

AUSTRALIA / JUDGMENT

Mehmet v Candemir [2013] NSWSC 1897

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Supreme Court

New South Wales

Medium Neutral Citation: Mehmet v Candemir [2013] NSWSC 1897

Hearing dates: 11/09/2013

Decision date: 19 December 2013

Before: Fullerton J

Decision: 1. The statement of claim is dismissed.

2. The plaintiff is to pay the costs of the notices of motion of the first, second and third defendants dated 21 February 2013 and 19 February 2013 respectively as assessed or agreed.

Catchwords: LIMITATION OF ACTIONS - plaintiff injured in car accident whilst at work - application to commence proceedings out of time

Legislation Cited: Limitation Act 1969

Motor Accidents Compensation Act 1999

Workers Compensation Act 1987

Cases Cited: Allianz Australia Insurance Ltd v MAA [2011] NSWSC 102

Coal & Allied Operations Pty Ltd t/as Hunter Valley Operations (Howick Mine) v Stringer [2003] NSWCA 271

GIO General Limited v Smith [2011] NSWSC 802

Itek Graphix Pty Limited v Elliott [2001] NSWCA 442

Nominal Defendant v Harris [2011] NSWCA 70

Smith v Grant [2006] NSWCA 244; 67 NSWLR 735

Walker v Howard [2009] NSWCA 408; 78 NSWLR 161

Zotti v Australian Associated Motor Insurers Ltd [2009] NSWCA 323

Category: Interlocutory applications

Parties: Menekshe Mehmet (Plaintiff)

Ahmet Candemir (1st Defendant)

Anthony Matthew Franks (2nd Defendant)

Kevin Patrick Day (3rd Defendant)

Representation: Counsel:

P Webb QC / K Balendra (Plaintiff)

J Turnbull (1st Defendant)

K Rewell SC (2nd & 3rd Defendants)

Solicitors:

Slater & Gordon Lawyers (Plaintiff)

TL Lawyers (1st Defendant)

QBE Insurance (Australia) Limited, CTP Legal (2nd & 3rd Defendants)

File Number(s): 2012/377795

Judgment

1FULLERTON J: By statement of claim filed 5 December 2012 the plaintiff commenced proceedings against three defendants to recover damages for injuries she sustained on 31 August 2004 whilst a passenger in a motor vehicle driven by the first defendant when involved in a collision with motor vehicles driven by the second and third defendants.

2By notices of motion dated 19 February 2013 and 21 February 2013, the first, second and third defendants sought an order dismissing the statement of claim under s 109 of the Motor Accidents Compensation Act 1999 ("the MAC Act") and for breach of ss 72 and 73.

3Section 109 of the MAC Act provides that a claimant is not entitled to commence proceedings more than three years after the date of the accident otherwise than with a grant of leave of the Court. The section also provides that leave must not be granted unless a full and satisfactory explanation for the delay is provided (s 109(3)(a)) and the total damages likely to be awarded if the claim is successful are not less than 25 per cent of the maximum amount that may be awarded for non-economic loss at the date of the accident (s 109(3)(b)).

4Section 72 of the MAC Act provides that a claim for personal injury must be made within six months of the accident by giving notice to the person against whom the claim is made or a third party insurer. Section 73 of the Act provides that a claim may be made after the six month period has expired if a full and satisfactory explanation for the delay is provided. That explanation is to be provided to the insurer in the first instance.

5For the purposes of s 72 and s 109, s 66(2) of the MAC Act provides:

... a reference to a full and satisfactory explanation by a claimant for non-compliance with a duty or for delay is a reference to a full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation. The explanation is not a satisfactory explanation unless a reasonable person in the position of the claimant would have failed to have complied with the duty or would have been justified in experiencing the same delay.

6The defendants did not seek to agitate the damages threshold in s 109(3)(b) and did not advance any submission that they would suffer actual prejudice in their defence of the claim by reason of the extension of time or that there was any presumptive prejudice that might impact on the question of leave and the discretionary judgment that is entailed. They limited their opposition to leave being granted to the plaintiff's failure to provide "a full and satisfactory explanation" for the delay.

7The defendants submitted that the evidence upon which the plaintiff relied for the grant of leave would not attract a grant of leave in the exercise of the evaluative judgment to which the section is directed, her explanation for the delay being neither "full" nor "satisfactory" in the relevant sense. Counsel for the second and third defendants also submitted that the plaintiff's explanation for the delay of six years in giving notice of her claim under s 72 of the MAC Act also failed the same statutory test of completeness and adequacy. That question was, however, largely subsumed for all practical purposes by the question whether the plaintiff ought be granted an extension of time to commence the proceedings under s 109.

Notification under s 72 of the Motor Accidents Compensation Act

8Allianz Australia Insurance Limited ("Allianz"), the compulsory third party insurer for the first defendant, was notified of the plaintiff's claim on 19 March 2007. The plaintiff's explanation for the delay in notifying them of the claim was furnished in writing on 31 July 2007. On 21 August 2007 Allianz rejected the explanation for the delay as neither full nor satisfactory. On 20 May 2008 Allianz was advised by the plaintiff's then solicitor that the claim was not being pursued.

9QBE Insurance Group (Australia) Limited ("QBE"), the compulsory third party insurer for the second and third defendants was first notified of the plaintiff's claim by service of a claim form under s 72 of the MAC Act on 18 May 2010. No explanation for the delay in notifying them of the claim was furnished in accordance with s 73 of the MAC Act.

Notification of intention to commence proceedings

10On 25 June 2012 both insurers were advised of the plaintiff's intention to "re-initiate" her claim. The statement of claim, the subject of the plaintiff's application for leave to commence the proceedings, was filed six months later on 5 December 2012, eight years and four months after the accident.

11 So far as the claim against the first defendant is concerned, s 109(2) of the MAC Act also provides that time does not commence to run until two months after the issue of a certificate of exemption under s 92(1)(a) of the Act. On 26 November 2007, a certificate exempting the plaintiff's claim from assessment under the Claims Assessment and Resolution Service ("CARS") issued the first defendant's denial of liability, it being alleged that the vehicles driven by either or both the second or third defendants were at fault. In this case, nothing turned on the additional "window" of two months under s 109(2) as the time within which to bring proceedings against the first defendant and fixed by reference to the date of the issue of the certificate, expired on 25 January 2008, obliging the plaintiff to provide a full and satisfactory explanation for the delay of more than three years after that date before the proceedings were commenced on 5 December 2012.

The evidence in the proceedings

12 The plaintiff gave evidence and was cross-examined to explain the delay in commencing the proceedings (and the delay in notifying QBE of the claim under s 72). She agreed she was made aware of her obligation to notify the insurer of the first defendant of her intentions to bring a claim under s 72 of the MAC Act in February 2005 (six months after the accident), when she first sought legal advice concerning her rights and entitlements to compensation for the injuries she sustained in the accident. She also agreed that, from as early as 23 August 2007 (that is, within the three year statutory limitation period), she was under no misapprehension as to the operation of s 109 of the MAC Act qualifying her right to bring proceedings for common law damages.

13 The plaintiff also called evidence from John Bolzan, the solicitor from whom she first sought advice in February 2005 and upon whose advice she relied when, in January 2008, she decided not to commence proceedings, and read the affidavits of Susan McTegg and Melinda Griffiths, solicitors from whom she sought and obtained legal advice after that date. On 23 August 2010 Ms McTegg also advised against commencing proceedings. On 1 May 2012 Ms Griffiths advised that the proceedings be commenced. Only Mr Bolzan was required to attend for cross-examination.

14 The first defendant relied upon the affidavit of Katherine Toshack, solicitor. The second and third defendants relied upon two affidavits of Michael Sofoulis, solicitor. Neither deponent was required to attend for cross-examination.

15 After the evidence had closed, and in the course of his final submissions, Mr Webb QC, senior counsel for the plaintiff, sought leave to reopen the plaintiff's case to tender a number of medical reports, to support what he informed me would be his ultimate submission that Mr Bolzan's advice in January 2008 that the claim he had lodged on 23 November 2006 against the first defendant (albeit out of time) not be pursued was misguided and, for that reason, the plaintiff's acceptance of his advice should not disentitle her to a grant of leave to commence the proceedings out of time. The advice was said to be seriously flawed.

16In Mr Bolzan's view, proceedings should not have been commenced because the quantum of any award of common law damages would be unlikely to exceed \$50,000, and this being the case, the plaintiff's workers compensation rights were too valuable, or potentially valuable, to jeopardise. By agreement the tender of the medical reports was limited to reports that were current at the date of Mr Bolzan's advice. Since there was no sustained opposition from counsel for the defendants, I granted leave and the plaintiff's evidence was supplemented by the following reports.

17The medical reports comprised three reports from Dr Alan Searle, an orthopaedic surgeon retained by Mr Bolzan, each dated 19 August 2006, and three reports from Mr Donald Jones, also an orthopaedic surgeon retained by the plaintiff's workers compensation insurer dated 25 July 2005, 8 June 2006 and 5 October 2006. A report from Dr D Ray Redden, the plaintiff's general practitioner, dated 30 November 2006, and a report from Ms Leanne Clarke, clinical psychologist, dated 3 November 2005 were also tendered.

18Ms McTegg's advice in August 2010 not to commence proceedings was also challenged by Mr Webb as being misconceived. That advice (based upon the advice of two members of counsel) did not address the quantum of the plaintiff's potential claim for common law damages per se. Rather, it focused upon the plaintiff's prospects of successfully proceeding against all three defendants (with attendant cost considerations) when, in counsel's view, each of the defendants were likely to deny liability thereby putting the plaintiff to proof on the issues of fault and causation. Counsels' advice also addressed the difficulties the plaintiff would likely face in providing an adequate explanation for what was, by August 2010, a delay of six years in commencing proceedings.

The accident

19In August 2004 the plaintiff was working as an undercover police officer with the New South Wales Police Force. On 31 August 2004, in the course of a controlled drug operation, she organised to meet the first defendant to buy drugs. By pre-arrangement, the plaintiff waited in a nearby park until the first defendant arrived in his vehicle, after which she got into the passenger seat.

20The first defendant passed two parked cars before pulling over to the side of the road where he parked. The plaintiff removed money from her handbag to pay for the drugs when she noticed a vehicle, which she knew to be driven by a member of the Tactical Operations Unit, driving towards the first defendant's vehicle.

21The following sequence of collisions between the motor vehicles is drawn from the COPS report prepared by police on 1 September 2004. It was the only version of the events of 31 August 2004 tendered in the proceedings before me which referred to more than one collision. The plaintiff's account of the incident in her affidavit refers only to the first defendant colliding with a parked car.

22The COPS report stated that the first defendant, apparently realising or suspecting police presence, accelerated under speed before losing control of his vehicle and colliding with the police vehicle driven by the second defendant after which he accelerated onto the incorrect side of the road. It goes onto record the fact that, in order to prevent the first defendant from leaving the scene (with the plaintiff in the car), another unmarked police vehicle (driven by the third defendant) manoeuvred into position to block its forward progress, colliding with the first defendant's vehicle in the process.

23There was some controversy at the hearing as to whether the incident involved a single or multiple motor vehicle accidents, and whether it would be open to the plaintiff, in the assessment of her whole person impairment for the purposes of addressing the statutory threshold in s 131 of the MAC Act, to "aggregate" the injuries she sustained in the incident, or whether it would be necessary for separate assessments of impairment to be made for each collision. Mr Rewell SC, senior counsel for the second and third defendants, submitted that it was arguable that each collision (of which, on one view, there were at least three) constituted a separate "motor accident". He submitted that, if that be correct, s 58(1) of the MAC Act, as it operated at the time of the accident, requires the injury caused by each accident to be separately assessed, there being no statutory basis for the permanent impairment arising from the separate motor accidents to be aggregated for the purposes of the s 131 threshold. Mr Webb submitted that a court would likely find that there was a single motor accident involving a number of related collisions. He submitted that viewed in that way it would not be necessary for a separate determination of permanent impairment to be made for each collision and that a single assessment would suffice with the award of damages being apportioned between the drivers found to be ultimately at fault.

24The resolution of that controversy is related to, but ultimately secondary to whether the plaintiff has otherwise discharged the onus of providing both a full and satisfactory explanation for the very considerable delay in bringing proceedings sufficient to attract the leave necessary to commence a claim for common law damages against all or any of the defendants.

The plaintiff's injuries, treatment and work history post accident

25As a result of the motor vehicle accidents the plaintiff suffered chest bruising; soreness in her neck, right shoulder and spine; tingling in her hands; and a bruise over her right shin. She was later diagnosed with post-traumatic stress disorder.

26The plaintiff's injuries were reviewed at various intervals after the accident (at least up until January 2008) under the different legislative schemes provided for in the Workers Compensation Act 1987 and the MAC Act.

27On 10 September 2004 the plaintiff returned to work for three days on restricted duties, and on 7 October 2004 she, after a further three weeks sick leave due to generalised tenderness and pain in her upper body, insomnia and anxiety, again returned to work albeit on restricted duties. She was referred for psychological counselling. When she resumed full-time work six months later she was restricted to performing administrative tasks, a limitation which continued up to and including March 2005.

28On 14 October 2004 the plaintiff commenced treatment at Southside Clinical Psychology under the care of Ms Jeanne Abelson, clinical psychologist. When Ms Abelson left the practice in November 2004, the plaintiff consulted with Ms Clarke, who she saw on a regular basis, relevantly for present purposes, until July 2005. (I note the plaintiff's evidence that she consulted with Ms Clarke (and other psychologists) after the deterioration in her functioning in May 2008, although no reports were tendered reflecting the level of treatment provided at that time.)

29On 9 December 2004 the plaintiff lodged a claim for periodic workers compensation payments. Her various treatment costs were met by her workers compensation insurer until April 2007.

30The plaintiff first consulted with Dr Searle on 1 June 2005 on the advice of Mr Bolzan. Dr Searle is an approved medical specialist with the Workers Compensation Commission and a certified specialist under the MAC Act. On 4 June 2005 he reported that he was satisfied that the work-related injury sustained in the motor vehicle accident caused severe contusion of the plaintiff's sternum and costal cartilages, traumatic capsulitis of both shoulders and ligament strain. He went on to report that the symptoms were persistent and could become permanent, although there was still some potential for spontaneous improvement. He advised that a final assessment of the plaintiff's residual disability and her prognosis should be delayed for twelve months, and that if she continued to present symptoms at that time she should be assessed for the purposes of estimating her whole person impairment. In the meantime, Dr Searle considered the plaintiff was fit for normal duties and that she should have time off work should her chest and shoulder pain recur or worsen, and that her treatment should continue to be conservative. (I note that Dr Searle apparently advised Mr Bolzan by telephone at this time that he did not expect that the plaintiff would exceed the 10 per cent whole body impairment threshold under the MAC Act when she was assessed the following year.)

31In July 2005 the plaintiff was assessed by Mr Jones, a consultant orthopaedic surgeon, at the request of her workers compensation insurer. He noted that although the plaintiff was performing restricted duties as a police officer (albeit by that date in a full-time capacity), her improvement was slow but progressive. He considered that within four to six months she would be likely to resume her pre-accident workload and for that reason he made no assessment of her degree of permanent impairment, as with Dr Searle, also preferring to defer that assessment for a further eight to ten months until her condition stabilised. He also advised that in view of the chronicity of the plaintiff's symptoms of general tenderness and sensitivity in the spine, and in the absence of a clearly defined diagnosis, an MRI scan should be performed.

32From 1 April 2006 (within ten months of Mr Jones' report of July 2005) the plaintiff assumed the position of Acting Sergeant of Police. She became eligible for a permanent promotion to Leading Senior Constable on 15 May 2006. She was advised, however, that as the position of Leading Senior Constable included the capacity to perform frontline policing as a prerequisite, she would not be considered for promotion whilst ever she was on restricted duties for medical reasons.

33In August 2006 the plaintiff attended upon Dr Searle for review. Dr Searle considered that the injury to the plaintiff's sternum, ribs and clavicle had resolved but that she continued to suffer the effects of the traumatic capsulitis and ligament strain, with the possibility of a cervical disc lesion, which required ongoing physiotherapy, chiropractic and psychological therapy. Dr Searle also noted the plaintiff's complaint of pain in the thoracic spine, right shoulder and neck, the latter of which caused severe headaches which spread to her jaw and face. He assessed her injuries as permanent and productive of a moderately severe degree of disability rendering her permanently unfit for the active duties of a police officer. He assessed her whole person impairment at a combined value of 14 per cent under the workers compensation legislation, and 11 per cent under the MAC Act.

34On 22 August 2006 the plaintiff lodged a claim for lump sum compensation under the Workers Compensation Act.

35On 5 October 2006 Mr Jones reviewed the results of the MRI scan which revealed a small cervical disc prolapse. In light of his previous clinical findings, he reported that the plaintiff did not have the capacity to return to her pre-injury duties as a police officer (including frontline policing), and that although she was able to work at reduced working hours and in a more sedentary role as a police officer she would be at the risk of further injury were she to be involved in active police duties. Mr Jones assessed the plaintiff's whole person impairment at 8 per cent under the workers compensation legislation. He made no assessment of her whole person impairment under the MAC Act.

36By letter of 18 April 2007 the plaintiff was advised that the workers compensation insurers had declined to meet the treatment costs of her physiotherapy, chiropractic treatment and remedial massage effective from July 2006. In 2007 the plaintiff received a lump sum payment for her work-related injuries in the amount of approximately \$23,000.

37On 19 June 2007 the plaintiff was promoted to the rank of Sergeant but remained on restricted duties with no entitlement to overtime or shift allowances. She married in October 2007.

38In May 2008 the plaintiff organised a training day with other undercover police officers, some of whom were in the field on the day of the accident. She described her reaction to planning for the event as traumatic, triggering acute symptoms of anxiety. She consulted Dr Redden who declared her medically unfit for work.

39The plaintiff did not return to work as a police officer in any capacity after 6 May 2008.

40She resumed treatment under a consulting psychologist and chiropractor throughout 2008 and 2009. (No medical reports relating to diagnosis or treatment were tendered in the proceedings). She gave birth to her first child in January 2009.

41In January 2010 she was discharged from the New South Wales Police Force as medically unfit.

The plaintiff engages Mr Bolzan

42On 14 February 2005, six months after the accident, the plaintiff retained Mr John Bolzan of Bolzan and Dimitri Lawyers for advice as to her entitlements to compensation for the injuries she sustained in the accident. Although neither Mr Bolzan nor the plaintiff were able to recall with precision the advice that was rendered at the time, the plaintiff agreed in cross-examination that she was made aware of the six month time limit imposed by s 72 of the MAC Act within which to make a compulsory third party claim against the driver(s) (which was due to expire within weeks of that conference), and also that Mr Bolzan must have been the source of that advice. She also acknowledged, and Mr Bolzan confirmed, that at the first conference the plaintiff was also advised of her rights to compensation as an injured worker under the Workers Compensation Act.

43On 24 February 2005 the plaintiff received a letter from Mr Bolzan, enclosing a Motor Accident Medical Certificate Form, which he requested be completed by the plaintiff's general practitioner as a matter of urgency. Mr Bolzan gave evidence that he asked the plaintiff to have the certificate completed by her doctor with a view to lodging a claim under the MAC Act within the six month time frame provided for in s 72, and that it was implicit in that request that he made her aware of the significance of the time limitation imposed by that section.

44On 25 February 2005 the plaintiff telephoned Mr Bolzan and advised him that she was making enquiries to obtain the registration details of the police vehicles involved in the accident. She gave evidence that she sought that information because she understood that it may ultimately have been necessary to make a claim against the insurers of the police vehicles, and that the six month time limit within which to notify them of the claim also applied to those insurers.

45On 28 February 2005 the six month time limit imposed by s 72 of the MAC Act expired.

46On 17 March 2005 Mr Bolzan noted in his file that the plaintiff's enquiries as to the registration details of the police vehicles involved in the incident were continuing and that she was awaiting receipt of the medical certificate from her doctor.

47Mr Bolzan gave evidence that he was concerned on his client's behalf that an award of damages under the MAC Act would put the plaintiff's ongoing entitlements to workers compensation under the Workers Compensation Act at risk and, for that reason, advised that she should be seen by an orthopaedic surgeon for an assessment of her whole person impairment under both legislative schemes. On 28 April 2005 Dr Searle was retained for that purpose.

48Between March 2005 and July 2005 Mr Bolzan continued to advise the plaintiff with regard to her workers compensation claim. She gave evidence that she appreciated that the statutory compensation schemes under the Workers Compensation Act and the MAC Act were, to a practical effect, alternatives, in the sense that if she chose to pursue a motor vehicle accident claim and received compensation for her injuries, either by way of a settlement or in an award of damages, she would lose her entitlement to workers compensation and would have to repay any compensation payments she had already received. She also gave evidence that at all times she appreciated that she had a right to claim under both schemes and simultaneously if she chose.

49On 28 July 2005 Mr Bolzan advised the plaintiff by telephone that Dr Searle had assessed her whole person impairment under the MAC Act at no more than 10 per cent and, in those circumstances, a motor accident claim was not viable, particularly since she had resumed full-time work and had suffered no significant loss of earnings. On 2 August 2005 Mr Bolzan rendered that advice in writing. The plaintiff instructed Mr Bolzan at that time only to pursue her claim for workers compensation. She agreed that Mr Bolzan's advice as to the operation of the two compensation schemes weighed heavily in the decision she made at that time not to pursue a motor accident claim, being convinced of the need to secure her entitlement to workers compensation into the future, or at least not to put those rights in jeopardy by pursuing a motor accident claim where a settlement of damages would be awarded on a once and for all basis.

50A year later, in July 2006, after learning from the plaintiff that she was not considered eligible for promotion because of her injuries, Mr Bolzan reconsidered the viability of a bringing a motor accident claim and, to that end, resumed his enquiries concerning the registration numbers of police vehicles involved in the accident. He also sought more detailed information from the plaintiff as to the circumstances in which the accident occurred. Upon receipt of what Mr Bolzan described in his evidence as "the police report and the facts sheet", he came to the view that the first defendant was the only driver at fault. He said he advised the plaintiff of his view and that the potential liability of the second and third defendants was not raised with her again.

51On 16 October 2006 the plaintiff discussed the viability of bringing a motor accident claim with Mr Bolzan in light of Mr Jones' report of 5 October 2006. In particular, Mr Bolzan advised that although it would not meet the statutory threshold under s 131 of the MAC Act, Mr Jones nonetheless accepted that her injuries disabled her from returning to her pre-accident police duties.

52On 15 November 2006 the plaintiff had a further conference with Mr Bolzan after which she gave instructions for a motor accident claim to be lodged against the insurer of the first defendant, in particular on the basis of Dr Searle's assessment that she had a whole person impairment of 11 per cent, thereby exceeding the 10 per cent statutory threshold, albeit by a narrow margin, and Dr Jones' report that her injuries disabled her from returning to her pre-accident police duties.

53A claim form bearing the date 15 November 2006 was forwarded to Allianz under cover of a letter from Mr Bolzan dated 23 November 2006. No claim form was lodged with QBE as the insurer of the second and third defendants, Mr Bolzan having formed the view that neither of the drivers of the police vehicles were at fault in the particular circumstances of the accident. The letter also attached a copy of the COPS report and a list of payments the plaintiff had received from her workers compensation insurer for the period September 2004 to 9 October 2004. For reasons which are not obvious, the claim form was not received by Allianz. It was resent on 19 March 2007.

54The plaintiff agreed that she was aware in November 2006 that the six month time frame within which to lodge the motor accident claim had long since expired and she would be required to provide Allianz with an explanation for the delay in notifying them of her bringing the claim. She also agreed that she appreciated at this time that there was a need for her to act promptly if the claim was to be pursued.

55On 28 March 2007 Allianz formally requested that the plaintiff provide a full and satisfactory explanation for the delay in making the claim. That request was repeated on 26 June 2007. On 31 July 2007 Mr Bolzan forwarded a statement signed by him, and a statement which he prepared and which was signed by the plaintiff, explaining the delay. Various documents were annexed, including the reports from Dr Searle. In essence, the plaintiff's explanation for the delay in commencing proceedings was the fact that she was "in two minds as to whether to pursue a claim", but decided "it would be in [her] best interests" to do so after receipt of Dr Jones' report, and the results of the MRI scan.

56Her affidavit refers to her attending Mr Bolzan's offices on 26 July 2007 at a time when she had less than five weeks before proceedings were barred by operation of s 109 of the MAC Act.

57On 21 August 2007 Allianz advised that the explanation for the delay in lodging the claim was rejected. Further, on 3 October 2007 they advised that liability was denied, it being their view that the drivers of the two police vehicles (nominated by reference to their registration numbers) were the drivers at fault.

58On 30 August 2007 Mr Bolzan applied to CARS for general assessment, one day before the three year limitation period under s 109 of the MAC Act expired. This was consistent with what he agreed was a strategic and prudent step to attract the protections under s 109(2) of "stopping time running". The plaintiff was unable to recall whether Mr Bolzan informed her that he proposed lodging the application for assessment or his reasons for doing so. Although Mr Bolzan did not have a file note to confirm that he filed the application on the plaintiff's instructions or that he advised her as to its effect, I am satisfied, given the general tenor of Mr Bolzan's evidence, and the considered advice he had rendered to the plaintiff up to that time, that he would not have acted without her informed instructions.

59On 22 October 2007 the Principal Claims Assessor declined to allocate the matter for assessment because it appeared to her that the claim was exempt under s 92(1)(a) of the MAC Act because Allianz denied liability. On 26 November 2007 the Principal Claims Assessor certified that the plaintiff's claim was exempt from assessment for that reason.

60On 16 October 2007 the plaintiff's workers compensation claim was settled. In a conference on the same date Mr Bolzan advised the plaintiff that Allianz had denied any liability for the injuries she sustained in the motor vehicle accident. He also expressed his concerns that the plaintiff would not exceed the statutory threshold under the MAC Act entitling her to claim damages for non-economic loss, and that her economic loss was "rubbery to say the least". He also advised her that in the event that she pursued the motor vehicle claim and was successful, she would be required to repay the settlement of her workers compensation claim, together with her out-of-pocket expenses incorporated in that claim. The plaintiff made no decision at that time as to whether or not she would pursue the motor accident claim against the first defendant having decided to defer the decision until she returned from her honeymoon.

61On 14 January 2008 Mr Bolzan informed the plaintiff she had until 25 January 2008 to commence proceedings to recover common law damages. His file note of that date records that he again discussed with the plaintiff the implications of bringing a claim under the motor vehicle legislation and, in answer to her query, confirmed that she would need to attend further medical appointments in the event she pursued the claim, which she did not welcome. His file note also records that it was agreed that they would discuss the matter further before any final decision was made. A conference was arranged for 21 January 2008 for that purpose.

62On 16 January 2008 (eleven days before the limitation period extended under s 109(3) of the MAC Act closed permanently) Mr Bolzan again discussed with the plaintiff the viability of the motor accident claim before ultimately advising her against pursuing it. He advised that, having regard to her age (she was 36 at that time), her future workers compensation rights were likely to be more valuable to her in the long term and that, in his view, it was not in her interests to pursue a motor accident claim and surrender those entitlements, particularly where he considered any award of damages would not be likely to exceed \$50,000. The plaintiff accepted that advice and instructed Mr Bolzan not to pursue the claim.

63Mr Bolzan agreed under cross-examination that the decisive factor underpinning his advice was the quantum of the plaintiff's common law damages claim compared to the value of her rights under the Workers Compensation Act given the potential for her injuries to become problematic in the future. He accepted that because she was injured in a collision whilst a passenger in a motor vehicle, the claim against the first defendant had to succeed on liability, and that damages would be awarded on an undiscounted basis, but remained of the view that the potential quantum of the claim was such that, in relative terms, her workers compensation rights were of greater value to her as a working police officer, irrespective of whether there were other drivers at fault.

64On 20 May 2008 Mr Bolzan advised Allianz that the motor accident claim would not be pursued.

65Mr Bolzan ceased to act for the plaintiff in September 2008. She agreed in cross-examination that it was her decision to maintain the security of the benefits and advantages she would receive under the workers compensation scheme rather than risk losing those entitlements with a once and for all motor accident claim, a decision she had carefully considered after receiving lengthy advice from Mr Bolzan. She said she remained of that view throughout the period Mr Bolzan was acting for her, that is up to and including September 2008.

The plaintiff engages Ms McTegg

66In March 2010, Ms Susan McTegg of Walter Madden Jenkins Solicitors was retained by the plaintiff. At the first conference on 4 March 2010, the plaintiff informed Ms McTegg of the circumstances of her accident. She also informed Ms McTegg that in January 2008 she had instructed Mr Bolzan not to pursue a claim under the MAC Act as she had by that time resumed full-time employment with no loss of income, but that since then she had been discharged from the police force as medically unfit.

67Ms McTegg advised the plaintiff that although the three year time limit within which to commence proceedings had expired, it was possible to have a claim determined by CARS outside the three year time frame if a claim had been lodged within six months of the date of injury (she was apparently unaware that this was not done). Ms McTegg initially regarded the drivers of each of the three motor vehicles involved in the accident as co-defendants, and she undertook to obtain the file from Mr Bolzan and advise the plaintiff further after she had reviewed the file.

68Upon review of the file, Ms McTegg realised that although a claim had been submitted to Allianz (albeit out of time), no claim had been notified to the insurers of the vehicles driven by the police officers involved in the accident as required under s 72 of the Act.

69To rectify this, on 6 April 2010 Ms McTegg notified QBE of the claim and served a motor accident claim form on 18 May 2010. On the same day, QBE responded requiring an explanation for what was at that time a delay of almost five and a half years. No response was received at that time or at any later time.

70On 6 April 2010 Ms McTegg also notified Allianz that the plaintiff wished to reactivate her claim because of the change in her circumstances, notably her medical discharge from the police force. Ms McTegg acknowledged in that correspondence that there was an outstanding issue as to whether the plaintiff could provide a full and satisfactory explanation for the delay, which Ms McTegg undertook to take steps to address, and that she was aware Allianz had not accepted that a full and satisfactory explanation for the delay had been provided at the time the claim was lodged in November 2006. She also acknowledged that Allianz had denied liability (because of what was alleged to be the fault of the drivers of the police vehicles), and a notice of exemption under s 91 had issued, thus necessitating that any claim against the first defendant be determined by a court and, further, since the accident occurred in August 2004, the plaintiff was obliged to provide a "full and satisfactory explanation" for the delay of, at that time, over six years if leave under s 109 were to be granted to commence proceedings.

71Despite the difficulties with which the plaintiff was confronted having regard to that lengthy delay, and despite it being as at that date more than three years after the issue of the s 91 notice, Ms McTegg advised the plaintiff that a claim should be lodged with QBE. She also advised that Allianz should be notified that the claim which Mr Bolzan had advised in May 2008 which would not be pursued, would be reactivated.

72On 6 May 2010 Ms McTegg emailed the plaintiff to remind her of the necessity to complete an additional claim form to be served upon QBE as a matter of urgency. The plaintiff completed the claim form and forwarded it the following day.

73Thereafter Ms McTegg briefed counsel to advise in conference.

74On 2 June 2010 Mr Stone of counsel advised that the plaintiff would have difficulty in pursuing her claim in circumstances where it could not be determined which, if any, of the three vehicles involved in the accident caused her injuries. On his review of the available evidence there were technically three separate motor vehicle accidents. The first defendant's collision with a stationary vehicle (which did not appear to him to have caused any injuries) and whose conduct Mr Stone doubted was, in any event, "within the scope of fault" under the Act. Mr Stone identified two further collisions (which it appears he did accept were causative of her injuries) when one police vehicle "rammed into the back of the drug dealer's vehicle whilst the other police officer rammed into the front of it". He was also concerned that there would be an issue as to the liability of the drivers of the police vehicles in these circumstances, in that a court may consider that their driving actions did not constitute any breach of duty in circumstances where they were endeavouring to protect the plaintiff as a fellow officer and where they suspected that the first defendant may be armed. (Mr Stone observed that the plaintiff instructed him that if she had been driving one of the police vehicles she might well have done the same thing.)

75He also noted that the claim against QBE was well out of time and that the claim against Allianz had been withdrawn two years earlier. He advised that it would be necessary for the plaintiff to give a full and satisfactory explanation for the delay in commencing proceedings which, as he observed, was a time-consuming and expensive exercise with no guarantee that leave would be granted. In the result, with the plaintiff's costs exposure potentially exceeding \$100,000, he considered it was difficult to advise the plaintiff to do other than to "rest on her workers compensation rights".

76Mr Cullen of counsel was also briefed by Ms McTegg to consider the question of whether a motor accident claim could or should be pursued. He advised that with multiple motor vehicle accidents, questions of causation rendered the prospects of a successful claim for common law damages problematic (with attendant costs risks) and, further, even assuming the police vehicles deliberately collided with the vehicle driven by the first defendant, a court may view that conduct as an "agony of the moment reaction" with the two police officers intervening to prevent the first defendant driving away with a police officer, and not conduct which rendered them liable in negligence. He also advised that, in any event, it would be "a near impossible task" for a doctor to separate and apportion the plaintiff's injuries between the three separate accidents.

77In August 2010, Ms McTegg advised the plaintiff by telephone not to pursue the claim in light of counsel's advice. The plaintiff accepted that advice.

78On 27 August 2010 Ms McTegg advised Allianz of her instructions that the motor accident claim would not be pursued and on 9 September 2010 she advised QBE in similar terms.

79Ms McTegg ceased to act for the plaintiff in September 2010.

The plaintiff engages Ms Griffiths

80In November 2011, 15 months after she had instructed Ms McTegg that she did not wish to pursue her claim, the plaintiff retained Ms Melinda Griffiths of Slater and Gordon Lawyers for advice about her entitlement to a total and permanent disability benefit from her superannuation fund. She said that it was not until Ms Griffiths suggested that she pursue the motor accident claim that, "we started once again to pursue it".

81On 7 January 2012, Ms Griffiths obtained the plaintiff's files from both Bolzan and Dimitri Lawyers and Walter Madden Jenkins Lawyers.

82On 1 May 2012, the plaintiff was advised by Mr Hickey of counsel that she had a viable claim on the basis of what she was told was a "no win no pay" policy, and that she should pursue her claim against all three defendants. She said in her evidence that this was a relief and she was happy for them to proceed. She said she asked Mr Hickey why his advice was different from the advice she had earlier received, but was unable to remember what she was told. There was no evidence from Ms Griffiths or counsel concerning their assessment of the viability of the claim or their advice as to its prospects. She said she attended a conference with Mr Webb in July 2012 and that she was told of the need to explain the delay in commencing proceedings which would require considerable work.

83In June 2012 the insurers for the first, second and third defendants were notified by the plaintiff's solicitor that the claim against them would be reinstated. Both insurers confirmed that the claim was (again) rejected.

84On 31 August 2012 solicitors for the first defendant sought confirmation from Slater and Gordon Lawyers that the claim was in fact to be pursued, and, if so, that they should provide documentation and particulars of the claim, and any notice of motion and supporting affidavit directed to explaining the delay pursuant to s 109 of the MAC Act.

85On 21 September 2012 a letter was sent in identical terms. A further letter was sent on 6 November 2012 in which the previous (unanswered) correspondence was referred to and further information sought.

86On 5 December 2012 the statement of claim and a statement of particulars were filed.

87On 21 February 2013 a notice of motion was filed by the plaintiff seeking leave to commence the proceedings out of time.

The plaintiff's submissions

88It was common ground that at all relevant times the plaintiff was aware that there was a statutory time limit of three years within which to bring proceedings and that her decision in 2008 to allow that time to expire was conscious and considered, as was her decision in 2010 not to seek a grant of leave to commence proceedings out of time.

89In summary, Mr Webb submitted that because the plaintiff's explanation for the delay in bringing proceedings against the first defendant, and the delay in making a claim against the second and third defendants, was in substantial reliance upon advice from a succession of lawyers that has been shown to be wrong or misconceived, as the moving party for a grant of leave under s 109, she has discharged the onus of providing an explanation that was both full and satisfactory (see *Smith v Grant* [2006] NSWCA 244;67 NSWLR 735 at [12]-[14]), and that I would be satisfied that her explanation meets the objective test of reasonableness (see *Walker v Howard* [2009] NSWCA 408; 78 NSWLR 161 per Allsop P at [95]-[102]).

90Mr Webb submitted that the plaintiff's explanation for the delay was satisfactory despite her evidence that in 2008 (before the three year limitation period had expired) she had decided against bringing proceedings for common law damages well knowing that the limitation period was due to expire, and despite her evidence that in 2010 (after the limitation period had expired) she decided against seeking a grant of leave permitting those proceedings to be brought.

91Mr Webb submitted that in making the decision not to commence proceedings at those two distinct intervals in the more than eight years between the accident and the swearing of her affidavit in support of the application for leave, the plaintiff's evidence that she had accepted the advice of a succession of solicitors and barristers to the effect that her claim was either too problematic in terms of proof of fault or not sufficiently viable in terms of its potential worth to warrant being pursued, advice which he submitted was at best misconceived and at worst simply wrong, meant that her decision was not a fully informed one. He submitted that when the plaintiff was given different (which I take to mean correct) advice in May 2012, she acted promptly to notify the insurers of her intention to commence proceedings and, in those circumstances, she should not be prevented from litigating her claim.

92It was the plaintiff's case that Mr Bolzan's advice in 2008 was wrong in two crucial and related respects, and that it must have been based upon a misunderstanding of the relevant facts and law. Mr Bolzan did not depose to having any doubts or misgivings about the quality and correctness of the advice he rendered to the plaintiff between February 2005 and September 2008 and Mr Webb did not seek to elicit that evidence from him before he was cross-examined by the defendant or in re-examination. It would appear that the challenge to the correctness and adequacy of his advice only crystallised as an issue in final submissions, ultimately prompting an application for leave to reopen the plaintiff's case to allow for the tender of the medical evidence. No application was made by Mr Webb at that time to have Mr Bolzan recalled.

93In Mr Webb's submission the material defects in the advice Mr Bolzan had rendered from time to time since February 2005 and, most critically in January 2008, were patent. Not only did the advice proceed on the basis that the first defendant was the only driver at fault, and the only potential party against whom the proceedings could be commenced (an error that he submitted was repeated when counsel instructed by Ms McTegg gave similar advice), but it was submitted his assessment of the quantum of an award of damages was seriously flawed because he failed to take into account the real possibility that the plaintiff would at some time in the future be unable to work because of the injuries she sustained in the accident.

94Mr Webb also submitted the advice of Messrs Stone and Cullen of counsel was also misconceived which, together with the compound effect of the earlier advice by Mr Bolzan, qualified, to a very significant degree, the defendants' reliance on what Ipp AJA said in *Itek Graphix Pty Limited v Elliott* [2001] NSWCA 442 at [91] and [98] would be the ordinary consequence where an applicant for leave to commence proceedings out of time deliberately allowed a limitation period to expire. In *Itek* Ipp AJA said:

[91] A deliberate decision to allow a statutory limitation period to expire would be a powerful factor against the grant of leave. Where a deliberate decision to allow the period to expire has been made, ordinarily it will be difficult to provide an explanation for that decision sufficiently cogent to warrant the grant of leave...

...

[98] In my opinion, to grant leave to sue long after the expiry of a limitation period, when the applicant has made a deliberate decision to allow the statutory period to expire, in the absence of special circumstances explaining satisfactorily the conduct of the applicant, would set at naught the purpose of the legislation.

95In the same case Sheller JA, who did not disagree with the observations of Ipp AJA observed at [4] that the applicant had decided quite deliberately, and on an informed basis, not to bring proceedings at common law and that she had delayed for a significant period of time before changing her mind.

96I accept that subsequent decisions of this Court have cautioned against the observations of Ipp AJA in *Itek*, as set out above, being applied as if they state a proposition of law dictating that leave will be refused under s 109(3) where a plaintiff has decided to allow a statutory time limit to expire. I also accept that there should be appropriate enquiry into the circumstances in which that decision was made, in the context of all relevant matters relied upon by the plaintiff in seeking to persuade the Court that leave should be granted.

97It was in that connection, that Whealy JA in *Nominal Defendant v Harris* [2011] NSWCA 70 said at [45]-[47]:

[45] First, it needs to be borne in mind that these comments by Ipp JA (and indeed, by Sheller JA) were not "principles" in the true sense of the word. They were intended to provide useful and cautionary guidance as to the way a court exercising a broad statutory discretion to

extend a limitation period will ordinarily respond. They do not (and were not intended to) supplant the language of the statute. They were not intended to override the broad discretionary exercise entrusted to a court to take into account all the relevant circumstances in determining what is fair and just. They were certainly not intended to operate as some kind of peremptory trigger or command requiring, without further evaluation, a predetermined outcome, namely a refusal of the application. They might indeed point firmly in that direction but they did not, without proper consideration of all the circumstances, dictate automatic and immediate refusal.

[46] Indeed, Ipp AJA recognised this when he said at [87]:-

In my opinion, in limitation legislation such as s 151D(2) of the Workers Compensation Act , where a broad discretion is conferred to grant leave to sue after expiry of the limitation period, the general question that has to be asked is what is fair and just (per Gleeson CJ in *Salido*). Or what does the justice of the case require (per McHugh J in *Brisbane South Regional Health Authority*). In answering such a question, the justice of the case must be evaluated by reference to the rationales of the limitation period that has barred the action, including the four rationales to which McHugh J referred.

[This reference to the "four rationales" is a reference to McHugh J at 552-3 in *Brisbane South Regional Health Authority*].

[47] Sheller JA echoed this thought at [2] when, speaking of the legislation there in question, he said:-

... the legislature does no more than enable the court to grant leave to a person to commence court proceedings after the expiry of the limitation period. In broad terms it can be said that a discretion expressed so widely should be exercised in a way which will best serve the justice of the case.

See also *Australian Croatian Cultural and Education Association v Benkovic* [1999] NSWCA 210, per Mason P at [3] - [5].

98Mr Webb placed particular reliance on *Coal & Allied Operations Pty Ltd t/as Hunter Valley Operations (Howick Mine) v Stringer* [2003] NSWCA 271, where both Foster AJA and Hodgson JA (Ipp JA being in dissent) considered that the quality of the legal advice upon which a plaintiff placed reliance in deciding not to commence proceedings may inform the question whether the decision was deliberate and informed. Approached in that way, their Honours concluded that it was open to the primary judge to have distinguished the decision in *Itek* where the applicant in that case had made a deliberate decision not to sue with the guidance of her legal advisors in the full knowledge that a limitation period applied whereas at [61], Foster JA described the applicant in the case under review, as the "victim of conflicting advice ... with which he was neither intellectually nor emotionally equipped to deal".

99Notably, in *Coal & Allied Operations* the Court was concerned with the operation of s 60C of the Limitation Act 1969, where the test to be applied is whether it is just and reasonable to grant an extension of time and not the statutory test with which I am concerned in this case. Accordingly, it was not necessary for the primary judge in that case to reach a final conclusion as to whether conflicting legal advice was the only reason for the delay, or whether the decision not to commence proceedings could be characterised as comprehended by the phrase "deliberate and informed", or whether the explanation could be characterised as "satisfactory". That said, as Hodgson JA observed at [3], it is generally a necessary step in showing that it is just and reasonable to grant an extension of time for the applicant to give an explanation as to why the proceedings were not commenced within time, and it is generally necessary that the Court assess whether that explanation is satisfactory in all the circumstances. His Honour went on to observe that consideration as to whether a decision to allow a limitation period to expire is a deliberate and informed decision can involve questions of degree, in that some decisions are more deliberate and better informed than others.

100Mr Webb did not seek to make out a case that the legal advice provided by Mr Bolzan from February 2005, and upon which the plaintiff relied in January 2008 when she resolved not to commence proceedings against the first defendant, was negligent. Rather, he submitted that his advice that the quantum of her claim was unlikely to exceed \$50,000 was wholly misconceived and that this led him to overvalue her future entitlements to workers compensation and to advise her that she should preserve her workers compensation rights rather than making a claim under the MAC Act. He submitted that given the plaintiff's evidence that the value of her rights as an injured worker was a dominating factor in deciding in 2008 not to pursue a motor accident claim, she should not be penalised by refusing her leave to bring proceedings out of time.

101In addition, Mr Webb did not seek to make out the case that when Mr Bolzan advised against her commencing proceedings in January 2008 he should have foreseen the possibility of the plaintiff being medically discharged. He also expressly eschewed any reliance on the fact that the plaintiff's deteriorating health from May 2009, after a relapse in her psychological functioning as grounding a grant of leave to bring the proceedings out of time. By this I assume Mr Webb accepted that the fact and extent of the deterioration in the plaintiff's health could not reasonably have been foreseen by Mr Bolzan in January 2008, or that there was any foreseeable risk of a recurrence of her symptoms to the extent that she would be discharged from the police force on medical grounds.

102Mr Webb did submit that the quality of Mr Bolzan's advice was undermined by his having concluded, erroneously, that the drivers of the police vehicles were not at fault (or could not be proved to be at fault) and that no claim should be made against their insurer. He submitted that since the plaintiff was injured in the incident, and that the COPS report revealed that three vehicles were involved, Mr Bolzan should have regarded all drivers as potentially liable and advised the plaintiff that proceedings be instituted against all three defendants.

103Mr Webb further submitted that the advice given by Mr Stone and Mr Cullen in May 2010 was also misconceived because they also focused on the viability of the claim against the second and third defendants. He submitted that the issues of fault and causation identified by both counsel as undermining the prospect of successfully claiming against the insurers of the vehicles driven by the police officers were overstated. He also submitted that to the extent that their advice should be read as comprehending a concern at the prohibition in s 58(1) of the MAC Act against permanent impairment arising from separate motor vehicle accidents being aggregated the purposes of the s 131 threshold, that was also an error. He submitted that a court would be likely to determine that what occurred in the course of the incident in which the plaintiff was injured was a single motor accident consistent with the consideration given to the word "collision" in *Zotti v Australian Associated Motor Insurers Ltd* [2009] NSWCA 323 at [22].

104In the result, Mr Webb submitted that counsel's wrong view of the law, or their failure to afford appropriate weight to competing views of the law, overwhelmed what should have been the focus of their advice, namely whether the plaintiff was able to discharge the obligation under s 109, which at least Mr Stone did not consider impossible even though he saw it as a time consuming and expensive exercise. Mr Webb submitted that it should have been clear to both counsel that the injuries the plaintiff sustained in the accident were compensable and, where the insurers were each alleging fault against the other, that the plaintiff was justified in bringing proceedings against all three defendants with questions of contribution being resolved at trial, commensurate with the approach of Hoeben J in *GIO General Limited v Smith* [2011] NSWSC 802 at [44].

105Mr Webb accepted that in order for what he conceded was the plaintiff's otherwise considered and deliberate decision not to commence proceedings (first in January 2008 and then again in August 2010) to be other than an informed decision based on legal advice, I would need to reach a positive finding that the advice she had received prior to engaging Slater and Gordon Lawyers in November 2011 was wrong, misconceived or misguided, whether as the product of her lawyer's misunderstanding of the motor accidents compensation scheme under the MAC Act relative to the compensation scheme under the Workers Compensation Act, or because of their failure to properly appreciate and assess the viability of her claim for common law damages in some material respect. Although the concession was not openly made, it follows that it is not enough for the plaintiff to establish that different advice might have been given as to issues of fault and causation identified by counsel, and even less so that Mr Bolzan's advice as to the likely quantum of an award may be the subject of differing views as to its adequacy.

106In summary, Mr Webb submitted that the plaintiff was continuously given wrong advice as to the competence and viability of her claim. In circumstances where she accepted that advice and did not commence proceedings based upon it, he submitted that her explanation for the delay of over eight years in commencing proceedings meets the statutory test, equally as it warrants a finding that a reasonable person in the plaintiff's position would have been justified in experiencing the same delay.

Submissions for the second and third defendants

107Mr Rewell focused his submissions on that aspect of the statutory test in s 109 which concerns the adequacy of the plaintiff's explanation for delay, whilst Mr Turnbull, counsel for the first defendant, directed his submissions to the completeness of the explanation, adopting Mr Rewell's submissions on the issue of sufficiency.

108Mr Rewell emphasised that the onus is on the plaintiff to establish that Mr Bolzan's advice was completely wrong or misconceived and that it is not sufficient that another lawyer may have given different advice or, more particularly, that other advice might have been given with the benefit of hindsight. He submitted that on a fair assessment of it, Mr Bolzan's advice that the plaintiff should preserve her workers compensation rights, was balanced and considered, based, as it was, on all the information which was available to him when he had carriage of the plaintiff's case for over three years from February 2005. Mr Rewell submitted that any lawyer with comparable experience would likely have shared Mr Bolzan's assessment of the relative worth of the plaintiff's rights and entitlements as a police officer injured in a motor vehicle accident whilst at work and her rights as an injured passenger in a motor vehicle accident. He submitted that this was necessarily the case in the circumstances as Mr Bolzan was able to assess them in January 2008, having regard both to the largely resolved state of the plaintiff's injuries at that time and what Mr Bolzan described as the "rubbery" assessment of her whole person impairment. Mr Rewell submitted that Mr Bolzan's advice was completely defensible and the plaintiff's reliance upon it informed her decision not to pursue the motor accident claim in circumstances where she was fully aware of the consequences of making that decision.

109Mr Rewell drew attention to the fact that the plaintiff was not ultimately disqualified from promotion in the New South Wales Police Force following the accident, given that she was promoted from Leading Senior Constable to Sergeant on 19 June 2007. He also emphasised that she had suffered no economic loss as a result of the accident at the time she accepted Mr Bolzan's advice in January 2008 such as might justify any significant variation to Mr Bolzan's assessment of a likely award of damages. He submitted that Mr Bolzan's analysis of the worth of the plaintiff's claim under all heads of damage as at January 2008 was soundly based upon the plaintiff's work history in the years after the accident; the largely resolved state of her injuries and the fact that the assessment of her whole person impairment for the purposes of the MAC Act, being at or less than the statutory threshold, would prevent her from recovering damages for non-economic loss. Further he submitted even if Mr Bolzan's estimate of the worth of the claim were an underestimate, even by a margin of 100 per cent, that did not render his advice as to quantum defective or flawed to the extent that the plaintiff's reliance upon it was uninformed.

110Alternatively, Mr Rewell submitted that even if the plaintiff had been advised that her claim was potentially worth more than \$50,000, or she was invited to factor into her decision as to whether to pursue a motor accident claim the risk that she might sustain economic loss in the future due to the accident (neither of which she was invited by Mr Webb to consider), her evidence put it beyond doubt that she resolved to pursue her rights under workers compensation legislation in an informed way in January 2008 in clear recognition of the fact that she had a right

to bring a motor accident claim and that the time frame within which those proceedings must be commenced was due to expire.

111Mr Rewell also submitted that the identity of the driver(s) at fault was not determinative of the outcome of this case. The question whether the plaintiff would meet the statutory threshold to entitle her to recover damages for economic loss was the predominant issue. Mr Rewell emphasised that Mr Bolzan was concerned that the plaintiff may not meet the 10 per cent whole person impairment threshold under the MAC Act entitling her to recover for non-economic loss that was critical, and the identity of the tortfeasor(s) was not determinative. He also submitted it is arguable that each of the three collisions considered by counsel retained by Ms McTegg is a separate "motor accident" and, if that is correct, s 58(1) arguably requires the identification and assessment of the injury caused by each "motor accident". He submitted that proposition was confirmed in the decision of Hoeben J in *GIO General Ltd v Smith* at [43] et seq, and in the decision of Hidden J in *Allianz Australia Insurance Ltd v MAA* [2011] NSWSC 102 at [17] et seq.

112Mr Rewell also submitted that in this case, when the primary question exercising the plaintiff's mind at the time she accepted Mr Bolzan's advice not to commence proceedings was the quantum of a potential damages award as compared with the impact on her workers compensation entitlements, whether there were one or more defendants who might be sued to recover those damages was immaterial.

113In summary, Mr Rewell submitted that the plaintiff had the opportunity to make an informed decision as to whether to commence or pursue her motor vehicle claim and that she exercised it on an informed basis. He also submitted that there is nothing in the advice she received from Mr Bolzan, counsel or Ms McTegg to support any finding that their advice was misguided or that her decision in January 2008 not to commence proceedings and then in August 2010 not to seek leave to do so was anything other than an informed decision based upon sound legal advice. He submitted that in those circumstances what has been variously described in the authorities as a formidable factor against the grant of leave referable to the observations of Ipp AJA in *Itek*, applies in this case, and, there being no other relevant circumstances which would justify leave being granted, it should be refused.

114Counsel further submitted that limitation periods are important features of the statutory scheme which are designed to regulate the time within which proceedings must be brought in the public interest and in conformity with the statutory objects of s 5 of the Act, to grant leave in this case would undermine that statutory purpose.

Submissions for the first defendant

115Mr Turnbull submitted that the plaintiff's explanation for the delay was deficient on the additional basis that it also failed to satisfy the second limb of the statutory test in s 66(2) of the MAC Act. He relied on paragraphs [52] and [96] in *Walker v Howard* which, in summary, provide that s 66(2) of the MAC Act is not limited to the conduct of an applicant for leave and, for that reason, a consideration of the explanation proffered by the plaintiff should not be viewed in

isolation from the conduct of Slater and Gordon Lawyers, the third firm of solicitors retained by the plaintiff.

116In oral submissions, discrete periods of delay for which there was no or no sufficient explanation from the plaintiff or her solicitors were identified: first, the six month delay between November 2011 and May 2012, when the plaintiff first consulted Slater and Gordon Lawyers and when Mr Hickey of counsel advised that she reactivate her claim, despite the fact that she knew that she was already well out of time to commence proceedings; and second, the seven month delay from 1 July 2012 after the plaintiff instructed her solicitors to commence proceedings under the MAC Act and the filing of the statement of claim in December 2012. Mr Turnbull submitted that these periods, when considered together and left unexplained, failed the test of adequacy.

117In summary, Mr Turnbull submitted that both limbs of the statutory test are intertwined, and in this case the plaintiff has failed to discharge the onus of providing both a full and satisfactory explanation for the delay.

Conclusion

118I accept that the question whether the explanation for the delay in commencing proceedings is full is to be considered without the need for a prolix or burdensome recounting of unnecessary details. I also accept that I am required to apply an evaluative judgment as to the satisfactoriness of the entire explanation proffered by the plaintiff by applying an objective test referable to whether a reasonable person in a position of the plaintiff would or would not have been justified in experiencing the delay. In this way an objective standard of reasonableness is imposed which is given subjective content by factors which include the conduct of the plaintiff and those acting on her behalf where their conduct is relevant to the explanation for the delay (see *Walker v Howard* at [53], [95]-[102], [106] and [133]). In the same case at [46] Allsop P observed:

Section 109 takes its place in Chapter 4 of the MAC Act dealing with motor accident claims. The objects of the MAC Act are set out in s 5. They include the encouragement of early resolution of compensation claims: s 5(1)(b). Chapter 4 contains a regime for claims handling by insurers and for assessment and resolution of claims. Restrictions exist on the taking of proceedings in court: Part 4.5, s 108. The MAC Act discloses an intention to encourage the timely bringing forward, and the timely and fair resolution, of motor accident claims.

119In this case it is not submitted that the plaintiff was acting under any intellectual incapacity or that her injuries disabled her from making an informed decision. To the contrary. She accepted that she was aware at all relevant times that a limitation period was imposed by statute and would expire three years after the date of the accident. Her case rests predominantly, if not exclusively, on the basis that her decision was not informed because the advice upon which it was based was deficient. I am not persuaded that she has made out that case.

120The fact that Mr Webb informed me from the bar table that damages are being claimed in the amount of \$1.5 million does not allow me to make any reasoned assessment as to whether Mr Bolzan's assessment of the worth of the claim in January 2008 was so egregiously wrong that the

plaintiff's reliance upon it permits the conclusion to be made that her decision was not informed. In the absence of any evidence that would allow for that finding, I am not persuaded Mr Bolzan's advice was wrong or misconceived in the way contended for by the plaintiff's counsel. In addition, I am not persuaded that the advice of Messrs Stone and Cullen in August 2010 was wrong or misconceived such that the plaintiff's decision at that time not to commence proceedings was other than considered and informed.

121 Finally, I am satisfied that there is a paucity of evidence to explain the effluxion of a further fifteen months from August 2010 to November 2011 when the plaintiff sought further advice from Slater and Gordon Lawyers, save only for the fact that it would appear that their advice as to whether she should commence proceedings was not actively sought but volunteered, and nothing to explain the further delay of six months from July 2012 after advice was given to reactivate the claim before proceedings were commenced.

122 I am not persuaded that leave to commence the proceedings against any of the defendants should be granted under s 109. Accordingly, the orders sought by the notices of motion of the first, second and third defendants dismissing the proceedings are granted and I make the following orders:

1. The statement of claim is dismissed.
2. The plaintiff is to pay the costs of the notices of motion of the second and third defendants dated 19 February 2013 as assessed or agreed.
3. The plaintiff is to pay the costs of the notices of motion of the first defendant dated 21 February 2013 on the ordinary basis up to and including 6 June 2013 and on an indemnity basis thereafter up to and including the date of the hearing of the motion.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 07 January 2014

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/54a63c183004de94513db67d>

CASE PAGE <https://chat.esheria.ai/case-law/australia/mehmet-v-candemir-2013-nswsc-1897-2013>

Prepared on 29 October 2026 · Esheria