Pre-Court Procedures in Civil Actions

(An address by Judge Michael Forde at a seminar organised by the University of Queensland T.C. Beirne School of Law at Customs House on 2 November 2005)

Introduction

1. This morning I shall talk about proposed amendments to the Personal Injuries Proceedings Act 2002 as contained in the *Civil Liability (Dust Diseases) and Other Legislation Amendment Act* 2005 (Qld)[1], the interaction between the legislation in common types of personal injuries legislation by reference to recent cases. In doing so I shall attempt to point out some common practical difficulties which practitioners encounter and perhaps provide some solutions.
2. Some of this discussion can be found in the "Recent Developments" section of the book "Personal Injuries Procedure in Queensland"[2]. To avoid your having to take copious notes at this time of the day, a copy of this paper will be available on the Supreme and District Courts website[3].

Legislation

3. As you would expect, the proposed amendments to PIPA are to be found in the *Civil Liability (Dust Diseases) and Other Legislation Amendment Act* 2005. This legislation became law on 14 October 2005. The name of the amending act is a very circuitous way of avoiding the use of the word "asbestos" in the same sentence as "liability" or "personal injury". It also masks the fact that the PIPA has been directly amended four times in three years.
4. The first amendment to which reference is made is s 12 of the Act which amends s 6 of PIPA. Not content with PIPA excluding its application only to the current versions of the *Motor Accidents Insurance Act* (MAIA) and the

[1] (No.43 of 2005)
[2] Jones and Forde Lexis Nexis Butterworths November 2005.
[3] www.courts.qld.gov.au -Queensland Courts- Recent Publications- Articles and Speeches -District Court- Judge M.W. Forde.

Workers' Compensation and Rehabilitation Act 2003 (WCRA), the PIPA now excludes from its purview

- the *Motor Vehicles Insurance Act* 1936
- the *WorkCover Queensland Act* 1996
- the *Workers' Compensation Act* 1990
- the *Workers' Compensation Act* 1916

5. Some of you may be concerned that the *Workers Compensation Act* 1916 directly affects anything not covered by PIPA. Some of you may not have seen the 1916 Act. It was passed in 1916 by a Labor government to assist in compensating workers who suffered injuries whilst involved in their work.[4] Obviously, the legislature believes it may still be relevant in relation to workers who may for example have contracted a disease prior to 1990 and where employment was a contributing factor and where a common law claim may exist. It was repealed in 1990.
6. The amendments are a further attempt to limit claims to one form of statutory procedure. However, s 14 of the Act envisages new provisions which relate to multiple pre-court procedures. Section 83 of PIPA will apply where a claimant:

- starts pre-court procedures under the PIPA; and
- procedures (not proceedings) under the MAIA or the relevant workers compensation legislation to recover damages for personal injury; or
- proceedings to recover damages for personal injury

7. The proposed s 83(2) will provide that the pre-court procedures under PIPA are stayed, and that stay will not allow the claimant to issue proceedings. A claimant can apply to lift the stay of the pre-court procedures under PIPA upon the court being satisfied that:

[4] It can be found in Volume 8 of the Red Statutes under "Labour".

- the claim under the relevant workers' compensation or motor vehicle accident insurance legislation is incorrectly made; and
- completion of the pre-court procedures under PIPA is necessary and appropriate to deal with the claim.[5]

8. An application under s 83(4) will allow the court to make a ruling on which Act applies. If the wrong Act is chosen, the completion of the procedure under one Act will not assist. If in any doubt, an application under s 83(4) is a must. *Brew v Followmont* was a case where the claimant's solicitors formed an erroneous view that the claim was subject to the WorkCover legislation. The claimant in the course of his employment fell asleep whilst driving his motor vehicle. The employer was the registered owner of the vehicle. The claimant asserted negligence by the employer in that it required him to work excessively long hours. It was held that the MAIA applied.[6] Subsequently, a claim was commenced without complying with the notice requirements of the MAIA. The claimant relied upon an estoppel argument against WorkCover. The Court of Appeal held that the solicitor was aware at all material times that there was no obstacle to giving notice complying with all pre-litigation procedures pursuant to each statutory insurance scheme. No estoppel arose either under s 285 of the WorkCover Act because of a failure to respond within six months. The solicitor was aware of the need to take steps under the MAIA.[7]

Exclusion provisions in the Civil Liability Act [s 5(b)] and the PIPA [s 6(2)]

Newberry v Suncorp Metway Insurance Ltd.[8]

9. This was a decision of Dutney J. The question for determination was whether s 5(b) of CLA applied when a worker was injured in a head on motor vehicle

[5] PIPA ss 83(4)(a) and (b).
[6] *Brew v Followmont Transport Pty. Ltd*. [2003] QCA 504
[7] .([2005] QCA 245 para.19; see also *Pugin v WorkCover Queensland* QLR 17 September 2005 where it was held that the sending of a notice under s 285(2) did not operate as an election by WorkCover to treat a notice of claim as a complying one or as a deemed waiver of the need for compliance by the claimant of s 280 of the Act
[8] [2005] QSC 210.

accident. The other vehicle was on the incorrect side of the road. S 5(b) provides as follows:

> "This Act does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes -
> (a)…
> (b) an injury as defined under the Workers' Compensation and Rehabilitation Act 2003, other than an injury to which sections 34(1)(c) or 35 of that Act applies."

10. It was common ground that neither s 34(1) nor 35 applied to the facts. S 32 of WCRA provided as follows:

> ` "An 'injury' is a personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury..".

11. His honour went onto hold that the employment was a significant contributing factor to the injury as the claimant was driving in the truck as part of this employment. It followed that the CLA did not apply to limit the damages.
12. One line of argument relied upon by his honour was the comparison of s 5(b) of CLA with s 6 of PIPA. The latter provides:

> "(1) This Act applies in relation to all personal injury arising out of an incident whether happening before, or after 18 June 2002.
>
> i. However, this Act does not apply to –
>
> (a) …
> (b) injury as defined under the Workers Compensation and Rehabilitation Act 2003, ***but only to the extent that an entitlement to seek damages, as defined under that Act for the***

injury is regulated by chapter 5 of that Act." (bold italics added)

13. His honour reasoned that as the legislature had limited the exclusion in PIPA in that manner but failed to do so in the CLA that therefore, the subject accident was not subject to the CLA as the applicant's employment was a significant contributing factor. In *King v Parsons and Suncorp Metway Insurance Limited*[9], McMurdo J. rejected the approach by Dutney J. McMurdo J. was asked to determine whether s 5(b) of the CLA applied to a postman delivering mail on his motor bike and who was hit by Mrs. Parsons reversing out of her driveway. It was common ground that WCRA had no application to the applicant's case. In fact he was an employee of the Commonwealth. S 11(3) and Schedule 2 part 2 of WCRA specifically exclude an employee of the Commonwealth from its operation. However, the applicant argued that his injury was one as defined under WCRA viz. his employment was a significant contributing factor under s 32 of WCRA and so not limited by the CLA.

14. His honour had the benefit of the reasoning of Dutney J. but rejected that approach after discussing in detail the purpose behind the CLA and its relationship with PIPA and the MAIA. His honour stated (para 26):

> "It does not indicate that within s 5 of CLA it was intended to exclude an injury, for which a claim for damages was not subject to WCRA. And it does not evidence a policy that all work related injuries should be immunised from the impact of the CLA, including the provisions of the CLA which replicate those of other statutes which had previously affected identical claims."

MAIA and the Nominal Defendant

15. You may recall the decision of *Miller v Nominal Defendant*.[10] A bus driver injured his shoulder when he swerved to avoid unidentified motor vehicle. The injury occurred in February 2002. Notice of the accident was required to

[9] [2005] QSC 214.
[10] (2005) 1 Qd R 135.

be given to the Nominal Defendant within three months or within nine months if a reasonable excuse is available for not giving the notice within the three months. It was found at first instance that it was the neglect of the solicitor which was the cause of the delay. Leave to proceed cannot be given under s 39(5)(c)(ii) once the action is barred by s 39(8) which relates to the Nominal Defendant. S 57 which allows an alteration of the limitation period was held to have no application. It is open to a court to give leave under s 39(5)(c)(ii) within the nine month period.(ibid. p. 149 para.40)

16. Miller's case was applied in *Kumer v Suncorp Metway Insurance Ltd*[11]. The claimant was involved in a multi-vehicle accident on the Gateway Arterial road. She gave notice to the insurer of one vehicle involved in the accident but made no reference to the unidentified vehicle also involved. Neither the claimant nor the insurer gave notice to the Nominal Defendant within the nine month period. It was open to the co-insurer to give notice under s 37(4) of the MAIA. This would have probably sufficed but it was not done. The action by the claimant against the Nominal Defendant was barred pursuant to s 37(3).

Other MAIA cases

17. An application under s 39(5) may be combined with an application to extend time under s 31 of the Limitation of Actions Act. A material fact of a decisive nature must be shown to have come to the knowledge of the claimant after a certain date.[12] The application allows the applicant to proceed notwithstanding non-compliance with Div.3 Part IV of the MAIA.
18. In *Gardiner v Car Choice*[13], Chesterman J. with whom the President and Williams JA agreed discussed the interaction of s 57 and s 39(5) of MAIA. The discussion occurred with the background of the amendments in October 2000. The first thing which must be remembered about Gardiner's case is that a complying notice had been given. Any barrier to granting leave to proceed under s 39(5) can be overcome by dispensing with the compulsory conference required by Div.5A. Section 51A should not be seen as a hurdle in a case where an order is made by the Court pursuant to s 39(5) i.e. s 51A is subject to an order of the court pursuant to s 39(5).

[11] [2005] QCA 254 at para. 46.
[12] *Jocumsen v Thiess Pty Ltd. & Suncorp Metway Insurance Ltd.* [2005] QCA 198.
[13] [2004] QCA 480.

Admission of Liability and disclosure under s 47(1)(b) MAIA

19. The comments made by McGill DCJ in *Lemon v Suncorp Metway Insurance Limited*[14] are apposite to the legislation:

> "The real difficulty is that the provisions for the pre-litigation procedures in the Act are too superficial and too rigid to accommodate the multitude of possible situations which can arise in practice. They have been insufficiently thought through and inevitably therefore throw up all sorts of difficulties when something out of the ordinary happens. The sections make no express provision for what is to happen if an admission of liability is subsequently withdrawn, and apart from s 41(6) do not make any allowance even for the possibility that an admission of liability could be withdrawn. That is all very unhelpful" (para.15)

The respondent insurer was required to provide further information relating to liability even though liability had been admitted under s 41(1)(b). The admission could be withdrawn at any time subject of course to any estoppel argument.

WorkCover cases

20. If there is a failure to list all injuries initially, then problems may occur. In *Watson v WorkCover Queensland*[15], the claimant initially suffered a physical injury when a guide bar fell on him. When he commenced proceedings, he sought damages for personal injuries which were specified as an adjustment disorder and psychiatric injuries. A notice of assessment issued for a soft tissue injury to the right elbow with ulnar nerve compression and pain syndrome. The impairment was 11%. Later the applicant applied for a conditional certificate for an adjustment disorder. It was issued. The applicant also obtained an order pursuant to s 305 of the WQA permitting him to commence proceedings against his employer for all injuries. Subsequently, WorkCover issued a notice of assessment with respect to the adjustment disorder. Neither the claim and statement of claim or any amended pleading was served on the employer within 60 days of the compulsory conference. It was filed on 20 December 2004 outside the limitation period

[14] [2005] QDC 128.
[15] [2005] QSC 225.

21. Mullins J. held that the amendment was made in accordance with the UCPR and without circumventing the requirement of s308(2) of the WQA. The amendments did not add a cause of action and therefore could be made without leave.[16] The consequential injuries were as a result of the incident but did not give rise to a separate cause of action for each injury. A conditional certificate had issued on 2 September 2002. The claimant had the benefit of the existing proceeding, as a result of relying on the alternative regime for commencing a proceeding before the expiry of the limitation period related to the grant of the conditional damages certificate.[17] The conditional certificate issued on 4 September 2002. The accident had occurred on 6 September 1999. The claimant had the benefit of an order 6 September 2002 pursuant to s 305 of WQA. Leave was given to proceed pursuant to s 306(3)(b) WCA.
22. The effect of s 308 may cause an action to be a nullity. Dutney J. held in *West v Anglo Coal*[18] that s 308 did not prevent a court from extending time pursuant to s 31 of the Limitations of Actions Act. As s 308 did not apply to part of the cause of action accruing before 1 January 1997, his honour extended the time relying on s 31.
23. In *Mason v Toowoomba City Council*[19], the claimant had his injury assessed and it was described as "Moderate to severe aggravation or acceleration of pre-existing disease in the lumbar sacral spine". The date of the injury was listed as 30 April 2001. In 2004, WorkCover received a Notice of Claim pursuant to s 280 of the Act notifying of a claim being an "Aggravation of pre-existing degeneration" which occurred on 30 April 2001. The latter injury occurred in fact between February 1999 and April 2001. It was held that a person was a claimant within the meaning of s. 305 notwithstanding that the lawful exercise of the person's entitlement to seek damages was subject to the satisfaction of other conditions imposed by ch. 5 of the Act. Accordingly, an order might be made under s 305 in favour of such a person even if s 253(1)(c) applied to him and he had not yet obtained a damages certificate as required by s 265.

[16] S 387 UCPR.
[17] *Green v Suncorp Metway* [2001]1 Qd R 485.
[18] [2005] QSC 162.
[19] [2005] 1 Qd R 600.

Conclusions

24. The consequences of not serving a complying notice can be seen in cases such as *Dunn v Lawrence*[20] and *Piscitelli v Everready Concrete Contractors Pty Ltd*[21]. The former related to the PIPA and the latter to the WorkCover Act. In both instances, the applications to extend time were dismissed.[22] In Dunn's case, Mackenzie J. held that the delivery of a complying notice was a prerequisite to proceeding under s 59. In both cases, the delivery of a complying notice was required before the expiration of the limitation period. Of course, under s 43 of PIPA leave can be given to commence proceedings notwithstanding that there is no compliance if there is some urgency. The impending application of a period of limitation is such a ground. For a comparison of other sections in both the MAIA and WCRA see Jones and Forde.[23]

[20] [2005] QSC 291.
[21] [2005] QSC 47.
[22] s 59 PIPA and s 308 WorkCover Act.
[23] op.cit.