SUPREME COURT OF QUEENSLAND

CITATION:	*Cielo v Fitzgerald & Anor; Cielo v Keighran & Anor* [2015] QSC 330
PARTIES:	**JOSEPH MARIO CIELO** (plaintiff) **v** **GARRETT FITZGERALD** (first defendant) and **STATE OF QUEENSLAND** (second defendant) **JOSEPH MARIO CIELO** (plaintiff) **v** **ROBYN KEIGHRAN** (first defendant) and **STATE OF QUEENSLAND** (second defendant)
FILE NO/S:	BS No 8897 of 2005 BS No 8445 of 2007
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2015
JUDGE:	Peter Lyons J
ORDER:	**Application dismissed.**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – DISMISSAL OF PROCEEDINGS FOR WANT OF PROSECUTION – where the plaintiff claims damages for personal injuries against two doctors, alleged to have arisen out of treatment given by the first doctor in 2002 and 2003, and by the second doctor from 2003 until 2005 – where the defendants apply to strike the proceedings out on the grounds of want of prosecution – where the defendants rely on the long delay since

the underlying events occurred, the absence of proper explanation for much of that delay, and the general presumption of prejudice – where the plaintiff commenced the actions within the limitation period, and preceded the actions with notices of potential claims – where the plaintiff claimed economic loss relating to, amongst other matters, arrangements made to manage a hotel owned by the plaintiff's family, and gave the defendants a reasonably extensive explanation of this claim in June 2007 – where those arrangements were, in part, made with the plaintiff's father who died in 2003, but primarily with other members of the plaintiff's family – where, on 28 October 2010, the plaintiff did not attend a compulsory conference – where, at the end of 2010, the defendants made, and the plaintiff rejected, mandatory final settlement offers – where, from the plaintiff's withdrawal of instructions at the end of 2010, until 30 May 2014, the plaintiff's former solicitors refused to release the plaintiff's files without arrangements being made for the payment of their costs – where the plaintiff made attempts to obtain legal representation from the end of 2010 until 2014 when representation was obtained — where there was no suggestion that the defendant doctors' contemporary records of the treatment given were not adequate – where there was no suggestion of any relevant omission from the reports and records of various medical experts who examined the plaintiff – where there was no suggestion of any difficulty with the medical experts giving evidence about causation, or the appropriate treatment standard at the relevant time – where the defendants' submission that the plaintiff had poor prospects of success on any of his claims was not accepted – whether the plaintiff's claims against the defendants should be struck out for want or prosecution – whether the defendants have suffered prejudice arising from the plaintiff's delay in prosecuting the claims

Personal Injuries Proceedings 2002 (Qld), s 4, s 9, s 9A, s 20.
Uniform Civil Procedure Rules 1999 (Qld), r 24, r 389.

Brisbane South Regional Hospital Authority v Taylor (1996) 186 CLR 541, [1996] HCA 25, distinguished.
Cooper v Hopgood & Ganim [1999] 2 Qd R 113; [1998] QCA 114, cited.
Tyler v Custom Credit Corp Ltd & Ors [2000] QCA 178, cited.
Witten v Lombard Australia Ltd (1968) 88 WN (Pt 1) NSW 405; [1968] 2 NSWR 529, cited.

COUNSEL: **In BS No 8897 of 2005**
KC Fleming QC with A Marks for the plaintiff
DW Diehm QC with MA Callaghan for the first defendant
CL Heilbronn (*sol*) for the second defendant

BS No 8445 of 2007
KC Fleming QC with A Marks for the plaintiff
DW Diehm QC with MA Callaghan for the first defendant
CL Heilbronn (*sol*) for the second defendant

SOLICITORS: **In BS No 8897 of 2005**
Kerin Lawyers for the plaintiff
Avant Law for the first defendant
Minter Ellison for the second defendant

BS No 8445 of 2007
Kerin Lawyers for the plaintiff
Avant Law for the first defendant
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[1] The defendants in each of these proceedings (which are conveniently referred to as the *Fitzgerald proceeding* and the *Keighran proceeding*) have applied to strike the proceedings out on the grounds of want of prosecution. They rely on the long delay since the underlying events occurred, including the delay until the proceedings were commenced; the absence of proper explanation for much of the delay; and prejudice (primarily what was described as "presumptive prejudice" or "the general presumption of prejudice" by McHugh J in *Brisbane South Regional Hospital Authority v Taylor*[1]).

[2] In each proceeding, the plaintiff claims damages for personal injuries alleged to have arisen out of treatment given by the defendant Doctor Fitzgerald in 2002 and 2003; and the defendant Doctor Keighran from 2003 until 2005. The State of Queensland is a defendant because it is alleged some of the treatment was given in hospitals.

[3] For reasons which will become apparent, it is necessary to examine in some detail the dealings between the parties. They may be better understood if this examination is preceded by an overview of the legislation which regulated the bringing of the proceedings by the plaintiff.

Statutory background

[4] The bringing of each proceeding was regulated by the *Personal Injuries Proceedings Act* 2002 (Qld) (*PIPA*). It is convenient to commence with its main purpose, as follows:

> "**4 Main purpose**
>
> (1) The main purpose of this Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.

1 (1996) 186 CLR 541, at 557, 558.

> (2) The main purpose is to be achieved generally by—
>
> (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 of trial; and
>
> (d) putting reasonable limits on awards of damages based on claims; and
>
> (e) minimising the costs of claims; and
>
> (f) regulating inappropriate advertising and touting."

[5] Section 9 required that a Notice of Claim be served by the plaintiff on each proposed defendant before the commencement of proceedings. The notice was required to contain certain information, and to authorise each proposed defendant and each defendant's insurer to have access to records and sources of information relevant to the claim. The notice was required to be in two parts, the giving of Part 2 to be somewhat later than the giving of Part 1.

[6] The prescribed form for Part 1 of the Notice of Claim made it necessary for a claimant to give a brief description of what is described as "the incident", no doubt requiring an account of the events which resulted in the alleged injury; together with an explanation for the claimant's belief that a proposed defendant caused the incident; and some other relevant information.

[7] The prescribed form for Part 2 required a claimant to provide information relevant to economic loss; as well as the identification of potential witnesses and reports.

[8] However, s 9A required, in the case of "a claim based on a medical incident" that an "initial notice" be given before the Notice of Claim. Amongst other things, the initial notice was to include a description of the medical services alleged, the name of the doctor who provided those services, and the date or dates when, and the place or places at which, the medical services were provided; as well as a description of the alleged injury. The person to whom the notice was given was required to give a written response, and copies of all documents held by that person about the medical services.

[9] Section 20 of the PIPA required a person described as a respondent to a Part 1 Notice of Claim to take reasonable steps to inform himself, herself, or itself about the incident; and to give the claimant written notice stating whether liability is admitted or denied; as well as to make a fair and reasonable estimate of the damages to which the claimant would be entitled in a proceeding against that respondent; and to make a written offer of settlement. The offer was required to be accompanied by a copy of medical reports and other documents relevant to the alleged loss.

[10] Section 22 then imposed obligations on the claimant to provide documents and other information dealing both with liability and quantum aspects of the claim. Subsequent

sections made provision for medical examination of the claimant. Section 36 required the parties to participate in a compulsory conference. Section 37 required the parties at least 7 days before the conference to exchange further documents; and to provide a Certificate of Readiness, certifying that party's readiness for the conference and the trial (subject to compliance with the requirements of the Court's rules).

[11] The tenor of these provisions is that the procedures must be completed before a proceeding in respect of the claim might commence. However the PIPA recognised that in some cases, the procedures may not have been completed before the expiry of a limitation period. Under s 43(1), a Court might give leave to a claimant to start a proceeding notwithstanding noncompliance, in such circumstances; but the section provided that proceedings so started are stayed until the claimant complied with the requirements of Part 2 of the PIPA, or the proceeding was discontinued or otherwise ended.

History

[12] An initial notice under s 9A of the PIPA was served on Dr Fitzgerald and the Toowoomba Hospital on about 6 October 2005[2]. The Fitzgerald proceeding was commenced by the filing of a Claim and Statement of Claim on 21 October 2005, Dr Fitzgerald having agreed to an order that the plaintiff have leave to do so under s 43 of the PIPA[3]. The Part 1 Notice of Claim was served on Dr Fitzgerald on about 10 November 2005[4]. It set out in some detail the treatment alleged to have been provided by Dr Fitzgerald, its alleged consequences, reasons why it was alleged that Dr Fitzgerald caused the plaintiff's difficulties, and a relatively lengthy list of persons, including medical practitioners, who subsequently treated the plaintiff, identifying those who had provided a report. At about the same time a similar notice was served on the State of Queensland, alleging that it was vicariously responsible for Dr Fitzgerald's treatment of the plaintiff[5].

[13] On 21 February 2006, the plaintiff's solicitors provided a copy of a liability report from Dr Silverstein, an Ear, Nose and Throat Surgeon, dated 30 January 2006[6], to Dr Fitzgerald's solicitors. That report referred to the records, notes and instructions on which the report was based; and identified a date (22 November 2002) by which Dr Silverstein considered Dr Fitzgerald had failed to meet the appropriate standard of care in treating the plaintiff.

[14] On 1 June 2006, the plaintiff's solicitors provided a report of Dr Vaughan, an oncologist, dated 3 April 2006[7]. That report expressed the view that the plaintiff's carcinoma could have been detected at about 28 November 2002 by MRI and/or biopsy; his pain would have been less severe with a diagnosis at this time; he was likely to be suffering from osteoporosis as a result of taking Dexamethasone, and the reason for the dosages and duration for which he took this drug was unclear; and earlier diagnosis was likely to have resulted in an overall better outcome for him.

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2 Affidavit of Cassandra Lee Heilbronn in BS No 8897 of 2005 sworn 29 October 2015 (*CLH-8897)* at Ex 1 (*CLH-8897 Ex 1*).
3 Affidavit of Emma Beale in BS No 8897 of 2005 sworn 29 October 2015 (*EB-8897*) at Ex 6 (*EB-8897 Ex 6*).
4 CLH-8897 Ex 3.
5 Affidavit of Penelope Jane Brown in BS No 8897 of 2005 sworn 2 November 2015 (*PJB-8897*) at Ex
6 EB-8897 Ex 12.
7 EB-8897 Ex 13.

[15] On about 4 September 2006, the plaintiff's solicitors served an initial notice on Dr Keighran, and the next day a similar notice on the State of Queensland in respect of the plaintiff's treatment with Dexamethasone at the Princess Alexandra Hospital[8]. The latter referred to a similar notice given with respect to the plaintiff's treatment at the Toowoomba Hospital, withdrawn by notice to the State's solicitors on 22 March 2006. The notices served in September enclosed correspondence with a number of doctors, including earlier correspondence with Dr Keighran and her solicitors; the reports of Drs Silverstein and Vaughan, referred to previously; a further report of Dr Vaughan dated 14 August 2006; and a report of a Dr Franz dated 6 July 2006. The second report of Dr Vaughan[9] commented on the report of Dr Franz, which explained the administration of Dexamethasone. Dr Vaughan linked the plaintiff's osteoporosis to the extensive administration of this drug; and indicated that its use should have been curtailed, making the development of osteoporosis unlikely.

[16] On about 27 September 2006, the plaintiff's solicitors served a Part 1 Notice of Claim on Dr Keighran[10], and the State[11]. That Notice provided information analogous to that contained in the Part 1 Notice to Dr Fitzgerald. It was accompanied by Dr Vaughan's report of 14 August 2006. As mentioned earlier in these reasons, that report stated that Dexamethasone should not be used for a lengthy period of time because of its significant toxicity. The dosage prescribed for the plaintiff was sufficient to explain his osteoporosis; and had use of it ceased after two months, it was unlikely that he would have developed this condition.

[17] On 22 February 2007, Dr Keighran's solicitors (who were also acting for Dr Fitzgerald) served a copy of a liability report prepared by Dr Brian Kable, a general practitioner, on the plaintiff's solicitors[12]. Dr Kable had been provided with the Part 1 Notice, Dr Keighran's clinical records, and the records (apparently relating to the plaintiff's treatment) at the Princess Alexandra Hospital and the Toowoomba Hospital. He did not consider that there were any readily ascertainable additional facts or materials which would assist him in reaching a more reliable conclusion.

[18] On 10 May 2007, the plaintiff's solicitors served upon the solicitors for the medical practitioners, a copy of a report prepared by a radiologist, Dr Mark Scott[13]. Dr Scott would have expected a more comprehensive range of views of the plaintiff's paranasal sinuses from the CT scans of 30 August 2002 than those with which he had been provided. What he had seen raised a suspicion of pathology in the naso-pharynx.

[19] On 8 June 2007, the solicitors for the plaintiff provided to the solicitors for the medical practitioners what was described as an interim list of documents, the qualification reflecting uncertainty about having a complete of all hospital records[14].

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8 Affidavit of Cassandra Lee Heilbronn in BS No 8445 of 2007 sworn 29 October 2015 (*CLH-8445)* at Ex 5 (*CLH-8445 Ex 5*).

9 CLH-8445 Ex 4 at p 22.

10 Affidavit of Penelope Jane Brown in BS No 8445 of 2007 sworn 2 November 2015 (*PJB-8445*) at Ex 3 (*PJB-8445 3*).

11 CLH-8445 Ex 6.

12 Affidavit of Emma Beale in BS No 8445 of 2007 sworn 29 October 2015 (*EB-8445*) at Ex 7 (*EB-8445 7*).

13 EB-8445 Ex 8.

14 EB-8897 Ex 14.

[20] The letter from the plaintiff's solicitors of 8 June 2007 provided an explanation of the plaintiff's proposed claim for economic loss[15]. It related to an arrangement with other members of the plaintiff's family that he manage a hotel; and to the plaintiff's intention to develop some land in Chinchilla. The letter identified relevant members of the plaintiff's family, and some other people who might be regarded as potential witnesses.

[21] On 14 June 2007, the solicitors for the plaintiff sent to the solicitors for the defendants a report of Dr Brian Burmeister, dated 21 May 2007[16]. Dr Burmeister was the Director of Radiation Oncology at the Princess Alexandra Hospital. His report recorded that because of the advanced state of the plaintiff's naso-pharyngeal cancer, the plaintiff required both radiation treatment including at a high level at the base of the brain; and aggressive chemo-radiation therapy to the head and neck. He considered that the plaintiff had some brain and psychological damage. The plaintiff was treated with analgesics including Dexamethasone to deal with the consequences of this aggressive treatment. His long term ingestion of Dexamethasone may have contributed to his osteoporosis, but damage to his pituitary gland could also have been a contributing factor. Extreme mental and physical stress is commonly a consequence of aggressive therapy. He would be unlikely to be able to hold a managerial position after his therapy.

[22] A further report of Dr Burmeister dated 18 June 2007 was provided to the solicitors for the defendants on 5 July 2007[17]. It confirmed the likelihood that radiation affected brain tissue. It stated that damage to the dominant frontal lobe may result in personality and emotional changes; and that an earlier diagnosis might have resulted in less aggressive therapy, not requiring the use of chemotherapy, and with less morbidity.

[23] On 8 August 2007, the solicitors for the State provided its response under s 20 of the PIPA in both matters[18]. The medical practitioners' responses were provided on 23 August 2007[19].

[24] On 20 September 2007, an order was made under s 43 of the PIPA granting leave to the plaintiff to commence the Keighran proceedings, apparently with the consent of the defendants[20].

[25] On 12 September 2007, the plaintiff's solicitors provided the solicitors for the defendants with a copy of a report of Dr Gary Persley, a psychiatrist, dated 14 August 2007[21]. Dr Persley considered that the plaintiff's behavioural changes were likely to be the effect of the frontal brain tumour, the carcinoma having infiltrated the frontal lobe; and his condition would be assessed as an acquired brain injury with cognitive impairments.

[26] On 25 February 2008, the solicitors for the plaintiff provided to the solicitors for the defendants a copy of a report of an orthopaedic surgeon, Dr Morgan, dated 27 November 2007[22]. The report addressed the alleged effects of the prolonged use of Dexamethasone. It recorded in detail an extensive examination of the plaintiff's condition. The copy of

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15 EB-8897 Ex 14.
16 EB-8897 Ex 15.
17 EB-8897 Ex 16.
18 CLH-8445 Ex 24.
19 PJB-8897 at [14]; PJB-8445 at [10].
20 PJB-8445 Ex 5.
21 EB-8897 Ex 17.
22 Affidavit of Emma Beale in BS No 8897 of 2005 sworn 2 November 2015 (*2 EB-8897*) at Ex 1 (*2 EB-8897 Ex 1*).

the report in evidence is incomplete, making it difficult to appreciate its effect. Dr Morgan appeared to acknowledge that difficulties in the plaintiff's thoracolumbar spine might be linked to the use of Dexamethasone. These difficulties represented a 24% loss of functional capacity of the person. Difficulties in the cervical spine and the left shoulder represented losses of function of 5% and 6% respectively. He could perform only sedentary work, and had limitations on his recreational activities. He would require domestic assistance as a result of his thoracolumbar difficulties.

[27] On 13 January 2009, a copy of a further report of Dr Morgan, dated 2 September 2008, was served on the solicitors for the defendants[23]. Dr Morgan reviewed some other radiographs. These were taken 17 months after the commencement of the Dexamethasone treatment, and did not exclude a direct causal link between that treatment and osteopenic compression fractures in the plaintiff's thoracolumbar vertebral column.

[28] On 12 May 2009, the plaintiff's solicitors served a Part 2 Notice of Claim and a Statement of Loss and Damage[24]. It provided details of the plaintiff's income since July 1999; his claim for lost income; a list of the doctors who had provided information or explanations about the subject matter of his claim since the delivery of the Part 1 Notice or provided him with treatment in that time; tax returns and medical reports; a detailed list of expenses claims; and details of his (alternative) claims for economic loss. One of his claims for economic loss was consistent with the earlier information provided by his solicitors, regarding arrangements to manage a hotel owned by the plaintiff's family. The Notice expanded upon this claim. The other claim was based on his capacity to work as a labourer. Details of his claim based on his need for domestic and personal assistance were also included.

[29] One of the documents referred to in the Part 2 Notice was a further report from Dr Burmeister dated 14 February 2008[25]. It expressed the view that earlier diagnosis of the plaintiff's cancer may have made chemotherapy unnecessary; but he could not say whether the plaintiff would have suffered less brain damage; and it is unlikely the plaintiff would have been able to hold down a managerial position. This report does not appear to have been provided to the other parties until 4 October 2010[26].

[30] On 11 June 2009, the plaintiff's provided copies of 66 documents[27] described by Counsel for the medical practitioners as relevant to his business and financial dealings[28], and, it would appear from their description, relevant to his primary claim for economic loss.

[31] On 21 June 2010, the solicitors for the plaintiff advised that the plaintiff had recently fallen off a motorised quad bike, and had subsequently experienced some soreness for a couple of weeks[29].

[32] On 13 July 2010, the solicitors for the plaintiff provided the solicitors for the defendants, apparently in response to a request, with a copy of a quotation dated 10 July 2002 for a

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[23] EB-8445 Ex 17
[24] EB-8897 Ex 21.
[25] 2 EB-8897 Ex 3 at p 23.
[26] 2 EB-8897 Ex 3.
[27] EB-8897 Ex 22.
[28] EB-8897 at [23].
[29] EB-8897 Ex 23.

flood study in relation to a subdivision[30]. The only likely explanation is that it related to an aspect of the plaintiff's primary claim for economic loss.

[33] In the latter part of 2009 and again in 2010, the solicitors corresponded in relation to a compulsory conference[31]. The date ultimately fixed for this conference was 28 October 2010[32]. The solicitors for all of the defendants requested a waiver of the requirement to exchange certificates of readiness under s 37(1)(d) of the PIPA, to which the solicitors for the plaintiff agreed[33].

[34] Precisely what happened on 28 October 2010 is not clear from the affidavit material, and there has been a dispute in any event about its correct legal characterisation. The plaintiff's present solicitor, who was not retained at this time, deposed, without objection, to what occurred, on the basis of a file note made by an employee of the solicitors then acting for the plaintiff[34]. The plaintiff attended at a conference at his Counsel's chambers. He then withdrew his instructions, and did not attend at the compulsory conference. The solicitors who had been acting for the plaintiff attended at the chambers of the mediator who was to conduct the conference. Ultimately, the defendants made a joint offer of settlement, communicated to the solicitors who had until that day been acting for the plaintiff. In a telephone conversation of 8 November 2010, the plaintiff informed his former solicitors that he had received the offer, but did not accept it[35].

[35] On 22 November 2010, the plaintiff wrote to his former solicitors[36]. He stated that he had not contacted any other solicitors, as it was pointless without the file; and he could not see his former solicitors giving the file without payment or waiting until it goes to Court. He also stated that he did not have the funds to pay for it, presumably a reference to the file. On the same day, the plaintiff's former solicitors wrote to the solicitors for the defendants claiming a lien over any damages which the plaintiff might recover[37].

[36] On 1 December 2010, the solicitors for the medical practitioners served on the plaintiff a joint mandatory final offer, open until 20 December 2010[38]. There is no evidence of a reply to this offer.

[37] The submissions for the plaintiff referred to attempts by him to obtain legal representation, not referred to in the evidence which, until then, had been filed. The plaintiff's legal representatives were given the opportunity to provide a further affidavit relating to these attempts. That resulted in an affidavit from Ms Penelope Brown, a solicitor representing the plaintiff, which exhibited a letter from the plaintiff dated 15 July 2014[39]. I indicated that I would be prepared to hear submissions as to whether this affidavit should be received. However, no objection has been taken to it. Nor has the deponent, or the plaintiff, been required for cross-examination. The affidavit was sworn on information and belief, based on the letter.

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30 EB-8897 Ex 24.
31 EB-8897 at [26]-[30] and Ex 25, 26, and 28.
32 EB-8897 Ex 26.
33 CLH-8897 at [47] and Ex 44.
34 PJB-8897 at [19]-[21].
35 PJB-8897 at [23].
36 PJB-8897 at [25].
37 PJB-8897 Ex 9.
38 PJB-8897 at [29].
39 Affidavit of Penelope Jane Brown in BS No 8897 of 2005 sworn 3 November 2015 (*2 PJB-8897*) Ex 1 (*2 PJB-8897 Ex 1*).

[38] The plaintiff's letter refers to a phone book which he used to make calls on solicitors, which had been ticked off; but which has since been thrown out. Attached to the letter is a list. It records three telephone calls to the Queensland Law Society, in 2010, 2011 and 2013; four calls to the "Brisbane courthouse" in each of the years from 2011 to 2014; a call to the New South Wales Law Society in 2012; a call to the Attorney-General, a call to the Ombudsman, and a call to Legal Aid Southport, each in that year; a call to Slater and Gordon on 3 May 2011, and to Carew Lawyers in the same year; a call to Greg Smith (it would seem, of Smith Lawyers) in 2012; and calls to Maurice Blackburn and Chris McManson, both in 2013.

[39] That the plaintiff attempted to engage Slater and Gordon received support from a letter of 3 May 2011, stating that that firm "cannot offer to represent you"[40].

[40] The plaintiff wrote three letters to his former solicitors, one undated[41], one dated 8 June 2011[42], and one dated 16 June 2011[43]. The letter of 16 June 2011 records that the plaintiff had been unable to find a solicitor to represent him, having "called the whole list the law society gave me – Brisbane and Gold Coast". The latter two letters sought a copy of the file held by the plaintiff's former solicitors. On 9 June 2011, those solicitors wrote to the plaintiff, claiming a lien over the file, and stating that suitable agreement would need to be reached before the file could be released[44]. A letter from the same firm of 17 June 2011 again asserted a lien over the file, but stated that the solicitors would be prepared to release the file upon the provision of satisfactory security for unpaid costs[45]. The total amount claimed was just over $150,000.

[41] On 30 November 2011, Maurice Blackburn wrote to the plaintiff acknowledging receipt of a signed costs agreement[46]. On 14 February 2012 it advised that the amount of fees claimed by the former solicitors was $151,384.40, which was considered reasonable[47]. It expressed the view that the former solicitors would be willing to accept an initial part-payment of their fees, together with an undertaking that the remainder would be paid on settlement of the claim. It sought instructions about the amount which should be offered by way of part payment. There is no evidence of the plaintiff's response.

[42] At some stage in 2013, the plaintiff made enquiries of McInnes Wilson Lawyers with regard to his representation, without success[48].

[43] On 8 May 2014, the plaintiff's former solicitors wrote to the plaintiff, apparently in response to a letter from him of 5 May 2014[49]. That letter stated that the solicitors had advised Maurice Blackburn in 2012 that they would accept $120,000 "in finalisation of costs". The letter stated that the solicitors would now be prepared to accept $100,000, inclusive of GST. It foreshadowed an application by the solicitors for the medical practitioners to strike out the plaintiff's claims. It concluded by stating that upon payment

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40 PJB-8897 Ex 12.
41 PJB-8897 Ex 13.
42 PJB-8897 Ex 14.
43 PJB-8897 Ex 15.
44 PJB-8897 Ex 16.
45 PJB-8897 Ex 17.
46 PJB-8897 Ex 18.
47 PJB-8897 Ex 19.
48 PJB-8897 at [45].
49 PJB-8897 Ex 20.

of the sum of $100,000, urgent delivery of the plaintiff's file would be arranged, in accordance with his instructions.

[44] On 22 May 2014, the plaintiff's solicitors wrote to his former solicitors asking for his file as a matter of urgency[50]. The response indicated the file would be released on undertakings that the outstanding fees would be paid in full upon settlement or judgment in favour of the plaintiff "subject of course to the 50/50 rule"[51]. The letter in reply from the plaintiff's present solicitors contested the amount of the fees claimed, and offered payment of the former solicitors' reasonable fees and outlays, to be assessed at the conclusion of the claim[52]. On 30 May 2014, the former solicitors released the plaintiff's files to his present solicitors[53].

[45] The plaintiff's present solicitors then sought an advice from Counsel[54]. Shortly afterwards, there was correspondence with the solicitors for the defendants, about an application for leave to proceed, and an application to dismiss the proceedings for want of prosecution[55]. The plaintiff's solicitors then attempted to have the compulsory conference reconvened[56]. There was also a dispute as to whether the action remain stayed under the PIPA[57]. Further attempts were made to obtain an advice from Counsel, without success until about May 2015[58]. After further correspondence in which the parties were in disagreement about the position which had been reached[59], applications were filed and served on the plaintiff's behalf[60]. The applications by the defendants to strike out the proceedings for want of prosecution were served on 28 and 29 October 2015[61].

Applications and submissions

[46] I have already mentioned the applications by the defendants to have the proceedings struck out for want of prosecution. The plaintiff orally applied for leave to proceed under the provisions of the Uniform Civil Procedure Rules 1999 (Qld) (*UCPR*). However it was common ground that s 43 of the PIPA had the effect that the proceedings were stayed. When this was raised, the plaintiff did not persist with the oral applications.

[47] The plaintiff had filed and read applications for declaratory relief, primarily to the effect that a compulsory conference under s 36 of the PIPA had not yet taken place, and for an order fixing the time and place for such a conference. However, I was informed that, if the defendants' applications were unsuccessful, it would nevertheless by unnecessary to deal with the plaintiff's application. Thus the only live matter was whether the proceedings should be struck out for want of prosecution.

[48] It was common ground that the stay of the proceedings under s 43 of the PIPA did not prevent my dealing with these applications.

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50 PJB-8897 Ex 21.
51 PJB-8897 Ex 22.
52 PJB-8897 Ex 23.
53 PJB-8897 at [51].
54 PJB-8897 at [52].
55 PJB-8897 at [53]-[54] and Ex 24-25.
56 PJB-8897 at [55] and Ex 26.
57 PJB-8897 at [57] and Ex 28.
58 PJB-8897 at [60]-[63].
59 PJB-8897 at [65]-[67].
60 PJB-8897 at [72] and Ex 34.
61 PJB-8897 at [74]-[75] and Ex 35-36.

[49] The submissions for the first defendant in each action referred to the Court's inherent power to dismiss a claim for want of prosecution. Reference was made to the identification of relevant factors in *Tyler v Custom Credit Corp Ltd & Ors*[62]. It was submitted that the compulsory conference did not take place in accordance with the requirements of the PIPA because the plaintiff did not comply with the requirement that he attend. There had not been an exchange of mandatory final offers under s 39 of the Act. It was submitted that the plaintiff had made no attempt to complete the pre-court procedures required by that Act for almost four years. The relevant events occurred a long time ago, and the proceedings had also been commenced many years ago. It was submitted that the plaintiff had poor prospects of success in his claim against Dr Keighran, by reference to the report of Dr Kable. Dr Burmeister's report indicated that there may be some cause for the plaintiff's osteoporosis, other than the ingestion of Dexamethasone. Nor could Dr Burmeister say that the brain injury would have been avoided by earlier diagnosis. Dr Morgan expressed the view that a report of an endocrinologist was required to establish the cause of the plaintiff's osteoporosis, and no such report had been obtained. Dr Vaughan's report linking the osteoporosis to the Dexamethasone treatment was qualified and did not carry much weight.

[50] It was submitted that much of the treatment by Dr Fitzgerald was given more than three years before the institution of the Fitzgerald proceeding, so that the *Limitation of Actions Act* 1974 (Qld) excluded claims based on that treatment. Dr Vaughan's report of 3 April 2006 stated that if a cancer diagnosis had been made at 28 January 2003, the plaintiff would still have required surgery, chemotherapy and radiotherapy. Time has shown that the plaintiff's prospects of survival had not been adversely affected.

[51] It was submitted that there had been "disregard for the stated purposes of the PIPA to provide a procedure for speedy resolution of claim and minimising the costs of claims". The written submissions for the first defendants contended that the pre-court procedures were characterised by delay, by reference to the time prior to the proposed compulsory conference in October 2010. As I understand the oral submissions, it was accepted that the progress of the matter in that period was not so remarkable as to lead to an application like the present ones. The delays were the result of the plaintiff failing to prosecute his claim. There has been no progress in the Court proceeding beyond the filing of the Claim and Statement of Claim. Any delay is not attributable to the solicitors for the plaintiff. Reliance was placed on the general presumption of prejudice.

[52] It was submitted that the difficulty in determining whether the primary claim for economic loss was related to the plaintiff's injuries was exacerbated by the gross delay which had occurred, and the investigation of this claim many years after the relevant events would be fraught with difficulty. The plaintiff contended that his father wanted him to manage the hotel, previously mentioned; but his father died in 2003. In the present case, it could not be concluded from the fact that the parties were prepared to hold the compulsory conference, that they were ready for trial. The first defendants in these proceedings were entitled to get on with their lives without the stress or uncertainty of this litigation. Nor could it be said with confidence that if the applications were refused, the matters would proceed in a proper and timely manner.

[53] The submissions for the second defendant pointed out, by reference to r 24 of the UCPR, that the plaintiff would need leave to renew his claims; as well as leave to proceed under

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[62] [2000] QCA 178 at [2] per Atkinson J.

r 389. Reference was also made to this Court's inherent jurisdiction to strike the proceedings out for want of prosecution; and to the identification of relevant factors in *Tyler*. Otherwise, those submissions substantially reflected the submissions on behalf of the first defendants.

[54] The submissions for the plaintiff pointed out the extent to which the defendants were provided at an early stage with information about the claims. They were in a position to provide their responses to the claims by August 2007 (at which time the State denied any liability to the plaintiff). The plaintiff's former solicitors refused to release the files or provide a copy of them, until May 2014. The plaintiff approached other lawyers between 2010 and 2014, in an attempt to secure representation in relation to his claim, without success. He was extremely unwell for large periods of time in this period. After May 2014, there were debates about the stage which the proceedings had reached, until October 2015. Any delay by the plaintiff was not wilful or the result of deliberate neglect. He now faces the potential loss of all his rights to compensation against the defendant. There is no evidence to show that the delay had prejudiced, or is likely to prejudice, the ability of the defendants to defend the claim. The first defendants are insured, and continue to be represented by their original legal representatives. The plaintiff's treatment and management has been recorded in medical files and notes which had been made available to the defendants' legal representatives. It was submitted by reference to *Witten v Lombard Australia Ltd*[63], cited with approval in *Cooper v Hopgood & Ganim*[64] that the applications should not be determined by reference to rigid rules, but required a decision reached, upon a balance of the relevant circumstances. That balance favoured dismissing the applications made by the defendants.

Consideration

[55] It is convenient to commence with some observations about the nature of the plaintiff's claims. In each case, the claim relates to the medical treatment which he received from each of the first defendants. Important matters in respect of each claim will therefore be the plaintiff's condition at the time of treatment, and the treatment which he received; whether that treatment accorded with appropriate standards current at the time; what injuries the plaintiff suffered; the causal relationship between any such injury, and the conduct of each first defendant; and, particularly in the present case, any economic loss established by the plaintiff.

[56] It is apparent, particularly from the reports of Dr Silverstein and Dr Vaughan, that several doctors recorded in writing matters relevant to the plaintiff's condition. There are also CT scans and reports (the earliest from 1999), MRI scans, and Xrays, documenting the plaintiff's condition at various times. The materials referred to previously appear to set out in some detail (particularly in the case of Dr Fitzgerald) the extent to which the doctors provided treatment. It is usual for a contemporary record to be made by a medical practitioner of the treatment given, and there is no reason to think that that did not occur in the case of the treatment given by each first defendant. There has been no suggestion that there is no adequate record of these matters.

[57] The plaintiff has been extensively examined by medical practitioners who have recorded the results of their examinations. There has been no suggestion that there is any relevant

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63 (1968) 88 WM (Pt 1) NSW 405, 412.
64 [1999] 2 Qd R 113, at 118.

omission in what they have recorded. On a number of occasions, the correspondence reveals that the arrangements for medical examinations were "joint", which I understand to mean the result of agreement between the legal representatives for all parties. It has not been suggested that any defendant indicated a wish for the plaintiff to be examined by some medical expert, other than those who have provided reports. I am conscious that one of the doctors recommended a report from an endocrinologist, which was not obtained. This, however, was not specifically relied on in relation to prejudice, and it was not suggested on behalf of any of the defendants that such a report could not now be obtained on the basis of the material at present available. As I have indicated, there is a substantial body of this material. If such a report were thought important from the point of view of the defendants, it is a little surprising that they did not seek to obtain it before the proposed compulsory conference.

[58] In the medical reports which have been obtained, views have been expressed about the likelihood of a causal link between the plaintiff's condition and injuries, and the treatment given by the first defendants. It was not suggested that there was any difficulty about the medical experts giving evidence on this question at some future trial. Views have also been expressed about whether the treatment was in accordance with standards. It has not been suggested that there is a difficulty about establishing the appropriate standards of treatment at the time when the treatment was given.

[59] So far as the plaintiff's primary basis for his claim for economic loss is concerned, there is greater difficulty. Matters specifically relevant to this claim are, by and large, particularly within the knowledge of the plaintiff and members of his family. It seems somewhat unlikely that any defendant would have called evidence of the intention of the plaintiff and members of his family relevant to this claim, no matter when the trial was held. On the other hand, the solicitors for the defendants were given a reasonably extensive explanation of this claim in June 2007; and some further elaboration in the Statement of Loss and Damage in May 2009. They were also given a substantial number of documents said to be relevant to this claim in July 2009. Apart from the apparent request for a copy of the quotation for the flood study, it has not been suggested that there is any omission from these documents.

[60] It is not without relevance that by the end of 2010, the defendants considered themselves to be in a position to make mandatory final offers. They were also in a position to participate in a compulsory conference, it would seem from about the end of 2009. Although they were not prepared to certify that they were ready for trial, nevertheless their conduct suggests that they were at a relatively advanced stage of preparation. No evidence has been led to demonstrate that any of the defendants had, by reason of the passage of time or otherwise, been unable adequately to investigate the plaintiff's claim, and in particular the primary basis on which he claims economic loss.

[61] Although the plaintiff's father died in 2003, his role in the plaintiff's claim for economic loss appears to be by no means central. The arrangements alleged by the plaintiff were (at least primarily) with other members of his family. Although at one point it was said that the father had a "financial interest" in the hotel, he was said not to be a proprietor. The registered proprietors were said to be the plaintiff's mother and brothers. There does not seem to be any substantial prospect that, had the plaintiff's father survived, his evidence would have materially assisted the defendants in defending the case.

[62] The plaintiff's case, taken as a whole, is not without its complexities. It seems to me that it finds some support in some of the medical reports. I am not prepared to accept the submission that he has poor prospects of success in any of his claims.

[63] It is correct to say that the proceedings have made no formal progress since the filing of the Claim and Statement of Claim in each case. Of itself that is not particularly significant. It is a consequence of the statutorily-imposed stay. Of greater relevance are the steps that have been taken by the parties to prepare themselves for the compulsory conference, and, one would assume, for a trial.

[64] *Taylor's* case involved an application for an extension of the limitation period, made more than 15 years after the cause of action accrued. While the remarks of McHugh J on which the defendants rely have been influential, it should be borne in mind that they were concerned with cases where the limitation period had expired before a proceeding was commenced, the question being whether the justice of the case required liability to be imposed again on the defendant[65]. That is not the present case. *Taylor's* case revolved around whether a doctor who had been unable to be contacted[66] had given a warning to the plaintiff about the dangers of undergoing a hysterectomy. If the doctor were able to be contacted, it was unlikely with the passage of time that he would have any recollection of relevant conversation[67].

[65] In the present case, the actions were commenced within the limitations period. They were preceded by some notice of potential claims. It has not been suggested that, in relation to the case on liability, recollections beyond what is contained in contemporary records will be of importance, though I acknowledge there is always a possibility that such a difficulty might emerge during the trial. It seems to me that in the present case, the weight to be attributed to the general presumption of prejudice, particularly on liability questions, is much less than it would be in many other cases.

[66] Although there has been no evidence from either of the first defendants, I accept that it is probable that the continuation of the proceedings will occasion them some stress. There is no suggestion of financial jeopardy to them personally, but nevertheless an unresolved allegation of negligence against a person in a profession is likely to be troubling. They were subjected to that stress as a result of the steps undertaken on behalf of the plaintiff under the PIPA, and the institution of proceedings within the limitations period. If I refuse to dismiss the proceedings, and the plaintiff is unsuccessful, then these defendants will have the benefit of a judgment to the effect that they were not negligent. If on the other hand, the plaintiff is successful, then the additional stress occasioned by the prolongation of the action does not seem to me to be a matter of great significance in the present application. Accordingly, I do not intend to give much weight to it.

[67] The plaintiff's explanation for some of the delay is unsatisfactory. However, it should first be observed that an ordinary person in the position of the plaintiff would be unlikely to appreciate the existence of the causes of actions, either at the time when he was treated, or even when he subsequently experienced difficulties. His former solicitors appeared to have acted with reasonable expedition once they were instructed, and it seems to me that he left it to them to progress his claims appropriately until October 2010. On at least one

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65 See *Taylor* at 555.
66 *Taylor* at 545.
67 *Taylor* at 548.

occasion he failed to attend a medical appointment, but attended a subsequent one; and this does not seem to me to be a matter of great moment.

[68] It is apparent that, shortly after the plaintiff's former solicitors ceased to act for him about the end of 2010, he made attempts to engage other solicitors to advance his claims. The fact that he did not have possession of the file undoubtedly contributed to his difficulties in doing so. It may well be said that he could have acted with greater alacrity; or could have tried harder to get the file released by his former solicitors. Nevertheless, the evidence shows that from that time on, he made reasonable efforts to obtain legal representation in order to pursue these claims.

[69] Weighing up the competing considerations, this does not seem to me to be a case which should be struck for want of prosecution.

Conclusion

[70] I propose to refuse the application made by the defendants.