising out of a motor vehicle accident which occurred on 14 March 2004 along the Bruce Highway at Flaggy Rock in the State of Queensland ("the claim") be dispensed with, pursuant to subsection 51A(5)(b) of the MAIA.

2. The obligation of the Applicant and the Respondent to exchange written final offers under subsection 51C(1) of the MAIA ("mandatory final offers") be dispensed with, pursuant to subsection 51C(11) of the MAIA.

3. Pursuant to section 57(2)(b) of the MAIA, an action for damages be started by the Applicant in respect of the claim by no later than 30 August 2007 ("the action") and copies of the claim and statement of claim be provided to the Respondent within fourteen (14) days of the action being so started.

4. The orders in paragraphs 1 and 2 of this Order are made on conditions that, subject to any further

order:-

(a) The action, if started, be stayed until each of, and the last of, the following has occurred:-

(i) The Applicant and the Respondents hold a conference that complies in all respects with section 51A of the MAIA as if it were a compulsory conference within the meaning of, and for the purposes of, that section ("the conference") and the terms of section 51A of the MAIA apply to the conference as if it were a compulsory conference;

(ii) The Applicant and the Respondents hold and conduct the conference in all respects in accordance with the procedures and other provisions contained in section 51B of the MAIA as if the conference were a compulsory conference within the meaning of that section, and the terms of section 51B of the MAIA apply to the conference as if it were a compulsory conference;

(iii) The Applicant and Respondents exchange written final offers which must remain open for 14 days and be in accordance with, and comply in all respects with, subsections 51C(1), (2), (3), (4) and (5) of the MAIA as if the provisions of those subsections had not been dispensed with ("the offers");

(iv) The Applicant and the Respondents participate in the compulsory conference by 10 November 2007 or within such further time as the Court may allow;

(v) The Applicant does provide to the solicitors for the respondents a statutory declaration in the form of a statement of loss and damage at least fourteen days prior to the compulsory conference.

5. Each party have liberty to apply by giving three business days notice in writing to the other party.

6. There be no order as to costs.

CATCHWORDS: LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – APPLICATION OF THE STATUTES TO PARTICULAR CAUSES OF ACTION –

MOTOR VEHICLE INSURANCE – the applicant suffered personal injuries in a motor vehicle accident – the applicant failed to start proceedings for damages within the limitation period as a result of an administrative failure on the part of the applicant's solicitors – the court has an unfettered discretion to extend time in which to commence proceedings, under the *Motor Accident Insurance Act 1994* (Qld) – whether to exercise that discretion

Limitation of Actions Act 1974 (Qld) s 11
Motor Accident Insurance Act 1994 (Qld) s 57

Morrison-Gardiner v Car Choice Pty Ltd [2005] 1 Qd R 378; [2004] QCA 480, cited
Winters v Doyle [2006] 2 Qd R 285; [2006] QCA 110, cited

COUNSEL: R B Dickson for the applicant
P V Ambrose SC for the second respondent

SOLICITORS: Jensen McConaghy for the applicant
Cooper Grace Ward for the second respondent

[1] **WILSON J**: The applicant was injured in a motor vehicle accident on 14 March 2004. He wishes to bring a proceeding for damages against the first respondent (the driver of the vehicle in which he was a passenger) and the second respondent (the compulsory third party insurer). However, he failed to do so before the expiration of the three year limitation period prescribed by s 11 of the *Limitation of Actions Act 1974* (Qld), and in this application he seeks an extension of time in which to bring such a proceeding pursuant to s 57(2)(b) of the *Motor Accident Insurance Act 1994* (Qld).

[2] Section 57 subsections (1) and (2) of the *Motor Accident Insurance Act* provide –

> "**57 Alteration of period of limitation**
>
> (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—
>
> (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."

[3] Solicitors then acting for the applicant sent a Notice of Accident Claim form to the second respondent; it was received on 4 May 2004. The second respondent was not initially satisfied that the notice complied with all of the requirements of the

legislation; further information was supplied, and on 9 June 2004 it informed the applicant's solicitors that the notice was then compliant.

[4] On 29 December 2004 the second respondent denied liability. The applicant was the front seat passenger in the vehicle driven by the first respondent. The first respondent lost control of the vehicle and it ran off the road. But the second respondent has alleged that the first respondent was a learner driver, that it was the applicant's responsibility to supervise him, and that instead of doing so, the applicant was asleep at the time of the accident.

[5] The applicant is a 29 year old indigenous man. He has described his education as poor, but says that he can read, and that he has had employment from time to time in labouring fields. He placed his confidence in his solicitor, Mr Andrew Kelly of Kelly & Down, solicitors, in Kingaroy. He co-operated with his solicitor fully, and has said that Mr Kelly and his staff made special efforts to see that he understood documents and matters concerning his claim. However, Mr Kelly did not tell him that a proceeding had to be commenced on or before 14 March 2007.

[6] In his Additional Information Form (submitted to the second respondent), the applicant said he had sustained the following injuries in the accident –

> comminuted fracture of left talus
> deep lacerated wound to the scalp
> abrasion wound to the left face
> large laceration under the bottom lip
> one (1) front tooth knocked out
> one (1) front tooth chipped
> several bottom teeth loosened.

[7] Both the applicant's solicitors and the second respondent set about gathering information and reports necessary to advance their cases. The applicant's solicitors responded in a timely manner to requests for information made by the second respondent's solicitors.

[8] The applicant's solicitors obtained a report from the Rockhampton Community Dental Clinic dated 28 February 2006, which they forwarded to the second respondent's solicitors. The report was as follows –

> "Thank you for your letter of the 13th February 2006 requesting information about Dental Treatment provided for Kevin.
>
> | | |
> |---|---|
> | 13.7.04 | Teeth scaled and cleaned |
> | 8.9.05 | Presented with anterior fractured teeth and 12, (upper right lateral), restored. |
> | 22.9.05 | Surgical extractions of anterior fractured teeth 11/21, (upper right central and upper left central tooth) removed. |
>
> There has been no recorded document of how injuries were sustained. However, a fair degree of trauma would have occurred to fracture the anterior teeth. The fractured roots of these teeth were removed on the 22.9.05.

> We recommend that a Part Upper Denture be constructed and he is listed at our Dental Clinic at Woorabinda to have this made."

[9] On 9 August 2006 the solicitors for the second respondent advised the applicant's solicitors that their client would fund private dental treatment even though liability had been denied. On 19 October 2006 the solicitors for the second respondent suggested that the applicant make a dental appointment and asked that a treatment plan be forwarded to them. The applicant saw Dr Clarkson, a dentist in Kingaroy, in November 2006, and was referred to Dr William Bruce, a prosthodontist in Toowoomba. Dr Bruce arranged to see him in his Brisbane surgery on 20 February 2007 and for him to see Dr John Walker, an oral surgeon, on the same day. The second respondent agreed to meet the costs of both consultations.

[10] After examining the applicant on 20 February 2007, Dr Bruce reported to Dr Clarkson –

> "The history of his present condition is that he was involved in a motor vehicle accident approximately 3 years ago which resulted in loss of teeth 11 and 21, his upper incisor teeth with associated alveolar bone structure. Tooth 12 appears to have been injured at the same time with loss of incisal ledge, enamel and dentine. The surrounding adjacent teeth 13, 12, 22 and 23 all test positive to cold and show no radiographic evidence of the degeneration. There has been some closure of the space required to restore teeth 11 and 21. The bite is impacted by the presence of the impacted wisdom teeth 28, 38 and 48.
>
> In relation to cause and effect it is most probably [sic] that teeth 11 and 12 with damage to 30% of the coronal portion of tooth 12 has directly resulted from the involvement in the motor vehicle accident. As the condition of the rest of the patient's dentition, apart from his third molar wisdom teeth is stable and largely without restoration, it could safely be assumed that there wasn't a pre-existing problem in this area.
>
> The proposed treatment plan to restore the patient as closely as possible to his pre-accident condition would involve extraction of the wisdom teeth 28, 38 and 48 in order to stabilize his occlusion and improve the prognosis of surgical implants placed in the position of the missing roots of tooth 11 and 21 by Dr John Walker (Oral & Maxillofacial Surgeon). Costings of these procedures will be furnished by Dr John Walker.
>
> Subsequent to adequate resolution and healing following surgery I envisage placement of two abutments which will then retain two porcelain fused to gold jacket crowns. Protection and prevention of movement of the teeth relative to the implants and tooth grinding damage will be achieved by the construction of an occlusal splint. Lower incisors will need to be reshaped because over eruption has occurred in the three years that the patient has had no prosthetic restoration in this area.

> An appointment has been made with Dr John Walker for the surgical appraisal of this area considering the patient comes from Cherbourg and will need to optimize his travel [sic]. I will forward this letter as a legal report to Kelly & Down Solicitors.
>
> Thanks again for your referral."

He provided a treatment plan, and estimated that the treatment would cost $8,840.

[11] On 1 March 2007 Dr Walker provided an itemised estimate of the cost of oral surgery. The total was $7,818.81. He noted that the surgery was tentatively booked for 8 March 2007.

[12] The second respondent wanted confirmation that all of the dental injuries had been sustained in the accident. On 6 March 2007 its solicitors wrote to the applicant's solicitors –

> "We refer to your facsimile of 5 March 2007 and to our phone discussions on 6 March 2007.
>
> Before our client makes a decision on the request to fund payment for surgery with Dr Walker, there is a clarification that our client seeks from you in relation to the matter. We appreciate that due to the close proximity of the proposed date of surgery of Thursday 8 March 2007, you will possibly not have enough time to provide this clarification. As such the surgery will have to be rescheduled.
>
> In your facsimile of 26 April 2006 you provided us with a copy of a letter from Dr Don Knowles, Dentist, of the Rockhampton Community Dental Clinic dated 28 February 2006.
>
> That letter makes reference to an attendance on 13 July 2004 by your client at the clinic to have his teeth scaled and cleaned.
>
> In a subsequent attendance on 8 September 2005 your client presented with anterior fractured teeth.
>
> The subject accident happened on 14 March 2004. The impression that our client receives from this material is that if there had been fractured teeth present in the accident, these would have been mentioned in the attendance on 13 July 2004.
>
> The fact that the fractures are only mentioned in the attendance of 7 September 2005 [sic], raises an inference that in fact the fractures have occurred between the attendance on 13 July 2004 and the attendance on 8 September 2005. Surely Dr Knowles would have commented upon the fractures had they been present, in his notation for 13 July 2004.
>
> Pursuant to s. 45 of the *Motor Accident Insurance Act 1994*, would you please within one month attend to the following:-

(a) Provide us with a Statutory Declaration from your client advising whether he has had a subsequent accident causing injury to his teeth or whether he alleges the fractures were sustained in the subject motor vehicle accident;

(b) Provide a further letter from Dr Knowles dealing with this issue.

Once those two items are attended to, our client will give your client's request for this funding further consideration.

We await hearing from you."

[13] The surgery scheduled for 8 March 2007 was cancelled, and the solicitors made further inquiries of the Rockhampton Community Dental Clinic and set in train other steps to respond to the request.

[14] Meanwhile the limitation period expired, as the second respondent's solicitors pointed out to the applicant's solicitors by letter dated 30 May 2007. This application was promptly filed on 8 June 2007.

[15] The applicant's solicitors' neglect to commence a proceeding before the limitation period expired was attributable to a failure in their administrative system. The solicitors' firm relied on a Law Society diary in which it noted important dates – in this case the office's 2006 diary did not contain a note of the date the limitation period expired, which resulted in a failure to record the date in the 2007 diary. The firm's practice of noting important dates in a prominent position on the matter's file, generally on the inside cover, also failed: the notation somehow lost its prominent position on the file.

[16] The discretion conferred on the Court by s 57(2)(b) of the *Motor Accident Insurance Act* is exercisable on an application made after the expiration of the limitation period subject to the existence of one of the two pre-conditions found in s 57(1).[1] Here the applicant gave the second respondent a Notice of Accident Claim form in a timely manner, thus satisfying one of those pre-conditions.

[17] As the Court of Appeal has explained in *Morrison-Gardiner v Car Choice Pty Ltd*[2] and *Winters v Doyle*[3] the discretion to allow an injured person to commence a proceeding after the expiration of the limitation period is an unfettered one which must be exercised judicially in all the circumstances of a particular case. Senior counsel for the second respondent prepared a useful, non-exhaustive summary of matters which may be relevant to the exercise of the discretion:

(a) the objects of the legislation – in particular encouraging speedy resolution of claims; [4]

(b) the length of the delay;

(c) any explanation for the delay;

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1 *Morrison-Gardiner v Car Choice Pty Ltd* [2005] 1 Qd R 378; [2004] QCA 480, [78].
2 [2005] 1 Qd R 378; [2004] QCA 480.
3 [2006] 2 Qd R 285; [2006] QCA 110.
4 s 3.

(d) whether the delay was related to difficulties in complying with pre-litigation steps prescribed by the legislation;

(e) whether the applicant and his solicitors were diligent in attempting to comply with the provisions of the legislation;

(f) any likely prejudice to a party such that the prospect of a fair trial is compromised;

(g) that an order in favour of the applicant would deprive the respondents of an otherwise complete defence to the claim;

(h) the interests of justice.

[18] It will often be a powerful factor in favour of an applicant that the delay was related to difficulties in complying with the procedural requirements of the legislation. That factor is not present here. But its mere absence will not necessitate the dismissal of the application.[5]

[19] True it is that in the present case the fault lies with the applicant's solicitors whose system for reminding them of limitation periods was quite inadequate and prone to let them down, as it did. But their constant attention to the file and to communicating constructively with the solicitors for the second respondent as well as with the applicant himself must be balanced against that default.

[20] The delay since the expiration of the limitation period has not been great. Within just over a week of being alerted to what had occurred, solicitors for the applicant filed the present application.

[21] I am unpersuaded that the respondents' prospects of a fair trial would be prejudiced if the application were granted. There was a back seat passenger in the vehicle the second respondent has not been able to contact. However, the inability to do so is not related to the passing of the limitation period; its investigator was unable to locate him as long ago as late 2004.

[22] Of course, to allow the application would be to deprive the respondents of a complete defence to the applicant's claim which is never an insignificant factor.

[23] Weighing all of these factors, I have decided to exercise the discretion in favour of the applicant. I will hear counsel on the form of the orders and on costs.

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5 *Winters v Doyle* [2006] 2 Qd R 285; [2006] QCA 110, [24], [26], [34] (Keane JA), [56] (Fryberg J).