

Update for 'Pre-Court Personal Injuries Procedure in Queensland 2nd ed' December 2010

References in [] are paragraphs in 'Pre-Court Personal Injuries Procedure in Queensland'.

1 Amendments to the *Personal Injuries Proceedings Act 2002 (Qld) (PIPA)*.

Effective from 1 July 2010, the *Civil Liability & Other Legislation Amendment Act 2010 (Qld)* amended the PIPA and the Personal Injuries Proceedings Regulations 2002 (PIPR), the Motor Accident Insurance Act (MAIA) and the Motor Accident Insurance Regulation 1994 (MAIR). In summary those amendments:

- for an injury arising on and from 1 July 2010 increase the 'declared costs limit' to \$2,950 (from \$2500) (PIPR r 13(1), MAIR r 27A (1))
- Amend s 51C(3) – (4), 55F of the MAIA and ss 4 and 56 of the PIPA to refer to lower offer limit and upper offer limit (in place of \$30,000 and \$50,000 respectively) . For injuries on and from 1 July 2010, the lower offer limit is \$35,340 and the upper offer limit is \$58,900. For injuries before 1 July 2010, the originally enacted limits apply (PIPR r 13(2)-(3) MAIR r 27A(2)-(3)).
- Provide for future indexation of those amounts (PIPA 75A, MAIA 100A); Provide that a claim is to be certified ready for 'conference' rather than 'trial' for the PIPA s 37(2). The MAIA is not amended in this respect.
- Insert the PIPA s 44 allowing urgent proceedings by agreement, where the urgency is stated in the notice of claim. It is difficult to see what utility this has. It is based on the WCRA s 276. A notice of claim delivered timeously under the PIPA (within 9 months of the date of injury or one month of consulting a lawyer) will rarely give rise to the 'urgency' occasioned by imminent expiry of the limitation period. Note that where the section specifies 7 days within which the respondent must reply, that period cannot be abridged where the limitation period will expire beforehand: *Handover v Consolidated Meat Group* [2009] QSC 41.

2 Amendments to the *Workers' Compensation and Rehabilitation Act 2003 (Qld) (WCRA)*

Effective 1 July 2010, the *Workers' Compensation and Rehabilitation & Other Legislation Amendment Act 2010 (Qld)* amended the WCRA. In terms of pre-court procedure for injuries occurring from 1 July 2010, the Act:

- Amends s 233 (definitions for Ch 5) to define a 'contribution claim' as : 'a claim for contribution or indemnity made against another person by an insurer who adds the person as a contributor under s 278A'.
- Replaces ss 292 and 292A of the WCRA. This is to require a contributor to make a written final offer at the compulsory conference. There is capacity to make a joint written final offer under s 292(3) of the WCRA with the respondent, for specific contribution.

The Act inserts s 316A 'Principles about orders as to costs', providing for orders in a contribution claim:

- If a court awards an amount of contribution that is equal to or more than the other party's written final offer, the court must order the contributor to pay the other party's costs on an indemnity basis from the day the written final offer was made.
- If the court dismisses the contribution claim or makes no award for contribution, or makes an award for contribution of an amount that is equal to or less than the contributor's written final offer, the court must order the other party to pay the contributor's costs on the standard basis from the day of the offer.
- If an award of contribution is less than the other party's written final offer, but more than the contributor's written final offer, each party bears its own costs.

Those provisions differ substantially from those concerning 'offers to contribute' under s 41 of the PIPA. The legislative amendments are incomplete, at least where contributors under the WCRA are respondents under the PIPA, there is no legislative direction as to which regime prevails.

The Act amends s 316 of the WCRA to allow costs to be awarded against an unsuccessful claimant (s 316(2)(b)).

If an entity other than a defendant participating in a compulsory conference is joined as a defendant in subsequent proceedings for damages, the court may make an order about costs in favour of or against that entity according to 'the proportion of liability of the defendants'. Rarely will a defendant who has not participated in a compulsory conference be joined to proceedings in light of the decision of *Pukeroa v Birkeley Challenge* [2005] QCA 49.

For analysis of some of the difficulties on costs these amendments create see Garrett, P 'Costs Payable in Personal Injury Claims Under the Various Legislative Regimes' Paper to Queensland Law Society Personal Injuries Conference 28 July 2010.

3 Which Act?

[1.21] Driving of the motor vehicle MAIA s 5(1)(a)(i)

In *Suncorp Metway Insurance Limited v Sichtler & Ors* [2010] QSC 164, the plaintiff was standing adjacent to a recycling wheelie bin positioned on the edge of a footpath. A garbage truck pulled up adjacent to the wheelie bin. The truck was fitted with a mechanical arm which was used to pick up bins from the footpath and hoist them. The driver then caused the mechanical arm to operate away from the side of the truck. The 'grab' of the mechanical arm caught the plaintiff causing injury. The parties agreed the injuries were caused 'by, through or in connection with' a motor vehicle. The question was whether the injury was a 'result of the driving of the motor vehicle' or the 'result of a collision with the motor vehicle'. Daubney J held:

...the garbage truck... was brought to a stationary position beside the wheelie bin. At this stage no movement in the traditional sense of 'driving' was intended and the driver of the truck had engaged the mechanical arm of the truck in order to grab and raise the wheelie bin. There is a clear distinction between operating the garbage truck mechanical lifting device on the one hand, and on the other, driving the truck in the sense of actual control and management of the vehicle while it is moving. The driving of the vehicle had ceased, albeit temporarily.

This is not a case where it could be said that the injury was caused by the speed with which the truck was being driven or the place to which it was driven. The injury was directly caused by the allegedly negligent operation of the lifting device attached to the truck. (at [38-39]).

There was no 'collision' with the motor vehicle within s 5(1)(a)(ii) of the MAIA:

In natural and ordinary language, the present incident would not readily be described as a 'collision'. What happened was the plaintiff was picked up or 'collected' by the lifting mechanism of the truck (at [49]).

[1.89] Interstate claims

In *Kok v Sheppard* [2009] NSWSC 1262, the defendants applied to have proceedings transferred to Queensland from the New South Wales Supreme Court. The court noted that the PIPA was part of the law in Queensland and had the proceedings been brought in that state the Act would apply (at [25]). The plaintiff opposed transfer of the proceedings in part because the relevant provisions of the PIPA were procedural (under NSW law see [1.89]) and did not apply to NSW proceedings. The New South Wales Supreme Court held that this was not an appropriate basis upon which to resist transfer (at [41]). The appropriate forum for the proceedings was Queensland as the place of the alleged negligence and the place of residence of all parties.

Having initiated a claim in Queensland, a claimant cannot avoid the legislation by instituting proceedings in another state. In *RACQ Insurance Ltd v Wilkins* [2009] QSC 365, the claimant was injured in a motor vehicle accident at Bundaberg. Both vehicles were registered in Queensland. The

claimant served a notice of accident claim form under the MAIA. The respondent admitted liability. The respondent required examination of the claimant under the MAIA. The claimant's solicitors then advised that they held instructions to commence proceedings in the Supreme Court of the ACT as most of the corroborative witnesses were from New South Wales or the ACT, and that the claimant had been examined by a number of experts in Sydney or the ACT. The respondent's solicitors invited the claimant to be examined by an expert in either Sydney or the ACT. The respondent applied for orders that the claimant comply with the request for medical examination and supply reports and other documents in her possession. The application was served before the proceedings issued in the ACT were served.

The claimant submitted the Supreme Court of Queensland lacked jurisdiction to enforce ss 45 and 46A of the MAIA. As the 'court' defined in s4 of the MAIA it had no jurisdiction to order compliance in the Supreme Court of the ACT. Further, the Supreme Court of the ACT would not order compliance with the 'pre-court' requirements as for choice of law purposes they were procedural.

Applegarth J held the definition of 'court' in s4(a) of the MAIA does not apply to s 50. An interpretation of the MAIA depriving the Queensland Supreme Court of jurisdiction to enforce compliance where it was doubtful the Supreme Court of the ACT would, did not achieve the objects of the MAIA (at [18]). This would defeat the purposes of the Act and lead to absurd and unintended consequences including the existence of obligations incapable of enforcement (at [19]). Even in the event of a different conclusion concerning the definition of the court under s 50, it would have been appropriate to exercise the inherent jurisdiction of the court, where otherwise statutory obligations conferring rights on the respondent were incapable of enforcement (at [24]).

4 Claim notification

[2.27] Statutory declaration

In *Corkery v Kingfisher Bay Resort Village* [2010] QSC 161, the Supreme Court observed that a notice of claim tendered without objection under s 92 or s 18 and 19 of the *Evidence Act 1977* was admissible evidence of any fact stated in it (at [11]).

Reasonable excuse? Objective test [2.52]

In *Sheehy v Hobbs* [2010] QSC 108, the claimant provided reasonable excuse for delay of 2 years and 7 months after the injury. The claimant expressed 'early interest' in a claim for damages, as noted in hospital records. The claimant instructed solicitors who advised they could not recommend proceeding with the claim. The claimant deposed she knew little about legal processes, had a grade 10 standard of education and relied completely upon her then solicitor. The possible cost of litigation was significant to the claimant as she had limited means. The first solicitor declined to act on a speculative basis (at [22]).

McMeekin J was satisfied the claimant was not advised about time limits. McMeekin J held the claimant had given a reasonable excuse for the delay where the claimant had limited education and no knowledge of legal matters or procedure. The only criticism that could be made of the claimant's conduct was that she failed to seek a second opinion earlier. In that regard, the claimant could not travel easily as she was a partial quadriplegic confined to a wheelchair. McMeekin J applied previous authority in holding that poverty was capable of providing a reasonable excuse for delay (at [32]). McMeekin J would have granted leave under the PIPA s 18(1)(c)(ii) (see [34-42]).

In *Nestorovic v Milenkovic* [2010] QSC 143, the claimant provided a reasonable explanation for delay in serving the notice of claim. The injury occurred on 26 January 2007. The claimant gave the respondent a notice of claim in mid-October 2009. The claimant was assessed on admission to hospital on 30 January 2007. He was told that he had a poor prognosis and a likelihood of an inability to work for 12 months and a prospective long-term disability. He was then periodically reviewed until approximately November 2007. The claimant deposed that during this period he was increasingly anxious about the lack of improvement in his ankle but 'managed to keep himself going' by focusing on the fact that improvement would happen. In late 2008 and 2009, he developed depression and deposed that it was at this time he first seriously thought about pursuing a claim. The claimant had not previously seriously considered pursuing a claim because the respondent was a fellow member of his church and an acquaintance. On 10 July 2009, he obtained the further medical advice indicating a need for surgery. The claimant deposed that until 10 July 2009 he had always believed that his

injuries and symptoms would resolve. On 28 July 2009, the claimant first contacted solicitors and an appointment was arranged for 31 July 2009. On 4 August 2009, he instructed solicitors to commence a claim. By 15 September 2009, the solicitors' enquiries had led to the proper identification of the respondent and the next day they sent a part 1 notice of claim to the claimant for signature which was returned approximately a month later.

Wilson J held that an injured person's hope or belief that his condition will improve with time can afford a reasonable excuse for delay in giving the notice of claim. The claimant was initially given 2 options and given the risks associated with surgery, he chose conservative management. He persevered and attended as recommended on his general practitioner and at the hospital, but for the period from the latter half of 2008 into early 2009 when he was in deep depression. On receipt of general practitioner's advice on 24 April 2009 he went into hospital that day but could not see the specialist until 12 June 2009. The delay in treatment from 24 April 2009 was not in any way attributable to the claimant, as opposed to the hospital waiting list. At the time of the initial hospitalisation, he was advised of the long-term disability but there was no evidence that he was counselled against conservative management. The claimant's own conduct was reasonable in all the circumstances and his solicitors had acted with reasonable diligence (at 20).

[2.78] Claimant a person entitled to seek damages WCRA

A successful appeal against rejection of an application for compensation may not always be a 'material fact of a decisive character', following amendments to the legislation since *Charlton*. In *Mooteboom v Ernest Henry Mining Pty Ltd* [2010] QSC 106, the applicant alleged he suffered severe psychiatric conditions, on or about October 2003. Medical records demonstrated that he presented with symptoms of stress and anxiety on 20 June 2002 and 18 March 2003.

On 26 August 2006, the claim for compensation was rejected as it was out of time and the decision-maker was not satisfied that the psychological injury had arisen out of or in the course of employment. On 15 September 2006, the applicant delivered a notice of claim for damages covering the period 1 July 2001 to 30 June 2003 and a notice of claim under the WCRA for the period 1 July 2003 to 31 October 2004. Solicitors for the respondent advised that any action for damages under the WQA was statute barred.

On 23 November 2006, the applicant applied for review with QComp, which was unsuccessful. On 8 June 2007, an appeal to the Industrial Magistrates Court was filed. On 2 February 2009, the appeal was allowed.

The Supreme Court held that for any psychiatric injury sustained by the applicant between 22 February 2001 and 30 June 2001, s 253(1) of the WQA prevented the claimant from commencing proceedings until the decision of the industrial magistrate on 2 February 2009. Unfortunately for the applicant, there was no evidence before the court that the applicant in fact sustained an injury by 30 June 2001.

From 1 July 2001, the WQA was amended to insert a new s 235(1)(c), referring to a worker lodging an application for compensation that 'is or has been the subject of a review or appeal and the application has not been decided'. This meant the applicant could pursue his claim through the pre-litigation procedures before the decision of the industrial magistrate:

[46]... the applicant in fact had all the knowledge related to his right of action in late 2006, but the problem was that at that time he failed to take the necessary steps pursuant to the Act (which were then open to him) to give him the right to commence proceedings at that time. The lodging of the application for review received on 12 December 2006 was a material fact of a decisive nature because it entitled the claimant to seek damages and the ability for him to proceed to a damages claim was not dependant on the decision by [the] Industrial Magistrate...

The matter arose again in *Leigh v State of Queensland* [2010] QSC 227. After a 'strongly contested hearing', the decision of the industrial magistrate was reserved for over 12 months, in which the primary limitation period expired. The applicant pointed to the decision of the industrial magistrate as a material fact of a decisive character. The respondent pointed to the entitlement given to the plaintiff under s 237(1)(c) of the WCRA to lodge her claim for damages at the time of applying for review. Mullins J cited *Charlton* where Williams JA observed (at [45]):

...when one considers the provisions of section 253 in the context of section 30 and section 31 of the *Limitations of Actions Act*, it must be a decisive consideration that for the first time a person has become entitled to seek damages for an injury sustained in the course of employment ... namely the consequence that a reasonable person taking appropriate advice on those facts would conclude that it was only then appropriate to commence proceedings.

The fact that the plaintiff did not rely on s 237(1)(c) of the WCRA to give her notice of claim for damages before expiry of the limitation period did not preclude her from seeking an extension of the limitation period. The entitlement given by s 237(1)(c) is a relevant matter in determining what steps a reasonable person in the position of the plaintiff would have taken in her own interests before expiry of the limitation period. That entitlement did not deprive the unresolved appeal of relevance.

The plaintiff's right to seek damages depended on her proving she had suffered an injury within s 32 of the WCRA, the very issue before the industrial magistrate. Uncertainty for the plaintiff about her prospects in pursuing a claim for damages until that proceeding was resolved was compounded by the length of time before the industrial magistrate's decision was given (at [49]). It was only when the plaintiff succeeded before the industrial magistrate that the significant question mark over the plaintiff's claim was removed.

Mullins J held that it was not until at least the giving of the industrial magistrate's decision in June 2007 that the material fact known by the plaintiff at the time she pursued the appeal took on the decisive character required under s 31(2). Mullins J extended the limitation period.

On that authority the mere availability of a 'gateway' under s 237(1)(c) of the WCRA may not be of a decisive character where other substantive questions about the claimant's success in the claim remain.

[2.80] WCRA 'claimant'

In *Jacobs v Woolworths* [2010] QSC 24, the applicant had lodged an application for statutory compensation which the respondent rejected. The application was lodged after the time allowed under s 131(1) of the WCRA. The applicant sought a review of that decision, undetermined as at the time of the application. The respondent contended that the act of lodging an application for compensation however flawed or ineffective precluded the worker from pursuing a claim for damages. *Kelly v WorkCover Queensland* [2002] 1 QdR 496 was distinguished because in that case the application for statutory compensation was considered by the review tribunal. In *Watkin v GRM International Pty Ltd* [2007] 1 QdR 389, the claimant worked overseas and Queensland was not his principal place of employment. He was not entitled to receive statutory compensation under the WCRA. The claimant's application for compensation was unsuccessful, and he was found to have applied for compensation.

In *Jacobs*, the court held *Watkin* did not concern an out of time application and the validity of the application under s 131 was not in question. In *Charlton v WorkCover Queensland* [2007] 2 QdR 421, the claimant had lodged an application for statutory compensation but it was rejected on the grounds that he did not sustain an injury and the application was lodged out of time. In *Jacobs*, the court noted that the focus of the court's decision in *Charlton* was not on the validity of an application for statutory compensation lodged out of time. Rather, it was concerned with the effect of the decision of the Industrial Magistrate that the application was made within time providing a different gateway for the claimant to seek damages.

In *Jacobs*, the court noted that in none of those decisions was there any direct focus on the question of the proper construction of the WCRA s 131. The court held that lodging an application for compensation out of time did not preclude the applicant from pursuing the claim, in particular:

- the language of s 131 of the WCRA meant that the 'essential validity' of the application depended upon it being lodged within time. Additionally, the statutory power to waive invalidity would be ineffective if it was accompanied by the penalty of precluding a claim for damages;
- The general purpose and policy of the provision suggested that artificial barriers to an entitlement to claim damages should not be raised where there was in place a rigorous process of enquiry to determine that entitlement. Construing paragraph (d) of

s 237(1) as referring only to a valid application for compensation allowed the enquiry underpinning the entitlement to claim damages to be consistent and fair for each category of worker contemplated by the section (at [27]).

5 Claim notification – exceptions

[3.33] ‘Claimant’ WQA s 305

In *Carter v Queensland Formwork Contractors* [2010] QSC 315, McMeekin J held a claimant seeking leave to issue proceedings under the WQA s 305 must satisfy s 273A of the WQA. Where the claimant did not sustain an injury within the legislation, WQA s 305 did not assist. This is to be distinguished from a claimant who suffers an injury and falls within WQA s 253, but cannot satisfy other provisions of the legislation: see [3.33].

[3.74] In *Boulter v Batten & Anor* [2010] QDC 56 Dorney QCDCJ applied the methodology in *Berowra* (see [3.61-3.72]) to a claim under the MAIA (at [13]).

[3.81] Procedural issues

In *King v Banana Shire Council* [2010] QDC, the District Court held failure to comply with pre-litigation procedures was an ‘irregularity’ within rule 144 of the *Uniform Civil Procedure Rules 1999* (Qld) requiring the filing of a conditional notice of intention to defend. In light of the decision in *Berowra*, (see [3.61-3.72]) the parties conceded non-compliance with ‘pre-court’ procedures did not raise a question as to the court’s jurisdiction ([23]). The filing of a claim pleading matters within the PIPA and MAIA, where only the PIPA was complied with was an irregularity within r 144 (at [29]).

As to the form of order where non-compliant proceedings remain on foot, in *Racic v Haltiner* [2010] ACTSC 63, the proceedings were stayed until completion of the required steps.

6 Notification in medical liability claims

[4.15] Specialist’s report

In *Elliott v Walker & Ors* [2009] QDC 355, the claimant could not obtain the report required by s 9A(9)(d). Indeed, the initial report opined there had been no failure to meet the appropriate standard of care. A subsequent specialist came to the same conclusions. In the context of an application to excuse the non-compliance under s 18(1)(c)(ii), Robertson DCJ held that without expert evidence to support the particulars of negligence pleaded, there was very little prospect of the plaintiff succeeding, and refused the application.

7 Parties to claim

[6.14] Attempt to join a contributor as defendant in subsequent proceedings UCPR r 69

In *Etemovic v Baulderstone Hornibrook Queensland* [2010] QSC 141, the plaintiff’s attempt to join a contributor as a defendant out of time under UCPR r 69 failed. A claim and statement of claim against the defendant was filed on 3 August 2009. The defendant issued a third party notice against the contributor. The claimant had at no stage complied with s 9 of the PIPA (by delivering a notice of claim) in relation to commencing a proceeding against the third party. In attempting to join the third party as defendant, the plaintiff argued that the obligation to satisfy the PIPA was met by the third party being a contributor and the third party’s receipt of the contribution notice should be treated as compliance by the plaintiff with the giving of a notice under s 9 of the PIPA (at [10]).

The court held the third party participated in the compulsory conference as contributor and never received a claim from the plaintiff. The third party was provided with a copy of the plaintiff’s notice of claim by the defendant. Section 9(1) of the PIPA precluded a proceeding by the plaintiff against the third party (applying *Pukeroa v Berkeley Challenge Pty Ltd* [2005] 2 Qd R 46). There was no justification for construing s 9(1) of the PIPA as being satisfied by the plaintiff where a copy of the notice of claim was provided by the defendant to the third party with the contribution notice under s 16(1) of the PIPA. Further, the court held:

[27]As the decision in *Pukeroa* also illustrates, the power to add a defendant under rule 69 cannot be relied on to dispense with compliance by the plaintiff with the pre-court procedures under PIPA in respect of the proposed additional defendant. The remedial purpose of rule 69 does not replace the mandatory requirements imposed by PIPA in respect of a claim by the plaintiff that is regulated by PIPA.

8 Parties' Obligations

[7.87] Respondent must give information to claimant PIPA s 27 other incidents

The Supreme Court again considered 'other incidents' in *Oliver v Mulp* [2009] QSC 340. The notice of claim alleged the claimant was involved in: '...an altercation with another patron inside the hotel. Shortly thereafter he was involved in a physical altercation with the same patron immediately outside the entrance to the hotel'. Information sought included :

- A number of matters concerning a William John Dale whom it was alleged was an employee, servant or agent of the respondent;
- Training provided to Dale relevant to the provision of security services;
- Directions or instructions provided by the respondent to Dale;
- Supervision provided by the respondent to Dale;
- Policies, procedures, guidelines or protocols of the respondent dealing with aggressive or intoxicated patrons and responsible service of alcohol;
- Incidents of physical altercation on or in the vicinity of the Hotel for the 12 months preceding the assault on the claimant.

The Court noted:

- The notice of claim did not mention William John Dale. There was nothing in the description of incident in the notice of claim to suggest that Dale was at the hotel let alone involved;
- There were questions about intoxicated patrons but nowhere was it suggested the person who assaulted the claimant was intoxicated;
- There were questions about violent patrons and physical altercations on the hotel premises but the first altercation within the hotel premises was not described as physical in the notice of claim.

Questions about prior incidents were 'not facts to which the occurrence of the incident may be attributed' (at [15]), and outside s 27 of the PIPA.

McGill SCDCJ considered the point in *Wright v KB Nut Holdings* [2010] QDC 91. The claimant allegedly suffered a psychological injury after her right index finger was pricked by a hypodermic syringe left on an internal staircase of premises leased to her by the respondent.

The questions asked included:

- Whether the premises had been cleaned or inspected by the respondent before the commencement of the claimant's stay;
- Whether the respondent had found syringes or other drug related utensils in any of the units since the commencement of operation of the premises.

The respondent admitted an inspection and also cleaning before the arrival of the claimant. McGill SCDCJ cited the observations of the Supreme Court in *Ogilvie*, where Ambrose J held: 'A circumstance of the incident is any fact to which the occurrence of the incident may be attributed' (at 26).

The obligation in s 27 of the PIPA refers to causation and not the scope of the duty which may be owed by a respondent. Knowledge of a respondent as to a risk could be relevant to the content of any duty of care. In that sense, knowledge is relevant to the question of whether the respondent is liable. But this does not determine the question of whether information about that knowledge falls within s 27:

[36] If one focuses on the scope of the reasons for the incident, it may be in a particular case that one of the reasons for the incident can be seen as an omission on the part of the respondent to do something which, if done, would have prevented the incident. On that basis, it may well be relevant to inquire about whether the respondent had done, or had not done, at or prior to the time of the incident, any particular things which if done, or perhaps if done more thoroughly or extensively, or better, would have prevented the incident. That could well cover matters like inquiries as to previous directions given by school staff to pupils in relation to their conduct, which it is alleged ultimately led to the claimant's injury, as in *Broadhead*. Possibly, it might extend to information about whether or not the respondent had done anything in relation to a particular individual alleged to have been responsible for the harm as a result of previous conduct by that individual, as in *Wolski*.

[37] There is a difference between information as to whether the respondent did or omitted to do something and information which is only relevant to the question of whether the respondent had a duty to do something or to do more, in the lead up to the particular incident.

The information about the admitted inspection was required to be given. Information about prior incidents was not, as this went to knowledge and the existence of a duty of care.

The issue again arose in *Curry v Brisbane City Council* [2010] QDC. The questions there related to the configuration of a traffic island. The Plaintiff suffered injury when struck by a taxi. Investigators reports disclosed by the respondent demonstrated that:

- The respondent was aware persons had been hit by motor vehicles at the intersection;
- A division of the respondent was informed of incidents occurring at the intersection and indeed all CBD intersections and information was recorded in a crash statistics register;
- The respondent liaised with Queensland Police in encouraging the public to exercise care when crossing intersections.

Reid DCJ held that a number of the questions did not fall within s 27 of the PIPA. The applicant submitted it was entitled to documents or information to explain the process leading to:

- Painting a 'look' on the roadway shortly following the incident;
- Reconfiguring the intersection.

The Court held that documents about prior accidents at the intersection were also not disclosable (at [50]). The court noted:

Information for example relevant to the respondent's knowledge about its duty of care to the applicant, can be seen to be outside the ambit of enquiry under section 27. The information sought and denied about trainings of and complaints concerning security guards in *Haug* or other altercations in *Oliver* can be seen in this light (at [54]).

The information sought in *Curry* was not about the circumstances of, or reasons for the incident. They were questions: 'designed to establish that the respondent owed a duty of care to the Applicant. They are not directed to the actual cause of the accident itself' (at [60]).

Policies & Procedures

Policies or procedures put in place by the respondent in response to risk may be information within the scope of s 27(1)(b). In *Bradley v Woolworths* [2010] QSC 284, the claimant suffered injury in a slip and fall said to be caused by the presence of water in or about a mat. Questions about the respondent's inspection procedures, and training of cleaning contractors were held to be within s 27 because this went to the question of what the respondent did or did not do in regard to the risk of injury.

In *Oliver*, the Court held that questions about intoxicated patrons (or policies to deal with them) did not need to be answered where there was no allegation in the notice of claim that the assailant was intoxicated. In that regard, the PIPA s 27(1)(b)(i) is not confined to information 'directly relevant to a matter in issue in the claim'. (In *Haug* (which did not concern s 27(1)(b)), questions about policies and procedures were not allowed. In *Newson v Aust Scan* [2010] QSC 223, a safe work policy was disclosable, although the focus of that decision was whether the respondent could rely on the document in subsequent proceedings.

Corrective action

There is conflicting authority on whether questions can be asked concerning actions taken after an incident (compare *Broadhead v State of Queensland* [2006] QDC 273 with *Higgs v Australia Meat Holdings* [2006] QSC 70 at [18]). On the latter cases, anything done post-event cannot by definition be causative of the previously occurring event. It is evidence of what steps could have been taken, and goes to breach (therefore liability), but this would not satisfy the test in *Nut Holdings*.

[7.150] Use of information not disclosed PIPA s 32(2)

In *Newson v Aust Scan* [2010] QSC 223, the respondent failed to disclose a document detailing its procedure for a safe system of work. The document was pleaded in the defence in subsequent proceedings. The Court accepted discretion to over-ride the prohibition in the PIPA, s 32(2). The respondent's solicitors assumed responsibility for the non disclosure (at [13]). The court held in light of the penalties for non-disclosure elsewhere in the legislation, the legislature 'placed a strong emphasis on the obligation to disclose' (at [17]). Wilson J refused the application noting the importance the legislation placed on proper compliance (at [22]), and the absence of evidence of due care and diligence towards disclosure on the affidavit material (at [19-20]).

9 Experts' Reports

[9.45] At the respondent's expense MAIA s 46A

A respondent cannot seek non attendance fees from the claimant, because the examination is at the expense of the respondent: *Motor Accidents Insurance Board v Gibson* [2010] QSC 152 at 3.

[9.50] Unreasonable?

In *Aviles v Allianz Australia Insurance* (DC(Qld), Boulton DCJ, No256/03 unreported), the court ordered the respondent provide a panel of psychiatrists who were available within 3 months. The outcome turns on the circumstances of the case so probably does not establish a general that all examinations are to be performed within 3 months.

Starting proceedings

[11.41] – Effect of stay: delay PIPA s 43

The Court of Appeal considered the issue in *Crompton v Buchanan & Ors* [2010] QCA 250. The claimant was injured on 14 October 1997. On 12 October 2000, 2 days before expiry of the limitation period the appellant's then solicitor filed a claim and statement of claim which was stayed under the then s 262(4) of the WQA. It was not served on the defendant. An unconditional notice of assessment was issued on 18 December 2002, but it was not until 11 July 2008 that a notice of claim for damages was finalised and deemed compliant from 1 October 2008. The parties proceeded to a compulsory conference on 16 February 2009 at which the claim did not settle. The Supreme Court claim had been renewed for 12 months by the registrar in 2001 and 2002. The appellant then sought to have his claim renewed or alternatively sought leave to proceed under rule 389. In response, the respondent applied to have the proceedings dismissed for want of prosecution or dismissed under s 291 of the WQA.

The respondent did not allege actual prejudice, but relied upon the prejudice inherent in the lengthy delay from the time of the initial injury in 1997. The proceedings were struck out at first instance. The Court of Appeal noted:

- The primary judge noted that the claim was filed 2 days before expiry of the limitation period and without the pre-commencement procedures required under the WQA being completed. The notice of assessment was issued on 18 December 2002 after a number of delays occasioned by applications for reopening of the claim and an appeal against WorkCover's refusal to reopen. The trial judge concluded that any delay associated with that period could not tell against the applicant;
- The defendants did not complain of delay between the date of injury to mid-2003 because during this time the statutory requirements were being attended to. It was reasonable to allow a period for enquiries to be undertaken and for the appellant to confer with counsel. The next step after conferring with counsel in August 2003 ought to have been the service of the claim and statement of claim before it became stale on 12 October 2003. Any activity on the court proceedings was stayed pending conclusion of the pre-court steps. His Honour noted some contact and preparation in November 2005, but the applicant's next contact with his solicitors was on 18 September 2006. The appellant's house was destroyed by Cyclone Larry in March 2006;
- Apart from one contact from each of the appellant's former and present solicitors, there was no communication between the appellant's advisors and the defendant's advisors between 25 November 2003 and 18 August 2008; His Honour concluded there was no proper explanation for the delay during the two identified periods. The trial judge observed that the 'action has only begun and has not moved to the second step in 12 years'.

Accepting that the claim needed to be renewed (and therefore that proceedings stayed under the legislation can go stale) the Court of Appeal held that the loss of the ability to pursue an apparently worthwhile claim alone did not constitute a sufficiently good reason to allow renewal. The contention that there was a want of explanation for the delays had to be considered in light of the relationship between the appellant and his solicitors (noting the claimant was 'fobbed off or ignored' regularly). Further, in the absence of prejudice preventing a fair trial, unexplained delay is less relevant.

Significantly for cases where proceedings have become stale as a result of failure to comply with the 'pre-court' requirements timeously, the court noted:

[62]...the primary judge misconceived the history of the matter by suggesting that there had been no movement 'to the second step in 12 years' against the background of the purpose of the provisions of the *WorkCover Queensland Act*. Furthermore, His Honour suggested that had the matter been ready to proceed to trial, he may have exercised his discretion differently. He has made no reference to the state of readiness which must necessarily have been achieved for the compulsory conference.

[63]A purpose of the pre-court procedures leading to the compulsory conference are to have the proceedings as at the date of the compulsory conference in as good a position as they would be immediately prior to trial so that all information is 'on the table'... Accordingly, with the exception of updated medical reports and adjusting financial statements, the matter must be regarded as ready to proceed to trial. These were matters not adverted to by the primary judge. The failure to do so, together with a failure to acknowledge the appellant's attempts to get his several Queensland solicitors to advance his claim over many years, and the early engagement of WorkCover in the investigation ... has minimised any prejudice to the respondent and this has meant that His Honour's discretion miscarried.

The very existence of 'pre-court' procedures may well militate against striking out for want of prosecution in most cases unless actual prejudice making a fair trial impossible is demonstrated to the respondent. For a case where prejudice was proved against the respondent see *Lekau v State of Qld & Anor* (unreported, SC 956/2003 19 October 2010 per Cullinane J subject to appeal but not on this point).

10 Costs of proceedings

[12.2] Costs of non compliance PIPA s 48

In *Samways v Workcover Qld (No 2)* [2010] QSC 273, the respondent failed to disclose a surveillance recording during the 'pre-court' procedures. An unsuccessful application was made under the UCPR r 393, to vary the requirement that the footage be disclosed within 7 days of trial. After the trial, the plaintiff sought costs of the non-compliance under the PIPA s 48, on the basis that had the plaintiff known of the contents of the footage, the plaintiff's conduct of the matter and offers to settle might have differed (at [26]). Applegarth J declined to exercise his discretion. The plaintiff's conduct in making and persisting in false claims did not of itself disentitle the plaintiff from such an order but did tell against exercise of the discretion where a more timely application by the defendant may have resulted in the tape not coming to light until part-way through cross examination of the plaintiff (at [28]).

[12.33] Pre-action costs where damages exceed the 'higher offer limit'

Entitlement to 'pre-action' costs in those cases not specifically mandated by the legislation is found in the UCPR. Rule 679 defines 'cost of the proceeding' to include costs of complying with necessary steps before starting the proceeding. A successful respondent may be in a better position regarding 'pre-court costs' once proceedings are issued (for example under the PIPA s 43).

Ashley Jones

23 November 2010