SUPREME COURT OF QUEENSLAND

CITATION:	*Aydar v Pashen & Anor* [2002] QCA 326
PARTIES:	**HELEN MARIE AYDAR** (plaintiff/applicant/appellant) **v** **ELIZABETH ANN THERESE PASHEN** (first defendant/first respondent) **NOMINAL DEFENDANT** (second defendant/second respondent)
FILE NO/S:	Appeal No 11200 of 2001 DC 5214 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2002
JUDGES:	Williams and Jerrard JJA and Wilson J Separate reasons for judgment of each member of the Court; Williams JA and Wilson J concurring as to the orders made, Jerrard JA dissenting.
ORDERS:	**1. Leave to appeal granted;** **2. Appeal dismissed with costs.**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – APPLICATION FOR THE STATUTES TO PARTICULAR CAUSES OF ACTION – MOTOR VEHICLE INSURANCE - where appellant who was injured in a motor vehicle accident gave s37 Notice accompanied by reasons for delay pursuant to *Motor Accident Insurance Act* 1994 (Qld) immediately prior to the expiration of the ordinary period of limitiation – where limitation period then extended 6 months pursuant to s 57 of the Act – where appellant commenced proceedings within 6 months of the Notice in contravention of s 39(5)(a)(i) of the Act - where appellant did not seek leave pursuant to s 39(5)(c) of the Act before the expiration of the extended period of limitation - whether primary judge erred in dismissing an application seeking a declaration that proceedings had been validly brought or alternatively leave to commence proceedings

pursuant to s 39(5)(c) of the Act

LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – POWER OF COURT TO EXTEND TIME – whether the court has jurisdiction pursuant to s 39(5)(c) or s 57 (2) to give leave to commence proceedings – whether court has power to grant leave *nunc pro tunc*

Acts Interpretation Act 1954 (Qld), s 38(1)(b)
District Court Act 1967 (Qld), s 118(3)
Limitation of Actions Act 1974 (Qld), s 11
Motor Accident Insurance Act 1994 (Qld), ss 37, 39 and 57

Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390, considered
Couling v Nelson [1999] 2 Qd R 231, considered
Crowder v Moore [1997] 1 Qd R 24, considered
Dandashli v Dandashli (NSWCA 40733/96 judgment given 16 December 1996), considered
Emanuele v ASC (1997) 188 CLR 115, considered
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421, considered
Hill v Bolt (1992) 28 NSWLR 329, considered
Horinack v Suncorp Metway Insurance Limited [2001] 2 Qd R 266, followed
Jol v State of New South Wales (1998) 45 NSWLR 283, considered
McKelvie v Page [1999] 2 Qd R 259, considered
Nguyen v Nguyen (1990) 169 CLR 245, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, considered
Prowse v McIntyre (1961) 111 CLR 264, considered
Re: Gray; Ex parte Deputy Commissioner of Taxation (1993) 115 ALR 638, considered
Re Tonks [1999] 2 Qd R 671, considered
Sweeney v Volunteer Marine Rescue Currumbin Inc [2000] QCA 455, Appeal No 55 of 2000, 6 November 2000, considered
Telstra Corp Ltd v Treloar (2000) 102 FCR 595, considered
Thomas v Transpacific Industries Pty Ltd and Anor [2002] QCA 160, Appeal No 237 of 2002, 10 May 2002, considered
Young v Keong [1999] 2 Qd R 335, considered

COUNSEL: P V Ambrose SC, with S R Connor, for the applicant/appellant
R J Douglas SC, with K F Holyoak, for the respondents

SOLICITORS: Elias Mumford for the applicant/appellant
McInnes Wilson for the respondents

[1] **WILLIAMS JA:** This appeal raises the same issue as is considered in my judgment in *Bermingham v Priest & Nominal Defendant*; both matters were heard together. I will not repeat in these reasons the provisions of ss 37, 39 and 57 of the *Motor Accident Insurance Act* 1994 (Reprint No 2) which are applicable.

[2] The appellant was injured in a motor vehicle accident which occurred on 5 February 1998. She gave her s 37 Notice on 1 February 2001 and in an affidavit provided reasons for the delay in submitting it. It was accepted both at first instance, and on appeal, that such Notice was compliant. By operation of s 57 the ordinary period of limitation, which would have expired on 5 February 2001, was extended to 1 August 2001. The appellant commenced proceedings on 13 July 2001, but by operation of s 39(5)(a)(i) she had no right to commence proceedings until 2 August 2001. Liability had not been denied prior to commencement of the proceedings.

[3] On 25 September 2001 the appellant filed an application seeking a declaration that the proceedings had been validly brought, or alternatively leave, pursuant to s 39(5)(c), to commence proceedings. The respondents, by cross-application filed 1 October 2001, sought an order that the proceedings be struck out and judgment given in their favour because of non-compliance with s 39(5).

[4] The learned District Court judge dismissed the appellant's application and, on the defendant's application, ordered that the proceedings be struck out. From those orders the appeal is brought.

[5] The submissions in this case were identical with those in *Bermingham*, and there is no basis for distinguishing my reasoning therein.

[6] The proceeding here was commenced within the extended limitation period, but the 6 month period referred to in s 39(5)(a)(i) had not expired. It follows that the proceeding contravened s 39(5) and could only have been commenced by the appellant consequent upon leave having been obtained pursuant to s 39(5)(c). As noted in *Bermingham* that leave could have been obtained at any time prior to the expiration of the extended period of limitation. It was not so obtained and in consequence no court had, at the time the application was filed or since, power to grant leave nunc pro tunc.

[7] It follows that the decision of the learned District Court judge in this case was correct. Leave to appeal should be granted but the appeal should be dismissed with costs.

[8] **JERRARD JA:** The *Motor Accident Insurance Act* 1994 (Qld) was substantially amended by Act No. 17 of 2000. The amendments came into force on 1 October 2000, and the Act as in force before those amendments applies to a motor vehicle accident claim arising from a motor vehicle accident happening before that date. It is likely that the Act in its unamended form will apply to most proceedings for damages based on motor vehicle accidents begun in the three and a half years after 30 September 2000. This appeal, and an appeal in the matter of *Bermingham* in which the argument was heard at the same time, arises from the inconsistent requirements in the Act in its unamended form that an intending claimant who has taken certain steps required by the Act:

- may bring a proceeding for damages only if "**at least** six months have elapsed" since the last such step was taken;

- but may only bring the proceedings if they are brought "**within** six months after" the day on which that step was taken.

[9] For convenience these reasons for judgment will describe the Act in its unamended form as if currently in force. Additionally, because the circumstances giving rise to these appeals involve very specific situations, these reasons for judgment will make no reference to the factual situations in which either s 39(5)(a)(ii) or (iii) or s 39(5)(b) of the Act apply.

[10] Section 34(1)(b) of the Act provides that a person who proposes to claim damages for personal injury arising from a motor vehicle accident must give written notice to the third party insurer against whom the claim may be made within one month after first consulting a lawyer about the possibility of making such a claim. Section 34(2) describes the information to be given to the insurer. Section 37(1) provides that before bringing such an action a claimant must give written notice of further specified matters to the insurer, which notice must be given within nine months either after the accident or after the first appearance of symptoms of the injury. If not so given within nine months, a notice, if and when given later, must contain an explanation of the delay (s 37(2)).

[11] Section 39(5) relevantly provides that the claimant may bring a proceeding for damages only if:

- either the claimant has given the notice required under s 37 or the insurer has waived compliance with that requirement, and in either case if "at least six months have elapsed" since that notice or waiver was given;
  or
- the court gives leave to bring the proceedings despite non compliance with requirements of (Division 3 of part 4 of the Act).

[12] Section 57 of the Act relevantly provides that if, before the end of the period of limitation applying to the claim, either a notice is given under s 37 or an application for leave to bring a proceeding is made, then the claimant may bring the proceedings even though the period of limitation has ended; provided the proceeding is brought "within six months after the day on which the notice is given or leave to bring the proceeding is granted" (s 57(2)). The plaintiff/appellant Ms Aydar says that in the circumstances of her case she would always have been unable to comply with each of the requirements, imposed on the one hand by s 39(5) that she bring proceedings only when at least six months have elapsed since the relevant notice was given, and on the other in s 57(2) that proceedings be brought "within six months" after the day in which she gave that notice. She says that in the circumstances further described herein, she would inevitably have fallen between two stools; and in any event has lost her common law right of action because of that discrepancy.

[13] The argument in this appeal was presented by the same counsel and heard at the same time as the argument in appeal number 3416 of 2002, in which the Nominal Defendant is the second appellant and Justine Eileen Bermingham is the respondent/plaintiff. Each appeal squarely raises on differing facts the same fundamental issues as to the proper construction of provisions of the Act.

Ms Aydar's Claim

[14] The plaintiff/appellant Ms Aydar was a driver of a motor vehicle which collided on 5 February 1998 with a car driven by the first defendant/first respondent Elizabeth Pashen. Ms Aydar asserts that she suffered physical and psychological injury resulting from that collision, which she also asserts was caused solely by Elizabeth Pashen's negligence. Ms Aydar first consulted a solicitor regarding her accident on 25 January 2001 and on 29 January 2001 a notice in accordance with s 34 of the Act was served on Ms Pashen's third party insurer, FAI General Insurance Company Limited.

[15] A notice in apparent compliance with s 37 of the Act was served on FAI on 1 February 2001, four days before the end of the period of limitation applying to Ms Aydar's claims by reason of s 11 of the *Limitation of Actions Act* 1974 (Qld). It was common ground between the parties that the combined effect of s 57(2) of the *Motor Accident Insurance Act* and s 38(1)(b) of the *Acts Interpretation Act* 1954 (Qld) was that the last day upon which Ms Aydar could bring proceedings was 1 August 2001. The learned judge below so held and I respectfully agree (see *Prowse v McIntyre* (1961) 111 CLR 264 and the cases discussed in *Re:Gray; Ex parte Deputy Commissioner of Taxation* (1993) 115 ALR 638 at 639, those latter cases being matters in which there was not the contrary intention legislatively provided for by s 38(1)(b) of the *Acts Interpretation Act*).

[16] It was also common ground between the parties, and so held by the learned judge, that the first day upon which proceedings could be commenced by Ms Aydar in the court consistent with s 39(5)(a)(i) was 2 August 2001. Assuming that that subsection applied in her case, I respectfully agree (see *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 particularly at 445).

[17] Ms Aydar brought proceedings without leave of the court on 13 July 2001, when she filed a claim and statement of claim in the Maroochydore Registry of the District Court. In those proceedings she named Elizabeth Pashen as first defendant and FAI General Insurance Company as second Defendant. In fact, by reason of provisional liquidators having been appointed by that time for FAI and the provisions of s 33(2) of the *Motor Accident Insurance Act* 1994, the Nominal Defendant had become the insurer under the compulsory third party policy held by Elizabeth Pashen with that insolvent insurer. On 22 August 2001 Ms Pashen and the Nominal Defendant jointly filed a Notice of Intention to Defend and Defence, in which they pleaded in par 3 thereof that Ms Aydar's proceedings were in breach of s 39(5) and nullity. This was by reason of these having been instituted when six months had not elapsed since the notice apparently complying with s 37 had been given, and when the court had not given leave to proceed despite non compliance.

[18] On 25 September 2001 Ms Aydar filed an application seeking that a declaration that her claim was "validly started", or alternatively for leave pursuant to s 39(5)(c) for leave to start those proceedings despite non compliance. On 16 November 2001 the learned judge who heard that application held that the decision in this court given in *Horinack v Suncorp Metway Insurance Limited* [2001] 2 Qd R 266 was an authority binding the court that there was no power to give leave under s 39(5)(c) upon an application brought outside the period of limitation ordinarily applying, and further

was authority that there was no power to make an order nunc pro tunc[1]. The judge accordingly dismissed her application and ordered that her proceedings be struck out. She applied pursuant to s 118(3) of the *District Court Act* 1967 (Qld) for leave to appeal, for leave pursuant to s 39(5)(c) nunc pro tunc "to start" her proceedings despite non compliance with provisions of the Act, and for an order that par 3 of the joint defence be struck out.

Ms Bermingham's Appeal

[19] In that appeal argued at the same time the circumstances giving rise to similar ultimate issues were as follows. On 12 August 1998 the plaintiff, Justine Bermingham was a passenger in a motor vehicle driven by the first defendant/first appellant Melissa Priest, which collided with another motor vehicle. Justine Bermingham alleged that she suffered physical and psychological injuries as a result of that collision, which she alleged was caused by the negligent driving of Ms Priest. Ms Priest's compulsory third party insurer was also FAI.

[20] Ms Bermingham first consulted a solicitor about her injuries and possible cause of action on 1 November 2000. On 15 November 2000 a notice in accordance with s 34(1)(b) of the Act was served on FAI, and likewise a notice in apparent compliance with s 37 was served on 6 April 2001. On 23 April 2001 the Nominal Defendant, who by virtue of s 33(2) of the Act was the third party insurer in that matter as well, wrote to Ms Bermingham advising that "we confirm" that the notice she had provided complied with the requirements of s 37.

[21] By reason of s 57(2), service of that notice had the effect that the period of limitation which would have expired on 12 August 2001 was extended until 6 October 2001. Ms Bermingham in fact filed a claim and statement of claim in the Cairns Registry of this court on 6 August 2001 within the three year limitation period, but not before at least six months had elapsed since 6 April 2001, and without having obtained leave from this court to bring those proceeding despite non compliance with the requirement that at least six months had so elapsed.

[22] On 5 November 2001 the first and second defendants filed a joint Notice of Intention to Defend and Defence, in which they pleaded that Ms Bermingham's failure to wait until at least six months had so elapsed or instead to obtain leave to bring the proceedings despite non compliance, meant that she "may not bring" her proceedings. On 22 November 2001 those defendants applied for orders striking out Ms Bermingham's claim and statement of claim. On 19 March 2002 the learned judge who heard that application dismissed it, and instead granted an application filed 30 November 2001 by Ms Bermingham for leave nunc pro tunc to commence the proceedings on 6 August 2001. The defendants in that matter have brought an appeal to this court, contending that the learned judge erred in the view that there was a capacity to grant leave nunc pro tunc.

Common Features

[23] In the two matters under appeal, common features include:

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[1] The nature and history of leave nunc pro tunc ("now instead of then") was described by Toohey J in *Emanuele v ASC* (1997) 188 CLR 114 at 131-2. Rule 660(3) of the UCPR provides for orders taking effect on an earlier date.

- That in each the defence denying any right in the respective plaintiffs to bring the proceeding was filed more than six months after the notice pursuant to s 37 was given, and therefore after the expiration of any extended period of limitation resulting from giving the relevant notice.

- That the application for leave to bring the proceedings despite non compliance with requirements of Division 3 of Part 4 of the Act was filed after the defence was filed, and likewise after the expiration of the extended period of limitation so provided.

- That for leave to be effective it would have to be nunc pro tunc.

Provisions of the Act

[24] The relevant parts of s 34, 37, 39 and 57 read as follows:

34.(1) If personal injury arises from a motor vehicle accident –

(a) the driver, person in charge or owner of the motor vehicle involved in the accident must give written notice to the insurer of the motor vehicle within 1 month after the accident; and

(b) a person who proposes to claim damages for personal injury arising from the accident must give written notice to the insurer, or 1 of the insurers, against whom the claim may be made within 1 month after the person first consults a lawyer about the possibility of making a claim.

(2) A notice under this section must –

(a) state the date, time and place of the accident and describe how it happened and;

(b) identify all motor vehicles and drivers involved in the accident as far as known to the person by whom the notice is given; and

(c) state the names and residential addresses of all persons injured in the accident; and

(d) if the notice is to be given by an intending claimant, state-

(i) the intending claimant's full name, date of birth, and residential address; and

(ii) the general nature of the personal injury to the intending claimant and

(iii) the date the intending claimant first consulted a lawyer about the possibility of making a claim.

37.(1) Before bringing an action in a court for damages for personal injury arising out of a motor vehicle accident, a claimant must give written notice of the claim to the insurer, or 1 of the insurers, against which the action is to be brought-

(a) containing a statement, sworn by the claimant, of the information required by regulation; and

(b) containing an offer of settlement or a sworn statement of the reasons why an offer of settlement cannot yet be made; and

(c) accompanied by the documents required by regulation.

(2) The notice must be given within 9 months after the motor vehicle accident or the first appearance of symptoms of the injury.

(4) If the notice is not given within the time fixed by this section, the obligation to give the notice continues and the notice, when given,

must contain an explanation of the delay but, if a motor vehicle accident claim relates to injury caused by, through or in connection with a motor vehicle accident claim relates to injury caused by, through or in connection with a motor vehicle that cannot be identified and notice of the claim is not given to the Nominal Defendant within 9 months after the motor vehicle accident the claim against the Nominal Defendant is barred.

39.(1) If a notice of claim is given to an insurer under this division or purportedly under this division-

(a) the insurer must, within 1 month after receiving the notice of claim (even though the notice may have been given out of time), give the claimant written notice-

(i) stating whether the insurer is satisfied that the notice has been given as required under this Division; and

(ii) if the insurer is not satisfied – identifying the non compliance and stating whether the insurer waives compliance with the requirements; and

(iii) if the insurer does not waive compliance with the requirements – allowing the claimant a reasonable period (at least 1 month) specified in the notice either to satisfy the insurer that the claimant has in fact complied with the requirements or to take reasonable action specified in the notice to remedy the non compliance; and

(b) if the insurer is not prepared to waive compliance with the requirements in the first instance – the insurer must, within 1 month after the end of the period specified under paragraph (a)(iii), given the claimant a written notice-

(i) stating that the insurer is satisfied the claimant has complied with the relevant requirements, is satisfied with the action taken by the claimant to remedy the non compliance or waives the non compliance in any event; or

(ii) stating that the insurer is not satisfied that the claimant has taken reasonable action to remedy the non compliance, with full particulars of the non compliance and the claimant's failure to remedy it.

(5) A claimant may bring a proceeding in a court for damages based on a motor vehicle accident claim only if-

(a) the claimant has given notice to an insurer who may be liable on this Division or the insurer has waived compliance with the requirement and –

(i) at least 6 months have elapsed since the notice or the waiver was given; or

(ii) the insurer has denied liability on the claim;

(iii) the insurer has admitted liability but only in part and the claimant has given the insurer written notice that the extent of liability is disputed; or

(b) the court, on application by a claimant dissatisfied with the insurer's response to a notice of a claim under this Division, declares that –

(i) notice of claim has been given as required under this Division; or

(ii) the claimant is taken to have remedied non compliance with this Division; or

(c) the court gives leave to bring the proceeding despite non compliance with requirements of this Division.

57(1) If notice of a motor vehicle accident claim is given under Division 3 (Claims procedures), **or** an application for leave to bring a proceeding based on a motor vehicle accident claim is made under Division 3, before the end of the period of limitation applying to the claim, the claimant may bring a proceeding in court based on the claim even though the period of limitation has ended.

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

(3) If during the last 14 days of the period of limitation, the claimant wants to give a notice of claim under Division 3 but is unsure to which insurer the notice should be given, the notice is validly give if it is given to the Commission.

Issues

[25] These appeals raise at least the following issues:

- The proper construction of s 39(5);
- Whether the respective plaintiffs were bound to fall between two stools by reason of inconsistent provisions in the legislation;
- Whether proceedings brought where there has been non compliance with requirements of Division 3 of Part 4, but where the court has not first given leave to bring those proceedings, are invalid;
- Whether it is appropriate for a claimant to ask for leave to bring proceedings where non compliance is anticipated but has not yet occurred;
- Whether the fact that a s 37 notice has been given allows the court to grant leave pursuant to s 39(5)(c) nunc pro tunc on application made after the expiration of either the ordinary or the extended limitation period;
- Whether it is open to this court, or appropriate, for it to decline to follow its earlier judgment in *Horinack v Suncorp Metway Insurance* (supra).

Constructions placed on s 39(5)(c).

[26] As might be expected, there has been a considerable degree of both first instance and appellate construction of those relevant provisions of the Act. In *Young v Keong* [1999] 2 Qd R 335 this court considered an appeal in which there had been no notice given in accordance with s 37, nor any leave to bring proceedings sought from a court at any time. The claimant had been injured in an accident in New South Wales and had brought proceedings in this State in which it was contended that the provisions of the Act requiring notice did not apply. On application, a

District Court Judge struck out those proceedings and the claimant appealed. It seemed to have been conceded on the appeal that the provisions of the Act did apply, the respondent's vehicle being registered in this State.

[27] The leading judgment was that of Williams J, as His Honour then was. That judgment held that the reference to "bringing" an action in s 37(1) and "to bring a proceeding" in s 39(5) was a description of the initiation or commencement of the relevant legal proceeding. It was further held that both sections are in terms mandatory, and that fact was emphasised by the use of the "only" in s 39(5). In addition what His Honour considered similar provisions in New South Wales legislation had been construed by the New South Wales Court of Appeal (in *Hill v Bolt* (1992) 28 NSWLR 329) to prohibit commencing court proceedings until a specified condition was fulfilled. It was held by that New South Wales court that proceedings purportedly commenced, without compliance with that condition, were not validly commenced and should be struck out. This court likewise held that, as the proceedings in *Young v Keong* had been brought in circumstances where there was a failure to comply with mandatory requirements, the proceedings had correctly been struck out.

[28] That judgment expressly left open the question of whether leave might still be granted, since there had been no application made in that case for leave. The first case to which this court was referred in argument on the instant appeals, and in which an application for leave had been made, was in *Re Tonks* [1999] 2 Qd R 671. In that case the application for leave was actually made within the three year limitation period ordinarily applying. The relevant injury had occurred on 6 July 1995, a s 37 notice given on 6 May 1998, and the application for leave pursuant to s 39(5) was heard in June 1998. Obviously enough, that application was made during the period of six months which s 39(5)(a)(i) provides must elapse before a claimant can bring a proceeding.

[29] The learned judge hearing the application observed (at page 667) that s 39 provides for a continuing dialogue between claimant and insurer; and that the requirement that notice be given, and that six months thereafter elapse before proceedings are commenced (unless leave to do otherwise was given), was mandatory. *Young v Keong* was relied upon. The learned judge gave leave, remarking that the reference in s 57(1) to notice of a claim being given, or an **application** for leave being made, must be a reference to leave actually being given.

[30] That last observation was declared to be in error by this court in its judgment in *Thomas v Transpacific Industries Pty Ltd and Anor* [2002] QCA 160, discussed below. Returning to the judgment in *Re Tonks*, I respectfully observe that the construction of the words in s 57(1) "if…..an application for leave to bring to a proceeding….is made…" as being a description of leave actually being given, (disapproved in *Thomas*), is a construction which sits comfortably with construing s 39(5)(c) to require that the court **first** gives leave to bring the proceeding despite the fact that the applicant will be unable therefore to comply with the mandatory (*Young v Keong*) requirement in s 39(5)(a)(i) that at least six months have elapsed after either the notice required or a relevant waiver has been given. In *Re Tonks* the learned judge remarked that where a limitation period would expire before the expiration of the six months last referred to, a court would be slow to prevent a claim being litigated. I understand that to mean that the court would ordinarily give

leave on an application brought, and heard and determined, within the period of limitation ordinarily applying.

[31] The next matter in which these provisions were considered and to which this court was referred was that of *Couling v Nelson* [1999] 2 Qd R 231, in which no relevant s 37 notice or application for leave had been made within the limitation period. That claimant had been injured on 30 October 1994 and had issued a writ on 21 October 1997. A summons for leave to bring the proceedings was issued on 26 June 1998. The learned judge hearing that application held that the provisions of both s 37(1) and s 39(5) having been considered mandatory in *Young v Keong,* the writ was of no legal effect. The judge observed that the discretion provided in s 39(5)(c) was limited by the provisions of s 57, which the learned judge considered to require that either a notice of the claim be given or an application to bring a proceeding be **brought** before the end of the period of limitation applying to the claim. Since neither had occurred before the end of the period of limitation ordinarily applying, leave might not be given pursuant to s 39(5)(c).

[32] This court held in *Thomas* (supra) in the judgment of Davies JA in par 44, with whom the President and Helman J agreed, that an application is probably made pursuant to s 57(1) when it is **filed**.[2] This latter view destroys some of the symmetry between s 39(5)(c) and s 57(1), which apparent symmetry seems to have influenced the remarks in *Re Tonks*.

[33] If the reference to "brought" in *Couling v Nelson* described the requirement that leave actually be given (enunciated in *Re Tonks*), then this court was being moved at that time at trial level to a consistent view of s 39(5)(c). That view required that leave be first obtained before the expiration of limitation period ordinarily applying before bringing any proceedings. On that consistently applied view the question of leave nunc pro tunc would not arise.

[34] A different view of s 39(5)(c) was taken in *McKelvie v Page* [1999] 2 Qd R 259, in a matter in which both the writ issued, and the s 37 notice was given, on the last day of the ordinary period of limitation. If the effect of s 39(5)(a)(i) was to require that six months then elapse before the proceedings commenced (it appears there was no relevant waiver), then those proceedings were brought despite non compliance with s 39(5). The limitation period would of course have been extended by six months by the provisions of s 57(1). The claimant brought an application for leave nunc pro tunc.

[35] The learned judge hearing that application granted it. The judgment remarked upon the absence in s 39(5)(c) of any specified time within which an application for that leave had to be made. The judge considered that that subsection was similar to a provision found in the Corporations legislation, which provision required leave of a court before proceeding with, or commencing proceedings against, a company in liquidation. Such provisions had commonly been interpreted as allowing the giving of leave nunc pro tunc. The judgment adverted to the inconsistency between s 57(2) requiring claimants to bring proceedings "within six months" after the day on which leave was granted, and s 39(5)(a)(i) requiring that six months have elapsed before a claimant might bring them.

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2 *Crowder v Moore* [1997] 1 Qd R 24.

[36] These conflicting views expressed about s 39(5)(c) and the availability of leave nunc pro tunc were ruled upon by this court in *Horinack v Suncorp Metway* (supra). In that matter the claimant suffered an injury on 31 January 1996 and on 4 January 1999 served the third party insurer with a notice which did **not** comply with s 37 of the Act. This was because that notice when given did not contain an explanation of the delay sworn to by the claimant. This court in *Horinack* held that a notice which did not contain an explanation for the delay did not comply with s 37(4), and nor did an explanation which was not sworn comply with s 37(1)(a).

[37] That claimant has filed an application on 24 June 1999 for leave to proceed despite non compliance with s 39(5), and that application was heard on 30 June 1999. On the same day the claimant issued a writ. It would seem the claimant relied upon the extended limitation period. The learned chamber judge published a reserved decision giving leave pursuant to s 39(5)(c) to bring the proceedings.

[38] On appeal the leading judgment in this court's decision was that of White J, who had been the presiding judge in each of *Re Tonks* and *Couling v Nelson*. Her judgment in *Horinack* holds that an application under s 39(5)(c) for leave to bring proceedings must be brought within the ordinary limitation period, and that this is so is clear from the provisions of s 57 of the Act[3]. She held those provisions made clear that a claimant might bring a legal proceeding where a notice of a "complying" claim had been given pursuant to the claims procedure in Division 3 of Part 4 of that Act, or alternatively where an application for leave to bring proceedings based on such a claim was made. As Her Honour observed, the reference in s 57(1) to an application for leave to bring a proceeding made under Division 3 must be a reference to an application made pursuant to s 39(5)(c). Her judgment also contains a comment that the extension of the limitation period provided by s 57(2) occurs when there is a conforming notice of claim. Her judgment, and that of this court, was that s 39(5)(c) did not confer a general discretion on a court to give leave to bring a proceedings despite non compliance, where the application to do so was brought outside the period of limitation ordinarily applying.

[39] In *Thomas* (supra), the claimant suffered injury on 11 December 1998, provided a notice which contained no explanation for the delay on 4 December 2001, and filed an application on 10 December 2001 for leave to commence proceedings despite non compliance with the notice provisions. That application was heard and refused on 11 December 2001. On appeal the judgment of Davies JA (on this point the judgment to the court) approved as undoubtedly correct the ruling in *Horinack* that where no notice of claim had been given or application for leave made before the limitation period had expired, then in such a case there was no basis as a matter of construction for making an order giving leave to bring proceedings. That ruling did not exclude the claimant in *Thomas,* who had applied before the end of the limitation period.

[40] In *Thomas* the judgment of Davies JA and Helman J held (at par 28) that a notice, given after the expiration of nine months after an accident and complying with s 37(1), and containing an explanation for the delay and thus complying with s 37(4), would **not** be a notice "given as required under this Division" within the meaning of s 39(5)(a). This was because such a notice would fail to comply with the

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[3] Judgment in *Horinack* at Para 18.

mandatory requirement of s 37(2). Such a non complying notice (that is, complying in all respects other than not having been given within nine months of the accident) required "either waiver by the insurer or leave of the court" (par 29). That part of the judgment in *Thomas* produces the result that where a notice is given, non compliant only as to its having been given after nine months have elapsed and where neither s 39(5)(a)(ii) or (iii) or s 39(5)(b) apply, then either the third party insurer must waive that non compliance or the claimant must apply for and obtain leave to bring the proceeding.

Giving notice as required

[41] The decision in *Thomas* was given on 10 May 2002, some months after the decision from which Helen Aydar has appealed. Applying it to the facts in her matter produces the result that she may never have been in truth required to wait until at least six months had elapsed, after giving her notice and before bringing her proceedings. It was assumed by all that the six month waiting period provided for by s 39(5)(a)(i) applied to her. This assumption can be seen in each of the defence of the defendants, her own application filed 25 September 2001, the argument, before the learned judge at first instance, the judgment below, the outlines of argument and the argument made on the appeal. This was because all concerned had treated Ms Aydar as having provided a "wholly complying notice". That description appears, for example, in par 4 of the appellant's outline of argument filed 9 January 2002, par 8 of the respondent's outline of argument filed 24 January, 2002, and in par 6 of the judgment under appeal which described the claimant as "having given notice as required".

[42] Instead, the decision in *Thomas* establishes that Ms Aydar did **not** give notice "as required under" Division 3 of Part 4 of that Act. She would only have had to wait until six months had elapsed after giving that non complying notice if the insurer had waived compliance. No submissions were made about the matter of waiver by either party. The correspondence exhibited records that the insurer declared in writing on 5 February 2001:

> "We confirm that the Notice complies with the requirements of s 37(1) of the *Motor Accident Insurance Act* 1994 ("the Act"), does not comply with s 37(2), and complies with s 37(3) despite the late explanation not being provided within the sworn notice.
> Our understanding is that the limitation point is addressed by s 57(2) which has the effect of extending the limitation period to 1 August 2001."

[43] That description given by the insurer was factually accurate, but did not state as required by s 39(1)(a)(ii) whether the insurer **waived** compliance with that nine months requirement. Since the insurer had conducted this proceedings on the assumption, shown by *Thomas* to be wrong, that a "wholly compliant" notice had been given, it has not turned attention to waiving compliance. Accordingly it has not expressly waived compliance, and I do not think that the correspondence described necessarily implies a waiver. It simply identifies the fact of non compliance with s 37(2) and says nothing else.

[44] This conclusion means the six months waiting period did not apply to Ms Aydar. It also means that she could bring her proceedings only if a court gave leave to her to do so despite her non compliance with the obligation that she gave notice as

required. All parties correctly understood that leave was required, but incorrectly understood this was because the proceedings were begun before six months had elapsed after the non compliant notice was given.

Where there is no Waiver

[45] As a matter of logic the extension of the limitation period normally applying to a claim, which is granted by s 57(1) if "notice of a motor vehicle accident claim is given under Division 3", must apply when notices are given which do not comply with s 37(2). This is simply because a notice which did comply with that section would almost always be filed within nine months after the accident. I note that s 57(1) refers only to a notice "given under Division 3", and not to a notice "as required under this Division", the latter being the provision in s 39(5)(a) construed in *Thomas*. It follows that delivery of a notice pursuant to s 37, which is non complying only because it breaches the mandatory requirements of s 37(2), will have the effect when delivered towards the end of the ordinary limitation period of extending that period for six months from the date of giving that non complying notice (s 57(2)). However, unless compliance is waived, leave to bring the proceedings will be required. This means that in the absence of a waiver, the construction placed on s 39(5)(c) to date, namely that the application for leave must be filed before the end of the period of limitation ordinarily applying, far from reducing the extent of litigation in courts of this state in matters involving claims arising from motor vehicle accidents, actually requires that there **be** proceedings filed within the limitation period seeking leave.

[46] There may ultimately be no proceedings litigated at all, because the claimant and insurer may achieve the Division 3 goal of negotiating a settlement. The construction presently applied to s 39(5)(c) produces the result that where a notice is given after nine months has passed, and there is no waiver, a provision which declares that a claimant may bring a proceeding only in certain circumstances and which appears intended to reduce the number of proceedings brought in court has the effect that a claimant must at least file an application to bring proceedings. Increasing the number of applications that courts are required to hear seems a very undesirable achievement.

Where Compliance is Waived

[47] Where there is a notice under s 37 that is non compliant only because of breach of s 37(2), and there has been a waiver, the same results will occur if this court continues to impose that construction of s 39(5)(c). This is the position of the plaintiff Bermingham. Where there has been waiver, an intending claimant who takes only the first step described in s 57(1) at any time within the last six months of the ordinary limitation period will find herself or himself in the position that these plaintiffs considered each was in, namely that the period of limitation ordinarily applying will be extended but that any proceedings brought by those plaintiffs must be brought "within six months after the day on which the notice is given" (s 57(2)). The obvious inconsistency between that requirement and the requirement, in s 39(5)(a)(i) of the imposition of a six month waiting period, means that plaintiffs whose compliance is waived are caught in the conundrum imposed by those inconsistent requirements. The respondents in Ms Aydar's appeal acknowledged that she could not obey both statutory commands (wrongly thought to apply to her), and submitted that accordingly Ms Aydar was obliged to apply for leave pursuant to

s 39 (5)(c), which leave the respondent argued must be sought before the end of the expiration of the limitation period ordinarily applying. That submission accorded with the construction placed on the section in this court in *Horinack* and in *Thomas,* and at first instance in *Re Tonks* and *Couling v Nelson*. It required she apply for leave although non compliance would not have occurred at the time of the application.

[48] This construction produces the surprising result that a potential claimant whose notice under s 37 is non complying only with the requirements of s 37(2), and who takes the first step described in s 57(1) within the last six months of the limitation period ordinarily applying (that is, giving notice of a claim under Division 3), must also take the second (that, is applying for leave to bring a proceeding) before the end of that period of limitation ordinarily applying. This is so because there will either be no waiver, in which case leave is necessary; or waiver, in which case that minimum six months waiting period will be imposed, and an application for leave to bring the proceedings will be necessary to protect the claimant from falling between two stools. Why this is surprising is that s 57(1) is expressed in the alternative.

[49] Another and undoubtedly unintended consequence of so construing s 39(5)(c) and requiring the application for leave to be made in the period ordinarily applying is that a claimant, who does take both the steps described in s 57(1) in the last six months of the ordinary limitation period and to whom leave is granted, will actually have two differing extensions of the period of limitation applied by reason of s 57(2). Giving the non compliant notice will extend the limitation period as already described herein, and once leave is granted s 57(2) provides that proceedings may be brought within six months after the day on which "leave to bring the proceeding is granted". It will probably be the case for many such claimants that the date on which that leave is given is after the date which the non complying s 37 notice is given. The grant of that leave in those circumstances, thereby extending the limitation period for a further six months from the date of grant, will have the effect that it was actually unnecessary to have brought the application to avoid falling between those two stools in the first place. This illogical result will be the position in which all claimants are placed who deliver a s 37 notice non complying only as to s 32(2) and whose non compliance is waived, such as the claimant in *Bermingham* and to whom leave is granted, if the present construction of s 39(c) continues to be applied.

[50] A further difficulty for a claimant can be identified resulting from the present construction of s 39(5)(c). This is that a claimant in Ms Aydar's position who delivers her notice under s 37, complying in all respects other than with s 37(2), right near the end of the expiration of the limitation period ordinarily applying, and who files an application for leave within the ordinarily applying three year period, may be granted leave to bring an application despite that non compliance with the requirement that notice be given as required "under this Division". An insurer acting in good faith could later waive non compliance and communicate that wavier **after** the expiration of the period of limitation, and indeed after the date on which leave had been granted. The six months "waiting" period would immediately apply, and that claimant would not be one for whom an application for leave could be "made" before the end of the period of limitation ordinarily applying. I think the provisions of s 39(1) mean that this possibility is not idle speculation. Those provisions allow the insurer a month within which to identify the fact of non compliance, and the insurer in turn can allow the claimant a further month within

which to satisfy the insurer that there has in fact been compliance, or else to take action specified by the insurer to remedy the non compliance. When that second month has ended, the insurer has a further month within which to give the claimant a written notice waiving non compliance. Thus three months can pass after receiving a non complying notice and before compliance is waived.

Construction of Section 39(5)(c)

[51] S 57(1) provides that in either of the two situations described therein a claimant may bring a proceeding even though the period of limitation ordinarily applying has ended. The second of those situations is specified to be when an application for leave is made before the end of the period of limitation otherwise applying. In contrast, s 39(5)(c) contains no express provision specifying that an application for leave to bring proceedings despite non compliance with requirements of Division 3 must occur before the end of the ordinary three year limitation period. I respectfully observe that the work done by s 57(1) does not require that the like specifications be read into s 39(5)(c) as a matter of necessity. Applications made under s 39(5)(c) outside the three year limitation period for leave to bring proceedings will not have the effect of extending the limitation period pursuant to s 57 if granted, but that limitation period may have already been extended by the service of the s 37 notice which is non complying only that it fails to comply with s 37(2). I think it follows as a matter of construction that it is not necessary that an application under s 39(5)(c) **must** be made before the end of the period of limitation ordinarily applying to the claim. To put it another way, the application described in s 39(5)(c) need not be an application described in s 57(1).

[52] I have endeavoured to describe why I consider construing s 39(5)(c) to include a requirement that the application for leave be made within the period of limitation ordinarily applying produces results, in cases which are non compliant only because s 37(2) is breached, which appears irrational. I think this is particularly so where there is a waiver by the third party insurer. If that requirement is not read into s 39(5)(c), there seems little logic in reading in any alternative requirement that the application be made, or leave be given, before the end of the extended period of limitation, extended by the operation of s 57(1) upon the fact of delivering that non compliant notice. As a matter of it may often be the case that a decision giving leave is made during that extended period. However, I see no persuasive reason for considering that s 39(5)(c) must be construed to require that the application be either made or heard during either the originally applying or during an extended period of limitation. If the section is not to be given its present construction, there appears to be no strong compelling reason why that section should not be understood as giving the court the power to grant leave at any time when the court considers it appropriate so to do; or why that power should be restricted to applications which were made before the expiration of either the original or the extended limitation period. It would follow that such leave in an appropriate case could be given nunc pro tunc.

[53] So construing s 39(5)(c) would mean that there was no obvious potential advantage or disadvantage to the claimant or the insurer in the insurer waiving compliance with s 37(2); or to a claimant in not giving a s 37 notice at all, as opposed to a notice which is non compliant only as to s 37(2). Construing s 39(5)(c) to allow leave to be given nunc pro tunc would mean that applications for leave could be considered on their merit.

[54] I think that these considerations mean that this court should consider whether or not the construction applied to s 39(5)(c) in *Horinack,* and in *Thomas* should continue to be followed. The court was not asked in the submissions on either appeal to overturn the decision in *Horinack* and it was submitted it could be distinguished on the facts. The critical fact relied on by the claimant in both appeals was the giving of the s 37 notice before the expiration of the ordinary limitation period. Although I understand why the argument is put in that way, I think that the difficulty caused by the construction presently applied to s 39(5)(c), identified by the facts in these matters, cannot be resolved by attempting a contorted construction of that section which distinguishes between claimants who have given non complying notices (whether or not there has been waiver), and other claimants. The former claimants may well have far better cases for leave nunc pro tunc, but I see nothing in the section or the Act which allows a construction enabling the granting of leave nunc pro tunc where non complying notices were provided, but prohibits it where they were not.

[55] In *Sweeney v Volunteer Marine Rescue Currumbin Inc* [2000] QCA 455 this court was asked to overturn the construction applied in *Horinack*. In the former case the applicant had commenced relevant proceedings a few days prior to the expiration of limitation period, but had given notices under s 34 and 37 of the Act a month after the expiration of the limitation period. The application for leave was brought one year after the notices were given, and was dismissed. In those circumstances this court declined the invitation to depart from its own quite recently determined upon construction in *Horinack*.

[56] The judgment in *Sweeney* observed that an intermediate Court of Appeal will usually follow its own decisions, citing the observations of Dawson, Toohey and McHugh JJ in *Nguyen v Nguyen* (1990) 169 CLR 245, at 267 and those of Branson and Finkelstein JJ in *Telstra Corp Ltd v Treloar* (2000) 102 FCR 595 at par 27-28.

[57] In *Nguyen* their Honours wrote that a Court of Appeal should depart from an early decision only when compelled to the conclusion that it was wrong, and that occasions when that departure from previous authority would be warranted were infrequent and exceptional. The remarks in *Telstra Corp v Treloar* were to the same effect, and in *Sweeney* the particular paragraphs cited from *Telstra* included the observations that:

> "The problem is very real when what is at issue is the construction of a statute. For one thing statutory language is often ambiguous. Court can struggle to determine the legislative intent. It is often impossible to discover any legislative intent in many instances the generality of the statutory language is deliberate and allows courts to develop a body of law to fill the gaps. This may lead to disagreement among judges about what a statute means. It would be sound policy that once that intent had been discerned by an appellant court then that should be an end of the matter.
>
> The view which we prefer is that unless an error in construction is patent or has produced unintended and perhaps irrational consequences, not foreseen by the court that created the precedent, the first decision should stand."

[58] In *Sweeney* this court held that the appellant there had not demonstrated an obvious error by the court in the construction of the Act adopted in *Horinack,* nor that there had been resulting unintended consequences. I readily acknowledge that the principal judgment in *Horinack* was written by a judge of this court very experienced at trial and appellate level, and the principal judgment in *Thomas* by one of the two judges first appointed to this division of this court. The court in *Horinack* included the other. The President of this court wrote a judgment agreeing in substance with that of Davies JA in *Thomas,* and hers was the principal judgment in *Sweeney*. All together, nine judges with a vast breadth of experience in this court have approved the reasoning in *Horinack*. Nevertheless I think the circumstances thrown up in the two appeals now being considered demonstrate that irrational consequences, not foreseen, do in fact follow from that construction.

The Like Provisions Construed Elsewhere

[59] Provisions akin to s 39(5)(c) have not received any strikingly consistent interpretation at either intermediate or ultimate appellate level. In *Hill v Bolt* (supra) s 48(3) of the *Transport Accidents Compensation Act* 1987 (NSW) relevantly provided:

> "…..if the claimant fails without reasonable excuse to comply with this section court proceedings cannot be commenced in respect of the claim while the failure continues."

[60] Kirby P considered that the subsection was expressed unusually, and the language had an imperative nature; and the court considered the prohibition mandatory.

[61] In *Dandashli v Dandashli* (NSWCA 40733/96 judgment given 16 December 1996) Handley JA and Cowan AJA in the New South Wales Court of Appeal considered that s 52(4) of the *Motor Accident Act* (NSW) did not impose a procedural condition precedent to be satisfied before the commencement of litigation, but rather an irregularity capable of being cured by the subsequent grant of leave. That section relevantly provided:

> "The claimant is not entitled to commence proceedings in respect of a claim more than three years after:
> (a) the date of the motor accident to which the claim relates…..
> except with the leave of the court in which the proceedings are to be taken".

[62] In *Emanuele v ASC* (1997) 188 CLR 115 the High Court considered a prohibition in s 459 P(2)(d) of the Corporations Law. By a majority of 3-2 it held that a provision that an application for an order winding up a company, which "may only be made with the leave of the court" by the (ASC), was a requirement breach of which created a defect or irregularity in proceedings which might be cured by granting leave nunc pro tunc, even by an Appellate Court.

[63] In *Jol v State of New South Wales* (1998) 45 NSWLR 283 the New South Wales Court of Appeal construed a provision in the *Felons (Civil Proceedings Act)* 1981 (NSW) which relevantly provided that:

> "A person who is in custody….may not institute any civil proceedings in any court except by leave of that court granted on application."

The court held (at page 290) that it could see no reason why the New South Wales legislature should have intended that a civil action instituted without the leave of a court by a person in custody should be treated as a nullity, rather than as an irregularity. The court cited from the observations of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at par 93 (page 390). At par 69 of that judgment McHugh, Gummow, Toohey and Hayne JJ cited the remarks of Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 that:

> "….the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meanings than the logic with which it is constructed".

Their Honours in *Project Blue Sky* went on to observe that accordingly the process of construction must always begin by examining the context of the provision that has been construed.

[64] Section 39(5)(c) has been construed now in a variety of differing factual contexts. I think that examination over time has established that the object of the Act of encouraging the speedy resolution of personal injury claims (s 3(c)), and the policy made obvious by the provisions of the Act, namely both of encouraging claimants to disclose information about themselves and also of allowing and ensuring six months within which to assess a claim, are consistent with accepting a power in a court to give leave at a later date if proceedings are instituted during a limitation period but in breach of one or more matters in s 39(5)(a). The language of s 39(5)(c) is not obviously limited to granting leave in respect of anticipated or future non compliance, although it is sufficiently broad to permit that. Applications with respect to anticipated non compliance were made in both *Re Tonks* and in *Thomas*. However, the actual words of the provision are more consistent with leave being given despite past non compliance having occurred. For the reasons given at length herein, I am satisfied that the objects of the Act will be at least equally achieved as the section is construed to include a power to grant leave nunc pro tunc, and illogical consequences will be avoided. I consider the section should be so construed.

[65] Since writing these reasons in draft I have been provided with a copy of the reasons for judgment of Williams JA. I find myself in respectful disagreement with his view that it is consistent with the judgment in *Horinack* to hold, as His Honour does, that a court can grant leave under s 39(5)(c) on an application made during the period of limitation extended by s 57. That view does remove a number of the illogical consequences of what I have described as the construction presently applying to s 39(5)(c). My reason for being in respectful disagreement with Williams JA is that *Horinack* itself was a case in which a non complying s 37 notice **was** given immediately before the end of the three year limitation period in that case, and the application for leave pursuant to s 39 was brought within the extended limitation period, if extended. There seems no reason for holding that s 37 notices non complying with s 37(2) can extend the limitation period[4], but that s 37 notices non complying with s 37(1)(a) or s 37(4) do not.

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4 As to which, see [38] herein.

[66] Regarding the merits of the application brought by Ms Aydar, the learned Trial Judge appeared willing to grant leave, and the respondent did not suggest that there was any reason on the merits that leave should not be granted if that order was available. Accordingly, I would order:

- That the application for leave be allowed;
- That the applicant have leave nunc pro tunc pursuant to s 39(5)(c) of the *Motor Accident Insurance Act* 1994 to bring a proceeding begun on 13 July 2001 despite non compliance with requirements of Part 4 Division 3 of that Act;
- That par 3 of the defence of the first and second defendants in that proceeding be struck out;
- That the respondents pay the applicant's costs of this application and appeal.

[67] **WILSON J:** The facts are fully set out in the reasons for judgment of Jerrard JA. I shall repeat only the most salient of them.

[68] The appellant was injured in a motor vehicle accident on 5 February 1998. Under s 11 of the *Limitation of Actions Act 1974* she had three years in which to commence an action for personal injuries against the first respondent.

[69] By s 37 of the *Motor Accident Insurance Act 1994* she was required to give the compulsory third party insurer of the first respondent's vehicle a notice of her claim (a "s 37 notice"). She gave a notice on 1 February 2001 which contained the information required by subsection (1) of s 37. However, by subsection (2) that notice should have been given within 9 months after the accident or the first appearance of symptoms. Clearly it was given well outside that period. It should have contained a sworn explanation for the delay[5], but it did not. However, a sworn explanation dated 2 February 2001 was posted to the insurer and received by it on 5 February 2001.

[70] The insurer wrote to the respondent's solicitors on 5 February 2001, saying –

> "We confirm that the Notice complies with the requirements of Section 37 (1) of the Motor Accident Insurance Act 1994 ("the Act"), does not comply with Section 37 (2) and complies with Section 37 (3) despite the late explanation not being provided within the sworn notice.
>
> Our understanding is that the limitation point in addressed by Section 57 (2) which has the effect of extending the limitation period of 1 August 2001."

This was a clear indication that it would take no point about the explanation for the delay having been provided separately, and it has not done so. It should also be understood as notice that the insurer was satisfied that the noncompliance constituted by the late delivery of the notice had been remedied. Section 41 (3) provides -

[5] s 37(4)

"**(3)** If a notice of claim is not given as required under this division, the insurer is taken to receive the notice when–

(a)the insurer gives the claimant notice that the insurer waives compliance with the requirement that has not been complied with or is satisfied the claimant has taken reasonable action to remedy the noncompliance; or

(b) the court makes a declaration that the claimant is taken to have remedied the noncompliance, or gives leaves to bring a proceeding based on the claim despite the noncompliance."

Thus the s 37 notice was to be taken as received by the insurer on 5 February 2001.

[71] Section 57 provides (so far as is relevant) -

"**Alteration of period of limitation**

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

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

The appellant gave a s 37 notice before the end of the 3 year limitation period. Accordingly she could commence a proceeding for damages after the expiration of the 3 years, so long as she did so within 6 months after 5 February 2001 or leave to bring the proceeding was granted.

[72] The appellant commenced this proceeding on 13 July 2001 (within 6 months after 5 February 2001). By application filed subsequently she applied unsuccessfully for leave nunc pro tunc to bring the proceeding despite noncompliance with requirements of Division 3 of Part 4 of the Act.

[73] The respondents contend that the proceeding is a nullity because it falls foul of s 39(5) which provides –

"**(5)** A claimant may bring a proceeding in a court for damages based on a motor vehicle accident only if -

(a) the claimant has given notice to an insurer..... as required under this Division* or the insurer has waived compliance with the requirement and -

(i) at least 6 months have elapsed since the notice or the waiver was given; or

(ii) the insurer has denied liability on the claim; or

(iii) the insurer has admitted liability but only in part and the claimant has given the insurer written notice that the extent of liability is disputed; or

(b) the court, on application by a claimant dissatisfied with the insurer's response to a notice of a claim under this Division*, declares that -

(i) notice of claim has been given as required under this Division;

(ii) the claimant is taken to have remedied noncompliance with this Division*; or

(c) the court gives leave to bring the proceeding despite noncompliance with requirements of this Division*."

*"This Division" is Division 3 of Part 4 of the *Act*, which is headed "Claims procedures" and contains ss 37 - 44.

Of the alternatives in subsection (5)(a), only that in paragraph (i) is presently relevant - that 6 months had not elapsed since the s 37 notice was given[6].

[74] The primary judge observed that one section says that a proceeding cannot be commenced within six months while another section says that it must be[7]. This is true insofar as a plaintiff relies on the giving of a s 37 notice to extend the limitation period. Waiting until at least 6 months had elapsed since the s 37 notice was given[8] would have meant not commencing the proceeding until after 5 August 2001. Yet the effect of the first limb of s 57(1) was to necessitate the commencement of the proceeding by 5 August 2001 at the latest if it were not to be vulnerable to a limitations defence.

[75] However, the giving of a s 37 notice within the limitation period is not the only circumstance which will result in an extension of the limitation period pursuant to s 57. It is extended also if an application for leave[9] is made before the expiration of the 3 year period. (This must mean a successful application). Then the claimant may commence a proceeding within 6 months after the day on which leave is granted.

[76] Section 39(5)(c) speaks of "leave to bring the proceeding despite noncompliance with requirements of this division". In a factual context such as the present, if leave were sought before the commencement of the proceeding, but with the intention of commencing a proceeding within the extended limitation period, noncompliance with requirements of Division 3 (constituted by failing to let 6 months elapse) would be anticipated only. It strains the natural meaning of the language of s 39(5)(c) to extend it to anticipated noncompliance. However, being constrained by this Court's ruling in *Horinack v Suncorp Metway Insurance Ltd*[10] that leave must be obtained before the proceeding is commenced, I feel compelled to so read it. To

[6] During that 6 month period, the insurer was obliged to attempt to resolve the claim: s 41.
[7] Reasons for judgment para [15]
[8] as required by s 39(5)(a)(i)
[9] under s 39(5)(c)
[10] [2001] 2 Qd R 266

do otherwise would be to deny a claimant in a position like that of the appellant any avenue of redress.

[77] It is regrettable that Parliament enacted such a turgid legislative scheme to achieve its laudable goal of the speedy resolution of motor vehicle accident claims. I have considerable sympathy for the appellant. Instead of making a pre-emptive application for leave before the elapse of 6 months from the giving of the s 37 notice, she let the time pass, commenced a proceeding, and then applied for leave nunc pro tunc. The sequence of relevant events was such that she has lost any chance of recovering damages for her substantial injuries. However, her appeal must be dismissed, and costs should follow the event.