SUPREME COURT OF QUEENSLAND

CITATION:	*Folwell v Mayer* [2020] QSC 162
PARTIES:	**DONNA LEE FOLWELL** (Applicant) **v** **JENNIFER MAYER TRADING AS DISCOVERY CHIROPRACTIC** (Respondent)
FILE NO/S:	BS No 13682 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	8 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2020
JUDGE:	Bowskill J
ORDERS:	**An order will be made under ss 59(1) and 59(2)(b) of the *Personal Injuries Proceedings Act* 2002, giving the applicant leave to start a proceeding even though the period of limitation has ended, subject to hearing from the parties as to the precise form of order.** **The Court directs that:** **1. The applicant file and serve submissions as to costs within seven days, addressing the matters in paragraph [51] of the judgment.** **2. The respondent file and serve submissions as to costs in reply (if required) within 14 days.** **The issue of costs will be dealt with on the papers following receipt of the submissions, unless either party requests an oral hearing.**
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 chiropractic treatment in October 2015 – 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 *Personal Injuries Proceedings Act* 2002 (Qld), s 59

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541

Cottle v Smith [2008] QCA 244

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

Morrison-Gardiner v Car Choice Pty Ltd [2004] QCA 480; [2005] 1 Qd R 378

Paterson v Leigh & Anor [2008] QSC 277

Singh v Hill [2019] QCA 227

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

Winters v Doyle [2006] 2 Qd R 285

COUNSEL:	R D Green for the applicant P Hackett for the respondent
SOLICITORS:	CMC Lawyers for the applicant Meridian Lawyers for the respondent

[1] The applicant wishes to commence proceedings against the respondent to recover damages for personal injuries she claims to have suffered as a result of chiropractic treatment, involving manipulation of her neck, on 4 October 2015. She gave the respondent notice of the claim under s 9 of the *Personal Injuries Proceedings Act* 2002 (Qld) (**PIPA**) within the limitation period, but did not commence proceedings before the limitation period expired. The applicant applies, under s 59(2)(b) of the PIPA, for an order altering the limitation period and permitting her to commence proceedings within 60 days after the earlier of:

(a) a compulsory conference held in accordance with s 36 of the PIPA and mandatory final offers exchanged in accordance with s 39 of the PIPA; or

(b) the parties agreeing to dispense with the compulsory conference pursuant to s 36(4) of the PIPA; or

(c) the court making an order to dispense with the compulsory conference pursuant to s 36(5)(b) of the PIPA.

[2] Section 59 of the PIPA provides as follows:

> "**59 Alteration of period of limitation**
>
> (1) If a complying part 1 notice of claim is given before the end of the period of limitation applying to the claim, the claimant may start a proceeding in a court based on the claim even though the period of limitation has ended.
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> (2) However, the proceeding may be started after the end of the period of limitation only if it is started within —

(a) 6 months after the complying part 1 notice is given or leave to start the proceeding is granted; or

(b) a longer period allowed by the court.

(3) Also, if a proceeding is started under subsection (2) without the claimant having complied with part 1, the proceeding is stayed until the claimant complies with the part or the proceeding otherwise ends.

(4) If a period of limitation is extended under the *Limitation of Actions Act 1974*, part 3, this section applies to the period of limitation as extended under that part."

[3] At the hearing of the application counsel for the applicant submitted it may be possible to construe s 59 in such a way that it does not extend the limitation period, and that the order sought could be made without prejudice to the respondent's ability to plead a limitation defence.[1] However, it is quite clear that this is not correct as a matter of law. The effect of s 59 is accurately stated in the heading of the section: *alteration* of period of limitation. It is a provision which permits the limitation period to be extended.[2] As McMurdo J (as his Honour then was) said in *Kash v SM & TJ Cedergren Builders & Ors* [2004] 1 Qd R 643:

> "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." (at [15])
>
> and
>
> "… the effect of the order [under s 59] is to permit the proceeding to be commenced out of time and to deprive the defendant of the limitation period defence." (at [20])

[4] The decision of McMeekin J in *Paterson v Leigh & Anor* [2008] QSC 277, in relation to the equivalent s 57 of the *Motor Accident Insurance Act* 1994, contains a helpful summary of the relevant principles which apply to the exercise of the discretion on an application such as this:

> "(a) The discretion to be exercised in respect of an application pursuant to [s 59(2)(b) of the PIPA] is unfettered;
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> (b) The onus lies on the applicant to show good reason why the discretion ought to be exercised in his or her favour;

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1 See [15] of the applicant's submissions.

2 See, for example, *Kash v SM & TJ Cedergren Builders & Ors* [2003] QSC 426; [2004] 1 Qd R 643 at [14], [15], [20], [24]-[25] per McMurdo J (as his Honour then was); *Morrison-Gardiner v Car Choice Pty Ltd* [2004] QCA 480; [2005] 1 Qd R 378 at [12] per McMurdo P, at [29] per Williams JA, and at [82], [88]-[89] per Chesterman J (in relation to the equivalent provision, s 57 of the *Motor Accident Insurance Act* 1994 (Qld)); *Haley v Roma Town Council* [2005] QCA 3; [2005] 1 Qd R 478 at [27], [29] and [30] per McMurdo P, Jerrard JA and Mullins J (as her Honour then was) agreeing; also per Jerrard JA at [48]; *Singh v Hill* [2019] QCA 227 at [52] per Flanagan J, Sofronoff P and Gotterson JA agreeing (also in relation to s 57 of the *Motor Accident Insurance Act*).

(c) Where an applicant is able to show that the delay which has occurred was occasioned by a 'conscientious effort to comply' with the Act then that would normally be good reason for the favourable exercise of the discretion but is not a 'dominating consideration'. Conversely, claimants who ignore the obligations imposed on them by the Act or who make no conscientious effort to comply with them may have difficulty obtaining a favourable exercise of the discretion;

(d) Where an applicant is not able to show that the delay was occasioned by 'a conscientious effort to comply' with the Act that is not fatal to the application;

(e) Any delay on the part of a claimant in complying with the Act's requirements or in applying for an extension of time will be relevant to the exercise of the discretion;

(f) The length of any delay is important and possible prejudice to the defendant is relevant;

(h) Depriving a defendant of the complete defence afforded by the statutory time bar is an important matter;

(i) The interests of justice are of course the overriding consideration and in that regard the question of whether a fair trial of the proceedings is unlikely is an important consideration;

(j) The giving of a notice of claim before the expiry of the limitation period and compliance by a claimant with the provisions of the Act that it provide any information sought by the insurer are both relevant factors."[3]

[5] The respondent opposes the application on the basis that the applicant has failed to adequately explain the delay which led to the limitation period expiring; the applicant cannot show that the delays were occasioned by a conscientious effort to comply with the pre-court procedures under the PIPA; there is potential prejudice to the defendant; and to allow the application would deprive the respondent of a complete defence under the *Limitation of Actions Act* 1974 (Qld).

Factual circumstances

[6] The applicant saw the respondent for chiropractic treatment on her hip on 4 October 2015. She claims that during this consultation the respondent performed a manipulation on her neck and that immediately after this manipulation was performed she experienced severe head pain. This severe head pain, and also neck pain, continued up to and including 8 October 2015, when she went back to see the respondent again. She says the respondent told her not to worry, and began performing more chiropractic treatment on her, which did not help.[4] The applicant says she was unable to return to work, and in fact has never returned to work since the first

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3 *Paterson v Leigh & Anor* [2008] QSC 277 at [8]; references omitted. Recently referred to with approval in *Singh v Hill* [2019] QCA 227 at [55] per Flanagan J, Sofronoff P and Gotterson JA agreeing.

4 Folwell (CFI 10) at [6]-[12].

manipulation. The applicant says she did go to see her GP, who referred her to an orthopaedic surgeon, who in turn referred her to a spine and neurosurgeon.[5] The applicant says that by about March 2016 she realised she would not be able to go back to work any time soon, as she was in too much pain, and started to turn her mind to making some sort of claim.[6]

[7] The applicant first consulted her solicitor on 12 April 2016.

[8] On 3 May 2016 the applicant's solicitor (CMC Lawyers) served an "initial notice" under s 9A of the PIPA on the respondent.[7] They were advised by the respondent's solicitor that was incorrect, as the respondent is not a doctor.[8]

[9] On 7 June 2016 the applicant's solicitor served a notice of claim under s 9 of the PIPA on the respondent's solicitor.[9] By letter dated 29 June 2016, the respondent's solicitor identified some deficiencies in the notice of claim,[10] and an amended notice was then served on 19 July 2016.[11]

[10] The applicant's notice of claim was consequently served outside the time prescribed under s 9(3) (which requires the notice to be given by the earlier of nine months after the day of the relevant incident, or one month after the claimant first instructs a lawyer about making a claim); but as the Act makes clear, this does not necessarily affect the subsequent progress of a claim.

[11] In October and November 2016 the respondent's solicitor disclosed copies of various documents to the applicant's solicitor, including the respondent's clinical records in relation to the applicant.[12]

[12] On 1 December 2016 the respondent's solicitor wrote to the applicant's solicitor, chasing the part 2 notice of claim, which had not yet been served.[13] The applicant's solicitor responded by letter dated 3 January 2017, saying that the part 2 notice of claim would be "provided shortly" and complaining that the respondent's delay in providing a copy of her clinical records had "restricted our ability to evidence our client's claim prior to the receipt of same".[14] On 24 January 2017 the respondent's solicitor responded, by referring to the letter of 16 November 2016 enclosing those clinical records.[15]

[13] On 3 January 2017 the applicant's solicitor wrote to Mr Bruce Watts, a chiropractor, asking him to "prepare a report in relation to the circumstances of our client's

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5 Folwell (CFI 10) at [14]-[20].
6 Folwell (CFI 10) at [22].
7 Exhibit TSW1 to Ms Wills' affidavit (CFI 2); Mr Chandra's affidavit (CFI 4) at p 8 of the exhibits.
8 Section 9A(1) provides that s 9A applies to a claim based on a "medical incident". The term "medical incident" is defined in s 9A(14) to mean "an accident, or other act, omission or circumstance involving a doctor happening during the provision of medical services". Chandra (CFI 4) at p 11 of the exhibits.
9 Exhibit TSW4 to Wills (CFI 2).
10 Exhibit TSW5 to Wills (CFI 2)
11 Exhibit TSW7 to Wills (CFI 2).
12 Exhibit TSW10 to Wills (CFI 2); Chandra (CFI 4) at pp 18-20 of the exhibits.
13 Chandra (CFI 4) at p 23 of the exhibits.
14 Chandra (CFI 4) at p 25 of the exhibits.
15 Chandra (CFI 4) at p 28 of the exhibits (noting that the letter is incorrectly dated 24 January 2016; but must in context have been dated 24 January 2017).

incident".[16] As Ms Wills says in her affidavit (CFI 2) at [17] the applicant's solicitor "wrote to Mr Bruce Watts, Chiropractic Expert, requesting his expert opinion in relation to liability in this matter". The request seems to have been made on the (continuing) misunderstanding that s 9A applied (despite the earlier correspondence from the respondent's solicitor pointing out that it did not, as the respondent is not a doctor). The letter of instructions to Mr Watts makes specific reference to the requirement under s 9A(9) that a claimant must, as part of giving a complying part 1 notice of claim, give a written report from a medical specialist, competent to assess the medical incident alleged to have given rise to the personal injury, stating, in the medical specialist's opinion –

(i) that there was a failure to meet an appropriate standard of care in providing medical services; and

(ii) the reasons justifying the opinion; and

(iii) that as a result of the failure, the claimant suffered personal injury.

[14] In February and March 2017, there was further correspondence between the solicitors, in relation to disclosure of various information.

[15] On 24 March 2017 the respondent's solicitor wrote to the applicant's solicitor, giving notice under s 20 of the PIPA that the respondent denied liability for the applicant's claim.[17] A few days later, on 27 March 2017, the respondent's solicitor again chased up the part 2 notice of claim.[18]

[16] There was further correspondence from the respondent's solicitor to the applicant's solicitor in April and May 2017, and then a further prompt for the part 2 notice of claim on 19 May 2017.[19] It seems the applicant's solicitor did not respond to these letters.

[17] On 7 November 2017 the respondent's solicitor sent another letter to the applicant's solicitor, chasing the part 2 notice of claim and requesting a response to earlier correspondence asking whether the applicant was to undergo independent medical examinations.[20] A further letter was sent on 30 April 2018, noting the applicant's solicitor's failure to respond.[21]

[18] There was a delay in obtaining the report from Mr Watts,[22] which was not provided until March 2018. This was due, in part at least, to a delay on the part of the applicant's solicitor paying an invoice from Mr Watts.[23] The delay is also said to be due to Mr Watts requesting, in October 2017, that the applicant undergo a cervical angiogram and brain scan; and the applicant not being able to do that until January 2018, because she required a referral from a specialist.[24] Although the applicant did not

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16 Exhibit TSW11 to Wills (CFI 2).
17 Chandra (CFI 4) at p 34 of the exhibits.
18 Chandra (CFI 4) at p 35 of the exhibits.
19 Chandra (CFI 4) at p 41 of the exhibits.
20 Chandra (CFI 4) at p 45 of the exhibits.
21 Chandra (CFI 4) at p 48 of the exhibits.
22 Wills (CFI 2) at [19]-[27].
23 Wills (CFI 8) at [18]-[20].
24 The reasons for this delay are further explained in Wills (CFI 6) and Wills (CFI 8) at [30]-[34]; see also Folwell at [34]-[39].

then provide the results of the scans to her solicitor until mid-March 2018, by which time Mr Watts had already been asked to finalise his report without them.[25]

[19] In any event, Mr Bruce Watts provided a 12 page report dated 9 March 2018.[26] That was received by the applicant's solicitor on 26 March 2018, and served on the respondent's solicitor under cover of a letter dated 14 May 2018.[27] This seems to have been the first letter sent by the applicant's solicitor since August 2017 (despite a number of letters from the respondent's solicitor in that time).

[20] In the "summary" of Mr Watts' report, he says:

> "Due to the sudden onset of headache following the first neck manipulation on 4 October 2015, and the fact that Mrs Folwell had no previous history of headaches, I can only conclude that it is more likely than not that that cervical manipulation caused the head pains.
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> Due to the ongoing nature of the headaches and related cervical cranial symptoms suffered by Mrs Folwell since that initial manipulation, and given that Dr Mayer did not detect any significant abnormality in the cervical x-rays, I can only conclude that Mrs Folwell must have suffered a soft tissue injury to the upper cervical region as a result of the first manipulation on 4 October 2015 and this was further complicated by the second cervical manipulation on 8 October 2015.
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> Due to the sudden onset of symptoms immediate[ly] following the cervical manipulation, and the prolonged nature of Mrs Folwell's head pains, I am of the opinion that Ms Folwell more likely than not suffered a vascular injury to the upper cervical region as a result of that manipulation. For the present I am unable to recognise any other likely cause for the ongoing headaches.
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> …
>
> In my opinion the chiropractic manipulations are responsible for Mrs Folwell's present and continuing pain and disability in the cervical and cranial regions. …"

[21] According to Ms Wills, in early June 2018 arrangements were made for the applicant to be medically assessed by a neurologist, rehabilitation physician and occupational therapist, "to investigate whether the allegations of negligence prescribed in Mr Watt's [*sic*] report were causative of the Applicant's ongoing injuries". The appointments were scheduled for July 2018.[28]

[22] However, Ms Wills says that on about 12 July 2018, the applicant advised someone from the solicitor's firm (a secretary) that she had been diagnosed as having four aneurysms and was required to undergo surgery on 19 July 2018. She was therefore unable to attend the appointments. Ms Wills suggests the secretary failed to pass this information onto the solicitor then handling the applicant's file.[29] Ms Wills says she

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25 Wills (CFI 8) at [35]-[37].
26 Exhibit TSW13 to Wills (CFI 2).
27 Chandra (CFI 4) at p 49 of the exhibits.
28 Wills (CFI 2) at [29].
29 Wills (CFI 8) at [43].

believes the applicant had another surgical procedure (a craniotomy) in March 2019.[30] The applicant's diagnosis, and surgeries, were not disclosed to the respondent's solicitor until May 2019 (contrary to the obligation under s 22(6) of the PIPA).[31]

[23] It seems the applicant was told she had aneurysms in her brain following a scan in January 2018, which was a shock to her. She says she does not recall telling her solicitor about this; as she had an understanding that they would receive the scan results directly. From then until May 2018 she was receiving treatment and discussing surgical options. She underwent surgery first in June 2018, then in July 2018 (the applicant also had further surgery in March 2019 and, most recently in February 2020).[32]

[24] The limitation period expired on about 4 October 2018.

[25] The respondent instructed her solicitors to close their file on 16 November 2018.[33]

[26] The evidence from the applicant's solicitor is given by Ms Wills, a junior solicitor in the firm. Ms Wills had previously worked as a paralegal in the firm, from about May 2016 to July 2017, and performed some work on the applicant's claim in that time; before returning as a solicitor in March 2019. Ms Wills took over the day to day conduct of the matter in May 2019.[34] Her evidence in relation to earlier times is therefore based either on review of the file, or discussions with the solicitor who was "in charge", a Ms Amarasinghe. I will return to say more about this below.

[27] Ms Wills emailed the respondent's solicitors on 17 May 2019 to advise them that she had taken over conduct of the file;[35] following which they re-opened their file.[36] In the email of 17 May 2019 Ms Wills referred to the applicant having to undergo surgery in about July 2018, and apologised for the delay the surgery had caused in the matter. It is not clear from the email of 17 May 2019 whether Ms Wills realised the limitation period had expired.

[28] Ms Wills deposes in one of her affidavits to an understanding, it seems based on discussions with Ms Amarasinghe, that the particular section of the applicant's solicitor's firm responsible for handling the applicant's claim was "understaffed" in the period from August 2017 to March 2019.[37] She attributes many of the delays to this understaffing.

[29] In June 2019 Ms Wills says she organised various medico-legal assessments "for the Applicant to be medically assessed in relation to the causal link between the subject incident and her ongoing injuries and disabilities", to be undertaken in July 2019.[38]

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30 Wills (CFI 2) at [30]-[32].
31 Chandra (CFI 4) at [11(g), (h), (i)].
32 Folwell (CFI 10) at [40]-[52].
33 Chandra (CFI 4) at [12] and [65].
34 Wills (CFI 8) at [5]-[7].
35 Chandra (CFI 4) at p 7 of the exhibits.
36 Chandra (CFI 4) at [12].
37 Wills (CFI 8) at [8].
38 Wills (CFI 2) at [33]-[34].

[30] One of the assessments undertaken in July 2019 was by Dr Roy Beran, a neurologist. He saw the applicant on 3 July 2019 and prepared a report on 9 July 2019.[39] Among other things, Dr Beran noted that:

> "The one thing that is missing from this presentation is either a CTA or MRA (angiography) close to the time of the neck manipulation because, as painted by Mr Watts, the high suspicion rests with vascular damage following questionable neck manipulation. The first MR was performed a long time after the damage and a dissection, which is a common sequelae of neck manipulation and may have recanalised and returned to normal by the time imaging was performed."[40]

[31] Between July and October 2019 the applicant was also reviewed by the following specialists, for the purpose of obtaining medico-legal reports: Dr Buckley, consultant physician (report dated 23 August 2019, not provided to the respondent's solicitor until 11 February 2020); Ms Parsons, occupational therapist (report dated 25 November 2019, not provided to the respondent's solicitor until 11 February 2020); and Dr Oldtree Clark, psychiatrist (report dated 23 October 2019, not provided to the respondent's solicitor until 22 January 2020). The explanation for the delay between the date of the report in each case, and the provision of it to the respondent's solicitor, once again relates to the timing of payment of the relevant doctor's invoice.[41]

[32] The applicant's part 2 notice of claim was not served on the respondent's solicitors until 16 October 2019.[42]

[33] Ms Wills says the report of Dr Beran was not received by the applicant's solicitor until 13 November 2019, and was then provided to the respondent's solicitor on 28 November 2019.[43] The explanation for the delay between the completion of Dr Beran's report (9 July 2019) and the report being provided to the applicant's solicitor is, again, delay on the part of the applicant's solicitor in paying Dr Beran's invoice.[44]

[34] The present application was filed on 9 December 2019. It was initially listed for hearing on 17 December 2019, but was adjourned in order to enable the applicant to file further evidence in support of it (in particular, from herself).

[35] In January 2020, the applicant's solicitor disclosed to the respondent's solicitor correspondence they had received from the applicant's former employer, Endeavour Foundation, in May 2016 (almost four years earlier). The letter showed that the applicant had been absent from her work from about 16 October 2015, and that her employment had been terminated in May 2016. As to why it took so long for this letter to be disclosed, Ms Wills says she was not aware the records from Endeavour Foundation had been emailed in May 2016.[45]

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39 Wills (CFI 2) exhibit TSW17.
40 Wills (CFI 2) exhibit TSW17 at p 5.
41 Wills (filed by leave) at [15]-[40].
42 Chandra (CFI 4) at p 60 of the exhibits.
43 Wills (CFI 2) at [37] and [38].
44 Wills (filed by leave) at [7]-[12].
45 Wills (filed by leave) at [46].

[36] In explanation for why it took until December 2019 (over a year after the expiry of the limitation period) to bring the present application Ms Wills says that:

> "Upon review of this file in May 2019, I formed the view that whilst I had evidence supportive of breach, I did not have evidence that supported causation of the Applicant's injuries. There would have been no point in proceeding with a section 59 Application if the Applicant could not ultimately prove causation of her injuries.
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> Upon receipt of the report of Dr Beran on or about 13 November 2019, I formed the view that the Applicant now had evidence to establish causation of her ongoing injuries and disabilities and thereafter, I took steps to seek the consent of the Respondent in respect of the foreshadowed section 59 Application."[46]

[37] This is a surprising, and unconvincing, explanation. There was clear evidence, from Mr Watts' report, of what was at least in Mr Watts' opinion a causal link between the chiropractic manipulation and the applicant's injury. But in Ms Wills' defence, she was a very junior solicitor, and so it is also surprising that it would have been a matter left for her determination alone. In that regard, there is a notable absence of evidence from someone more senior within the firm, with responsibility for supervising Ms Wills. It is somewhat unfair for a junior practitioner in her position to be left to carry the responsibility not only for what occurred in this matter when she was a paralegal, but even subsequently. There was, however, no cross-examination of Ms Wills, and other than commenting as I have on the plausibility of this explanation, I have no basis to reject the evidence of Ms Wills.

[38] Having said that, it is difficult to avoid the inference that the applicant's solicitor did not realise in May 2019 that the limitation period had expired. Even when this was pointed out in the letter from the respondent's solicitor of 9 July 2019, no action was taken.

Determining the application

[39] The delays in this matter begin with the applicant waiting about six months to consult a lawyer, after the chiropractic treatment on 4 October 2015. The respondent submits that the applicant has not adequately explained this initial delay, in circumstances where she alleges she suffered severe head pain immediately following the chiropractic treatment on 4 October 2015, which did not go away, and did not return to work. In my view it is not unreasonable for a person not to immediately consult a lawyer in circumstances such as these. The applicant explains in her affidavit that she had not been involved in a claim under the PIPA previously, although had been involved in some workers' compensation claims. She says it was when she was going to lose her job, because of the time she had been off work, that she became concerned about her future and decided to make enquiries about whether she had any rights in relation to the injuries she was suffering from.

[40] The applicant also says that, after her first meeting with her solicitors (who were then, as now, CMC Lawyers), "it was my understanding that they would contact me if they required any information from me, or for me to do anything in relation to my claim. It

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46 Wills (CFI 8) at [52] and [53].

was my understanding that they would obtain all of my medical records as they needed to and that I didn't have to tell them about my treatment and progress".[47] The respondent submits that this exemplifies the applicant's attitude to progressing her claim, which she says cannot be described as conscientious.

[41] It is fair to say the applicant should have been more proactive; but, again, it is not unreasonable for a lay person who consults a solicitor to rely on the solicitor to advise her of steps which are required to be taken.[48] This is not a case in which there is evidence of the applicant failing to respond to correspondence from her solicitors, or losing contact with them,[49] or simply ignoring the legislative requirements.

[42] It is otherwise submitted on behalf of the applicant that the delays are explained by difficulties the applicant encountered attending specialists for treatment or review (due to the distance she had to travel from her home to Townsville), delays obtaining the necessary referrals (for example, for the scans requested by Mr Watts), and the surgeries the applicant has required as a result of the identification of aneurysms. As to the latter, the applicant explains in her affidavit that she was told she had aneurysms in her brain in January 2018 and from this point she was very concerned for her health and "this was my main focus".

[43] It is difficult to reach the conclusion in this case that the delays, which resulted in the limitation period expiring, were occasioned by a conscientious effort to comply with the PIPA requirements. Although it is apparent that the applicant's own circumstances (both in terms of her understanding of the solicitor's role, and her location, and the medical complications from January 2018) contributed to the delays, on the material before the court, the failure to conscientiously comply with the legislative requirements in my view rests predominantly with the applicant's solicitor (CMC Lawyers, not Ms Wills personally), rather than the applicant herself.

[44] But as the authorities make clear, the absence of evidence of such conscientious efforts is not fatal to the favourable exercise of the discretion;[50] it is but one of the relevant considerations.

[45] Also relevant is the fact that the respondent was given notice of the claim, if not precisely within the time frame contemplated by the Act, not too long after it. To that extent, the main purposes of the period of limitation might be thought to have been served.[51] It is also apparent from the correspondence which has been put into evidence that a number of steps were undertaken, prior to the limitation period expiring, in terms of obtaining disclosure of various records and reports.

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47 Folwell (CFI 10) at [27].

48 See, for eg, *Ward v Wiltshire Australia Pty Ltd* [2008] QCA 93 at [15] per McMurdo P and at [79] per Fraser JA.

49 Cf *Jonathan v Mangera* [2016] QCA 86 (noting that the applicant's conduct in that case, absenting himself from the jurisdiction for about two years, was found to have caused prejudiced to the respondent's ability to properly defend the claim).

50 *Winters v Doyle* [2006] 2 Qd R 285 at [26] per Keane JA and at [56] per Fryberg J; see also *Ward v Wiltshire Australia Pty Ltd* [2008] QCA 93 at [3] per McMurdo P, at [66]-[67] per Fraser JA and at [103] per Mackenzie AJA; and *Cottle v Smith* [2008] QCA 244 at [21] per Keane JA

51 See *Kash v SM & TJ Cedergren Builders & Ors* [2003] QSC 426 at [16]; see also *Haley v Roma Town Council* [2005] QCA 3 at [48] per Jerrard JA; and *Ward v Wiltshire Australia Pty Ltd* [2008] QCA 93 at [69] per Fraser JA.

[46] The respondent does not identify any specific prejudice it will suffer if the application is granted. She submits that the "accumulated delays create possible prejudice to the respondent by being unable to address either a CTA or MRA (angiography) close to the time of the neck manipulation [referring to the point made about this by Dr Beran] … and that attributed to the passage of time generally", citing the observations of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551 (that where there is delay the quality of justice deteriorates). But in that regard, as McMeekin J said in *Paterson* at [43]: "[s]uch prejudice of course affects both sides and it is the applicant who will bear the onus of proof on all significant issues…".

[47] As to the unavailability of either a CTA or MRA (angiography) close to the time of the neck manipulation, counsel for the respondent acknowledges the prejudice can only be described as "possible" because that could go either way, in terms of prejudice to the applicant in proof of her claim, or prejudice to the respondent in defending it. But significantly, those scans would not have been available, even if the delays (after the applicant consulted her solicitor) had not occurred. That is not an answer in itself, for the reasons explained by McHugh J in *Brisbane South Regional Health Authority v Taylor* at 555, but it does tend to diminish the weight of this as a factor against the grant of the application.

[48] On the evidence before the court the applicant does have an arguable claim and, notwithstanding the delays, I am not persuaded that a fair trial cannot now be had.

[49] 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.

[50] I therefore propose to order, pursuant to ss 59(1) and 59(2)(b) of the PIPA, that the applicant have leave to start a proceeding against the respondent, based on the applicant's claim for injuries, loss and damage allegedly suffered as a result of the treatment on 4 October 2015, even though the limitation period has ended. I will hear from the parties as to the precise form of the order.

Costs

[51] In her application, the applicant proposes that there be no order as to costs. In the circumstances, it seems to me that there should be an order that the respondent recovers her costs of this application. The applicant has sought an indulgence from the court, in circumstances where it was not unreasonable for the respondent to oppose the application.[52] But I am also concerned as to whether those costs should in fact be paid by the applicant's solicitor. I will therefore direct that the applicant file and serve submissions within seven days on the question of costs, including as to why the applicant's solicitor should not be ordered to bear both the applicant's and the respondent's costs of the application; and the respondent file and serve submissions in reply (if required) within seven days after that. I will decide the question of costs on the papers, unless either party requests an oral hearing.

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[52] Cf *Paterson v Leigh* [2008] QSC 277 at [51].