DISTRICT COURT OF QUEENSLAND

CITATION:	*Dunbabin v Camilleri* [2021] QDC 9
PARTIES:	**BRIAN DUNBABIN** (applicant) **v** **TED CAMILLERI** (respondent)
FILE NO:	D134/2020
DIVISION:	Civil
PROCEEDING:	Originating Application
ORIGINATING COURT:	Maroochydore District Court
DELIVERED ON:	29 January 2021
DELIVERED AT:	Maroochydore
HEARING DATE:	21 August 2020
JUDGE:	Long SC DCJ
ORDER:	**Application dismissed.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – where the applicant claims to have suffered injury as a result of an assault by the respondent on 21 October 2016 – where the applicant issued a complying notice of claim within the limitation period but had not otherwise completed the pre-litigation procedures under the Personal Injuries Proceedings Act 2002 (Qld) before the limitation period expired – where the applicant applies for leave to commence proceedings even though the limitation period has ended
LEGISLATION:	*District Court of Queensland Act 1967* (Qld), s 68(1)(a) *Limitation of Actions Act 1974* (Qld), s 11 *Personal Injuries Proceedings Act 2002* (Qld), ss 4, 9, 36, 43, 44, 59
CASES:	*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 *Folwell v Mayer* [2020] QSC 162 *Haley & Anor v Roma Town Council* [2005] QCA 3; [2005] 1 Qd R 478 *Kash v SM & TJ Cedergren Builders* [2003] QSC 426; [2004]

1 Qd R 643; [2003] QSC 426

MacDonald v Romijay P/L & Ors [2005] QCA 3 at [48]

Paterson v Leigh & Anor [2008] QSC 277

Ward v Wiltshire Australia Pty Ltd [2008] QCA 93; (2008) 51 MVR 1

Yarwood v State of Queensland [2017] QDC 305

COUNSEL: G Barr for the applicant
P Metzdorf for the respondent

SOLICITORS: Butler McDermott Lawyers for the applicant
Ryan Solicitors & Attorneys for the respondent

Introduction

[1] This is an application brought to allow the applicant to commence a proceeding for compensation for personal injuries due to the assault of the applicant by the respondent on 21 October 2016, despite the passing of the period of limitation in s 11 of the *Limitation of Actions Act 1974* (Qld).

[2] Although the processes required by the *Personal Injuries Proceedings Act 2002* (Qld) ("*PIPA*") have been engaged by the applicant, who has the benefit of a compliant Notice of Claim served within the limitation period, which, it is common ground, relevantly expired on 20 October 2019, the difficulty is that such processes have not been completed and in particular no compulsory conference has occurred as required by s 36 of the *PIPA*.

[3] The application also seeks relief in the form of an order dispensing with the requirement for a compulsory conference, pursuant to s 36(5)(b) of the *PIPA*. Such dispensation may only be granted for "good reason" and is not a necessary condition of any grant of the primary relief sought to enable the applicant's claim to be pursued. That is because, in the event that the applicant is granted relief pursuant to s 59(2) of the *PIPA,* to start it, pursuant to s 59(3), "the proceeding is stayed until the claimant complies with the part or the proceeding otherwise ends". It is only

necessary to consider whether there is good reason to dispense with the compulsory conference, if the applicant effectively obtains leave to proceed by starting the proceeding in this Court.

[4] It may also be noted that there is nothing to suggest that the Court lacks jurisdiction in respect of the application. Although "the court" to which the applications permitted by s 36(5) and s 59(2)(b) may be brought, is not defined in the *PIPA*, these provisions operate in the context of the "pre-court procedures" otherwise set out in part 1 of chapter 2 of the *PIPA* and which are initially engaged pursuant to the requirement in s 9(1), that a claimant give a written Notice of Claim "[b]efore starting at proceeding in a court based on a claim". Therefore, it is sufficient to note that such a proceeding could be commenced in this Court, in accordance with s 68(1)(a) of the *District Court of Queensland Act 1967* (Qld), in circumstances where there is nothing to suggest that the amount which may be sought to be recovered by way of damages would exceed the monetary limit.

[5] By way of brief overview, the claim arises out of an altercation between the applicant and respondent, who are neighbours at Ocean Crest Place, Alexandra Headland and respectively aged 67 and 68 years, on 21 October 2016. That altercation was precipitated by an incident when each was driving a motor vehicle in their street of residence when, as described in the applicant's Notice of Claim:

> "The Claimant spat out of the window of his car and the Respondent assumed it was aimed at him and proceeded to follow and overtake the complainant's car, causing the complainant to stop."[1]

The applicant suffered fractures to his right arm, when, as claimed, and after the respondent had struck the applicant whilst he remained in the driver's seat of his car, he also kicked the car door so that it forcibly closed onto the applicant's right arm.[2] The respondent has pleaded guilty and been dealt with for an offence arising out of these circumstances, on 2 November 2017. And it is noted that the applicant has received the sum of $3,500 through the Victim Assist Scheme.[3] However, the applicant has provided evidence of medical assessments of his whole person impairment of five percent by an orthopedic surgeon,[4] and six percent by a consultant psychiatrist.[5] The claimant also indicates a claim for economic loss of no less than $52,150.00.[6]

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1 Affidavit of B Dunbabin, filed 4/8/20, at BD-4, p 10.
2 Ibid at [6].
3 Ibid at BD-4, p 35.
4 Ibid at BD-7, p 50 by Dr Bell.

Leave to proceed

[6] Accordingly, the applicant seeks to engage s 59(2)(b) of the *PIPA*, which, as has been recognised, permits the court to extend the limitation period and deprive the respondent of his defence under the *Limitations of Actions Act 1974* (Qld).[7]

[7] By reference to the decision in *Patterson v Leigh & Anor,*[8] as also noted in *Folwell v Mayer*[9], the applicant notes the following factors as being relevant to the exercise of the discretion:

(a) The discretion is unfettered;

(b) There is onus on an applicant to show good reason why the discretion ought to be exercised in his favour;

(c) Whilst not a "dominating nor necessary consideration" a demonstration of delay due to a conscientious effort of an applicant to comply with the pre-litigation procedures under the Act normally points towards there being good reason for favourable exercise of the discretion. Conversely, circumstances indicating that the obligations were ignored or a lack of conscientious effort to comply with them may indicate difficulty in obtaining a favourable exercise of the discretion;

(d) Delay by an applicant in compliance with the requirements of the Act or in applying for an extension of time will be relevant, as will the length of any delay and potential prejudice to the position of a respondent;

(e) An important consideration is that the application seeks to deprive a defendant of the complete defence afforded by the statutory time bar; and

(f) The overriding consideration is in the interests of justice and an important consideration may be whether a fair trial of the proceeding is unlikely. Related considerations will involve the giving of any notice before the expiry of the limitation period and the extent of compliance by the applicant with the

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5 Ibid at BD-8, p 79 by Dr Garg.
6 Ibid at BD-4, p 34.
7 See: *Kash v SM & TJ Cedergren Builders and Ors* [2004] 1 Qd R 643 at [15] and [20].
8 [2008] QSC 277.
9 [2020] QSC 162 at [4].

provision of the Act in providing information sought by an insurer or respondent.

[8] The applicant contends that there are three principle reasons why he should have the relief he seeks:

(a) First, in that the delays in his compliance with his obligations pursuant to the *PIPA* are adequately explained by the demonstration of a conscientious effort to comply with the pre-litigation procedures;

(b) Secondly, in that the delay and circumstances are not substantially different to that in *Folwell v Mayer*,[10] where similar relief was granted in the Supreme Court; and

(c) Thirdly, in that no prejudice is demonstrated to the respondent, in particular, having regard to the respondent's guilty plea to a criminal charge of assault occasioning bodily harm of the applicant and that he has now had the Notice of Claim for compensation for his injuries occasioned by that assault, since June 2018.

A substantial contention is that it is the respondent who has ignored correspondence, and chosen not to take opportunities afforded to him under the *PIPA* to arrange independent medical examination despite invitations to do so. Further, it is contended that there is no hindrance to a fair trial of the matter in circumstances where medical records relating to the applicant's treatment have been produced and there is no suggestion that there were witnesses to the incident or that evidence is no longer available.

[9] For the respondent, reference is made to the adoption of the list of relevant factors or considerations, identified in *Patterson v Leigh & Anor*,[11] and in the dismissal of what is described as a "similar application" in *Yarwood v State of Queensland*.[12] Particular emphasis is essentially placed upon the considerations as to:

(a) The importance of depriving the respondent of the defence provided by the statutory time bar;

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10 [2020] QSC 162.
11 [2008] QSC 277 at [8].
12 [2017] QDC 305.

(b) Whether there is good reason for an exercise of the unfettered discretion. in favour of the applicant pursuant to s 59(2)(b) of the *PIPA*; and

(c) Whether it is appropriate to find that the delay in compliance with the pre-court procedures has been occasioned by "a conscientious effort to comply", as opposed to the contention that:

> "The applicant's claim has been characterised by failure in respect of the timely execution of the procedures provided for in the Act. The dilatory conduct of the applicant and his representatives is solely responsible for the failures."; and

(d) The overriding consideration as to the interest of justice being facilitated by bringing to finality any litigation between these neighbours and the anxiety and concern which has been occasioned to the respondent, in circumstances where the applicant may now have an ability to recover from an insurer, due to the conduct of his legal representatives.

[10] It is effectively further contended that the applicable considerations are to be taken into account in the following context:

(a) That a purpose of the pre-court requirements of the *PIPA* is to facilitate timely and cost effective resolution of these matters without resort to court based litigation;[13] and

(b) The absence of an insurer as a party to the claim against the respondent and therefore in protection of the potential liability of an impecunious respondent, who has been diagnosed with very limited life expectancy and who due to such impecuniosity, has been dealing with the *PIPA* procedures with only limited legal assistance.[14]

Discussion

[11] Notably, the prospect of an alternative cause of action in respect of any such failure, is not noted as a potentially relevant factor amongst those identified in *Patterson v Leigh & Anor*.[15] However, that list did note, what was identified in the context of

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13 See s 4 of the *PIPA*.

14 See affidavit of T Camelleri, filed 21/8/20. Although, it must be observed that these matters are only deposed most generally and for example, in respect of impecuniosity: "My financial situation does not allow me to readily meet the costs of this litigation. In the event I am ordered to pay compensation I will be unable to meet that expense."

15 [2008] QSC 277 at [8].

dealing with an equivalent provision in s 57(2)(b) of the *Motor Accident Insurance Act 1994* (Qld), as the potential relevance of the provision of notice to an insurer, pursuant to the Notice of Claim and consequential procedures.

[12] In circumstances where s 43 and s 44 of the *PIPA* allow for the protection of an applicant's right to commence proceedings prior to the expiration of the limitation period, it may be expected, that it will be a common feature of applications made pursuant to s 59(1)(b) and which may be expected to be brought after such expiry,[16] that such relief is sought, as it is here, in circumstances where the limitation period has been allowed to pass, without action being taken to protect an applicant's interests. Otherwise and where such application may be brought before such expiry, such consideration does not arise. It is therefore not surprising that the review of authority undertaken in *Patterson v Leigh & Anor*, did not separately identify the prospect of the potential liability being directed at a different insurer and not one engaged by the pre-court procedures, as a separate relevant factor.

[13] As noted in *Folwell v Mayer*,[17] the intent of s 59 and effect of orders made pursuant to it, were noted in *Kash v SM & TJ Cedergren Builders & Ors*, as:

> "The evident intent of s 59 is to permit, in some cases, an extension of the period of limitation because the defendant has had the benefit of a complying Notice of Claim within the limitation period."[18]

And

> "… the effect of the order is to permit the proceeding to be commenced out of time and to deprive the defendant of the limitation period defence.
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> The potential unfairness to a defendant, in a particular case, from an order extending time could be greater where the order is made after the expiry of the period, if a defendant has by then in some way relied upon that expiry to its detriment. That is a consideration which would affect the exercise of the discretion under s 59, but it does not require the section to be interpreted as precluding an order beyond the limitation period in every case."

[14] Accordingly, it is not a matter of attempting to assess or perhaps speculate as to the relative prospects of success in prosecution of any claim based upon fault of a

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16 Cf: Haley & Anor v Roma Town Council; McDonald v Romijay P/L & Ors [2005] 1 Qd R 478 at [30]-[31] and [47]-[49].
17 [2020] QSC 162 at [3].
18 [2004] 1 Qd R 643 at [15].

solicitor in allowing the limitation period to expire, but rather in understanding that absence of the involvement of an insurer for the respondent, serves to underscore the weight to be placed upon the consideration that allowance of the application will be to deprive the respondent of the complete defence provided by the statutory time bar and the policy underlying such legislation.

[15] Neither is the assistance to be obtained from the decision in *Folwell v Mayer*[19], to be drawn from reference to the outcome and/or any sense of similarity of the circumstances and extent of delays in compliance with the pre-court procedures and in bringing the application for relief. First, the notified claim in that case was for negligent provision of chiropractic treatment and there is nothing in the reasoning to suggest that the respondent was uninsured. Although, there was specific notation of the difficulty in avoiding "the inference that the applicant's solicitor did not realise in May 2019 that the limitation period had expired".[20] Secondly, such assistance will be gained in an understanding of the application of principles in that decision, which included that:

(a) the absence of conscientious efforts of the applicant to comply with the *PIPA* requirements does not prevent a favourable exercise of discretion;[21]

(b) the giving of the Notice of Claim and related disclosure, as required by the Act, serves what may be thought to be "the main purposes" of the limitation period.[22] Although and in the authority directly cited: *Kash v SM & TJ Cedergren Builders & Ors*,[23] the conclusion was expressed, by McMurdo J, in terms that:

> "To a large extent the purposes of a period of limitation might be thought to be served by the giving of a compliant Notice of Claim."
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> It may also be noted that further reference is made to *Haley & Anor v Roma Town Council; MacDonald v Romijay P/L & Ors*,[24] where the observations of Jerrard JA were directed at noting that the usual position of a respondent being

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19 [2020] QSC 162.
20 Ibid at [18].
21 Ibid at [43] – [44] and the cases therein cited.
22 Ibid at [45].
23 [2003] QSC 426 at [16].
24 [2005] QCA 3 at [48].

provided with extensive information within the limitation period, satisfying the main purpose of the *PIPA*, as sought to be achieved by s 4 and identified as being "to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury". Further and in respect of the reference to *Ward v Wiltshire Australia Pty Ltd*,[25] the view expressed by Fraser JA as to the discretion permitted by the equivalent provision in the *Motor Accident Insurance Act 1994* (Qld) was (relevantly) that:

> "[69] Compliance by a claimant with those provisions is apt also to ameliorate prejudice that otherwise might flow from an extension of the limitation period under s 57(2)(b). Section 57 provides that the fact that such a notice of claim has been given before expiry of the limitation period is a basis upon which a claimant may rely to justify suing after expiry of the limitation period. Whilst the strength of this consideration as a discretionary factor might vary from case to case, it is plainly one of the relevant considerations in favour of the exercise of the discretion to extend time ….
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> [70] To elevate any one such consideration to a position of decisive importance in all cases would be to confine the discretion. A remedial discretion conferred in general terms upon a court it is not readily to be confined by the implication of a limitation not expressed in the grant of the discretion: …." [citations omitted]

(c) The potential significance of the absence of any identified specific prejudice to a respondent and the limitations as to the reliance upon the possible prejudice that may be attributed to the passage of time generally, as particularly noted by McHugh J in *Brisbane South Regional Health Authority v Taylor.*[26] Specific reference is made to the observations of McMeekin J in *Paterson v Leigh*,[27] in reference to the discussion in the *Brisbane South Regional Health Authority* decision of "the general prejudice" that delay brings and its affect upon the accuracy of memories of witnesses, as being prejudice which "of course affects both sides and it is the applicant who will bear the onus of proof on all

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25 [2008] QCA 93 at [69]–[70].
26 (1996) 186 CLR 541 at 551 and ff.
27 [2008] QSC 277 at [43].

significant issues".[28] By way of contrast, the respondent points to the observations of McMurdo P in *Haley & Anor v Roma Town Council*; *MacDonald v Romijay P/L & Ors*:[29]

> "In exercising that discretion a court must be cognisant of the purpose of the Act and of the general considerations apposite to any extension of the limitation period as discussed by McHugh J in *Brisbane South Regional Health Authority v Taylor.*"; and

(d) The ultimate conclusion that:[30]

> "It must be accepted that to grant the application does deprive the respondent of a defence under the Limitation of Actions Act. But in circumstances where, notwithstanding the delay, there is otherwise no clear prejudice to the respondent, and there can be a fair trial, in my view the interests of justice favour exercising the discretion to grant the application to alter the limitation period under s 59."

[16] The present circumstances are also such that it should not be concluded that there has been an, at least wholly, conscientious effort to comply with the *PIPA* requirements, on the part of the applicant. The applicant seeks to attribute the blame for delays in completion of the pre-court procedures on the respondent and seeks a finding as to his conscientious efforts to comply with those procedures by particular reference to the following considerations:

(a) that the applicant first consulted a solicitor on 4 September 2017 and was appropriately advised to first await the outcome of the criminal proceeding on 2 November 2017.

(b) the applicant executed a Notice of Claim – Part 1 on 9 January 2018 and relied upon his solicitors to serve this upon the respondent. After some inability to effect personal service, this was done by express post, sent on 25 June 2018 and after further correspondence, there was a response by solicitors engaged to act for the respondent, dated 3 August 2018.

(c) it is pointed out that due to the absence of response within one month, pursuant to s 12 of the *PIPA*, a conclusive presumption arose pursuant to

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28 [2020] QSC 162 at [46].
29 [2005] QCA 3 at [30], with whom Jerrard JA generally agreed, at [38], and Mullins J wholly agreed at [55].
30 [2020] QSC 162 at [49].

s 13 that the applicant's Notice of Claim was a complying Part Notice of Claim.[31] It is also noted that by correspondence dated 15 August 2018, the respondent's solicitors advised that the respondent "is the proper respondent".[32]

(d) on 3 December 2018, the applicant's solicitors wrote to note that a response as to liability, pursuant to s 20 of the *PIPA*, was due by 26 January 2019 and also requested disclosure of any relevant material.[33] By letter dated 17 January 2019, the respondent's solicitors advised that liability was denied "in full" and issue was then raised as to the failure of the applicant to provide Part 2 of his Notice of Claim, by 15 October 2018.[34] Although this was noted in the context of an expressed view that such failure of compliance with the *PIPA*, led to belief that the matter was finalised, the incorrectness of this belief was pointed out in correspondence dated 18 January 2019 from the applicant's solicitors, which also contended that there had been a failure of the respondent to comply with disclosure obligations pursuant to the *PIPA*.[35]

(e) Part 2 of the Notice of Claim was provided under cover of correspondence dated 4 September 2019, which also enclosed "all taxation documents in our possession".[36] Prior to then, there had been disclosure of Centrelink and Medicare documents.[37] Subsequently, in September 2019, further disclosure of hospital records was made for the applicant.[38]

(f) by email dated 2 October 2019, the respondent's solicitors were advised of appointments for assessment of the applicant by Dr Bell on 26 November 2019 and Dr Garg on 2 December 2019, and a request was made for the respondent to submit "panels of experts if you require examinations, as soon as possible".[39]

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31 See affidavit of P G Boyce, filed 4/8/20, at [9] and PGB – 2.
32 Ibid at [11(a)] and PGB – 4.
33 Ibid at [11(b)] and PGB – 5.
34 Ibid at [11(c)] and PGB – 6.
35 Ibid at [11(d)] and PGB – 7.
36 Ibid at [11(g)] and PGB – 10.
37 Ibid at [11(e)] and PGB – 8.
38 Ibid at [11(h) – (j)] and PGB – 11 to PGB – 13.
39 Ibid at [11(k)] and PGB – 14.

(g) by email dated 9 October 2019 the applicant disclosed further medical records.[40]

[17] As is pointed out for the respondent, the limitation period expired on or about 21 October 2019 and the evidence as to the next step taken after 9 October 2019, is that by letter dated 17 December 2019 and referring to the correspondence dated 9 October 2019, there was a request made of the solicitors who had been previously engaged for the respondent, to provide contact details for him.[41] However and despite that invitation being rejected,[42] the applicant's solicitors wrote directly to the respondent at his residential address, by letter dated 19 December 2019, enclosing the reports of Drs Bell and Garg and requesting a response in respect of any request he had for medical assessment of the applicant. It was further indicated that failure to respond by 10 January 2020 would lead to the matter being progressed to a compulsory conference.[43] Subsequently and without any response being received from the respondent to any of this correspondence, further letters dated 20 January 2020 and 19 February 2020, were sent seeking notification of availability for a compulsory conference and the prospect of an application pursuant to s 36(5) of the *PIPA*.[44]

[18] In this context, the applicant seeks to emphasise:

(a) the giving of a compliant Notice of Claim in June 2018, with the subsequent provision of Part 2 of that notice.

(b) that from the applicant's perspective, there has been requisite disclosure and the obtaining of medical assessment; and

(c) that the only obstacle to the compulsory conference has been the lack of preparedness of the respondent to engage, particularly after terminating his instructions to his former lawyers, including in respect of the opportunity for independent medical assessment of the applicant.[45]

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40 Ibid at [11(k) – (m)] and PGB – 15 and PGB – 16.
41 Ibid at [12] and PGB – 17.
42 Ibid at [12] and PGB – 18.
43 Ibid at [13] and PGB – 19.
44 Ibid at [14] – [16] and PGB – 20 and PGB 21.
45 Affidavit of P G Boyce, filed 4/8/20, at [17].

[19] On the other hand and for the respondent it is contended, with some degree of justification, that the applicant's claim has been characterised by the absence of timely execution of the requisite procedures, or at least, that there have been significant delays for which there is no explanation or no adequate explanation in the material. In particular, it is pointed out that:

(a) the Notice of Claim – Part 1 was executed "three months late (09.01.2019) and served nearly 10 months late (25.06.2018)";

(b) Part 2 of the Notice of Claim was not served until 4 September 2019 and only after correspondence from the respondent's solicitors drew attention to the omission. This is noted to be very late, in circumstances where pursuant to s 9(3)(A) of the *PIPA* it was required within two months of the determination of the compliant provision of Part 1 of the notice; and

(c) the medical assessments of the applicant and request for compulsory conference did not occur until after the expiry of the limitation period.

[20] In respect of the first contention, it is to be noted that this appears to proceed on the basis of a focus upon the requirements of s 9(3)(b) of the *PIPA* and therefore the point at which the material evidences the applicant first instructing a law practice to act on his behalf in seeking damages for his personal injury. However, it is to be noted that that is not the primary consideration in s 9(3), which in fact draws attention to the earlier occurrence of the event nine months after the day of the incident giving rise to the personal injury. However and in the circumstances where consistently with the effective acknowledgement by the respondent's solicitors of the compliance of Part 1 of the Notice of Claim and the express concession on this application that such a compliant Part 1 Notice of Claim was served on the respondent,[46] nothing would appear to turn on this as far as this application is concerned. The inference to be drawn is that despite the fact that no such explanation appears in the material in the Notice of Claim so served or otherwise, that s 9(5) of the *PIPA* is regarded as being engaged, in the sense that the applicant has a reasonable excuse for that delay.[47]

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46 Respondent's written submissions, filed 21 August 2020, at p 2.

47 Accordingly, no issue such as primarily arose in *Connolly v Bellette* [2019] QDC 38, arises for determination in this application.

[21] Nevertheless, it is correctly noted for the respondent that by the time that this application was filed, a period of three years and ten months had passed since the incident whereby the applicant was occasioned with injury. It is also to be noted that in the context of the effluxion of time which occurred in the handling of the applicant's claim, the material placed before the Court does not include any reference to any consideration of the bringing of an application pursuant to s 43 of the *PIPA*. It might have been expected that if not before then, the indication, given on 9 October 2019 that the respondent had disengaged from his solicitors, would reasonably have alerted the necessity to do something to protect the applicant's interests. Otherwise and as the applicant explains, it was in June 2020 that he received advice from his solicitors that he should obtain independent legal advice and that following that and on 22 July 2020, he provided his solicitors with instructions to proceed with this application.[48]

[22] Whilst it is correctly pointed out for the applicant that, on the material, there is an absence of demonstration of specific prejudice to the respondent, nor any hindrance to the prospect of a fair trial of the claim made against him and that medical records in relation to the treatment and assessment of the applicant have been disclosed and that he has the benefit of the evidence of the respondent's guilty plea to the criminal offence, these are not the only considerations.

[23] It is also necessary to note that primarily the responsibility for progress of the pre-court procedures rests with a claimant. Also of some particular importance here is the position of the uninsured respondent. Whilst the respondent was, of course, required to comply with the obligations imposed upon him under the *PIPA*, perhaps with the exception of disclosure,[49] it may be seen that he largely responded to those obligations, through his solicitors, prior to the expiry of the limitation period and it is only after that point when it is contended that the respondent has ignored the correspondence. As has been noted, the applicant claims both the benefit of the effect of s 13 of the *PIPA* but also had the benefit of the effective acknowledgment of a compliant Part 1 of the Notice of Claim at about 15 August 2018 and therefore more than 14 months before the expiry of the limitation period. There is no requirement that a respondent must arrange for medical assessment of a claimant.

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48 Affidavit of B Dunbabin, filed 48/20, at [26] – [27].

49 Although it is far from clear that there was anything which was disclosable by the respondent pursuant to s 27 of the *PIPA.*

Moreover and whilst these provisions did apply to the respondent, his position is not informed by the main purpose set out in s 4 of the *PIPA* in the same way as that of an insured respondent.

[24] On the other hand, what can be observed in the broader context of the absence of attention to the protection of the applicant's interest, is also an absence of satisfactory explanation for the languidness of the progress of the claim through the requisite procedures. It is not a question of the appropriateness of obtaining the materials, including the medical assessments, before the compulsory conference, but rather the absence of any particularly satisfactory explanation as to why the procedures were not more promptly completed, even in the period of almost two years after the completion of the criminal proceedings and before the expiry of the limitation period. In short the circumstances do not permit of a positive finding that the applicant's position in seeking a remedy is characterised by a conscientious effort to comply with the *PIPA* requirements, particular as they are contemplated to occur so as to effect speedy resolution of claims by promoting early settlement of them.

[25] The remedy sought by the applicant is to effectively deny the respondent his otherwise accrued entitlement to rely on a limitation of action defence. This, in the circumstances, is an important and weighty consideration. As was recognised in the *Brisbane South Regional Health Authority* decision, identification of additional and actual prejudice to a respondent's position due to the effluxion of time, will usually be an influential matter in denying relief sought by an applicant.[50] More fundamentally, each of the majority judgements noted the onus upon such an applicant to establish that the justice of the case requires the reasonable exercise of discretion and necessity in doing so to prove that such an extension would not result in significant prejudice to a prospective defendant. However and as further explained by McHugh J,[51] such an exercise of discretion is to be exercised in the context of the policy or factors which motivate the legislation of limitation periods. His Honour identified that "the effect of delay on the quality of justice is one of the most important influences but not the only one. He further identified the perception of four broad rationales, being:

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50 (1996) 186 CLR 541.

51 with whom Dawson J, expressly agreed: Ibid at 544.

1. the likely loss of evidence as time goes by;

2. the sense of oppression of a defendant in allowing an action to be brought long after the circumstances giving rise to it;

3. the desirability of persons being able to arrange their affairs and utilise their resources on the basis that claims may no longer be made; and

4. that the public interest requires that disputes be settled as quickly as possible.

His Honour then observed as to the significance of the enactment of a limitation period:[52]

> "In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case. The purpose of a provision such as s 31 is "to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced." … But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension." [citation omitted]

[52] Ibid at 553 – 554.

[26] As has been noted, the absence of a finding for the applicant of his position being supported by conscientious effort to comply with the pre-court procedures, is not necessarily fatal to his application. Neither is it now a matter of speculating as to the prospects of the applicant potentially having a new cause of action because of the fault of his legal representatives and which, in this application, he must accept. But neither is that prospect to be ignored in understanding the position of the applicant and the contrasting position of the respondent, in circumstances where there is the sense of presumptive prejudice which may identified as influencing the legislative time limitation and perhaps more readily in respect of issues relevant to quantum rather than liability, as opposed to any identified actual prejudice. In circumstances where prior to expiry of the limitation period there is no significant delay attributable to the respondent in respect of the completion of the pre-court procedures and where he is uninsured for the potential liability which the applicant seeks to re-engage, the importance of his present ability to rely on the limitation of action defence, looms large. In these circumstances and despite the competing circumstances, it should not be concluded that the applicant has demonstrated that there is good reason, or that the interests of justice require that an extension of the limitation period be granted, so as to obviate the respondent's defence or bar to action against him.

Conclusion

[27] Accordingly, there is no necessity to deal with the application to the extent that dispensation of the compulsory conference is sought. The order is that the application filed 4 August 2020, is dismissed.