

# Please explain: EXPLANATIONS of DELAY under the Motor Accident Insurance Act 1994 Qld)

BRANNIGAN

v

NOMINAL  
DEFENDANT

CA 5764 OF 1999,  
24 AUGUST 1999,

UNREPORTED

BY CHRIS MCMANUS, QUEENSLAND

**O**n 24 August 1999 the Court of Appeal again demonstrated it was prepared to strike out a claim if satisfied the mandatory provisions of the *Motor Accident Insurance Act 1994* have not been complied with.

In this case the claimant delivered a Notice of Claim to the Nominal Defendant after the relevant 3 month time period (the matter involved an unidentified vehicle) had expired. No explanation for the delay was given before the 9 month time period expired. The claim was struck out.

## The law

In matters involving an "unidentified motor vehicle" Section 37(3) of the Act requires a claimant to provide Notice of the Claim to the Nominal Defendant within 3 months of the motor vehicle accident.

If Notice is given after this time it is not fatal to the claim if an explanation for the delay is given.<sup>1</sup> If the Notice of Claim is not given to the Nominal Defendant within 9 months of the motor vehicle accident the claimant loses all rights to bring any claim against the Nominal Defendant. The claim is statute barred.

## The facts

In *Brannigan's* case the Plaintiff alleged he sustained injuries in a motor vehicle accident on 13 April 1997. It was alleged the collision was caused by the negligence of the driver of an

unidentified vehicle.

The Plaintiff first consulted lawyers on 31 October 1997 (outside the 3-month period from the date of accident). The Notice of Claim was forwarded to the Nominal Defendant, on 24 December 1997, before the expiration of the 9-month period. However, no explanation for the delay in delivering the Notice after the 3 month period was ever given to the Nominal Defendant (in the Notice of Claim or otherwise).

A District Court Plaintiff was filed on 9 July 1998. The Nominal Defendant issued a Summons seeking orders striking out the action on the ground it was barred by Section 37 of the Act. The District Court struck out the claim. The Plaintiff appealed to the Court of Appeal.

## The decision

The matter came before De Jersey CJ, McPherson JA and White J. The

**Chris McManus** is a solicitor at McInnes Wilson, 4/15 Bindaree Crescent, Mooloolaba Qld 4557  
**PHONE** (07) 3229 4138 **FAX** (07) 3221 0479  
**EMAIL** cmcmanus@mcw.com.au

Plaintiff was required to seek leave to appeal. Leave was granted on the basis that the Court of Appeal felt the issues in this case warranted comment at an appellate level. De Jersey CJ particularly noted the decision would have wide application to a potentially large number of cases.<sup>2</sup>

Essentially, the real issue in this case involved an interpretation of Section 37(4) of the Act, which relevantly provides:

*"37(4) If the notice is not given within the time fixed by this section, the obligation to give the notice continues and the notice, when given, must contain an explanation of the delay but, if a motor vehicle accident claim relates to injury caused, by, through or in connection with the motor vehicle that cannot be identified and notice of the claim is not given to the Nominal Defendant within 9 months after the motor vehicle accident, the claim against the Nominal Defendant is barred".*

The critical issue for the Plaintiff was the meaning of the phrase "notice of the claim" mentioned towards the end of that subsection (which if not provided within 9 months bars the claim).

The Court found that the "notice of the claim" which must be provided before the expiration of the 9 month period was a Notice containing an explanation for the delay.

The requirements of Section 37(4) of the Act were found to be mandatory. In other words, the Plaintiff's failure to provide an "explanation of the delay" prior to the expiration of the 9 month period meant the Plaintiff was absolutely barred from pursuing a claim against the Nominal Defendant. The court held the failure to give the explanation was not a "defect" which was capable of being remedied at some later stage.<sup>3</sup>

In reaching these conclusions the Court of Appeal had regard to three main issues which supported the mandatory requirements of Section 37(4) of the Act:

1. The objects of the Act<sup>4</sup> (including the speedy resolution of claims and prevention of fraud) require such an interpretation.
2. The clearly mandatory terms of Section 37(4):  
*"...the Notice, when given, must con-*

*tain an explanation of the delay..."*

3. The Court also noted the significant effect of Section 39(8) of the Act. The court's formal power to dispense with the time for providing Notice has now been completely removed by Section 39(8).

Having regard to the above the Court of Appeal was satisfied that the legislature had intended to create an even stricter regime for claimants seeking damages in respect of unidentified vehicles in what De Jersey CJ describes as *"...a regime less accommodating of laxity or other non-compliance on the claimant's part, more supportive of the Nominal Defendant as a relevant insurer"*.<sup>5</sup>

#### **Where should the explanation be given?**

On a plain reading of Section 37(4) of the Act it seems clear the explanation of the delay must be "contained" in the Notice of Claim itself.

A claimant could be justified in feeling harshly done by if a claim was struck out solely because an "explanation of delay" was not physically "contained" in the Notice of Claim form itself but rather provided in some other document (such as correspondence) accompanying it. Certainly, McPherson JA<sup>6</sup> did not think the difference would be likely to be crucial. However, White J<sup>7</sup> makes the point that an explanation provided some days or more after the Notice of Claim form is delivered would be insufficient.

#### **RAMIFICATIONS**

##### **Unidentified vehicles**

In motor vehicle claims involving an unidentified vehicle the position is now clear. A claimant must provide an explanation of delay in the Notice of Claim if the Notice is given to the Nominal Defendant more than 3 months after the date of accident. If no such Notice is given before the 9-month period expires, the claim will be struck out.

To avoid technical arguments, the "explanation of delay" should be "contained" in the Notice of Claim form itself.

Practical difficulties arise because the claim form issued by the Motor Accident Insurance Commission fails to

**"the Plaintiff's failure to provide an 'explanation of the delay' prior to the expiration... period meant the Plaintiff was absolutely barred from pursuing a claim against the Nominal Defendant."**

allocate any area where the relevant details can be provided. The section following Q. 60 of the form seems the most logical choice. Alternatively, a separate sheet could be attached within the form.

Practitioners acting on behalf of claimants in personal injuries claims involving unidentified motor vehicles would be well advised to review all such files ensuring the relevant Notices of Claim comply with the requirements of the Act, particularly s 37 (4).

##### **Other motor vehicles**

In other motor vehicle claims (that is claims involving other CTP insurers or claims against the Nominal Defendant where an uninsured vehicle is involved) the same result is highly unlikely to eventuate.

The court's power to give leave to bring proceedings despite non-compliance is not fettered or removed in any other claim. Of course, any such leave should be sought before the expiration of the relevant time limitation period for personal injury claims. The strict regime which has been adopted in the Act with respect to claims involving unidentified vehicles does not apply to other motor vehicle claims. 

##### **Footnotes:**

- <sup>1</sup> See s. 37(4) of the Act
- <sup>2</sup> At paragraph [3] of his judgment
- <sup>3</sup> The Court distinguished the decision of Wilson J in *McKelvie v Page & Ors* (1998) 27 MVR 292 on the grounds that in that case the matter involved an uninsured, rather than an unidentified, vehicle
- <sup>4</sup> See s.3 of the Act
- <sup>5</sup> At paragraph [17] of his judgment
- <sup>6</sup> At paragraph [8] of his judgment
- <sup>7</sup> At paragraph [5] of her judgment