Supreme Court of Queensland Library
Bridge to the Past • Gateway to the Future

Twenty-five Trip Wires to Successful Litigation

(A paper delivered by Judge Michael Forde to the Australian Lawyers Alliance 15 February 2008 at the Gold Coast.)

Executive Summary

This paper has an interstate component to it. Decisions emerging from the New South Wales courts, in particular, have helped to reshape the Queensland landscape. In the early stages of the legislation, the Queensland Court of Appeal took a restrictive approach to personal injuries legislation. This approach severely limited the discretion to avoid non-compliance with the relevant legislation. The recent High Court decision of Berowra Holdings Pty Ltd v Gordon has redefined the discretion available to the courts. A discussion of the cases from different States, leading up to those decisions, helps to understand why the High Court was able to rectify the more restrictive approach.

Introduction

1. When I have been asked about the topic of today's talk, the response has been "What only 25?" Shortly, I shall discuss some of these, and yes there are more than 25. In fact, once I reached the magic number, it justified the title and my search stopped.[1] I am indebted to Justin Harper, your president, for allowing me the indulgence of this topic. When my co-author, Ashley Jones and I were searching for a title for our book on personal injuries,[2] the title of this paper was suggested by me. As he acted for many insurance companies, we agreed to give the book a more neutral title. However, I anticipate that the second edition may have a name similar to "Pre-court Procedures in Personal Injuries Cases: How to avoid the minefield". There are some who believe that all of these pre-trial steps or trip wires are justified. For example, Geoff Davies, a former justice on our Court of Appeal said late last year:

> …legislation introduced in 2003, and I think in some other states, has had a dramatic effect on delay in and cost of resolving personal injury disputes.
>
> The legislation has required a person who wishes to make a claim for damages for personal injury to give notice of his or her claim to the potential respondent with particulars of the circumstances of the accident, its causes, the persons involved, known witnesses and the known injuries and damages. It has also required, generally, that the notice include an offer of settlement.[3]

[1] Examples of the "trip wires" can be found in the Appendix to this paper
[2] Jones and Forde, *Personal Injuries Procedure in Queensland*, LexisNexis Butterworths 2005
[3] The Australian Friday 30 November 2007 p 35

Mr Davies has been for some years a critic of the adversarial system. He believes in mediation as the way to resolve disputes. I do not wish to be side tracked by that philosophy today. However, there is one comment which should be made and that is even where matters are the subject of mediation, a properly prepared case argued by practitioners acting for their respective clients and properly presented in a logical way are reasons why mediation is so successful. Even mediation has an air of the adversarial system about it. Some support for the adversarial system as a necessary part of the legal system was given by the retired High Court Justice Ian Callinan in a speech to the Institute of Mediators.[4]

2. Many of you would immediately relate to the intricacies of the relevant legislation when considering pre-trial steps. Mr. Davies was probably referring to the Personal Injuries Proceedings Act 2002 ("PIPA"), the Workcover Queensland Act 1996 and its successor the Workers' Compensation and Rehabilitation Act 2003 ("WCRA"), the Motor Accident Insurance Act 1994 as amended in 2000 ("MAIA") and the Civil Liability Act 2003 ("CLA") which limited in a significant way the damages able to be claimed in personal injuries actions. The latter was seen to be as a consequence of the HIH debacle and the Ipp Inquiry. It is not intended to discuss the restriction on damages, but rather the formal requirements necessary before a litigant can successfully commence proceedings.[5]

Berowra Holdings Pty Ltd v Gordon[6] - a landmark decision

3. The interstate nature of this case does not detract from its importance in Queensland. Decisions in other States impacted on the interpretation of our statutes. Decisions such as Berowra Holdings Pty Limited v Gordon have broad application not only in relation to the workers' compensation legislation

[4] Ian Callinan's Speech on referral of Honorary Fellows of the Institute of Mediators (Brisbane – 23 November 2007
[5] Publications such as *Civil Law Australia* by Douglas et al LexisNexis 2006 deal with the question of damages under the Civil Liability Act and related Acts in other states
[6] [2006] 225 CLR 364;

but also the MAIA and PIPA[7] and their equivalents in all states. Berowra Holdings concerned the interpretation of s151C of the Workers Compensation Act 1987 (NSW). It required six months to elapse between notice of the injury being given to the employer and the commencement of court proceedings.[8] The High Court held that non-compliance with the section did not mean that subsequent proceedings were a nullity. A court retains the jurisdiction to remedy the defect in the exercise of its discretion in appropriate cases. Berowra Holdings is mentioned briefly at this point so as to put the discussion of the cases into context. In comparison to the Queensland Court of Appeal, the New South Wales courts have taken a less restrictive view of the PIPA legislation and other legislation which set up procedural requirements for unsuspecting litigants and their advisors.[9]

Hamilton v Merck & Co[10]

4. In Hamilton v Merck the plaintiffs sought to commence representative proceedings on behalf of persons in New South Wales and Queensland who had allegedly been injured through the ingestion of Vioxx, a non-steroidal anti-inflammatory drug. It was held that the procedure in the proceedings was governed by the law of New South Wales as the law of the forum. Therefore, to the extent that the notices before action and the compulsory conference provisions of PIPA had not been complied with, it did not prevent the accrual of complete causes of action and time running under the Limitation Act and so the provisions were procedural in nature and not substantive.[11] In effect PIPA was not a statute in force in New South Wales and therefore the courts in New South Wales were bound only by the procedural law of that state.[12]

5. It is interesting to note that in relation to Div 2 of PIPA, that Spigelman CJ had no doubt that it was merely procedural and not related to the

[7] For a discussion of the nature of the PIPA legislation see Haley v Roma Town Council (2005) 1 Qd R 478 at [9]-[22]
[8] The equivalent in Qld is s 296 WCRA
[9] see also Hamilton v Merck and Co Inc; Hutchinson v Merck Sharp and Dohme (Australia) Pty Ltd (2006) NSWCA 55 in dealing with PIPA as it related to a claim by Queensland residents in New South Wales court.
[10] ibid
[11] This was in accord with ss 79 and 80 of the Judiciary Act
[12] per Spigelman CJ at [14]

enforceability of the tort as discussed in John Pfeiffer Pty Ltd v Rogerson.[13] Div 2 relates to the obligation of the parties to provide information. However, he asserted that the provisions in Div 1 relating to claims procedures including notices and Div 4 relating to Compulsory Conferences were arguably related to enforceability and so failure to comply could be a matter of substance. Of course, s 7 of PIPA provides that all provisions of Ch 2 which included Divisions 1,1A, 2 and 4 "are provisions of substantive, as opposed to procedural law." For a New South Wales court that was not determinative. However, as his honour pointed out a prohibition upon the institution of proceedings is capable of satisfying the test for a substantive law provision expressed in terms of "enforceability" as set out in John Pfeiffer.[14] For a more detailed discussion of interstate claims see Jones and Forde op cit at [1.47-1.53].

6. It is probably of some assistance to touch upon the facts of John Pfeiffer v Rogerson. The claimant, Rogerson, was injured in New South Wales but sued in the Australian Capital Territory. The question arose as to whether the applicable law for the assessment of damages was NSW or the ACT. It was held that the limitation of damages, not being directed to governing or regulating the mode or conduct of court proceedings, was a matter of substance rather than procedure, and therefore was governed by the lex loci delicti. The Workers Compensation Act 1987 (NSW) applied as the lex locus delicti.

7. In his reasons in Hamilton v Merck & Co,[15] in reference to a court exercising Federal jurisdiction Handley JA referred to the joint judgment of the High Court in John Pfeiffer v Rogerson and quoted the passage:[16]

> …does not involve any choice between laws of competing jurisdictions, but identification of the applicable law in accordance with ss 79 and 80 of the Judiciary Act.

[13] (2000) 203 CLR 503
[14] per Spigelman CJ at [39]
[15] at [115-116 and 125]
[16] p 530

> …the lex loci delicti is the governing law with respect to torts committed in Australia … which have an interstate element.[17]
>
> …it is the governing system of law binding on the court of the forum which furnishes the rules for choice of law.[18]

8. As noted by Spigelman CJ, the 'Parliament of Queensland cannot vary the common law choice of the law rule that is to be applied by the courts of this State' referring, of course, to New South Wales. You may recall that s 79 of the Judiciary Act provides that the laws of each State or Territory, including those relating to procedure and evidence should be binding on all courts exercising federal jurisdiction in that State or Territory in all cases to which they were applicable. Section 80 of the Judiciary Act provided that, so far as the laws of the Commonwealth were not applicable or so far as their provisions were insufficient to carry them into effect, the common law in Australia as modified by the Constitution and statute law in force in the State or Territory in which the court in which the jurisdiction was exercised was held should, so far as it was applicable, govern all courts exercising federal jurisdiction. Hamilton v Merck & Co involved the Trade Practices Act as providing a cause of action and so the federal jurisdiction arose.

9. Handley JA went on to find that s 7 of PIPA in so far as it causes its provisions to be of a substantive nature, relates only to Queensland. In New South Wales such provisions relating to notice of claim before action and compulsory conferences etc are procedural. As will be discussed later in this paper, the distinction between substantive and procedural may not be determinative. Handley JA agreed with the analysis by Spigelman CJ. which will be discussed in more detail.

Queensland cases

[17] ibid 540
[18] ibid 527

10. His honour, Spigelman CJ,[19] referred with approval to the Queensland decision of Zanatta v Netpro Employees Pty Ltd.[20] In that case, the claimant had been injured in South Australia whilst erecting shade netting over abalone tanks on a farm owned by the respondent. Proceedings were brought in the Supreme Court of Queensland. Fryberg J, after referring to the provisions of s 7 of PIPA, ruled that the substantive laws of South Australia applied and relied upon John Pfeiffer v Rogerson.[21] Had the provisions of PIPA been characterised as procedural, PIPA would have applied in Queensland.[22] This decision of Fryberg J has stood the test of time.

11. Another decision of the Supreme Court of Queensland is probably useful in one respect but wrong in another. The decision is Nicholls v Brisbane Slipways [2003] QSC 193. This was a dependency claim. The deceased was killed off Broome, Western Australia, as a result of the defective repair by a boat builder in Brisbane. His widow sued in Victoria and Queensland. Justice White held that the proceedings in Victoria were a nullity and of no effect as the PIPA provisions had not been complied with. This aspect of the decision may not now be correct. (Berowra Holdings op cit.p 390 (f)) where the concept of proceedings being a nullity was rejected) As the negligence occurred in Brisbane, PIPA applied as the lex locus delicti. Her honour referred to s 7 of PIPA and John Pfeiffer v Rogerson (op cit).

12. Cases in Queensland of Horinack v Suncorp Metway Insurance Ltd[23] and Holmes v Adnought Sheet Metal Fabrications Pty Ltd[24] were doubted by Spieglman CJ as being correct. In Horinack, a writ had been issued but no leave had been obtained under s 39(5)(c) of the MAIA before the limitation period expired. It was held that the writ was a nullity. In Holmes case, Dutney J. held that where a plaintiff commenced a proceeding claiming damages for personal injury against his employer in contravention of s 280 of

[19] Hamilton v Merck at [48]
[20] [2004] QSC 131
[21] op cit
[22] per Spigelman CJ op cit [48]
[23] [2001] 2 Qd R 266
[24] [2004] 1 Qd R 378 at [26]

the 1996 Act,[25] and without obtaining an order under s 305,[26] the proceeding was void. In light of Berowra Holdings and Phipps v Australian Leisure and Hospitality Group Ltd,[27] those earlier cases of Horinack and Holmes are not good law. On the other hand in Johnson v Hill,[28]it was held that the notice requirements of s 37 of the MAIA were provisions with respect to the mode of enforcement of a cause of action against the Nominal Defendant, or to the fulfilment of a preliminary procedural condition, rather than an element of that cause of action. In that event, an insurer's entitlement to claim contribution from the Nominal Defendant under s 6(c) as applied by s 52A(2) was not defeated by the plaintiff's failure to comply with those requirments. Section 37 of MAIA required the claimant to give a notice of accident to the Nominal Defendant within three months after the accident. The court distinguished Bonser v Melnacis.[29] That case was concerned with the provisions of the WorkCover Queensland Act which effectively abolished any entitlement on the part of the injured worker to proceedings against the employer unless there was compliance with the prescribed steps. In other words a right of action or cause of action. Section 253(1)[30] referred to an "entitlement to seek damages" which the court compared to the phrase "title to enforce the liability" as discussed by Sir Owen Dixon in Harding v Lithgow Corporation.[31] Section 252[32] also provided that the provisions of the WorkCover Act were substantive provisions.

13. This, of course, would have to be considered in light of Berowra Holdings. In comparison the provisions of the MAIA such as ss 37and 39(5) were seen as referable "to the mode of enforcement of the cause of action or the fulfilment of a preliminary procedural condition rather then to the validity of the title to enforce it."[33] It should be noted that ss 37 and 39(5)(c) of the MAIA are in similar terms to ss 9 and 18(1)(c) of PIPA. For a clear analysis

[25] S275 WCRA
[26] s WCRA
[27] [2007] QCA 130
[28] [2002] 2 Qd R 486
[29] [2002] 1 Qd R 1 at [22]
[30] S237 WCRA
[31] (1937) 57 CLR 186 at 195
[32] s WCRA
[33] ibid at p 497 per Davies JA with whom McMurdo P and Douglas J agreed

[34]

> The first indicative consideration is that by force of s 18(1)(a) the claimant may proceed if the respondent has either stated that he or she is satisfied that the Pt 1 notice has been given , or is presumed by s 13 (namely after the prescribed period has passed) to be satisfied that such a notice has been given. Secondly, the claimant may proceed if the respondent has waived compliance with the requirement for a notice by s 18(1)(b). Thirdly, by s 18(1)(c)(i), the court is empowered to declare that the claimant has remedied any non-compliance and upon such a declaration the claimant may also proceed. Fourthly, the Court has a general discretion to authorise the claimant to proceed despite non-compliance (s 18(1)(c)(ii). Fifthly, by force of s 35, if a party failed to comply with a duty imposed under Div 1 then the court may make an order that, relevantly, the plaintiff, is to take such action to remedy the default within a time specified by the court. Sixthly, by s 48 a failure to comply with Div 1 may result in an award of costs in the respondent's favour, after proceedings based on the claim are commenced. This particular provision presumes that such proceedings are effective at least for these purposes. Finally, s 59(3) provides for a stay in situations in which a claimant has commenced proceedings without having complied with Pt 1, although it is not clear to me how this subsection links to s 59(1) and (2).

14. One explanation for the link between the subsections in s 59 is that "the presence of the stay contained in s 59(3) supports the interpretation that s 59(2) was intended to operate in circumstances where a complying notice of claim is given, but the requirements of PIPA are not otherwise complied with. Were the position otherwise, s 59(3) would have no purpose.[35]

15. The Court of Appeal in Hamilton v Merck & Co[36] were content to adopt the reasoning in Young v Keong.[37] That is, in relation to notices under Div 1 and compulsory conferences under Div 4, the provisions are procedural subject to

1. [34] op cit at [95]

[35] Jones & Forde at [11.35]
[36] op cit at [90]
[37] [1999] 2 Qd R 335

s 7. Of course, under the MAIA there was no equivalent to s 7.[38] It was held that the provisions of s 37 were procedural or forensic and so they applied to an action brought in Queensland even though the accident occurred in New South Wales. In holding that the provisions of ss 37(1) and 39(5) are mandatory and in the absence of an order to the contrary, legal proceedings cannot be commenced where there has been non- compliance. Although the MAIA did not affect title to the action as discussed in the cases, it did not prevent the court exercising a discretion to strike out the action for want of compliance with a procedural bar.[39] The use of the term mandatory is not conclusive. In the joint judgment in Berowra Holdings,[40] the court said referring to a statement by Professor Jolowicz:[41]

> …each procedural step taken by a litigant requires the other party or the court to take some action, so affecting the path which proceedings take towards ultimate disposition. This is the case even where a procedural rule is expressed in mandatory form; if the party to whom it is addressed chooses to disregard it, the normal outcome is that a choice accrues to the other party either to do nothing or to seek an appropriate order from the court.

Victorian case

16. As a comparative study, reference is made to the case of Wilson v Nattrass.[42] Two passengers, residents of Victoria, injured in a motor vehicle accident in South Australia commenced proceedings against the other driver who was resident in South Australia and whose car was registered in that State.[43] It involved s 93 of the Transport Accident Act (Vic) which provided that a person shall not recover any damages in any proceedings in respect of the injury or death of a person as a result of a transport accident otherwise in accord with the section. The section required a determination as to whether

[38] S57A(2)(b) MAIA requires courts within and outside Queensland to regard limits on liability for damages to be regarded as substantive
[39] Jones and Forde at 2.62; Holmes case op cit.
[40] op cit at [143]
[41] On Civil Procedure (2000) pp 68,78
[42] (1995) 21 MVR 41
[43] This case was referred to by Spigelman J in Hamilton v Merck & Co

the impairment amounted to a serious injury. Section 93(4) precluded the bringing of proceedings for the recovery of damages in the absence of a determination of impairment or the existence of a serious injury. It was held that the common law right previously enjoyed by persons injured in a transport accident, wherever occurring, is extinguished by s 93. Therefore, absent a pre-action determination an injured person may not bring proceedings. Section 93 was held to be part of the substantive law of Victoria. As discussed by Spiegelman CJ[44] a similar conclusion was reached in Bonser v Melnacis.[45] The reasoning in Wilson v Nattrass[46] relied on the earlier decisions of Stevens v Head[47] and McKain v RW Miller& Co[48] both of which were not followed in John Pfeiffer v Rogerson.[49]

Nullity or procedural defect?

17. Before further discussing the obvious effect of Berowra Holdings and Phipps case,[50] there are some further comments by Spigelman CJ in Hamilton v Merch which may become relevant and to which reference should be made[51]:

> It cannot, in my opinion, be said that the PIPA Provisions as a whole, or the scheme of Div 1 in particular, can be characterised as either creating a new right or substituting a legislative scheme for common law rights. PIPA modifies the common law in a number of respects, both procedural and substantive, but does not substitute a new regime.

18. In some ways, his honour predicted what the High Court said in Berowra Holdings some 15 months later. As pointed out by Spigelman CJ, the courts in New South Wales took a different approach to the question of procedural conditions precedent resulting in a nullity.[52] The decision of the NSW Court of Appeal in Berowra Holdings was upheld in the High Court.

---

[44] op cit at [64-65]
[45] op cit
[46] op cit at p42 and 43
[47] (1993) 176 CLR 433 at 456
[48] (SA) Pty Ltd (1991) 174 CLR 1 at 39
[49] op cit.
[50] op. cit
[51] op cit [67]
[52] Hamilton v Merck & Co at [73]

19. In Hamilton v Merck & Co, the court held[53] that Div 1 relating to notices and even more clearly Div 4 relating to compulsory conferences, do not affect enforceability in the sense that the term was used in John Pfeiffer v Rogerson.[54] It is probably timely to look more closely at the decision in Berowra Holdings.

20. In retrospect, this case really turned the tide, at least in Queensland in relation to the question as to whether proceedings were merely irregular or a nullity.[55] Mention has already been made of Horinack, Holmes and Young v Keong.[56] Mr Gordon had given a notice of injury on 12 October 2001 thus enlivening s 151C(1) of the Workers Compensation Act 1987. The action was commenced on 23 November 2001. The employer admitted liability for worker's compensation payments. Numerous steps were taken without alluding to the requirement that there was a prohibition on the commencement of the proceedings before 12 April 2002. In fact, the action was set for hearing and the point taken the day before. An offer had been made and the solicitors for the employer sought to withdraw the offer on the grounds that the proceedings were a nullity. The worker accepted the offer but at first instance leave was given to withdraw the offer and the proceedings were dismissed as a nullity. The Court of Appeal found for the worker and entered judgment in accordance with the compromise. The High Court remarked[57] that the introduction into s 151C of the concepts of nullity and invalidity was misleading because they obscure the distinction between superior courts of record of general jurisdiction and courts of limited jurisdiction, when s 151C applies to both. Reference to a waiver of an employer' right to rely on s 151C was misleading

[53] op cit at [104]
[54] op cit
[55] Subsequent cases such as Australia Meat Holdings v Hamling [2006] QCA 422 and Phipps v Australian Leisure and Hospitality Group Ltd [2007] QCA 130 may have continued to apply the hard line which the Queensland courts had adopted for failure to comply with the pre-court steps under the various Acts
[56] op cit
[57] ibid [10]-[16]; the equivalent to s151C in Qld is s296. Compare s51A of the MAIA.

when the outcome of a summary application in reliance on s 151C depends on the exercise of a discretionary power given to the court.[58]

21. It is important to note what was actually decided in Berowra Holdings, as it has consequences in relation to the trip wires we are discussing. It provides as it were a map for those negotiating the minefield. The High Court held:

(1) that s 151C should not be read as if a plaintiff's entitlement to commence court proceedings after the passage of six months from the giving to the employer of notice of the injury was a pre-condition to the court's jurisdiction to determine claims for work injury damages.
(2) that s 151C did not extinguish or create new rights but postponed the remedy for the common law right to initiate proceedings in a court of competent jurisdiction. The right to object which s 151C conferred on a defendant employer had to be raised in accordance with the procedural rules of a particular court.
(3) That proceedings commenced in contravention of s 151C were not invalid for want of the jurisdiction or because the court had no jurisdiction except to accede to a defendant's application to set aside the proceedings. In exercising its discretionary power in deciding such an application the court must have regard to the procedural history of the matter and apply the rules of court.[59]

Application of the principles in Berowra Holdings

22. The ACT Supreme Court considered the provisions of s51 of the Civil Law (Wrongs) Act 2002. This was a similar provision to s 9 PIPA.[60] It was held applying Berowra Holdings that proceedings were not a nullity where the claimant had failed to serve a notice of claim. Leave was granted to proceed after the expiration of the limitation of s 59 of the ACT Act.[61]

23. The case of Berowra Holdings has been applied also in Queensland. In particular, Hamling's case[62] and Phipps case.[63] However, before discussing those cases, it is necessary to digress to the decision of Winters v Doyle[64]

[58] This was the position arrived at in Phipps case after what could be described as a hiccup in Winters v Doyle [2006] QCA 110.
[59] The subsequent application of r375 of the UCPR in Phipps case reflects this line of reasoning.
[60] See McGregor v Franklin [2006] ACTSC 69
[61] s 18 PIPA is the equivalent
[62] op cit
[63] op cit
[64] op cit

which was decided by the Court of Appeal three months before the decision in Berowra Holdings. The following passages appear in the judgment of Keane JA with whom Williams JA agreed:

> [24] It can be seen that each member of this Court in Morrison – Gardiner v Car Choice identified, as a consideration of central relevance to the proper exercise of the discretion conferred by s 57(2) of the MAI Act,[65] the relationship between the delay which has occasioned the need to seek relief from the operation of the statutory time bar and the plaintiff's attempts to comply with the requirements of the MAI Act. A plaintiff will usually be able to show good reason for the favourable exercise of the discretion conferred by s 57(2)(b) only if he or she can show that the delay which occurred was occasioned by a "conscientious effort to comply" with the MAI Act.
>
> [26] It should be emphasised that an explanation for delay which shows that the delay was associated with the plaintiff's attempts to comply with the requirements of the MAI Act and evidence negativing of the possibility of unfair prejudice to the defendant, are not conditions precedent to the enlivening of the power conferred by s 57(2)(b) of the MAI Act. Rather, they are considerations relevant to the proper exercise of that power.

24. Keane J. observed that a claimant relying on a mistake by his or her solicitors should supply an affidavit explaining both attempts to comply with the legislation and reliance on solicitors.[66] The explanation for the delay in that case did not 'identify any significant connection between the requirement of the MAI Act and the delay which occurred. It is to be emphasised that the issue here is not whether the plaintiff may reasonably be excused for having relied upon his solicitor to comply with the requirements of the MAI Act.[67] The issue is whether the delay which occurred was related to compliance with the MAI Act. The impression with which one was left seemed to be that the negligence or incompetence of the solicitor was no longer an answer to delays which have occurred as was the situation in Perdis v Nominal Defendant.[68] An action against the Nominal Defendant was required to be commenced within three months. If not, a reasonable excuse had to be given for the delay and

[65] s 57(2)(b) is similar to s 59(2)(b) of PIPA which allows proceedings to be brought after the end of the period of limitation 6 months after the notice is given or a longer period allowed by the court.
[66] ibid [36]
[67] Compare Perdis v Nominal Defendant [2003] QCA 555
[68] [2004] 2 Qd r 64

notice given before the expiration of 9 months by which time the action was barred. The court considered that a reasonable excuse was that she had left the matter entrusted to a competent solicitor who had failed to act. On the authority of Winter v Doyle it would seem that the solicitor would be required to show that the delay was as a result of problems complying with the MAIA not just an oversight related to pursuing the action within the time limits.[69]

25. Interestingly, Fryberg J expressed it somewhat differently:[70]

> I agree with Keane JA that the power conferred by s 57(2)(b) of the Motor Accident Insurance Act 1994 is unfettered by any condition precedent. The discretion is at large. Considerations relevant to the exercise of the discretion are well-known and there is no challenge in this application to the decision in Morrison -Gardiner. They include whether the delay was occasioned by the need to comply with the Act. That is an important, but not a dominating consideration. Its existence favours an extension of time. Its absence is by no means fatal to such an extension.

26. It is suggested that the approach of Fryberg J seems to favour an unfettered discretion and it sits more comfortably with the approach of the High Court in Berowra and the later decision of Phipps. However, in Spencer v Nominal Defendant [2007] QCA 252, Keane JA who sat on Winters v Doyle and Phipps commented[71] it was wrong to say that the "delay which occurred was related to compliance with the Act" was to be regarded as "crucial" or as "necessary" for the favourable exercise of the discretion conferred by s 57(2)(b) of the MAIA. It is convenient to deal with Australia Meat Holdings

[69] Bazley v Nominal Defendant [2006] QDC 379 per McGill DCJ at [19] who was not convinced that any delay was related to attempts to comply with the MAI Act. An application under s 57(2)(b) of the MAIA was refused. A similar approach was adopted by Griffin DCJ in Kurcharzynk v Transport Accident Commission [2007] QDC 35 at [40] and White J. in McColm v FKP Constructions Pty Ltd [2007] QSC 40; contrast Osman v Charles & Anor.
[70] Winters v Doyle op. cit at [56]
[71] ibid at [15]

v Hamling[72] at this point, only because it was decided before Phipps and is discussed in the later case.

Australian Meat Holdings v Hamling

27. Leave was given by the District Court on 19 December 2003 for the claimant to commence proceedings despite non-compliance with s 280 (s 275 WCRA) of the WorkCover Queensland Act 1996. The solicitor for Mr Hamling filed proceedings in the District Court on 23 December 2003 in contravention of s 303 of the now repealed WorkCover Act .[73] A day later proceedings were filed in the Supreme Court but those proceedings were struck out because that court had not given leave under s 305[74] to bring proceedings in it, and because that court held no complying notice of claim had been given before the end of the limitation period. On appeal those conclusions were upheld. On 4 January 2005, the employer applied in the District Court for a declaration that the proceedings commenced in the District Court on 23 December 2004 be struck out. That application was refused. The decision in Berowra Holdings was given on 16 June 2006 before the matter was heard on appeal on 3 October 2006. It was held that:

    (1) That s 303 did not inevitably result in the invalidity of proceedings commenced in contravention of it, because it did not extinguish rights or create new ones. Rather it postponed the remedy for the common law right to initiate proceedings in a court of competent jurisdiction.
    (2) That proceedings commenced in contravention of s 303 engaged the jurisdiction and procedural rules of the court and hence were vulnerable to an application to strike out or summarily dismiss the initiating process.
    (3) That in the present case the proceeding instituted by the respondent in breach of s 303 should not be struck out, in circumstances in which the applicant employer had actually had the benefit of the protection the Act intended and the respondent would otherwise be shut out from a

[72] op cit
[73] WCRA s 296
[74] s 298 WCRA

claim on the merit despite many efforts on his part to comply with the provisions of the Act regulating his access to damages.

19. In some ways the last aspect of the decision raised the issue so prominent in Winters v Doyle[75] and that is any explanation for delay should be related to attempts to comply with the Act and not merely the negligence or failure of the solicitor to deal with the passing of time and the expedition of the action. Berowra Holdings was applicable because although the s 253[76] WorkCover Act described those persons entitled to seek damages, the basis of the liability was not under statute but rather common law.[77] Once it was accepted that the court had jurisdiction, concepts of waiver, acquiescence and estoppel were imprecise. The defendant had filed an unconditional notice of intention to defend which did not plead non-compliance with s 303. The plaintiff had provided all of the information required shortly after filing the claim. The employer had lost no benefit from the non-compliance. Further, had the proceedings been struck out, the plaintiff would be shut out from the claim, despite efforts to comply with the legislation.[78] Those factors would have justified an exercise in the trial judge's discretion to refuse to strike out the claim, despite the non-compliance with s 303.[79]

Phipps v Australian Leisure Group & Anor.[80]

28. In Phipps, the action was commenced without obtaining a damages certificate. It was held at first instance that the failure to comply with pre-court procedures was an absolute bar once it was raised by the defendant.[81] On appeal, and giving effect to the decision in Berowra Holdings, it was held that proceedings will not be inevitably struck out for non-compliance with the WCRA or if there is failure to obtain leave to proceed before issuing proceedings. The failures by the claimant were listed as follows by McMurdo J:

[75] op cit.
[76] S237 WCRA
[77] ibid [18]
[78] ibid at [22]
[79] ibid at [23]
[80] op cit
[81] [2006] QSC 327 at [19] per Dutney J

a. the claimant had not received an assessment
b. the claimant failed to give a notice of claim within the limitation period
c. there was no compulsory conference
d. the time mandated by s296 of the WCRA had not passed before the issue of proceedings
e. the claimant had not sought leave to start proceedings under ss297 or 298 of WCRA.

Had that case been dealt with pre-Berowra Holdings, there would be little doubt that the claimant's claim would have been struck out.[82]

20. It is suggested that the claimant could have done a number of things to regularise proceedings:[83]

a. the claimant could have sought leave to commence proceedings despite the absence of a notice of assessment, complying notice of claim or a compulsory conference, under s 298 of WCRA.
b. if that leave was given the limitation period would have been extended under s 302.
c. the claimant would have the time required to obtain a notice of assessment, lodge a complying notice of claim and attend to the other steps.

As is stated in Jones & Forde:[84]

> The potential for an order under s 298 of the WCRA was relevant in two ways. Firstly, it was relevant in the construction of the statutory scheme and in considering the effect of non-compliance that the WCRA provided a means of avoiding non-compliance for urgent proceedings. Secondly, in the exercise of the Court's discretion it was relevant the claimant did not apply under s 298.

[82] See for example cases such as Holmes, Horinack, Tanks, Nicols op cit, Goerecke State of Queensland [2004] QDC 273, and Aydar v Pashen[2003]1 Qd R 601, Bermingham v Priest [2003] 1 Qd R 623.
[83] Jones & Forde www.lexisnexis.com.au/academic Supplement to 'Personal Injuries Procedure in Queensland' para.4.20
[84] ibid 4.20

29. The majority in Phipps case confirmed that ss 235 and 237 of WCRA affect title to the action and not merely the availability of remedy. Describing the provisions as procedural or substantive did not address the question whether a pending action which could be made to comply with ss 237 and 250 of WCRA must be struck out as an abuse of process.[85] The question was not whether the court had jurisdiction as the language of ss 276,296, 297 and 298 envisaged circumstances where proceedings could be commenced despite non-compliance. The real question was whether the claimant's action should be summarily terminated because a notice of assessment had not issued bearing in mind the prospect that the issue of a notice of assessment was imminent. This involved the consideration of various discretionary factors. Non-compliance enlivens the court's powers to prevent the case going forward and in particular to dismiss the proceedings if appropriate. The majority[86] seemed to place some emphasis on r375 of the UCPR which allows a party to amend to include a cause of action arising after the commencement of proceedings. The effect of r375(2) by necessary implication is that an action commenced before all the facts necessary to give rise to 'title' to sue occur is not a nullity. The action is irregularly commenced and susceptible to being struck out as an abuse of process, but it has sufficient existence in the eyes of the law to be capable of being made regular by amendment.[87]

30. The need to plead the irregularity in the defence may have consequences. Kirby J held that if contravention of s 151C of the Workers Compensation Act (NSW) 'is pleaded promptly there is no question but that it must be given effect so as to uphold the express command of Parliament'.[88] On the other had McMurdo J commented that unlike a limitation period, chapter 5 of WCRA is primarily concerned with the expeditious resolution of claims by avoiding litigation. It was not enacted following a concern that defendants were unlikely to have a fair trial, or for other purposes relevant to a statute of

[85] Phipps op cit t [19]
[86] Keane JA and Muir J as he then was
[87] Phipps op cit at [26] per Keane AJ and [89] per McMurdo J as discussed in Jones & Forde Supplement op cit [4.30]
[88] Betowra Holdings op cit at [104]

limitations, such as the need for people to arrange their affairs on the basis that claims would not be made against them. In both Hamling and Phipps, the proceedings were issued within the limitation period.

Discretionary matters

31. For completeness, reference should be made to the discretionary matters which the court in Phipps regarded as important. What must be remembered is that Ms Phipps had worked for the employer from October 1999 to July 2003 and developed pains in her right neck and shoulder area caused by unloading cartons at a hotel. Having received a condition certificate on 20 May 2004 relating to injuries suffered to 30 June 2001, she then commenced her action on 21 May 2004. Pleadings were served in August 2004 pleading a broader case and there were delays due to a change from WorkCover to the defendant as self insured. The claimant was diagnosed with cancer and underwent major surgery in January 2006. The discretionary matters not considered by the judge at first instance were:[89]

    a. There was a real likelihood amounting to a virtual certainty that a notice of assessment would issue;
    b. The notice of assessment was likely to issue sufficiently soon for there to be no suggestion that any delay would prejudice the respondent in its ability to have a fair trial;
    c. The notice of assessment was likely to show that the claimant had suffered a substantial injury. A loss of the opportunity to establish an entitlement to damages on the merits would be a substantial prejudice to the claimant;
    d. If the action was struck out, a new action by the claimant would be defeated by the Limitations of Actions Act 1974 (Qld);
    e. No prejudice to the respondents has ensued from the claimant's non-compliance with the WCRA;
    f. It was possible to infer from correspondence that the claimant's failures to comply with the WCRA were due to her lawyer's

[89] per Keane JA [28]-[31]

> inability to comprehend what was required. There was no suggestion the claimant deliberately flouted the requirements or intentionally pursued some forensic advantage which would not arise on obtaining leave under s296 or 298 of the WCRA, or complying with s302 of WCRA.[90]

Legislative changes?

32. The decision of the High Court in Berowra Holdings has softened the blow for claimants who struggle to comply with the personal injuries legislation. It would seem that the decision can be applied across the board to PIPA, MAIA and WCRA. The next step would be to attempt the rationalise the legislation to provide a streamlined uniform approach to a personal injuries claim however arising. There has been recent criticism of the duplication relating to the personal injuries legislation in Queensland.(Hon.Chief Justice Paul de Jersey addressing the Queensland Law Society Christmas breakfast, Hilton Hotel, 7 December 2007) His honour commented:

> There is potential for unnecessary expense and delay, or at worst, injustice, if an injured person faces different procedural requirements or restrictions on damages based on how or where the injury occurs.

The Chief Justice referred to a recent decision in the Court of Appeal concerning disclosure under the various Acts.(Haug v Jupiters Ltd trading as Conrad Treasury Brisbane [2007] QCA 199 at [16]) I notice that this topic will be discussed later at this conference. His honour went on to say that "some of the legislative requirements are genuinely perplexing". He went on to refer to the requirement that under both PIPA and MAIA, a party is required to certify that the matter is ready for trial before pleadings have been delivered.(Chief Justice op cit p 7) In summary, the Chief Justice stated (ibid p 8):

[90] Jones & Forde www.lexisnexis.com.au/academic supplement to 'Personal Injuries Procedure in Queensland' para.4.35

> It can reasonably be questioned whether the legislative changes have reduced insurance premiums or led to the speedy resolution of claims, as was hoped. What can be said, is that the complexities created by the legislation have increased litigation, contrary to stated claims.

I agree with his honour's observations. There have certainly been a huge reduction in the number of cases listed. In the District Court, our case load has been cut by two thirds. However, the pre-trial skirmishes to which his honour referred, have blossomed. It would be opportune to re-state what Ashley Jones wistfully wrote in 2005 (Jones & Forde op cit at (xvii)):

> We hope that this book will minimise those applications to court where confusion on the part of legal practitioners has resulted in the requirement for leave of the court to proceed. Perhaps a more detailed understanding of the Acts and their inter-relationship will assist the adoption of a more uniform approach by the legislature.

Twenty-five trip wires to successful litigation

Appendix

Notices

- PIPA ss9, 14, 20A, 22
- MAIA s37
- WCRA ss237, 275, 300(3)

Compulsory Conferences

- PIPA s36
- MAIA s51A
- WCRA ss289, s293A

Applications

- PIPA ss18, 42, 43
- MAIA s39(5)(c)
- WCRA ss 247, 250, 251, 255, 256, 259, 287, 296(a)(iii), 297, 298, 302(1)(iii)(iv), 303

Limitations of Actions issues

- Limitation of Actions Act 1974 s31
- PIPA s59
- MAIA s57
- WCRA s302

Discovery

- PIPA s32
- MAIA s45, 46, 46A
- WCRA ss167, 290A