SUPREME COURT OF QUEENSLAND

CITATION:	*Kumer v Suncorp Metway Insurance Ltd & Ors* [2005] QCA 254
PARTIES:	**LESHNI KUMER** (applicant/respondent) v **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (first respondent) **NOMINAL DEFENDANT** (second respondent/appellant) **NRMA INSURANCE LIMITED** ACN 000 016 722 (third respondent)
FILE NO/S:	Appeal No 10269 of 2004 SC No 9571 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2005
JUDGES:	McMurdo P, Keane JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Set aside orders made at first instance, insofar as they relate to the appellant** **3. Respondent to pay appellant's costs at first instance and of the appeal to be assessed on the standard basis**
CATCHWORDS:	LIMITATION OF ACTIONS - CONTRACTS, TORTS AND PERSONAL ACTIONS - APPLICATION OF THE STATUTES TO PARTICULAR CAUSES OF ACTION - MOTOR VEHICLE INSURANCE - where respondent involved in multi-vehicle road accident - where one other vehicle was identified as being involved in the accident - where notice of claim was given by the respondent to the insurer of that vehicle - where, subsequently, another unidentified vehicle was alleged to have been involved in the accident - where notice of claim was not given directly to the

Nominal Defendant by the respondent within the time allowed under s 37(3) *Motor Accident Insurance Act* 1994 (Qld) - where trial judge held that the notice given to the first insurer could be deemed to be notice given to the Nominal Defendant - whether s 37 *Motor Accident Insurance Act* 1994 (Qld) permits a notice of claim to be given to the Nominal Defendant via another insurer - whether s 37 *Motor Accident Insurance Act* 1994 (Qld) bars claims where notice has not been given directly to the Nominal Defendant

MISCELLANEOUS PROCEDURAL MATTERS - DECLARATIONS - JURISDICTION - where trial judge made a declaration that the respondent was entitled to commence proceedings against the appellant under the *Motor Accident Insurance Act* 1994 (Qld) - whether power exists to make a declaration that a statute does not pose a legal impediment to bringing an action when that statute confers no power to make such a declaration - whether the evidence supported the making of the declaration

Motor Accident Insurance Act 1994 (Qld), s 31, s 33, s 37, s 38, s 39

Miller v Nominal Defendant [2003] QCA 558; [2005] 1 Qd R 135, applied

COUNSEL: K N Wilson SC for appellant
R D Green for respondent

SOLICITORS: Gadens Lawyers - Brisbane for appellant
Connor Fox Lawyers for respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for allowing the appeal. I wish to add only the following observations.

[2] In this case, the respondent plaintiff, Ms Kumer, claims that she was involved in a multi-vehicle accident. Insofar as the vehicle which she alleged had struck her vehicle, she either followed the claims procedures under the *Motor Accident Insurance Act* 1994 (Qld) ("the Act") or, at least, that vehicle's insurer waived compliance with the requirements of the Act.[1] Under the Act the Nominal Defendant is the insurer of unidentified vehicles causing personal injury in motor vehicle accidents. Ms Kumer did not become aware that an unidentified motor vehicle may have caused or contributed to the accident resulting in her injury until after the expiry of the time periods in which she was mandatorily obliged under s 37(2)(a), s 37(3) and s 39(8) of the Act to notify the Nominal Defendant. Once Ms Kumer was aware of the potential involvement of an unidentified motor vehicle, the Nominal Defendant was notified timeously. The primary issue in this appeal is whether Ms Kumer is now barred under the Act from pursuing her claim against the Nominal Defendant because of her failure to give notice to the Nominal Defendant within the mandatory time frames provided in the Act, even though she either gave

[1] See s 39 of the Act.

compliant notice under the Act to the insurer of the vehicle which she believed was responsible for her injuries or that insurer waived compliance under the Act.

[3] As the learned primary judge noted, it would seem unlikely that the legislature intended that a claimant in Ms Kumer's position should lose her rights against the Nominal Defendant through no fault of her own.[2] Nothing in the objects of the Act[3] nor in the relevant Minister's second reading speeches or the Explanatory Notes when the Act was first introduced in 1994[4] or in 2000 when s 37 of the Act was subsequently replaced[5] suggests the legislature intended to prevent a person in Ms Kumer's position from bringing a claim against the Nominal Defendant.

[4] As Keane JA explains in his reasons, that is, however, the plain meaning of the words in s 37(2)(a), s 37(3) and s 39(8) of the Act. It is also consistent with the decision of Davies and Williams JJA and Mackenzie J in *Miller v Nominal Defendant*.[6]

[5] To interpret the Act in the way the respondent contends would effectively mean that this Court would imply at the conclusion of s 37(2)(a) of the Act the addition of the words "or within three months after the claimant first becomes aware that the personal injury may have been caused by, through or in connection with an unidentified motor vehicle". It would also require this Court to imply in the last line of s 37(3) of the Act after "accident" the addition of the words "or within nine months after the claimant first became aware that the personal injury may have been caused by, through or in connection with an unidentified motor vehicle". It would further be necessary to imply at the commencement of the third last line of s 39(8) of the Act the addition of the words "or within nine months of the claimant first becoming aware that the personal injury may have been caused by, through or in connection with an unidentified motor vehicle". It is not for this Court to amend a statute so significantly when its plain words have a clear meaning which is not obviously inconsistent with the legislative intent. I am conscious that this interpretation may not be that intended by the legislature and that it could perhaps have unjust consequences. If this interpretation is inconsistent with the legislative intent then it is for Parliament to amend the Act to reflect its true intention.

[6] The appeal should be allowed with costs to be assessed and the orders made at first instance insofar as they relate to the appellant should be set aside. The appellant should also have its costs to be assessed of the primary application.

[7] **KEANE JA:** On 7 November 2001, the respondent, Ms Kumer, was involved in a multi-vehicle motor accident on the M1 motorway near the Gateway Arterial exit. The vehicle which actually struck Ms Kumer's motor vehicle was a Nissan Patrol. As a result of the accident, Ms Kumer suffered personal injuries. Ms Kumer gave notice to NRMA Insurance Ltd ("NRMA"), the insurer of the Nissan Patrol, pursuant to s 37(1) of the *Motor Accident Insurance Act* 1994 (Qld) ("the Act"). This notice was given by letter dated 17 December 2001. That notice made no

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2 *Kumer v Suncorp Metway Insurance Ltd & Ors* [2004] QSC 381, [10].

3 See s 3 of the Act.

4 See Queensland, *Parliamentary Debates*, Legislative Assembly, 16 February 1994, 6900-6902 (K E De Lacy); Explanatory Notes, Motor Accident Insurance Bill 1994 (Qld).

5 See *Motor Accident Insurance Amendment Act* 2000 (Qld), s 19; Queensland, *Parliamentary Debates*, Legislative Assembly, 16 May 2000, 1037-1041 (D J Hamill); Explanatory Notes, Motor Accident Insurance Amendment Bill 2000 (Qld).

6 [2003] QCA 558; [2005] 1 Qd R 135.

reference to any involvement of an unidentified vehicle in the occurrence of the motor vehicle accident in which Ms Kumer was injured.

[8] After some correspondence, in which NRMA contended that the notice did not comply with the requirements of s 37 of the Act, NRMA, by letter dated 29 July 2003, accepted that Ms Kumer had complied with s 37 of the Act.

[9] It subsequently came to Ms Kumer's attention that it was possible that the operation of another, and unidentified, motor vehicle caused or contributed to the occurrence of the accident in which she was injured. No notice was given by Ms Kumer to the appellant, the Nominal Defendant, because she did not know of the possible relevance of any unidentified vehicle to the occurrence of the accident. The Nominal Defendant did not discover that Ms Kumer had a claim on foot until it received a letter from her solicitors on or about 21 September 2004. The Nominal Defendant was, however, aware of the circumstances of the accident earlier than that time as a result of other litigation arising out of the accident of 7 November 2001.

[10] The Nominal Defendant has asserted that Ms Kumer's claim is now barred by virtue of s 37(3) of the Act.

[11] Ms Kumer applied to the Court for orders permitting her to commence proceedings against the Nominal Defendant. The learned primary judge made orders to that effect. His Honour concluded that the provisions of s 37(3) did not bar a claim by Ms Kumer against the Nominal Defendant because Ms Kumer did not know of the involvement in the accident of an unidentified motor vehicle and because she had given notice of her claim to the insurer of one of the other motor vehicles involved in the accident.

[12] The appellant's principal challenge on appeal relates to the construction of s 37 of the Act pursuant to which the learned primary judge reached that conclusion. In order to appreciate the learned primary judge's reasoning, and the appellant's arguments, it is necessary to set out the material provisions of the Act.

The Act

[13] The Act establishes a scheme of compulsory third party (CTP) insurance to ensure that those persons who suffer personal injury in motor vehicle accidents as a result of negligence in the operation of motor vehicles will be able to recover compensation for that injury.

[14] The Nominal Defendant is a body corporate established by s 16 of the Act. Its functions include the administration of the Nominal Defendant Fund established by s 29 of the Act to ensure, inter alia, that persons injured by unidentified motor vehicles can recover compensation for their injuries.

[15] The Act provides by s 31(1) that:

> "If personal injury is caused by, through or in connection with a motor vehicle, the insurer for the statutory insurance scheme is to be decided in accordance with the following principles -
>
> (a) if the motor vehicle is an insured motor vehicle - the insurer under the CTP insurance policy is, subject to this division, the insurer;
>
> …

(c) if the motor vehicle is not insured and a self-insurer is not the registered owner - the Nominal Defendant is the insurer;

(d) if the motor vehicle, or insurer under its CTP insurance policy, can not be identified - the Nominal Defendant is the insurer."

[16] Section 33(1) of the Act provides relevantly as follows:

"The Nominal Defendant's liability for personal injury caused by, through or in connection with a motor vehicle is the same as if the Nominal Defendant had been, when the motor vehicle accident happened, the insurer under a CTP insurance policy under this Act for the motor vehicle."

[17] At this point it should be noted that s 52 of the Act provides that if an action is brought in a court for damages for personal injury arising out of a motor vehicle accident, then the action must be brought against the insured person and the insurer as joint defendants.

[18] The Act imposes restrictions on the bringing of proceedings in a court for the recovery of damages for personal injury suffered in a motor vehicle accident. In this regard, s 37 of the Act imposes an obligation on those who wish to bring such an action to give written notice to the insurer or one of the insurers of the motor vehicle or motor vehicles involved. It also makes provision for the consequences which follow where notice is not given within the prescribed time limit and, in this regard, it makes special provision where notice is not given to the Nominal Defendant. Section 37 of the Act provides relevantly as follows:

"(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 motor vehicle accident claim to the insurer or 1 of the insurers, against which the action is to be brought-

(a) containing a statement of the information required under a regulation; and

(b) authorising the insurer to have access to records and sources of information relevant to the claim specified under a regulation; and

(c) accompanied by the documents required under a regulation.

(2) The notice must be given -

(a) if it is to be given to the Nominal Defendant because the motor vehicle can not be identified - within three months after the motor vehicle accident; or

(b) in any other case - within the period ending on the earlier of the following dates -

(i) 9 months after the motor vehicle accident or, if symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury;

(ii) 1 month after the claimant first consults a lawyer about the possibility of making a claim.

(3) If notice of a motor vehicle accident claim is not given within the time fixed by this section, the obligation to give the notice continues and a reasonable excuse for the delay must be given in the notice or by separate notice to the insurer but, if a

> motor vehicle can not be identified and the notice is not given to the Nominal Defendant within 9 months after the motor vehicle accident, the claim against the Nominal Defendant is barred.
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> (4) If 2 or more motor vehicles were involved in the motor vehicle accident, the insurer to which notice is given under subsection (1) must, within 7 days after receiving it, give a copy of the notice to any other insurer of a motor vehicle involved in the motor vehicle accident."

[19] Section 38(1) of the Act provides that where two or more motor vehicles are involved in a motor vehicle accident in circumstances in which two or more insurers may be liable on a motor vehicle accident claim arising out of the accident, one of the insurers is to act for all the relevant insurers as claim manager. In this regard, s 38(6) of the Act makes special provision in relation to the position of the Nominal Defendant as follows:

> "If the Nominal Defendant is 1 of 2 or more insurers who may be liable on a motor vehicle accident claim because a motor vehicle that can not be identified was involved in the accident, another insurer may act for the Nominal Defendant under this section only if the Nominal Defendant agrees in writing."

[20] Section 39 of the Act provides for the giving of a response by an insurer to a notice of claim. That response may include a statement that the insurer waives compliance with requirements of the Act which have not been complied with by the claimant: see s 39(1)(a)(ii) of the Act. In that regard, s 39(5) provides as follows:

> "A claimant's failure to give notice of a motor vehicle accident claim as required under this division prevents the claimant from proceeding further with the claim unless -
>
> (a) the insurer -
>
> (i) has stated that the insurer is satisfied notice has been given as required under this division or the claimant has taken reasonable action to remedy the noncompliance; or
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> (ii) is presumed to be satisfied notice has been given as required under this division; or
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> (b) the insurer has waived compliance with the requirement; or
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> (c) the court, on application by the claimant -
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> (i) declares that the claimant has remedied the noncompliance; or
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> (ii) authorises further proceedings based on the claim despite the noncompliance."

[21] Once again, special provision is made in relation to the position of the Nominal Defendant. Section 39(8) of the Act provides -

> "If a claim against the Nominal Defendant is barred because the claim relates to personal injury caused by, through or in connection with a motor vehicle that can not be identified and the claimant failed to give notice of claim under this division within 9 months after the motor vehicle accident, the Nominal Defendant can not waive compliance with the requirement to give notice within the time

> allowed by this division, nor can the court give leave to bring a proceeding in a court despite the noncompliance."

[22] In the light of these provisions of the Act, I turn to the reasons of the learned primary judge.

The judgment

[23] The learned primary judge was of the view that s 37 of the Act:

> "… is designed to operate by allowing one notice to be given to an insurer which is then obliged to notify any other insurer of another vehicle involved in the accident. Where, as here, a claimant notifies the insurer whose vehicle it believes to be at fault for the accident and is unaware of another unidentified vehicle the obligation to notify the Nominal Defendant does not fall on the claimant but on the insurer which is aware of that vehicle."[7]

[24] His Honour noted that the notice of claim given to NRMA was not given to the Nominal Defendant by the respondent or by NRMA or any other insurer within the nine months prescribed by s 37(2)(b)(i). In relation to s 37(2) and s 37(3), the learned primary judge reasoned that "when s 37(3) speaks of the notice 'not given to the Nominal Defendant' it means the notice 'to be given to the Nominal Defendant because the motor vehicle cannot be identified' referred to in s 37(2)(a)".[8]

[25] His Honour then went on to say:

> "Where, as here, notice has been given within the time fixed by the section to one insurer, the section should not be construed as barring a claim against the Nominal Defendant. This follows either because the condition on which s 37(3) is premised, namely giving of notice, has been met or because the notice necessary to satisfy s 37(1) was not one to be given to the Nominal Defendant because the motor vehicle could not be identified. To construe the subsection otherwise would have the result that claimant in Mr [sic] Kumer's situation, who gives notice to an insurer, not knowing of an unidentified vehicle, could lose his [sic] rights against the Nominal Defendant, not through his [sic] own fault but because of the failure of the insurer notified to give that notice to other insurers. That is a construction that, one suspects, would not have been intended by the legislature."[9]

[26] The appellant contends that the learned primary judge erred in proceeding on the footing that Ms Kumer had given notice to NRMA within the time fixed by s 37(2). The appellant contends that Ms Kumer did not give a timeous notice including an explanation for her delay in complying with s 37(2) or s 37(3). The respondent disputes these contentions and, in any event, relies upon NRMA's statement that it was satisfied with Ms Kumer's compliance of 29 July 2003. Because I consider that the applicant must succeed in its appeal even if this contest is resolved in favour of

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7 *Kumer v Suncorp Metway Insurance Limited & Ors* [2004] QSC 381; SC No 9571 of 2004, 5 November 2004 at [11].

8 *Kumer v Suncorp Metway Insurance Limited & Ors* [2004] QSC 381; SC No 9571 of 2004, 5 November 2004 at [10].

9 *Kumer v Suncorp Metway Insurance Limited & Ors* [2004] QSC 381; SC No 9571 of 2004, 5 November 2004 at [10] (emphasis in original).

the respondent, I will proceed on the assumption that the respondent has the benefit of s 39(5)(a)(i) against NRMA.

The appeal

[27] Before dealing further with the appellant's challenge to his Honour's conclusions in relation to the proper construction of s 37, I should note some other complaints made by the appellant.

[28] The appellant asserts that, insofar as the learned primary judge indicated a willingness to "declare that Mr [sic] Kumer is entitled to commence proceedings against [the appellant]", there was no power in the court to make a declaration of the party's rights. The appellant points to the absence of express provision in the Act for the making of such a declaration.

[29] The orders which his Honour made were more complicated than a simple declaration that s 37 and s 39 did not pose an impediment to the prosecution of an action; but, insofar as his Honour was disposed to declare the absence of a legal impediment to the prosecution of a claim by reason of the operation of s 37 or s 39 of the Act, the power to make such a declaration does not depend upon the existence of a provision in the Act. The Supreme Court has the power to make such a declaration which is engaged by the existence of a real dispute between the parties as to their respective rights.[10]

[30] The second complaint made by the appellant is that it was inappropriate for the learned primary judge to proceed to make the declaration which he made on the footing that an unidentified motor vehicle was in fact involved in the accident of 7 November 2001. The appellant contends that the evidence does not support the approach adopted by his Honour.

[31] In my view, it was not necessary for his Honour to find as a fact that an unidentified vehicle was the cause of the accident. It is sufficient to justify the making of the declaration that there is a real dispute as to this issue. Whether or not an unidentified vehicle was actually involved in the accident does not fall for final determination until trial. In any event, it is unnecessary for me to come to a final view on this issue having regard to my firm opinion that the appellant is entitled to succeed on the principal issue involving the proper construction of the Act.

The proper construction of s 37

[32] Of greater substance are the appellant's contentions that the learned primary judge erred in construing s 37 of the Act. This attack is made on two fronts. First, it is submitted that his Honour was wrong to conclude that s 37 of the Act permits a notice of claim to be given by a claimant to the Nominal Defendant, when it is one of several insurers of motor vehicles involved in a claim, by giving notice to one of the other insurers. The appellant submits that s 37 casts an obligation on a claimant to give a notice of claim directly to the Nominal Defendant so that notice of a claim passed on to the Nominal Defendant by another insurer pursuant to s 37(4) would not suffice as notice given to the Nominal Defendant. Secondly, it is submitted that his Honour fell into error when he concluded that, where notice has been given to one insurer but has not actually been given to the Nominal Defendant, the barring provisions of s 37(3) have no operation.

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[10] See *Supreme Court Act* 1995 (Qld), s 128 and s 244(9). *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 - 582, 595 - 596.

[33] As to the first aspect of the appellant's attack on the learned primary judge's conclusion, in my respectful opinion, the language of s 37 is indicative of a legislative intention that if a motor vehicle, which is one of several motor vehicles involved in a motor vehicle accident, is one which cannot be identified then notice of a claim may be given to the Nominal Defendant pursuant to the combined operation of s 37(1) and s 37(4). It is important to distinguish between the issue of whether the obligation cast upon a claimant by s 37(1) has been discharged and the issue of whether the discharge of that obligation means that notice is deemed to have been given to the Nominal Defendant. In my opinion, it is not essential that notice be given to the Nominal Defendant directly by the claimant in order to satisfy the obligation imposed on a claimant by the language of s 37(1) of the Act.

[34] The principal difficulty with the first aspect of the appellant's argument arises from the words of s 37(1). These words expressly create a positive obligation on a claimant to give a notice of claim to "one of the insurers". That express conferral of a choice on a claimant is quite inconsistent with an implied obligation on a claimant to give notice to the Nominal Defendant, rather than to any other of the insurers against whom an action is to be brought pursuant to s 52 of the Act.[11] Nor does s 37(3) expressly impose an obligation on the claimant to give notice to the Nominal Defendant directly. Section 37(3) does contemplate the actual giving of notice to the Nominal Defendant; and that result can be achieved by the claimant's choosing to perform the obligation under s 37(1) by giving notice to the Nominal Defendant as one of several insurers against whom an action is to be brought.

[35] In my opinion, when one reads the provisions of s 37 as a coherent whole, it can be seen that they deal with both single vehicle and multi-vehicle accidents. They contemplate that in the case where, because the only motor vehicle involved in the accident cannot be identified, the Nominal Defendant is the only insurer against whom an action is to be brought, s 37(2)(a) prescribes the time limit within which a claimant must comply with s 37(1). In the case of multi-vehicle accidents, the Nominal Defendant may be given notice, either by a claimant under s 37(1) or by a co-insurer under s 37(4) where notice of claim has been given to the co-insurer by the claimant. That notice, whoever gives it, must be given to the Nominal Defendant within the time prescribed by s 37(2)(b). If it is not then s 37(3) applies to the claim and, so far as the Nominal Defendant is concerned, the claim is barred against it even though an action may still be brought against the other insurers.

[36] It is convenient, at this point, to refer to the appellant's contention that there is a tension between s 37(2)(a) and s 37(2)(b) of the Act. This suggested tension disappears once it is accepted that, as the respondent argues, s 37(2)(a) is referring to the case where the only motor vehicle involved in the claim to be made is an unidentified motor vehicle. In such a case, the Nominal Defendant will be the only insurer to whom a notice is required to be given, and the only insurer to whom notice can be given by a claimant, in order to comply with s 37(1). Where an unidentified motor vehicle is one of several vehicles involved in the claim to be made then the case is not within s 37(2)(a) of the Act, but falls within s 37(2)(b).

[37] The language of that part of s 37(3), which deals specifically with the position of the Nominal Defendant, speaks of "**a** motor vehicle". In this regard, it stands in obvious contrast to the language of s 37(2)(a) which speaks of "**the** motor vehicle". The

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11 *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153 at 157 - 159.

language of s 37(2)(a) is thus concerned with a case where the **only** motor vehicle involved cannot be identified. Section 37(3) is, in terms, applicable to a situation involving a multi-vehicle accident where one of the vehicles involved cannot be identified and where notice of claim is not given to the Nominal Defendant within nine months after the motor vehicle accident. That is the present case.

[38] On the other hand, in my opinion, the second aspect of the appellant's argument must be accepted. That a claimant has satisfied the obligation cast upon him or her by s 37(1) of the Act does not necessarily mean that notice of the claim has been given to the Nominal Defendant for the purposes of s 37(3) of the Act. There is no provision which deems notice to be given to the Nominal Defendant for the purposes of s 37(3) upon satisfaction by a claimant of his or her obligation under s 37(1). In the absence of any such deeming provision, it is my view that if notice is not actually given to the Nominal Defendant, whether under s 37(1) or s 37(4), within nine months after the accident, the claim against the Nominal Defendant is barred by the operation of s 37(3) of the Act, even though the claimant may proceed against all other insurers of motor vehicles involved in the accident.

[39] It may be granted that it is possible to read s 37(3) in the way the learned primary judge has read it as set out at [25] above. That reading is not the natural reading of the provision. It is, with respect, somewhat awkward. The other possible reading, and the more natural reading, is that, where a motor vehicle involved in an accident which gives rise to a motor vehicle accident claim cannot be identified, there must be actual notice to the Nominal Defendant of a claim against it within nine months or the claim is barred. When one looks beyond s 37, it can be seen, in my respectful opinion, the learned primary judge's reading of s 37(3) is not the true construction of the provision read in its statutory context.

[40] In dealing with this aspect of the appellant's argument, and the learned primary judge's reasoning, it should be said at the outset that principles of statutory interpretation whereby it is presumed that common law rights of subjects are not to be regarded as abrogated in the absence of a clear statement of legislative intention to that effect afford little assistance to this discussion.[12] That is because the rights of a claimant against the Nominal Defendant are the creature of the Act.[13] A claimant has no right to damages against the Nominal Defendant at common law. Since it is the Act which creates rights against the Nominal Defendant, it is to the terms of that statute that one must look to discover the extent of, and limitations upon, those rights. It follows that there is no reason to prefer a reading of the Act that is different from its literal meaning in order to preserve a claimant's common law rights.

[41] As I have said, there is nothing in s 37 of the Act which deems a notice of claim given by a claimant to one insurer to be given to the Nominal Defendant or, for that matter, any of the other insurers involved in the claim to be brought. The insurer to whom such a notice is given is duty-bound by s 37(4) to pass on the notices but there is no provision which deems that obligation to have been complied with. In relation to insurers other than the Nominal Defendant, the legislation proceeds on the assumption that the insurer to whom a claimant gives notice of a claim will

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12 Cf *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109 - 110; *Plenty v Dillon* (1991) 171 CLR 635 at 639 - 641; *Wik Peoples v State of Queensland* (1996) 187 CLR 1 at 185 - 186.

13 *Miller v Nominal Defendant* [2003] QCA 558 at [35] - [36]; [2005] 1 Qd R 135 at 147 - 148.

comply with the requirements of s 37(4) of the Act. Uniquely, s 37(3) expressly requires actual notice of a claim to be given to the Nominal Defendant.

The unique position of the Nominal Defendant as an insurer

[42] That the Nominal Defendant is in a unique position as an insurer for the purposes of s 37 of the Act is clear as a matter of the ordinary meaning of the text of the section. Section 37(2) and s 37(3) make special provision in relation to the giving of notice of claim to the Nominal Defendant. As I have said, s 37(2)(a) is concerned with a case where the only vehicle involved in the accident is unidentified. In such a case it is obviously necessary that the notice be given to the Nominal Defendant. In other cases, including the case where one of the vehicles involved in a motor vehicle accident claim cannot be identified, s 37(2)(b) applies. If the notice of claim is given to the insurer of one of the motor vehicles involved in the accident within the time limited by s 37(2)(b), then the action may proceed against that insurer and insurers other than the Nominal Defendant and the claim management provisions of s 38 of the Act apply in relation to the conduct of that action; but if notice is not actually given to the Nominal Defendant within a nine month period then not only the action against it, but the claim on which it is based, are barred.[14] This is so whether the "fault" in failing to give notice to the Nominal Defendant can be laid at the door of the claimant of the insurer who is obliged to pass on the notice by s 37(4). To say this is certainly to accept that the Nominal Defendant is placed by the Act in a special position as a favoured insurer but that proposition is not difficult to accept for the following four reasons.

[43] First, there is the obvious point that s 37(2)(a) and s 37(3) expressly single the Nominal Defendant out for special attention amongst insurers by providing for periods of notice of claim specific to the Nominal Defendant.

[44] Secondly, the provisions of s 38(6) confirm that the legislature has indeed chosen to make special provision for the Nominal Defendant as an insurer liable to meet a claim for damages for personal injuries arising out of a motor vehicle accident. This provision demonstrates that the agency of a licensed insurer on behalf of the Nominal Defendant is dependent on the written consent of the Nominal Defendant. This provision is predicated upon notice of a claim actually being given to the Nominal Defendant. If actual notice to the Nominal Defendant was not required then s 38(6) of the Act would not be able to operate. One cannot exercise a choice if one does not know that it exists.

[45] Thirdly, the provisions of s 39(8) expressly provide that there can be no waiver of compliance with the requirement to give notice within the time allowed by the Act and no grant of leave to bring proceedings can be made pursuant to s 39(5)(c) of the Act. This provision may be seen as explicit recognition of the position of the Nominal Defendant as the steward of the public moneys comprising the Nominal Defendant Fund. However that may be, s 39(8) manifests a clear intention that unless "notice is given within nine months after the motor vehicle accident, the Nominal Defendant cannot waive compliance with the requirement to give notice within that time, nor can the court give leave to bring a proceeding in court despite the non-compliance".[15]

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14 *Miller v Nominal Defendant* [2003] QCA 558 at [39] - [40]; [2005] 1 Qd R 135 at 149.

15 *Miller v Nominal Defendant* [2003] QCA 558 at [40]; [2005] 1 Qd R 135 at 149.

[46] The respondent in this case seeks to argue that the combined operation of the subsections of s 37 of the Act and NRMA's acceptance of the notice means that a complying notice was given by Ms Kumer within nine months so that an action may now be brought against the Nominal Defendant. That argument does not sit easily with the decision of this Court in *Miller v Nominal Defendant*[16] which affirmed that any action against the Nominal Defendant as well as the underlying claim on which it is based, will be barred if notice is not given to the Nominal Defendant within nine months of the accident. In any event, the argument cannot be accepted. The real significance of that argument, for present purposes, is that it highlights the more fundamental problem for the respondent in this case. That is the obvious difficulty in accepting the suggestion that a waiver of non-compliance, something which the Nominal Defendant may not do itself because of s 39(8), may be done on its behalf, and that by a managing agent to whose agency it has not assented as required by s 38(6) of the Act or at all.

[47] If the construction of s 37 which commended itself to the learned primary judge was correct, then the waiver of non-compliance by NRMA pursuant to s 39(1)(a)(ii) of the Act could be effective against the Nominal Defendant notwithstanding the provisions of s 39(8) of the Act and even though, contrary to the evident intent of s 38(6), the Nominal Defendant has not ever had the opportunity to consent to the exercise by NRMA of that statutory agency, much less the waiver of any non-compliance with the Act by the claimant.

[48] The respondent seeks to skirt around this problem by arguing that s 37 should not be read in the light of s 38 and s 39 of the Act. The respondent submits that s 37 is a provision concerned with the making of claims while s 38 and s 39 are concerned with claim management. That attempted compartmentalization cannot work because of s 37(4). But, in any event, it would be quite wrong to read s 37 without regard to s 38 and s 39 which are grouped together within Part 4, Division 3 of the Act under the rubric "Claims procedures".

[49] Fourthly, the special position of the Nominal Defendant as an insurer is also recognized by other provisions of the Act such as s 60 and s 61.

Considerations of policy

[50] It is argued on the respondent's behalf that the decision of the learned primary judge fully accords with the policy which informs the provisions of s 37 of the Act and that a stricter view of these provisions does not. In this regard, it is said that the underlying policy of these provisions is to facilitate the early investigation of claims by CTP insurers and that it can be expected that an investigation of a claim will commence in the interests of all insurers potentially involved in a claim as soon as a notice of claim is given to one insurer.

[51] This statement of the policy underlying the provisions of s 37 of the Act does not adequately explain the existence of the special provisions of s 37(2)(a) and s 37(3) in favour of the Nominal Defendant. If it is said that s 37(2)(a) recognizes the special problems of investigating an allegation that an accident was caused by an unidentified motor vehicle, then that consideration is even more compelling in the situation contemplated by s 37(3) after the lapse of nine months and in the more complex situation of a multi-vehicle accident where the possibility that someone

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16 [2003] QCA 558 at [40]; [2005] 1 Qd R 135 at 149.

will seek to blame an unidentified motor vehicle as the real cause of the accident is obvious.

[52] More importantly, the view of legislative policy propounded on behalf of the respondent does not explain the existence of s 38(6) and s 39(5) of the Act. These provisions reflect an appreciation on the part of the legislature that the special interest of the Nominal Defendant as the steward of the Nominal Defendant Fund is not the same as the interests of other insurers in relation to the resolution of claims.

The result in this case

[53] The problem thrown up by the facts of the present case necessarily presupposes that a claimant has given notice of a claim to an insurer other than the Nominal Defendant and that that insurer has not complied with s 37(4) of the Act. The real strength of the argument for the respondent is that a claimant who has given notice of claim is left at the mercy of the insurer to whom the notice was given so far as the preservation of the claimant's rights against the Nominal Defendant are concerned. That is said to be harsh on a claimant. There are, in my view, three answers to this concern.

[54] First, it is obviously in the interests of insurers to obey s 37(4) so as to "share the load". It is not surprising that the legislature has proceeded on the assumption that self-interest can be relied upon to ensure that insurers will comply with s 37(4) of the Act.

[55] Secondly, a claimant may satisfy the obligation imposed by s 37(1) by giving a notice of claim directly to the Nominal Defendant. The problem thrown up by the present case is not beyond remedy by claimants themselves once the proper construction of s 37 is made clear. The problem, once identified, is easily solved. If a claimant wishes to proceed against the Nominal Defendant, and does not wish to rely on compliance by other insurers with s 37(4) of the Act, the claimant may give notice under s 37(1) to the Nominal Defendant. Section 37(1) of the Act does not suggest otherwise.

[56] Thirdly, the assumption on which this concern is based can be seen, on closer examination, to be essentially groundless. The concern is that an insurer to whom a notice of claim has been given may, by failing to observe the requirements of s 37(4), prejudice the claimant. But, in a case such as the present, the problem for the claimant arises not because NRMA failed to comply with s 37(4) of the Act, but for the simple reason that the claimant did not intend to bring an action against the Nominal Defendant at the time of giving the notice to NRMA. In such a case as the present, there is unlikely to be any indication in the notice of claim served on an insurer which would lead the insurer to realise that the Nominal Defendant is a co-insurer in respect of the claim of which notice has been given and against whom an action is to be brought.

[57] The provisions of s 37 and s 39 postulate a claim by a claimant as a result of a given motor vehicle accident and an "action to be brought" pursuant to s 52 of the Act lies to enforce that claim against the insurers of the motor vehicles whose operation gave rise to it. The learned primary judge reasoned that if the claim relating to an action to be brought does not include a claim in respect of the negligent operation of an unidentified motor vehicle, then the notice required by s 37(1) was not one which needed to be given to the Nominal Defendant. In my respectful opinion, this

reasoning fails to recognize that if the claim in respect of which the claimant wishes to bring an action - being the claim of which notice is required by s 37(1) - does not include a claim in respect of the operation of an unidentified motor vehicle then there is no claim in respect of an "action to be brought" against the Nominal Defendant. It does not mean that the claimant is exempt from compliance with the Act in relation to that claim when, at some time in the future, the claimant decides to bring an action in respect of it.

[58] When Ms Kumer originally gave notice of her claim to NRMA she had no intention of bringing an action against the Nominal Defendant. Not surprisingly, the Nominal Defendant received no notice from NRMA of a claim Ms Kumer did not seek to bring. The time limit on which any claim against the Nominal Defendant depended passed without notice of a claim against it by Ms Kumer. As a result, Ms Kumer may no longer pursue a claim or an action upon that claim against the Nominal Defendant.

Conclusion

[59] In my opinion, the appeal should be allowed and the orders made at first instance, insofar as they relate to the appellant, should be set aside. The respondent must pay the appellant's costs at first instance and of the appeal to be assessed on the standard basis.

[60] **MULLINS J**: I agree with the orders proposed by Keane JA for the reasons given by his Honour.