SUPREME COURT OF QUEENSLAND

CITATION:	*Nestorovic v Milenkovic* [2010] QSC 143
PARTIES:	**NESTOROVIC, Hranislav** (applicant) v **MILENKOVIC, Bobuljub, trading as ZORO EXPRESS** (respondent)
FILE NO/S:	SC No 484 of 2010
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	25 January 2010
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	22 January 2010
JUDGE:	Margaret Wilson J
ORDER:	**1. It is ordered that the applicant be given leave to commence a proceeding pursuant to section 43 of the *Personal Injuries Proceedings Act* 2002 (Qld);** **2. It is declared that the applicant has given a reasonable excuse for his delay in giving a Part 1 Notice of Claim pursuant to section 9(5) of the *Personal Injuries Proceedings Act* 2002 (Qld).**
CATCHWORDS:	LIMITATION OF ACTIONS – GENERAL MATTERS – STATUTES OF LIMITATION GENERALLY – OPERATION OF STATE STATUTES IN PARTICULAR ACTIONS – OTHER MATTERS – where applicant sustained personal injuries when he fell from the trailer of a truck – where applicant wishes to bring a claim for damages against respondent – where three-year limitation period prescribed in s 11 of the *Limitation of Actions Act* 1974 (Qld) is about to expire – where applicant gave respondent notice of his claim outside the time prescribed in s 9(3) of the *Personal Injuries Proceedings Act* 2002 (Qld) – where applicant purported to give an explanation for his delay by a letter his solicitor wrote to respondent's solicitor – where applicant seeks leave pursuant to section 43 of the *Personal Injuries Proceedings Act* 2002 (Qld) to commence a proceeding

against the respondent; a declaration that he has given a reasonable excuse for his delay in giving notice of claim pursuant to section 9(5) of the Act; pursuant to section 18(1)(c)(i) a declaration that he has remedied all non-compliance in respect of his notice of claim; or alternatively, pursuant to section 18(1)(c)(ii), leave to proceed with his claim for damages despite non-compliance with section 9(3) – whether applicant should have leave to proceed – whether declarations should be made

Limitation of Actions Act 1974 (Qld), s 11
Motor Accident Insurance Act 1994 (Qld), s 37(3), s 39(5)(c)
Personal Injuries Proceedings Act 2002 (Qld), s 4, s 9, s 18, s 43

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Chapman v The Body Corporate for Endeavour Inn [2005] QDC 18, considered
Gillam v State of Queensland [2004] 2 Qd R 251, cited
Miler v The Nominal Defendant [2003] 38 MVR 416, cited
Perdis v The Nominal Defendant [2004] 2 Qd R 64, cited
Piper v The Nominal Defendant [2004] 2 Qd R 85, cited
Thomas v Transpacific Industries Pty Ltd [2002] QCA 160, cited

COUNSEL: R A I Myers for the applicant.
O K Perkiss for the respondent.

SOLICITORS: Shine Lawyers for the applicant.
Rada Milovanovic Solicitor for the respondent.

HER HONOUR: On 26 January 2007 the applicant sustained personal injuries when he fell from the trailer of a truck. He wishes to bring a claim for damages against the respondent. The three-year limitation period prescribed in section 11 of the Limitation of Actions Act 1974 is about to expire.

The applicant did not give the respondent notice of his claim until mid-October 2009, well outside the time prescribed in section 9(3) of the Personal Injuries Proceedings Act 2002. He purported to give an explanation for his delay by a letter his solicitor wrote to the respondent's solicitor on 13 November 2009. It appears to have been faxed on 16 November 2009.

This originating application was filed on 14 January 2010 and heard on Friday 22 January 2010. The applicant seeks:

(a) pursuant to section 43 of the Personal Injuries Proceedings Act, leave to commence a proceeding against the respondent;

(b) a declaration that he has given a reasonable excuse for his delay in giving notice of claim pursuant to section 9(5) of the Act;

(c) (i) pursuant to section 18(1)(c)(i) a declaration that he has remedied all non-compliance in respect of his notice of claim; or

(ii) alternatively, pursuant to section 18(1)(c)(ii), leave to proceed with his claim for damages despite non-compliance with section 9(3).

In section 4(1) of the Personal Injuries Proceedings Act, the main purpose of the Act is expressed in these terms.: "To assist the ongoing affordability of insurance through appropriate and sustainable awards of damages."

Then section 4(2) sets out the ways in which that purpose is to be achieved. They include:

"(a) providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies: and

(b) promoting settlement of claims at an early stage wherever possible; and

(c) ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial."

Chapter 2 of the Act is headed "Claims". Part 1 of that chapter is headed "Pre-court procedures". Sections 9, 18 and 43 are contained in Part 1 of Chapter 2.

Section 9 provides (so far as is presently relevant):

"(1) Before starting a procedure in a court based on a claim, a claimant must give written notice of the claim, in the approved form, to the person against whom the proceeding is proposed to be started.

(1A) The approved form must provide for the notice to be in 2 parts, namely part 1 and part 2.

...

(3) Part 1 of the notice must be given within the period ending on the earlier of the following days -

(a) the day 9 months after the day the incident giving rise to the personal injury happened or, if symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury;

(b) the day 1 month after the day the claimant first instructs a law practice to act on the person's behalf in seeking damages for the personal injury and the person against whom the proceeding is proposed to be started is identified.

...

(5) If part 1 of the notice is not given within the period prescribed under subsection (3) or section 9A(9)(b), the obligation to give the notice under subsection (1)

continues and a reasonable excuse for the delay must be given in part 1 of the notice or by separate notice to the person against whom the proceeding is proposed to be started."

Section 18 provides:

"(1) A claimant's failure to give a complying part 1 notice of claim prevents the claimant from proceeding further with the claim unless -

(a) the respondent to whom part 1 of a notice of a claim was purportedly given -

(i) has stated that the respondent is satisfied part 1 of the notice has been given as required or the claimant has taken reasonable action to remedy the non-compliance; or

(ii) is conclusively presumed to be satisfied it is a complying part 1 notice of claim under section 13; or

(b) the respondent has waived compliance with the requirement; or

(c) the court, on application by the claimant -

(i) declares that the claimant has remedied the non-compliance; or

(ii) authorises the claimant to proceed further with the claim despite the non-compliance.

(2) An order of the court under subsection (1)(c) may be made on conditions the court considers necessary or appropriate to minimise prejudice to a respondent from the claimant's failure to comply with the requirement."

Section 43 provides (so far as presently relevant):

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

...

(3) However, if leave is given, the proceeding started by leave is stayed until the claimant complies with this part or the proceeding is discontinued or otherwise ends."

The discretion under section 43 is unfettered. It is to be exercised judicially, having regard to the object of the legislation. That said, a number of principles relevant to the exercise of the discretion have been identified.

(a) It is not necessary that an applicant demonstrate a prima facie case against the respondent, but the absence of anything to indicate liability in the respondent will be a relevant factor. See Thomas v. Transpacific

Industries Pty Ltd [2002] QCA 160 at paragraph 3 per McMurdo P, paragraph 32-34 per Davies JA, a case on section 39(5)(c) of the Motor Accident Insurance Act 1994.

(b) It is not fatal that an applicant does not satisfy the Court hearing the application that he has a reasonable excuse for not giving notice of claim under section 9 within the time prescribed in section 9(3). See Gillam v. State of Queensland [2004] 2 QdR 251.

(c) Nevertheless, the extent of delay in giving notice of claim, the adequacy of the explanation for the delay and the likelihood of prejudice flowing from that delay are all relevant to the exercise of the discretion in section 43. See Thomas v. Transpacific Industries Pty Ltd at paragraph 29 per Davies JA.

(d) There may be other relevant factors - for example, that it was not until just before the expiration of the limitation period that the applicant identified the respondent as someone potentially liable. See, for example, Gillam v. State of Queensland.

(e) The reasonableness of the excuse pursuant to section 9(5) and its adequacy as a factor in the exercise of the discretion under section 43 must be considered objectively, having regard to the applicant's personal characteristics such as age, intelligence and education.

See the trilogy of cases on section 37(3) of the Motor Accident Insurance Act: Perdis v. The Nominal Defendant [2004] 2 QdR 64, Piper v. The Nominal Defendant [2004] 2 QdR 85 and Miller v. The Nominal Defendant [2003] 38 MVR 416.

In this case the applicant was born in 1955.

He and the respondent are both members of the Free Serbian Orthodox Church at Vulture Street, South Brisbane. They were so at the time of the accident. The verger of the church was Mr Alexander Goren, an elderly man.

At the time of the accident the applicant performed caretaker/cleaner duties at the church in return for which he was able to live rent free in a dwelling on church property. He voluntarily assisted Mr Goren with his duties.

The respondent was a self-employed interstate truck driver. Twice a year he collected boxes of candles in Melbourne and transported them to the church at South Brisbane. He customarily helped unload them in Brisbane. He was not paid for these services.

In late January 2007 the respondent collected boxes of candles from Melbourne and transported them to Brisbane. He rang Mr Goren and said they were available for collection, but he could not assist with the unloading because he was recovering from heart surgery.

On or about 26 January 2007 Mr Goren approached the applicant and asked him to accompany him to where the candles were being unloaded and assist in transferring them to his car. The applicant agreed. The applicant and Mr Goren went to an address in Pinkenba where a semi-trailer truck was parked on the grass median strip.

The applicant has deposed -

"15. Shortly after our arrival the Respondent and I climbed onto the bed of the trailer in order to unload the boxes of candles. I observed various boxes, pallets and other cargo loaded onto the trailer. The Respondent directed me as to which boxes were to be unloaded. I began handling each box of candles down to Mr Goren who was standing on the ground next to the trailer.

16. In order to hand each box down to Mr Goren I held onto a pallet loaded onto the trailer with my right hand in order to anchor myself and then leaned down to my left and handed the box to Mr Goren using my left arm and hand.

17. As I was in the process of handing the last box down to Mr Goren the pallet that I was holding onto suddenly and unexpectedly slid towards me causing me to lose my balance and fall off the side of the trailer to the ground below.

18. When I hit the ground I landed heavily and awkwardly on my right foot and then tumbled to the ground. I felt immediate severe pain in my right foot and leg and knew immediately that I had suffered an injury."

The circumstances as recounted by the applicant provide a basis for liability of the respondent. That is sufficient for these purposes. I do not express any opinion on the strength of the claim.

After he was injured the applicant was taken to the Mater Public Hospital by Mr Goren. His right foot and ankle were x-rayed. He was found to have sustained a comminuted fractured of a bone in the right foot. He was admitted to the hospital where he remained an in-patient until 30 January 2007. There he was seen by Dr Ben Forster, an orthopaedic surgeon.

The applicant was a heavy smoker, smoking between 40 and 60 cigarettes a day. Dr Forster discussed the severity of the injury with him and presented him with two options: surgery or conservative management to allow the bone to heal naturally. He told the applicant that given his then current level of smoking, surgery had a poor prognosis. The applicant was not keen to reduce his smoking and elected conservative management. It is clear from the hospital notes that Dr Forster advised the applicant of the poor prognosis and likelihood of inability to work for 12 months and of the likelihood of long-term disability.

When the applicant was discharged from hospital he was given a support bandage to use. He was told to use ice as needed and to use crutches and not weight bear for at least six weeks. Thereafter he attended his general practitioner, Dr Nicholas Comino, regularly.

The first appointment with Dr Comino was on 9 February 2007. He was told to come back for review in three months. Pain in his foot and ankle and swelling continued and he became depressed.

On 22 May 2007 he saw Dr Comino again. Dr Comino repeated Dr Forster's advice that a long period of recuperation was to be expected and advised him to return for review within another three months.

On 15 June 2007 the applicant was reviewed by Dr Forster at the Mater Public Hospital. Dr Forster suggested an ankle brace or orthotics, and referred him to the relevant department of the hospital.

The applicant was further reviewed by his general practitioner on 22 July 2007 and 6 November 2007. The pain and swelling in his foot and ankle and the depression continued. He has deposed -

"Whilst I was increasingly anxious about the lack of improvement in my ankle, I managed to keep myself going

through this period by focusing upon the fact that improvement would happen and it was just a matter of time."

The applicant saw Dr Comino again on 23rd January 2008. He complained of pain and swelling in the foot and ankle and depression. He said he was concerned for his future. The general practitioner counselled him and encouraged him to persist. He was told to return in three months.

The brace brought about some improvement, which he reported to Dr Comino on 17 April 2008. Again he was to return for review in three months, but he did not. In the ensuing months his symptoms did not continue to improve and through the remainder of 2008 and 2009 he sank into deeper depression. He has deposed -

"41. It was when things became very bad during this period that I first thought about the possibility that I might be like this forever. I was terrified by the thought and wondered what would happen to me. I wondered if I would ever be able to return to work as a painter. It was during this period as I contemplated a very bleak future that I first seriously thought about pursuing a claim for compensation against the Respondent.

42. Prior to this I would not really have contemplated pursuing a claim for compensation against the Respondent as he is a fellow member of the church and a passing

acquaintance, and it would have made things uncomfortable for the church and its other members."

On 24 April 2009 he saw Dr Comino. Dr Comino said there was a need for updated x-rays and that he should see Dr Forster again. He went to the out-patients' department of the Mater Public Hospital that day. The first appointment he could obtain with Dr Forster was on 12 June 2009. He saw Dr Forster then and further x-rays were arranged.

It was not until 10 July 2009, two and a half years after the accident, that he obtained the further advice of Dr Forster.

"47. I underwent further x-rays as recommended and saw Dr Forster again for further review on 10 July 2009. On that occasion Dr Forster advised me that there were serious problems with the fractured bones in my foot and ankle and that I would need to undergo surgery to repair those bones if I was to have any hope of having an improvement in my symptoms. Dr Forster informed me that while he hoped to achieve some improvement with surgery, the future was not bright and I was likely to be left with a substantial disability in my right foot and ankle as a result of my injury.

...

52. Until seeing Dr Forster on 10 July 2009 I had always believed that my injuries and symptoms would eventually

> resolve with enough time and patience. In the event that my injuries resolved, even if it took quite a long time, I would not have elected to pursue a claim for compensation against the Respondent. However, now that I know that I will be left with a permanent disability and my future looks quite bleak, I feel compelled to do so."

The applicant's mental state was deteriorating. On 28 July 2009 he first contacted solicitors, and an appointment was arranged for 31 July 2009. He attended that appointment, when he was told what extra information the solicitors would need, and on 4 August 2009, he contacted the solicitors and instructed them to commence a claim.

On 1 September 2009 the applicant phoned the solicitors' office and provided the street and suburb where the accident occurred and the respondent's address. The solicitors still did not have the respondent's full name or the name of his business despite having their having told the applicant in the first appointment that this information was necessary.

By 15 September 2009 the solicitors' inquiries had led to the proper identification of the respondent. The next day they sent a Part 1 Notice of Claim to the applicant for signature. He returned it approximately a month later, on 12 October 2009. That day the solicitors sent it to the respondent by registered post. He received it on 15 October 2009.

On 21 October 2009 the applicant underwent surgery. By letters dated 12 and 13 November 2009 the solicitors for the respondent asserted to the applicant's solicitors that the notice of claim was out of time and that a reasonable excuse for the delay had not been given. The applicant's solicitors proffered an excuse by letter dated 13 November 2009, apparently faxed on 16 November 2009. They said:

"The Claimant hereby provides same, namely:

(i) Immediately after his accident the Claimant attended upon Mater Public Hospital for treatment for his injuries. He was advised by his treating doctors that due to the degree of swelling in his injured ankle they could not make a definitive prognosis or consider surgical intervention at that time.

(ii) The Claimant's treating doctors bandaged his injured ankle and discharged him home on the basis that he be strictly non-weight bearing and then return for periodic review over the coming months in order to assess whether his injury had stabilised to a sufficient degree to permit them to make a further assessment of his condition and the need for surgical intervention.

(iii) The Claimant attended at Mater Public Hospital for numerous periodic reviews over the coming months, stretching into years and also came under the care of a general practitioner, Dr Comino at West End. His

treating doctors persisted with conservative forms of treatment and repeatedly expressed the hope that with the passage of time and appropriate forms of conservative treatment the Claimant's injuries would improve without the need for surgical intervention.

(iv) The Claimant relied upon the medical advice he received and equally hoped and believed that with the passage of enough time his injuries and symptoms would improve to a sufficient degree to permit him to once again enjoy a reasonable quality of life. The Claimant is not a litigious person and he refrained from commencing a claim for damages pending the outcome of his medical treatment.

(v) In the middle of this year the Claimant's condition was not improving and, in fact, his symptoms were becoming intolerable and grossly debilitating. He ultimately sought further specialist medical opinion from Dr Ben Forster, orthopaedic surgeon, who recommended that he undergo urgent surgery to repair his fractured ankle and foot.

(vi) The Claimant underwent surgery in October 2009. He remains significantly disabled as a consequence of his injuries and ongoing symptoms and has experienced little improvement consequent upon surgery; and

(vii) The magnitude of his injuries and the potentially permanent and debilitating nature of his ongoing symptoms was not apparent to the Claimant until he was informed of the urgent need for surgery earlier this year.

The claimant refrained from commencing a claim for damages based upon medical advice which was available to him and based upon his genuinely held belief that his injuries would heal and his symptoms improve and that he would be returned to a reasonable quality of life.

When it became apparent to the Claimant that his belief would not be fulfilled and that he will be permanently disabled as a result of his injuries, the Claimant felt compelled to commence a claim for damages. Same is eminently reasonable."

On 16 November 2009 the applicant's solicitors sent a further fax to the respondent's solicitor containing an explanation for delay between their initial instructions and the sending of the notice of claim in terms of the chronology I have outlined. By letter dated 18 December 2009 received on 23 December 2009 the respondent's solicitor maintained the position that the notice of claim was out of time and a reasonable excuse had not been provided. The solicitor sought further information about the injury and medical advice obtained and about the circumstances of the accident.

Did the applicant provided a reasonable excuse? An injured person's hope or belief that his condition will improve with time can afford a reasonable excuse for delay in giving notice of claim. See, for example, the remark of Davies JA in Thomas v. Transpacific Industries Pty Ltd at paragraph 37.

In Chapman v. The Body Corporate for Endeavour Inn [2005] QDC 018 Judge Alan Wilson SC observed:

"There will be cases in which such a belief is plainly illogical and unjustified, and whether or not this is so will ordinarily fall to be determined by reference to such factors as the severity of the original injury, the nature and duration of treatment for it and the presence and extent of any ongoing symptoms (and questions of prejudice).

The obvious purpose of this legislation is to ensure putative defendants are alerted to the risk of a claim at an early time and to reduce the risk of embarrassment or prejudice. It is equally clear, however, that the legislature did not intend to penalise those with the fortitude to maintain a hope of recovery so long as that was reasonable in the circumstances."

In the present case the applicant was initially given two options. Given the risks associated with surgery, he chose conservative management. He persevered and attended as recommended on his general practitioner and at the hospital, but for the period from the latter half of 2008 into early 2009 when he was in deep depression.

On receipt of the general practitioner's advice on 24 April 2009 he went to the hospital that day, but he could not see the specialist until 12 June 2009. It took him another month to obtain an x-ray and a further appointment with the specialist when surgery was discussed. The delay in treatment from 24 April 2009 does not seem to be in any way attributable to the applicant. Rather it seems to have been attributable to the hospital waiting list.

It must be said that at the time of the initial hospitalisation he was advised of the likelihood of long-term disability, but there is no evidence that he was counselled against conservative management.

I have concluded that his own conduct was reasonable in all the circumstances. Further, I consider that his solicitors acted with reasonable diligence. Accordingly, I have concluded that the excuse provided was in all the circumstances a reasonable one.

I turn to the question of prejudice. The respondent relies upon the prejudice which is inherent in the passage of time. His own recollection of the accident has faded and he says he has lost the opportunity to investigate the accident, but he does not point to the death or disappearance of any particular witness or the loss of any particular document. It is well accepted that the mere passage of time can lessen the chances of a fair trial. See, for example, Brisbane South Regional Health Authority v. Taylor (1996) 186 CLR 541.

In all of the circumstances I am persuaded that the applicant should be given leave to commence a proceeding pursuant to section 43 of the Personal injuries Proceedings Act. There should also be a declaration that he has given a reasonable excuse for his delay in giving a Part 1 Notice of Claim pursuant to section 9(5) of the Act.
