HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

LIDO RUSSO & ANOR — APPELLANTS

AND

JOHN DOMINIC AIELLO — RESPONDENT

Russo v Aiello
[2003] HCA 53
30 September 2003
S292/2002

ORDER

1. *Appeal dismissed with costs.*

2. *Order 1 suspended for 28 days from the date of this Order and for such further time as a Justice of this Court may order before the expiry of that 28 day period and on an application made within 14 days of this Order.*

3. *Liberty to apply to file, on an application made in accordance with Order 2, written submissions as to whether any other order should be made by this Court respecting the position of the second appellant.*

On appeal from the Supreme Court of New South Wales

Representation:

G B Hall QC with A R Lakeman for the appellants (instructed by Turner Whelan)

D J Russell SC with G F Butler for the respondent (instructed by Mr Bhim Ramrakha)

CATCHWORDS

Russo v Aiello

Limitation of actions – Action in respect of motor vehicle accident where claimant lodged claim outside statutory time limit – Whether claimant had a full and satisfactory explanation for delay in making claim – Whether material difference between having and providing an explanation – Whether reasonable person in position of claimant would have been justified in experiencing the same delay – Onus of establishing full and satisfactory explanation – Relevance of prejudice to defendant caused by stay – *Motor Accidents Act* 1988 (NSW), ss 40(2), 43(2), 43A(2), 43A(6), 43A(7).

Appeal – Where primary judge of District Court erred in law and fact in making discretionary judgment – Whether errors vitiated decision of primary judge – Whether Court of Appeal erred in its disposition of appeal – Whether relief futile.

Motor Accidents Act 1988 (NSW), ss 40(2), 43(2), 43A(2), 43A(6), 43A(7).

1 GLEESON CJ. The relevant facts, and statutory provisions, are set out in the reasons for judgment of Gummow and Hayne JJ.

2 Part 5 of the *Motor Accidents Act* 1988 (NSW), ("the Act"), in the form relevant to this appeal, deals with claims (defined, in s 40, to include claims for damages in respect of personal injury arising from fault by the owner or driver of a motor vehicle), and court proceedings to enforce claims. The objects of the Part are stated in s 40A. They include ensuring that claims are quickly brought to the attention of insurers.

3 Division 2 of Pt 5, dealing with claims and other matters preliminary to court proceedings, is of present relevance. Section 43(2) states that a claim of the kind made by the appellants must be made within six months after the date of the motor accident to which the claim relates. Sub-section (1) explains the object of that requirement. Section 43(A), which also commences with a statement of its objects, qualifies the requirement in s 43(2) by providing that a claim may be made more than six months after the relevant date "if the claimant provides a full and satisfactory explanation for the delay in making the claim". The explanation is to be provided "in the first instance" to the insurer of the potential defendant.

4 The concept of a "full and satisfactory explanation" is, to some extent, explained by s 40(2), which deals with the two elements as follows. A full explanation is said to be 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 word "full" takes its meaning from the context. It refers to the conduct bearing upon the delay, and the state of mind of the claimant. The sub-section goes on to provide that an explanation is not a satisfactory explanation unless a reasonable person in the position of the claimant would have been justified in experiencing the same delay.

5 Part 5 is replete with legislative declarations of its objects. This is not an exercise in apologetics. Rather, it gives practical content to terms such as "reasonable", "justification" and "satisfactory". What would constitute justifiable delay on the part of a reasonable person in making a claim is to be considered in the light of the legislative purposes explained in the Act. That matter is taken further by a specific provision (in s 43A(3)) that evidence as to delay in the onset of symptoms of physical injury may form part of an explanation.

6 The concept of "a reasonable person in the position of the claimant" could give rise to difficulties that do not exist in the present case. The first appellant consulted a solicitor some 10 days after the motor vehicle accident in which he was injured. He was informed of the time limits imposed by the Act, and was handed a claim form. There is no basis in the evidence for concluding that he did not receive prompt and competent legal advice. We are not concerned with the possible significance of incompetent or inadequate legal advice, or lack of awareness of the time limits on making a claim.

7 Leaving to one side problems of the kind just mentioned, what would justify a reasonable person in the position of a claimant "experiencing" a delay? It is impossible to give an exhaustive list of possible justifications. Delay in onset of symptoms is one example; and it is an example of some relevance to this case. It is to be noted that what the Act requires is justification for delay; not demonstration that the delay caused no harm. That does not mean that the Act is unconcerned with the presence or absence of prejudice to insurers resulting from delay. The objects referred to in s 40A include enabling early investigation and assessment of claims, and early information to enable ready prediction of claim frequency and provision for calculation of further premiums. However, while the problems that insurers might experience as a result of delays in making claims form part of the general legislative concern, the focus of the statutory concept of a satisfactory explanation is upon justifying delay, rather than excusing it. It is one thing to say that conduct is justified by reference to the way in which a reasonable person in the position of a claimant could have been expected to behave. It is another thing to say that delay ought to be excused because it caused no identifiable harm to an insurer. It is the former, not the latter, question that is raised for consideration. Furthermore, the justification called for is in the context of a legislative scheme which aims "to ensure that claims are quickly brought to the attention of insurers". The various statements as to the objects of the legislation show that the legislature made its own evaluation of the importance of prompt notification of claims, and constructed a statutory scheme around that evaluation. It is not for a court to re-assess that policy on a case by case basis.

8 The mandatory language of s 43(2)(a) (a claim must be made within six months) is qualified by s 43A(2) (a claim may be made later if a full and satisfactory explanation is provided). However, the mandatory language is taken up again in s 43A(7), which provides that a court "must dismiss proceedings commenced in respect of a late claim if the court is satisfied that the claimant does not have a full and satisfactory explanation for the delay in making the claim". No discretion is conferred. If a certain state of satisfaction exists, the proceedings must be dismissed.

9 There was some argument about the significance of the word "have" in s 43A(7). It will be necessary to return below to the facts of the present case. As a matter of statutory construction, however, it is impossible to conclude that the legislation attaches significance to a supposed difference between having an explanation and providing one. In that respect, it is necessary to put the issue into perspective.

10 What is in question in a case such as the present is an explanation for delay on the part of a claimant in making a claim; that is to say, an explanation for the conduct of the claimant. Leaving aside cases of incapacity, or other exceptional circumstances, ordinarily it will be the claimant who is in the best position to give what s 40(2) describes as "a full account of the conduct,

including the actions, knowledge and belief" of the claimant in relation to the reasons for the delay. Often, perhaps usually, the claimant will be the only person who is in a position to give such an account. Section 43A(2) relaxes the strict time limit imposed by s 43(2), but only on condition that the claimant provides a full and satisfactory explanation of the delay. That explanation is to be "provided in the first instance" to the prospective defendant's insurer. The reference to the explanation being thus provided in the first instance is linked to s 43A(7), which refers to the duty of a court to dismiss proceedings commenced in respect of a late claim "if the court is satisfied that the claimant does not have a full and satisfactory explanation for the delay in making the claim". The existence of such a state of satisfaction is a condition precedent to the operation of the statutory duty to dismiss the proceedings. It follows that a defendant seeking an order dismissing proceedings will be entitled to such an order if, and only if, after evidence and argument, the court is persuaded to such a state of satisfaction. In that respect, the defendant carries the onus. But when regard is had to the nature of the question about which satisfaction is required, which is a question concerning the reasons for the conduct of the claimant, and is a matter about which the claimant will ordinarily be the person best able, and will often be the only person able, to give information, then a court would be likely to infer that such information as is made available to it by a claimant (which may involve information in addition to that provided to the insurer) is all that a claimant can say by way of explanation of his or her conduct.

11 Lord Mansfield said that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted".[1] This is a fundamental precept of the adversarial system of justice, and is treated as axiomatic in the day to day operations of courts. When a court comes to consider the issue raised by s 43A(7), by hypothesis, the claimant will already have provided information to the insurer pursuant to a statutory requirement to provide a full explanation of the delay. Sometimes that may be the whole of the information before the court. Sometimes a claimant may seek to add to it. Either way, since it is the claimant's explanation of his or her own conduct that is the subject of judicial evaluation, and since the claimant is at risk of having the proceedings dismissed, common sense will ordinarily justify the inference that a claimant does not possess undisclosed information that might assist his or her case, especially where, as here, the claimant is professionally represented.

12 Quite apart from such practical forensic considerations, the possibility that a claimant is in possession of, but has failed to provide to the court, information by way of explanation of his or her delay, is not one with which the legislation is

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1 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

concerned. The question raised by s 43A(7) is not whether the claimant possesses information; it is whether the claimant has an explanation. An explanation, of its nature, is something that is communicated to a third party. This is emphasised by the requirement for the court to consider whether the explanation is full, which is said (in s 40(2)) to mean a full *account* of the claimant's conduct. Section 43A(7) is concerned with the account of a claimant's conduct that is before the court, not with information which is undisclosed. If the explanation referred to in s 43A(7) were to be regarded as information possessed, but not communicated, by the claimant, rather than an account of conduct imparted to a third party, then the requirement that the explanation be "full" makes no sense.

13 There may be cases in which a primary judge, or an appellate court, is tempted to speculate that, perhaps because of deficiencies in a claimant's legal representation, or because of some accident or mistake, there is information helpful to a claimant that has not been put before a court when considering whether to dismiss proceedings. I say "speculate" because it is usually impossible for a judge to know what is in counsel's brief. Such speculation is not a reason for departing from the ordinary process of fact-finding, including drawing of inferences, or for failing to apply the provisions of the statute. In the case of an appeal, whether the possibility in contemplation is relevant, and ought to be pursued further, depends upon the grounds of appeal.

14 The account of the claimant's conduct that was before the primary judge in the present case is set out, and analysed, in the reasons for judgment of Gummow and Hayne JJ. The primary judge said:

> "The next question then to be addressed is whether I am satisfied that the plaintiff does not have a full and satisfactory explanation for the delay in making [the] claim. That must be assessed on the information now before the Court. The onus is on the plaintiff to provide that explanation."

15 As all the members of the Court of Appeal held, the last sentence in that passage is erroneous. For that reason, all three members of the Court of Appeal reconsidered the s 43A(7) issue for themselves. In doing so, Young CJ in Eq repeated what he described as the "key passage" in the judge's reasoning:

> "There is no attempt to identify when it was that the plaintiff realised that his disabilities had not improved, thus leading to the decision to seek further legal advice, and there is no attempt to identify when that decision was made. It can readily be seen that different consequences might flow in terms of whether the explanation is satisfactory if the realisation that disabilities had not improved had taken place in December 1997, or close to that time, as opposed to having taken place, for instance, in September 1998, or close to that time. There is just a dearth of detail over that period

> of approximately eleven months, which, in my view, prevents the conclusion being made that the explanation is full in the sense required under the Act."

16 The judge concluded that there was such a lack of detail for the period in question that the explanation "cannot be regarded as full".

17 Young CJ in Eq, with whom Meagher JA agreed, recorded that the case was not argued in the Court of Appeal on the basis that there was, or might have been, additional information favourable to the appellants that was not proffered to the primary judge. Hodgson JA recorded a concession by counsel for the appellants that there was no suggestion that the appellants were denied natural justice. It is possible to infer from his Honour's reasons for his dissenting judgment that he was troubled by that concession; but there is no ground of appeal before this Court that would call it into question.

18 Young CJ in Eq, reconsidering the s 43A(7) issue, concluded "that there was not a full and satisfactory reason given for the delay in this case". That conclusion followed an earlier reference to the precise terms of s 43A(7), and to the practical significance, having regard to the way the case was conducted, of the absence of information about aspects of the conduct of the appellants. It is to be understood in that context, and amounted to a conclusion that his Honour was satisfied that the appellants did not have a full and satisfactory explanation for the delay in making the claim.

19 The decision of the Court of Appeal has not been shown to be in error. The appeal should be dismissed with costs. I agree with the additional orders proposed by Gummow and Hayne JJ.

20 McHUGH J. The issue in this appeal is whether the Court of Appeal of New South Wales erred in finding[2] that the District Court of that State had not erred in holding[3] that the respondent had established that the appellants did not have "a full and satisfactory explanation for the delay" in making a claim governed by the *Motor Accidents Act* 1988 (NSW). In my opinion, the Court of Appeal did err in so holding. But on the evidence, and despite errors made by the District Court, the appellants did not have "a full and satisfactory explanation for the delay". Accordingly, the appeal to this Court must be dismissed.

21 Mr Lido Russo, the first appellant, alleged that he sustained injury on 11 January 1997 while a passenger in a car driven by the respondent, Mr John Dominic Aiello. He alleged that the negligent driving of Mr Aiello caused the car to leave the road and collide with a rock face. A Motor Accident Personal Injury Claim Form completed by Mr Russo was received by Mr Aiello's insurer on 26 March 1999, more than two years after Mr Russo sustained his injuries. Almost a year later, Mr Russo filed a Statement of Claim in the District Court of New South Wales claiming damages against Mr Aiello. The second appellant was also a plaintiff in the action. Its claim is a derivative one that is dependent on Mr Russo being successful in his action. For the purposes of this appeal, it is sufficient to refer only to the position of Mr Russo. If his appeal fails, so does the appeal of the second appellant.

22 Section 43(2) of the *Motor Accidents Act* requires any claim arising out of a motor accident to be made within six months of the "relevant date for the claim." For the purposes of the Act, the injured person makes a claim by giving notice of it to the person against whom the claim is to be made and to that person's insurer if the insurer is a third party insurer. However, s 43A(2) declares that a claim "may be made more than 6 months after the relevant date for the claim under section 43 (in this section called ***a late claim***) if the claimant provides a full and satisfactory explanation for the delay in making the claim." The explanation has to be provided to the third party insurer if there is one, or to the Nominal Defendant. Section 40(2) provides that "a full and satisfactory explanation ... for delay" requires:

> "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 been justified in experiencing the same delay."

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2 *Russo v Aiello* (2001) 34 MVR 234.

3 *Russo v Aiello* unreported, District Court of New South Wales, 15 August 2000.

23 If a plaintiff commences court proceedings in respect of a late claim, s 43A(6)(c) enables the insurer, or the person against whom the claim is made, to "apply to have the proceedings dismissed on ... the ground of delay". However, the application must be made within two months of the Statement of Claim being served on the defendant and received by the insurer, and the insurer must not have lost the right to challenge the claim on the ground of delay. Section 43A(6) provides that the defendant or that person's insurer or the Nominal Defendant, who is served with a late claim, loses the right to challenge the claim on the ground of delay when either of two conditions occur. First, if, within two months of receiving a late claim for which no explanation for the delay is provided, the insurer does not reject the claim or ask the claimant to provide a full and satisfactory explanation for the delay. Second, if, within two months after receiving an explanation for the delay in the making of a late claim, the insurer does not reject the explanation.

24 Once the insurer brings a valid application for dismissal, s 43A(7) relevantly and emphatically declares:

> "A court must dismiss proceedings commenced in respect of a late claim if the court is satisfied that the claimant does not have a full and satisfactory explanation for the delay in making the claim ..."

25 After receiving the late claim, Mr Aiello applied under s 43A(7) for an order dismissing the action. The primary judge found that the insurer in the present case rejected the explanation for the delay that Mr Russo had provided. The Court of Appeal upheld the primary judge's finding on this point. Mr Russo did not challenge that finding in this Court. Nor did Mr Russo challenge the fact that Mr Aiello brought the application to dismiss the proceedings within two months of the Statement of Claim being served on him and received by the insurer. Because that was so, the remaining issue for the primary judge was whether Mr Aiello had proved that Mr Russo "does not have a full and satisfactory explanation for the delay in making the claim"[4]. The terms of s 43A(7) indicate that Mr Aiello had the onus of establishing this issue. But once he did, the primary judge was required to dismiss the action. He had no discretion to refuse to do so. I also agree with Gleeson CJ "that what the Act requires is justification for delay; not demonstration that the delay caused no harm."[5] Prejudice or lack of prejudice to the applicant for a s 43A(7) order is irrelevant in determining whether the applicant is entitled to the order.

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4 Section 43A(7).

5 Reasons of Gleeson CJ at [7].

26 The primary judge held that Mr Russo's explanation for delay during the period 6 December 1997 to 6 October 1998 could not be regarded as "full". He upheld the application for dismissal and dismissed the action. In making his decision, however, the learned primary judge made two errors. First, his Honour said that the "onus is on the plaintiff to provide that explanation." That is, his Honour erroneously put the onus on Mr Russo to show that he had a full and satisfactory explanation for the delay. Second, the primary judge said that, apart from a statutory declaration of Mr Russo, "there is no further information given in relation to the plaintiff's work activities, if any, from 6 December 1997 to 6 October 1998". The primary judge erred in making this statement because there was other information before him concerning the relevant period. It included the particulars in Mr Russo's Statement of Claim, an affidavit that he had sworn and medical reports dated December 1998 and May 1999 concerning his condition.

27 It is a question of fact whether the applicant for a s 43A(7) order has proved that a plaintiff does not have a full and satisfactory explanation for the delay in making a late claim. But although it is a factual and not a legal issue, the criterion of a "full and satisfactory explanation" for delay does not involve any perception by the senses of some matter, event or entity in the external world. It does not depend on sight, hearing, feeling or touch. A "full and satisfactory explanation" for delay is an intellectual construct involving a value judgment, a judgment on which reasonable persons may have widely differing views. It is therefore properly described as a discretionary judgment. Because that is so, the Court of Appeal could set aside the primary judge's decision on the issue only on the basis of the well-known principles concerning an appeal against a discretionary judgment.

28 Despite this limitation on the right of appeal against the primary judge's decision, the case was one for appellate intervention. The two errors that the learned primary judge made vitiated his decision[6]. He made an error of law in respect of onus and he failed to take into account evidence that he should have taken into account. The Court of Appeal should have set aside his Honour's judgment and either exercised the discretion itself or remitted the matter to the District Court for further hearing. However, the majority judges in the Court of Appeal, although recognising that the trial judge had erred, neither exercised the discretion themselves nor remitted the case to the District Court. Instead, their Honours classified the errors as "errors of process", held that they did not constitute appellable error and that the primary judge's conclusion "was one which he was entitled to reach on the material before him".

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6 See, for example, *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627 per Kitto J.

29 For the reasons that I have given, the Court of Appeal erred in so holding. Its decision must be set aside. It is true that the majority considered what they would do if there had been appellable error on the part of the trial judge. Their Honours said that, if they had had to determine the matter, they would have reached the same conclusion as the primary judge. However, a statement as to how a judge would exercise a discretion, that the judge holds that he or she does not have, has no weight in determining whether an appeal from a discretionary judgment should be upheld[7].

30 This Court must make the order that the Court of Appeal should have made. That is to say, it should either exercise the discretion itself or remit the matter to the Court of Appeal to decide whether it should exercise the discretion or remit the matter to the District Court. Because this Court must make the order that the Court of Appeal should have made, it is also open to this Court to order that the appeal to the Court of Appeal be allowed and that the matter be remitted to the District Court.

31 Unlike Hodgson JA, who dissented in the Court of Appeal, I do not think that that Court should have refrained from exercising the discretion because of the course taken before the primary judge. Hodgson JA said that the additional information indicated "that the appellants could, if required, have provided more material". His Honour said that, because the insurer had not specified in what respect the explanation was deficient and had not cross-examined Mr Russo on his affidavit, "it would be quite wrong to draw the inference" that the appellants did not have a full and satisfactory explanation for the delay.

32 However, Mr Aiello had no obligation to specify in what respect the material relied on by Mr Russo was deficient. An applicant for a s 43A(7) order has the onus of proving a negative – that the plaintiff does not have a full and satisfactory explanation for the delay. But upon tendering what, if any, explanation the plaintiff has already given, the applicant makes a prima facie case for an order if that explanation is not "full and satisfactory". At the hearing, the plaintiff may supplement any explanation already given. But if and when the plaintiff does so, the explanation then given establishes that that is the only explanation that the plaintiff has. That is because the plaintiff's conduct in answering the applicant's case is an admission that the plaintiff has no other evidence that could help his or her case[8].

33 Ordinarily, the proper order for this Court to make would be an order remitting the matter to the Court of Appeal to exercise the discretion or to remit

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7 *Wade v Burns* (1966) 115 CLR 537 at 555 per Barwick CJ.

8 *Jones v Dunkel* (1959) 101 CLR 298 at 321 per Windeyer J.

the case to the court of first instance. However on the evidence, the only conclusion reasonably open is that Mr Russo did not have a full and satisfactory explanation. Because that is so, it would be pointless and an occasion for unnecessary expense to the parties to remit the case to the Court of Appeal. This Court should exercise the discretion and hold that Mr Russo did not have a full and satisfactory explanation for the delay in commencing the action. Accordingly, the primary judge correctly dismissed the appellants' action in the District Court.

Order

34 The appeal must be dismissed.

35 GUMMOW AND HAYNE JJ. This appeal is taken from a decision of the New South Wales Court of Appeal[9]. It concerns the principles to be applied by a court in attaining satisfaction, on an application for dismissal of proceedings, that a claimant does not have a full and satisfactory explanation for a delay in making a claim to which the *Motor Accidents Act* 1988 (NSW) ("the Act") applied.

36 The first appellant, Mr Russo, was born in 1975. The second appellant, Zucchini Pty Ltd ("Zucchini"), is a company which carried on business under the name "Red Zucchini Bar".

37 By their Statement of Claim filed in the District Court of New South Wales on 6 January 2000, the appellants pleaded a cause of action in negligence against the respondent. They alleged that on 11 January 1997 the respondent, whilst driving at Terrey Hills in New South Wales, had negligently failed to negotiate a sharp left-hand bend in the road, resulting in the vehicle losing traction and colliding with a rock face on the road's eastern kerb. Mr Russo, then 21 years of age and an employee and co-owner of Zucchini, was a passenger in the vehicle. He sought damages for injuries, lost earnings and medical expenses; Zucchini sought damages for loss of the services of Mr Russo and consequential loss and damage. As will appear, the arguments on this appeal invite attention to the position of Mr Russo and it is convenient hereafter on occasion to refer to him as "the claimant".

38 It will be necessary later in these reasons to refer in greater detail to the provisions of the Act, but it is sufficient here to note that s 43(2) thereof obliged the claimant to make the claim against the respondent within six months after the motor accident. Moreover, that limitation is imposed upon those claiming damages "in respect of the death of or injury to a person" (s 40(1)). It is not immediately apparent that Zucchini made a claim of that nature. However, at all stages, the fate of its claim has been treated as following that made by the claimant. The point may now be put to one side, but it will be necessary to return to it.

39 The claimant completed a document styled a "Motor Accident Personal Injury Claim Form" and dated 23 March 1999. It was received by the solicitors for the respondent three days later. This was some 26 months after the motor accident.

40 The claimant sought to explain the delay in a Statutory Declaration subscribed and declared on 25 March 1999. The relevant facts alleged in the

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9 *Russo v Aiello* (2001) 34 MVR 234.

Statutory Declaration were later summarised by Young CJ in Eq in the Court of Appeal in the following terms:

> "(i) [The claimant] saw a solicitor at Parramatta with his father on 21 January 1997;
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> (ii) On that occasion he [believed] he was ... handed a claim form [and was advised of the applicable time limits];
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> (iii) He did not complete the form as he considered his disabilities would improve;
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> (iv) He went to Italy in July, 1997 [to stay with his family, hoping the rest would improve his condition];
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> (v) During 1997, he received a letter from the Parramatta solicitor, but there was no follow up on the claim form;
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> (vi) In November, 1997, his father received a further claim form;
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> (vii) He returned to Australia in December, 1997;
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> (viii) His problems appeared to have improved with the time in Italy;
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> (ix) Later he realised his condition had not improved;
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> (x) In October 1998, he consulted new solicitors;
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> (xi) At the time he consulted new solicitors, he had in his possession a partly completed claim form, but he cannot remember how that came about.
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> (xii) He received specialist medical advice in January and February 1999.
>
> (xiii) He completed the claim form with his new solicitors on 23 March 1999."

The temporal gap between (vii) and (x) is significant for this case.

41 The respondent, by Notice of Motion, sought to have the Statement of Claim dismissed under s 43A(7) of the Act, on the footing that the claimant did not have a full and satisfactory explanation for his delay in making the claim.

The District Court

42 Upon the hearing of the respondent's motion before the District Court (Dodd DCJ), it became clear that it was only in respect of the period from 6 December 1997 (when the claimant returned from Italy to Australia) to 6 October 1998 (when the claimant consulted new solicitors) that the respondent alleged there had not been a "full" explanation.

43 Dodd DCJ dismissed the claimant's proceedings under s 43A(7) of the Act, finding that the claimant's explanation could not be regarded as "full" in respect of that period.

The Court of Appeal

44 By majority, the Court of Appeal (Meagher JA and Young CJ in Eq, Hodgson JA dissenting) granted leave to appeal but dismissed an appeal by the claimant. Young CJ in Eq, with whom Meagher JA concurred, observed that although, for reasons to which it will be necessary to return, there may have been "errors of process" in the District Court, there was no error in the conclusion of the primary judge. The Chief Judge in Equity said that, even if he had been of the view that the decision of the primary judge ought to have been set aside for error, he would still have reached the conclusion "that there was not a full and satisfactory reason given for the delay in this case".

45 Hodgson JA would have granted leave to appeal, allowed the appeal and dismissed the respondent's motion on the basis that he was not satisfied "that the appellants do not have a full and satisfactory explanation". It will be necessary later in these reasons further to consider his Honour's reasoning.

The scheme of the Act

46 Section 5 of the Act repeals the *Transport Accidents Compensation Act* 1987 (NSW). Section 6 provides that the law relating to a claim for damages for death or bodily injury arising out of a transport accident occurring on or after 1 July 1987 shall be as if that statute had not been passed and the common law and the enacted law (except that statute) is to have effect accordingly. Hence the recitation, in s 2A(1), of the objects of the Act as follows:

> "(a) to repeal the *Transport Accidents Compensation Act 1987* and thereby to abolish the scheme for compensating victims of transport accidents (TransCover) established under that Act, and
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> (b) to re-instate a common law based scheme under which damages can only be awarded after a finding of negligence, and

(c) by the scheme under this Act:

(i) to reduce the cost of the former common law based scheme by limiting benefits for non-economic loss in the case of relatively minor injuries, and

(ii) to introduce a stricter procedure for the making and assessment of claims for damages, and

(iii) to preserve the benefits payable to persons with more severe injuries involving on-going disability, and

(iv) to give full weight to the need to identify fraudulent claims, deter their lodgment and prosecute those responsible for them, and

(v) to encourage recovery from injury and early and effective rehabilitation, where appropriate, as a key feature of the scheme, and

(vi) to encourage the speedy, efficient and effective provision of benefits balanced by the need to investigate claims properly and the need to encourage an early return to employment."

47 Part 5 (ss 40-66A) of the Act is headed "Claims and court proceedings to enforce claims". The Part is concerned with claims for damages, as already mentioned, in respect of death or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle (s 40(1))[10]. Section 40A emphasises that the objects of Pt 5 are:

"(a) to ensure that claims are quickly brought to the attention of insurers:

(i) to enable early investigation and assessment of claims, and

(ii) to enable the early identification of the nature and severity of the injuries sustained in the motor accident and of the likely treatment and rehabilitation needs of the injured person, and

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10 Section 41 provides that Pt 5 of the Act does not apply to motor accidents occurring after the commencement of the *Motor Accidents Compensation Act* 1999 (NSW) on 5 October 1999.

(iii) so that insurers can readily predict claim frequency and hence make appropriate provision for the calculation of premiums, and

(iv) to enable accident victims to receive prompt treatment and rehabilitation and prompt payment of lost earnings where liability is clear, and

(b) to promote negotiation between the parties and, by means of alternate dispute resolution, to ensure that the resolution of disputed claims by the courts is kept to a minimum, and

(c) to underscore the need to deter and prevent the making of fraudulent and exaggerated claims."

48 Division 2 (ss 42-47A) of Pt 5 is headed "Claims and other matters preliminary to court proceedings". Section 42 obliges a person who is entitled to make a claim to ensure that a written report of the motor accident is made to the police within 28 days of the date of the accident. Section 43(2) stipulates that a claim must be made within six months after the "relevant date for the claim", being the date of the motor accident or death. A claim is made by giving notice of the claim to the person against whom the claim is made and, if that person's insurer is a third-party insurer, to the insurer (s 43(4)).

49 Sub-section (1) of s 43 provides that the object of that section is:

"to promote the early making of claims to enable the insurer:

(a) to commence investigations while evidence relating to a claim is available, and

(b) to identify injuries and facilitate the access of claimants to appropriate injury management and rehabilitation services and thus to expedite the claimant's recovery, and

(c) to allow the insurer to more accurately predict claim frequency and hence formulate premiums."

50 Section 43A permits, in certain circumstances, the making of claims beyond the six month limit provided for in s 43(2). Section 43A(2) states:

"A claim may be made more than 6 months after the relevant date for the claim under section 43 (in this section called ***a late claim***) if the claimant provides a full and satisfactory explanation for the delay in making the claim. The explanation is to be provided in the first instance to the

> third-party insurer concerned (if there is one) or to the Nominal Defendant."

The content of the expression "a full and satisfactory explanation for the delay" is supplied by s 40(2) in the following terms:

> "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 been justified in experiencing the same delay."

51 The only statutory indication of the kind of delay which a reasonable person in the position of the claimant would have been justified in experiencing appears in s 43A(3). This provides that evidence as to any delay "in the onset of symptoms" relating to the injury suffered as a result of the motor accident may be given in any explanation provided under s 43A(2).

52 Sub-section (4) of s 43A qualifies the exception from the six month time limit provided for in sub-s (2). It provides that a claim may not be made more than 12 months after the motor accident unless, in addition to the provision of a full and satisfactory explanation, a further condition is satisfied. This is that the total damages of all kinds likely to be awarded to the claimant if the claim succeeds are not less than 10 per cent of the maximum amount that may be awarded for non-economic loss under s 79 or s 79A of the Act. The claim made by the claimant on its face satisfies this condition.

53 Sub-section (6) of s 43A applies if a late claim is made against the Nominal Defendant or a person insured by a third-party insurer. It specifies two circumstances in which the insurer (defined so as to include the Nominal Defendant) and the person against whom the claim is made, "lose the right to challenge the claim on the ground of delay". These are *(i)* if, within two months after receiving a late claim for which no explanation for delay is provided, the insurer does not reject the claim or ask the claimant to provide a full and satisfactory explanation for the delay (par (a)); and *(ii)* if, within two months after receiving an explanation for delay in the making of a late claim, the insurer does not reject the explanation (par (b)).

54 The loss of "the right to challenge" is carried into effect, and a temporal limitation is placed on the exercise of the right, by par (c) of sub-s (6). This provides:

> "If court proceedings are commenced in respect of a late claim, an insurer (or the person against whom the claim is made) may apply to have the proceedings dismissed on:

(i) the ground of delay, or

(ii) in the case of a late claim that is made more than 12 months after the relevant date for the claim under section 43, the ground of the amount of damages,

or both, only within 2 months after the statement of claim is served on the defendant and received by the insurer. The insurer (or the person against whom the claim is made) may only apply to have the proceedings dismissed on the ground of delay if the insurer (or the person) has not lost the right to challenge the claim on the ground of delay."

55 The primary judge found that the insurer here "rejected" the explanation provided by the claimant in the sense spoken of in par (b) of sub-s (6) by letter dated 3 May 1999. This finding was upheld in the Court of Appeal and was not challenged in this Court. Further, the respondent brought its Notice of Motion within two months after the Statement of Claim had been served on the respondent and received by the insurer. It follows that the respondent was not disabled by sub-s (6) from applying to have the proceedings dismissed.

56 Sub-section (7) of s 43A is of central importance to this appeal. It imposes on the court a duty to dismiss the proceedings, conditioned upon the attainment by the court of satisfaction that a certain state of affairs exists. The sub-section states:

"A court *must dismiss proceedings* commenced in respect of a late claim *if the court is satisfied that the claimant does not have a full and satisfactory explanation for the delay in making the claim* and, alternatively or in addition in the case of a late claim that is made more than 12 months after the relevant date for the claim under section 43, that the total damages of all kinds likely to be awarded to the claimant if the claim succeeds are less than 10 per cent of the maximum amount that may be awarded for non-economic loss under section 79 or 79A as at the date of the relevant motor accident." (emphasis added)

57 The scheme of s 43A therefore is that, in the first instance, a claimant must provide to the insurer a full and satisfactory explanation for the delay. If dissatisfied with the explanation, it is then for the insurer, or the person against whom the claim is made, provided they have not lost the right to challenge the claim for delay under sub-s (6), to apply to the court to have the proceedings dismissed. The court must dismiss the proceedings if the moving party satisfies it that, relevantly, the claimant does not have a full and satisfactory explanation for the delay.

58 The use in sub-s (7) of the phraseology "does not *have* a full and satisfactory explanation for the delay" indicates that, in determining whether it

has attained the requisite satisfaction, the court is not restricted to a consideration of the explanation which the claimant was obliged by sub-s (2) to provide "in the first instance" to the insurer. The question the statute presents is whether the court is satisfied, on all the material before it, that the claimant does not "have" a full and satisfactory explanation for delay. The proceedings must be dismissed if the court is satisfied that either or both *(i)* it does not have before it 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, or *(ii)* that a reasonable person in the position of the claimant would not have been justified in experiencing the same delay.

59 Evidence tending to establish the "full account" referred to in *(i)* above is peculiarly likely to be within the control of the claimant. It follows that, ordinarily, a conclusion that the court does not have before it a "full account" of the claimant's conduct at the relevant times may more readily be reached where the claimant has failed to provide, by the close of submissions, such an account. However, the onus remains on the applicant to satisfy the court that the claimant does not have a full and satisfactory explanation for the delay. The discharge of this onus ordinarily would involve specifying the respects in which the claimant's account is said not to be "full" in the relevant sense, and identifying why it is that a reasonable person in the claimant's position would not have been justified in experiencing the same delay.

60 However, the applicant under par (c) of s 43A(6) and s 43A(7) is not required to speculate upon or to seek to challenge an unarticulated, or secret, reason for delay; a reason for delay which the claimant does not articulate cannot be described as an "explanation" for delay. It follows that the requisite satisfaction that a claimant does not have a full and satisfactory explanation for delay may readily be attained where a claimant fails to disclose any explanation at all. So much is consistent with the objects of s 43A, which are identified in sub-s (1) thereof as being:

> "(a) to ensure that the issue of the lateness of a claim is dealt with as soon as possible after receipt of the claim, and
>
> (b) to ensure that any delay caused to the consideration of the substantive claim by the lateness issue is kept to a minimum, and
>
> (c) to ensure that the lateness issue is either resolved or made a mutually apparent substantive issue at an early date".

61 Contrary to a submission put by the appellants in this Court, the imperative language of s 43A(7) leaves no room for a consideration of any "prejudice" that may be caused to the parties by a decision to dismiss or to decline to dismiss the proceedings. The provision imposes a duty to dismiss

upon the attainment of the relevant satisfaction; it does not confer a discretion to extend time of the type commonly found in statutes of limitation, the exercise of which may require evaluation of any prejudice to the defendant[11].

Full and satisfactory explanation?

62 The primary judge concluded that the claimant's explanation could not be regarded as "full" in respect of the period 6 December 1997 to 6 October 1998. Nonetheless, s 43A(7) uses the composite expression "full and satisfactory explanation", and the question the primary judge posed for himself, and that addressed by the Court of Appeal, was directed to whether the explanation was "full and satisfactory".

63 In this litigation the respondent's challenge to the adequacy of the explanation has been confined to the period 6 December 1997 to 6 October 1998. The District Court therefore was obliged to dismiss the proceedings if the respondent satisfied it that either or both *(i)* it did not have before it a full account of the conduct, including the actions, knowledge and belief of the claimant throughout that period, or *(ii)* a reasonable person in the position of the claimant would not have been justified in experiencing the same delay in that period.

64 In his reasons, the primary judge said that "[t]he onus is on the plaintiff to provide that explanation". As each member of the Court of Appeal indicated, if this was intended to mean that the claimant bore the onus of proving that the explanation he had given was full and satisfactory, it was an error.

65 As the moving party on the motion, the respondent ought to have made submissions first before the primary judge, yet it appears that the oral submissions for the claimant on the question whether the claimant had a full and satisfactory explanation were given before those for the respondent. One consequence was that the alleged gap in the claimant's explanation apparently was raised for the first time in the respondent's submissions in the District Court. The claimant did not then apply to re-open to lead more evidence in rebuttal, but was permitted to address the Court in reply.

66 It follows that, notwithstanding the deficiencies in the procedure adopted, the respondent specified the respects in which the explanation was said to be other than full and satisfactory, by challenging the detail provided in respect of the period 6 December 1997 to 6 October 1998, and the claimant was afforded the opportunity to respond.

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11 cf *Salido v Nominal Defendant* (1993) 32 NSWLR 524 at 531, 538; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

67 The primary judge correctly observed that whether he was satisfied that the claimant did not have a full and satisfactory explanation for the delay "must be assessed on the information now before the Court". His Honour then referred to the paragraphs of the claimant's Statutory Declaration respecting the period 6 December 1997 to 6 October 1998. These stated:

> "9. I returned to Australia on 6 December 1997 and my problems from the accident appeared to have improved as I had spent six months relaxing and under no stress with no responsibility.
>
> 10. I returned to Australia in relation to a job offer, believing that I would be able to rejoin the work force, although I was still having some problems associated with the accident.
>
> 11. Shortly before I returned to Australia, my father had received a letter addressed to me dated 7 November 1997, enclosing a further personal injury claim form, and he made arrangements with Dr Row, my general practitioner, to complete the medical certificate. This was arranged whilst I was still out of the country.
>
> 12. After some time, I realised that my disabilities had not improved, in fact, became worse, and my life was being affected to a greater extent than I had initially believed, and I decided to seek further legal advice.
>
> 13. On about 6 October 1998, I attended the offices of [the new solicitors] ...".

68 The primary judge continued that, apart from par 10 of this Statutory Declaration, "there is no further information given in relation to the plaintiff's work activities, if any, from 6 December 1997 to 6 October 1998".

69 Hodgson JA correctly observed that this was inaccurate. There was other material before the primary judge, to which Hodgson JA referred, which provided further details respecting the actions, knowledge and belief of the claimant from 6 December 1997 to 6 October 1998. The primary judge erred in not having regard to that material, which included the particulars in the claimant's Statement of Claim[12], certain medical reports and an affidavit dated 14 April 2000 sworn by the claimant.

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12 This was received into evidence without objection.

70 That additional material indicated the following. From December 1997 to July 1998, the claimant established a business by the name of Ceruti's Bistro where he worked as manager until July 1998. From July 1998 to December 1998, he set up with his brother an establishment called Lido Bar, where he worked as manager two nights per week until December 1998. The claimant then was employed as a manager at Ceruti's Bistro from December 1998 to March 1999. The claimant complained to medical practitioners of headaches, recurrent episodes of dizziness, and shoulder and back pain throughout this period, and appeared to experience some psycho-sociological disruption during his time at Lido Bar.

71 It may be inferred that, from the period 6 December 1997 to 6 October 1998, the claimant's symptoms, though recurrent, were not so severe as to prevent him from working. This suggests that, throughout this period, the claimant continued to hold the belief, expressed in his Statutory Declaration, that his injuries would improve and were not sufficiently serious to make a claim. The claimant asserted a gradual realisation that his condition was deteriorating, culminating in his decision to seek new legal advice in October 1998. The claimant acknowledged in his Statutory Declaration that he was advised in January 1997 of the time limits that applied to claims under the Act and that his father had received a further Personal Injury Claim Form shortly before the claimant's return to Australia. The inference is open that, throughout the period 6 December 1997 to 6 October 1998, the claimant knew of the relevant time limit.

72 The District Court therefore had before it an account of the conduct, including the actions, knowledge and belief of the claimant from 6 December 1997 to 6 October 1998. However, the conclusion was open that this was not a "full" account within the meaning of s 40(2) of the Act. Even when regard is had to the additional material not referred to by the primary judge, it was still correct to observe, as his Honour did, that:

> "[t]here is no attempt to identify when it was that the plaintiff realised that his disabilities had not improved, thus leading to the decision to seek further legal advice, and there is no attempt to identify when that decision was made."

73 Moreover, even if it were accepted that the account was relevantly "full", the conclusion would be open that the claimant's explanation in respect of the period 6 December 1997 to 6 October 1998 was not "satisfactory" because a reasonable person in the position of the claimant would not have been justified in persisting in such a delay.

74 Whether a "reasonable person" would have been so "justified" requires an evaluation by reference to a hypothetical objective standard and in light of the

objects of the Act. Part 5 of the Act evinces a legislative intention "to promote prompt settlement of claims and to encourage forensic diligence"[13]. The statutory scheme, emphasised repeatedly in the provisions to which reference has earlier been made, is to encourage the early investigation, assessment and resolution of claims. The statute in terms indicates that this scheme is intended to advance the interests of claimants in rehabilitation, prompt treatment and prompt payment of lost earnings and the interests of insurers in more accurately predicting claim frequency and formulating premiums. Those objects are sought to be achieved by the imposition of time limits and obligations to act expeditiously on both claimants and insurers[14].

75 The claimant here had been informed of the time limit with which he was required to comply. The relevant delay extended for some ten months, at a time when the initial six month limit itself had elapsed six months prior to the commencement of the period of delay now in issue. The delay was not referable to any delay in the onset of symptoms, the consideration to which the Act refers in s 43A(3). It is not to be assumed that this is the only consideration which may be relevant to whether a reasonable person in the position of the claimant would have been justified in experiencing the same delay. Nonetheless, in the relevant period, the claimant experienced recurrent symptoms, the severity of which became gradually more apparent to him, and yet he failed to make a claim which he knew should have been made on or before 11 July 1997. The conclusion was open that a reasonable person in the position of the claimant would not have been justified in a delay of this degree.

The reasons of Hodgson JA

76 In an earlier paragraph of his dissenting judgment, Hodgson JA had identified the correct approach to be adopted:

> "[I]n deciding whether a defendant has discharged its onus of proving that a claimant does not have a full and satisfactory explanation for the delay, a Court would have regard to the explanation provided to the insurer, and to the circumstance that normally only the claimant is able to give evidence of the claimant's explanation for delay; and if the Court considered that the explanation provided to the insurer was not full and satisfactory, and if there was no relevant additional material before the Court, the inference

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13 *Salido v Nominal Defendant* (1993) 32 NSWLR 524 at 530.

14 For example, s 45(1) provides that "[i]t is the duty of an insurer to endeavour to resolve a claim, by settlement or otherwise, as expeditiously as possible."

that the claimant did not have a full and satisfactory explanation would readily be drawn."

77 However, in the third last paragraph of his reasons, Hodgson JA said:

"The material relevant to the particular delay ultimately relied on by the respondent, namely that between 6 December 1997 and 6 October 1998, showed plainly that the appellants *could, if required, have provided more material* in relation to that period. Notwithstanding that the onus was squarely on the respondent to prove the absence of an explanation, the respondent chose not to specify any respect in which the explanation was said to be deficient, and chose not to cross-examine the first appellant on his affidavit. *Whether or not the material actually provided to the Court does itself amount to a full and satisfactory explanation*, in my opinion it would be quite wrong to draw the inference against the appellants in those circumstances that they do not have a full and satisfactory explanation." (emphasis added)

His Honour then emphasised that the question was whether the Court was satisfied that the claimant did not "have" a full and satisfactory explanation, rather than whether such an explanation had been "given".

78 If this passage was intended to indicate that the respondent was required to challenge a reason for delay which was not disclosed by the material before the Court by the close of submissions then, for the reasons earlier given, it should be rejected. The better view may be that his Honour was not intending to state any general propositions as to the construction of the statute. Rather, his remarks may reflect the view he took of the particular circumstances of the litigation in the District Court and of the consequences of the misapprehension as to onus of proof which appeared to affect the course of proceedings before that Court.

Conclusion

79 The majority in the Court of Appeal has not been shown to have erred in upholding the conclusion of the primary judge that the claimant did not have a full and satisfactory explanation for the delay in making the claim.

80 As indicated above, it was the whole of the Statement of Claim which was dismissed by the District Court and that order was upheld by the Court of Appeal.

81 The appeal to this Court should be dismissed with costs. However, that order should be suspended for 28 days from the date of that order and for such further time as a Justice of this Court may order before the expiry of that 28 day period and on application made within 14 days of that order. The parties should

be granted liberty to file on such application made as above written submissions as to whether any other order should be made by this Court respecting the position of Zucchini.

82 KIRBY J. This appeal challenges a judgment that followed a divided decision of the New South Wales Court of Appeal[15]. Special leave to appeal to this Court was not granted because of the inherent importance of the facts of the case. Rather, it was provided because the matter was said to raise a question of principle concerning the meaning of the *Motor Accidents Act* 1988 (NSW) ("the Act") as it applied to lateness in the making of claims and the commencement of proceedings in respect of claims governed by the Act.

83 At the special leave hearing, this Court was given statistics that suggested that, in the year 1999/2000, 21 per cent of all claims under the Act, running into many hundreds, were made outside the times which the Act fixed[16]. The motor accidents claim form in the present case was completed during that period. The number of out of time claims recorded in the statistics reportedly fell in later years, dropping to 18 per cent in 2000/2001 and to 8 per cent in 2001/2002[17]. These falls suggest that the requirements of the Act as to time eventually became known to injured claimants and their legal representatives.

84 Any superimposition of new time limitations upon a legal system that for centuries[18] had recognised a right, in most cases, to bring a damages claim in tort years after the cause of action arose, was bound to cause mistakes, and apparent injustices, at least at the beginning of the operation of the new legislation. This is what makes this appeal important not only to the present parties but for other cases affected by the interpretation of the provisions of the Act that this Court adopts. Many cases wait in the wings for the outcome of this appeal.

The facts and provisions of the Act

85 *Belated motor accident claim*: The facts are set out in the reasons of Gummow and Hayne JJ, as are the relevant provisions of the Act[19]. Mr Lido Russo ("the claimant") was injured in a motor car accident on 11 January 1997. He consulted a solicitor on 21 January 1997. The solicitor was described by him as "young and inexperienced" and not such as to give him confidence in the strength of his claim. However, the claimant was provided with a claim form and advised of the time limit imposed by the Act. In July 1997 he went overseas without having lodged the claim form.

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15 *Russo v Aiello* (2001) 34 MVR 234.

16 Special leave transcript, 9 August 2002 at 7-8. See also *Russo v Aiello* (2002) 23 (15) Leg Rep SL1 where further statistics are given.

17 Special leave transcript, 9 August 2002 at 8.

18 Since the *Limitation Act* 1623 (UK).

19 Reasons of Gummow and Hayne JJ at [36]-[41], [46]-[56], [60].

86 Given the common unpredictability of accident outcomes, prudence might have suggested that the solicitor take steps in January 1997 to ensure that the claimant's position as to the time for making a claim under the Act was protected, by proposing that the form be completed there and then (or at least that some letter of claim be sent to the insurer). No fee or disadvantage attached to lodging such a claim. But that course was not adopted.

87 The claimant returned to Australia in December 1997. He resumed work. Eventually, in October 1998, he consulted new solicitors. He received specialist medical advice in January and February 1999. Only then, on 23 March 1999, did he complete a claim form. It was lodged 26 months after the accident in which his cause of action (and that of the second appellant, his employing company) first arose.

88 *Substantial claim – time problem*: But for the operation of the Act, there would have still been ample time for the claimant to bring an action for damages. The driver alleged to be responsible for the accident was known and identified. He held a compulsory third party risk insurance policy. The claimant was innocent of any negligence, being a passenger in the driver's vehicle. The circumstances of the accident appear to indicate negligence on the part of the driver in controlling his vehicle, which ran off the road and struck a rockface. There seems to have been no doubt about the occurrence of the accident. The police attended the scene. The claimant was taken thence to hospital by ambulance. The hospital records confirmed the claimant's history. The claimant alleged that he suffered injuries that resulted in disabilities such that, if his claim succeeded, the award of damages would be more than 10 per cent of the maximum amount for non-economic loss under ss 79 or 79A of the Act[20]. The last-mentioned aspect of his claim was not contested by the insurer.

89 The medical evidence before the courts below suggested that the claimant had suffered an injury, among others, to his cervical spine. Objective tests indicated a disc protrusion. That evidence demonstrated that in May 1999, there was a significant residual disability in the claimant's neck estimated at a ten per cent loss of efficient function. This was said to be permanent. It had serious consequences for the claimant's occupation as a chef and restauranteur.

Approach of strict scrutiny of the Act

90 I mention these factual details because any rational application of the Act to the claimant's case (as may be imputed to the Parliament which enacted the Act) would not overlook such commonplace circumstances in deciding the

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20 Act, s 43A(4). See reasons of Gummow and Hayne JJ at [52].

consequences of any time default in making a claim and commencing proceedings. As the Attorney-General said in introducing the Bill containing the amendments that incorporated some of the provisions in question in this appeal[21]:

> "Common sense and community expectations generally demand that the [compulsory third party] policy provide coverage in respect of injuries which arise from crashes … on the roads or from vehicles running out of control."

On the face of things, the same is true of the entitlement to damages for the injuries suffered by the claimant.

91 The claimant's claim, notified a little more than two years after it arose, was therefore one involving an objectively established accident, apparently clear liability in negligence, a driver indemnified by a viable insurer and potentially serious disabilities of a kind that, experience teaches, sometimes take a period to manifest themselves. In such circumstances, in order to deprive a person of the entitlement to damages otherwise arising for the civil wrong done to him, on the basis of a procedural default in making a claim and commencing proceedings in time, the legislation would need to be clear. Any ambiguity or uncertainty in its terms would be construed in a way that would preserve the civil rights of the person injured. If this is so with respect to rights of an ancillary kind (such as a corporation's right to have access to the advice of a lawyer[22]) it is much more so for substantive rights of an individual in something as basic as a cause of action in tort[23]. A court must give effect to the meaning of legislation as derived from the words in which it is expressed. But deriving that meaning is not a mechanical task. It is one that calls forth evaluation and judgment.

The scheme of the Act

92 *Barriers to a late claim*: From the provisions of the Act set out in the reasons of Gummow and Hayne JJ[24], it can be seen that the New South Wales Parliament intended to introduce strict requirements for the prompt bringing of claims "for damages in respect of … injury to a person caused by the fault of …

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21 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 November 1995 at 3322.

22 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40; 192 ALR 561.

23 cf *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 307 per Mason CJ, Deane and Gaudron JJ, 312 per Brennan J.

24 Reasons of Gummow and Hayne JJ at [46]-[56], [60].

[a] driver of a motor vehicle in the use … of the vehicle"[25]. The present claimant was a person who made, or was entitled to make (but for any disqualifying provisions in the Act), such a claim[26]. The objects of the amendments to the Act included the introduction of "a stricter procedure for the making and assessment of claims for damages"[27] to protect the need to investigate claims properly[28]. The objects of the obligation to make a claim upon those liable within six months of the relevant date for the claim (in this case, the date of the accident) included the early commencement of investigations by insurers; the prompt access by the injured person to rehabilitation; and the provision to insurers of the facility to formulate their premiums based on claims experience[29].

93 Nevertheless, where (as in the present case) a claim was made more than six months after the relevant date, and was thus a "late claim", the claim might still proceed to determination on its merits "if the claimant provides a full and satisfactory explanation for the delay in making the claim"[30]. Evidence about any delay in the onset of symptoms relating to the injury as a result of the motor accident might be one such explanation[31]. However, it was not the only explanation. The terms of the Act suggest that, to be effective, the explanation required provision of the details of relevant facts and circumstances.

94 An added barrier to a "late claim" was imposed by the Act where the claim was made more than 12 months after the relevant date. Then the claimant was not only obliged to provide a "full and satisfactory explanation" but also to show that the awardable damages were of a certain amount (a condition satisfied in the present case)[32]. By the terms of the Act, the claimant was to "provide" the explanation specified "in the first instance to the third-party insurer concerned (if

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25 Act, s 40(1) (definition of "claim").

26 Act, s 40(1) (definition of "claimant").

27 Act, s 2A(1)(c)(ii).

28 Act, s 43(1)(a) set out in the reasons of Gummow and Hayne JJ at [49].

29 Act, s 2A(1)(c). See also s 40A set out in the reasons of Gummow and Hayne JJ at [46].

30 Act, s 43A(2).

31 Act, s 43A(3).

32 Act, s 43A(4).

there is one) or to the Nominal Defendant"[33]. Note that, at this point, the Act states that the explanation must be "provided" by the claimant.

95 The scheme of the Act then proceeds with a bifurcated provision dealing with the case where the claimant's claim is (as here) a "late claim".

96 *Peremptory dismissal on condition*: Provision is first made for what might be called a "fast track" procedure by which the insurer (or the person against whom the claim is made) may apply to have the proceedings which the claimant brings dismissed "on the ground of delay"[34] (or, if applicable, on the ground that the amount of damages did not meet the statutory precondition[35]). This "fast track" is itself subject to a number of requirements which the insurer (or person against whom the claim is made) must establish in order to gain the benefit of the procedure:

(a) the claim must be a "late claim"[36];

(b) it must be made against a person who is insured by a third-party insurer[37];

(c) the insurer must not within two months after receiving the late claim have failed to reject the claim or to have asked the claimant to provide a full and satisfactory explanation for the delay in making the claim[38];

(d) the insurer must within two months after receiving an explanation have rejected the explanation[39]; and

(e) court proceedings must have been commenced in respect of the late claim[40].

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33 Act, s 43A(2).

34 Act, s 43A(6)(c).

35 Act, s 43A(6)(c)(ii).

36 Act, s 43A(6).

37 Act, s 43A(6).

38 Act, s 43A(6)(a).

39 Act, s 43A(6)(b).

40 Act, s 43A(6)(c).

97 Only if all of the foregoing preconditions were fulfilled might an insurer obtain the advantage of the special procedure, in effect, to secure the peremptory termination of the claimant's entire proceedings. This is clear because of the conditions that circumscribe the insurer's remedy. If certain of the conditions were not met (namely (c) and (d)) the insurer would lose "the right to challenge the claim on the ground of delay"[41]. Note that the right referred to is to "challenge the claim". If court proceedings have already been commenced (normally brought by or for the claimant) the insurer "may apply to have the proceedings dismissed"[42].

98 Three observations can be made about this last-mentioned provision. First, it is expressed in the permissive ("may"). Any objections that the insurer (or relevant person) may have in respect of a "late claim" will remain to be decided at the trial if the "fast track" procedure is not invoked by the insurer (or such person) or does not succeed. That procedure is thus an option belonging to the donee of the statutory entitlement. It is not obligatory that it be availed of. It does not represent the only way, or time, to raise an objection about the lateness of the claim (or the insufficiency of the prospective damages). Secondly, the respective paragraphs of s 43A(6) (s 43A(6)(a), (b) and (c)) draw a distinction between challenges to the "claim" and applications with respect to the "proceedings". The "fast track" in s 43A(6) of the Act provides an additional statutory entitlement to the insurer (or relevant person) to apply for the termination of "the proceedings". Thirdly, what is envisaged by the sub-section is more than an objection going to an important issue (such as a "challenge" to a "claim on the ground of delay"). It is a provision for relief to have the entire proceedings dismissed. In such a procedure, the insurer (or relevant person), being the party who has exercised the entitlement to apply, is the applicant for such relief. In the ordinary way, as applicant, it bears the burden of making out its entitlement.

99 *Attention to "having" an explanation*: In the bifurcated scheme of the Act provision is then made, in general terms, for the way in which a court will deal with the issue of a late claim, whether under the "fast track" procedure pursuant to s 43A(6), available to the insurer or other person liable[43], or more generally, for example, pursuant to a motion for summary dismissal of the proceedings, as ancillary to some other interlocutory hearing, or in the disposition of the substantive action on its legal merits. It is in order to cover all such instances

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41 Act, s 43A(6)(a)-(c).

42 Act, s 43A(6)(c).

43 "Insurer" in s 43A(6) includes the Nominal Defendant in cases in which that office-holder is concerned.

that s 43A(7) provides that a court "must dismiss proceedings commenced in respect of a late claim if the court is satisfied" that the two criteria specified are met.

100 The bifurcation that I have described is given significance by a distinction appearing in the language of the Act to which several judges of the New South Wales Court of Appeal have drawn attention[44]. Hodgson JA did so in his dissent in the present case[45]. In *Manderson v Ellis*, Davies AJA put it this way[46]:

> "The subsection [s 43A(7)] requires that the court be satisfied that, 'the claimant does not have a full and satisfactory explanation for the delay in making the claim'. Unlike s 43A(2), (4) and (6)(a), the provision does not use the term 'provide', 'provided' or 'provision'. The onus necessarily fell upon [the insurer or person against whom the claim is made], who was the applicant for the order of dismissal, to establish that the respondent did not *have* a full and satisfactory explanation for the delay. Of course, an explanation actually provided by or on behalf of an injured party will be strong evidence of the explanation which the person *has*."

101 The distinction drawn by Hodgson JA and Davies AJA is a material one. As other cases involving s 43A(7) illustrate, it will often be the case that a person who has consulted a legal practitioner within time to make a claim will be individually innocent – or relatively so – for the failure to make the claim or bring the proceedings within the very short time-frame established by the Act for taking such steps. The person or the person's lawyer may not have *provided* a full and satisfactory explanation, but it may nonetheless appear that the claimant *has* one and, at the trial, upon detailed evidence, could establish one.

102 The hazards contained in the Act are serious for the uninstructed person, given the severe abbreviation of the time for making claims and bringing proceedings; the supposed encouragement afforded to the settlement of claims *without* resort to court proceedings; and the actual imposition of a prohibition upon a claimant's commencing proceedings in respect of a claim within six months from notice, or 90 days after required details are given to an insurer, or 28 days from an offer of settlement to the claimant by the insurer, whichever is the latest or the last of such events to occur[47]. Complex moveable time limits of

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44 See for example *Manderson v Ellis* (2002) 37 MVR 214 at 219 [19] per Santow JA, 225 [54] per Davies AJA.

45 *Russo v Aiello* (2001) 34 MVR 234 at 236 [6].

46 (2002) 37 MVR 214 at 225 [54] (emphasis added).

47 Act, s 52(1A).

this kind are bound to lay traps for people with claims (and probably also for not a few lawyers upon whom some claimants rely). In such matters, claimants are virtually forced into dependence upon legal advice. Such advice requires a degree of vigilance and a sense of urgency on the part of the lawyers.

103 The distinction between the sections of the Act addressed to the "provision" of a full and satisfactory explanation and s 43A(7), has been of particular importance in cases where the claimant is personally innocent of the delay but has been poorly represented by an incompetent or neglectful lawyer[48]. In such cases, correctly in my view, the Court of Appeal has given effect to the point of differentiation in the statutory language that Hodgson JA identified in the present case.

104 *Ambiguity and deprivation of rights*: To the extent that the provisions of s 43A of the Act are ambiguous, the construction favoured by Hodgson JA in the Court of Appeal should be adopted. It is supported by the language of the Act; the restraint that ordinarily governs the peremptory termination of proceedings by courts without a trial on the merits[49]; and the considerations of legal policy mentioned at the outset of my reasons[50].

105 It follows that the inquiry by a court, asked to dismiss proceedings commenced in respect of a "late claim", is directed to whether the court is satisfied that the claimant does not "have" a full and satisfactory explanation for the delay. If the court is so satisfied it "must" dismiss the proceedings. Where that inquiry is carried out in the final hearing of the trial, obviously the court will decide the issue so presented finally, upon all of the evidence adduced at the trial. When, however, the inquiry is carried out in the context of an interlocutory motion brought by the insurer (or relevant person) before a final hearing, or as part of the "fast track" procedure afforded on condition to such parties, the disposition may be provisional. If the insurer (or relevant person) fails to obtain such relief, that conclusion is not necessarily a final disposition of the objection about the lateness of the claim or of the late commencement of the proceedings. The judge deciding the motion will bear in mind that the burden of proof, normal to the final resolution of such proceedings, is reversed; the claimant does not, as a matter of law, have to prove anything. Although the motion may succeed, if it

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48 As in *Diaz v Truong* (2002) 37 MVR 158; *Manderson v Ellis* (2002) 37 MVR 214.

49 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130; cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 167-172; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 521-522 [7]-[9], 539-543 [66].

50 Above at [91].

fails, it does not necessarily mean that the issue will not ultimately be resolved in favour of the insurer (or relevant person) on the basis of all of the evidence adduced by both sides at the final hearing.

The errors of the primary judge

106 *Errors of law and fact*: In the determination of the respondent's motion, brought pursuant to the "fast track" provided by s 43A(6) of the Act, the primary judge in this case did not approach the issues for decision in the foregoing way. He made two relevant errors. As they represent common ground in this Court, I will not elaborate them but simply state what they were. First, his Honour expressed the burden of proof in the motion as being upon the claimant. I agree with Gummow and Hayne JJ and with the members of the Court of Appeal, that if (as I consider) this means that the claimant "bore the onus of proving that the explanation he had given was full and satisfactory, it was an error"[51]. It represented a mistake of law.

107 Secondly, the primary judge erred by stating that, apart from par 10 of the claimant's statutory declaration, filed in connection with the motion, "there is no further information given in relation to the [claimant's] work activities, if any, from 6 December 1997 to 6 October 1998"[52]. As Hodgson JA pointed out in the Court of Appeal[53] (and as McHugh J and Gummow and Hayne JJ have accepted in this Court[54]) that statement was not correct. There was other evidence. It needed to be evaluated in reaching a conclusion on the relevant issue, namely whether the claimant did "not have a full and satisfactory explanation for the delay in making the claim"[55]. This, then, was a second mistake. It was a mistake of fact.

108 *Consequences of the errors*: These mistakes of law and fact vitiated the decision of the primary judge[56]. He approached the resolution of the issue in the incorrect way. He failed to take into account relevant evidence. Neither the mistake nor the omission could be regarded as immaterial. As was common ground, the ultimately critical question was whether the explanation for the

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51 Reasons of Gummow and Hayne JJ at [64]. See also reasons of McHugh J at [26].

52 Cited in *Russo v Aiello* (2001) 34 MVR 234 at 236 [9].

53 *Russo v Aiello* (2001) 34 MVR 234 at 236 [8].

54 Reasons of McHugh J at [26]; reasons of Gummow and Hayne JJ at [69].

55 Act, s 43A(7).

56 See reasons of McHugh J at [28].

"delay in making the claim" between 6 December 1997 and 6 October 1998 was "full" and satisfactory[57]. In his reasons, Hodgson JA itemised a number of elements of the additional evidence specifically pertinent to that period. Such evidence included particulars, admitted without objection, which Hodgson JA[58] was prepared to treat as evidence of the fact of the assertions in them[59]. These covered intervals of, and absences from, work between January 1997 and March 1999. Then there were reports from medical specialists, dated 10 December 1998 and 31 May 1999[60], who had treated the claimant and who related the history given by him between December 1997 and May 1999. In addition, there was an affidavit by the claimant dated 14 October 2000. It elaborated his earlier statutory declaration to the effect that, at first, he had considered that his condition would resolve (as for a time it seemed to do) and then "[o]ver a period of time" he had "formed the view that my disabilities were not going to improve and that some have in fact … become worse, affecting my life to a greater extent than I had initially believed they would"[61].

109 In light of the material errors of law and fact identified, it was clear that, on the face of things, the primary judge's orders could not stand. The Court of Appeal had the authority in those circumstances to set aside those orders. The real question in the Court of Appeal was whether that Court should remit the decision on the respondent's motion to the District Court to be made afresh without the errors demonstrated or whether it would make the decision on the motion for itself.

The errors of the Court of Appeal

110 *Procedural error of Court of Appeal*: The majority in the Court of Appeal (Young CJ in Eq with whom Meagher JA agreed) decided simply to affirm the primary judge's decision. As McHugh J has demonstrated, the course that was adopted in that disposition was wrong[62]. Having correctly found error at trial, the Court of Appeal was required to set aside the order made at trial and then remit the discretion to the District Court to be exercised there again lawfully, or to assume the obligation of exercising the discretion on the record for itself. This it did not do.

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57 *Russo v Aiello* (2001) 34 MVR 234 at 236 [9].

58 *Russo v Aiello* (2001) 34 MVR 234 at 237 [11]-[12].

59 Pursuant to the *Evidence Act* 1995 (NSW), s 136; cf ss 60 and 75.

60 *Russo v Aiello* (2001) 34 MVR 234 at 237-238 [13]-[15].

61 *Russo v Aiello* (2001) 34 MVR 234 at 238 [14].

62 Reasons of McHugh J at [28]-[29].

111 As the process of appeal before the Court of Appeal miscarried, this Court, in the appeal to it, should set aside the Court of Appeal's erroneous order and, on the record, reconsider the primary decision for itself[63]. Somewhere in the judicial hierarchy of Australia the claimant is surely entitled to have one judicial tribunal correctly exercise the discretionary power that has the effect of depriving him of significant legal rights, doing so lawfully and by reference to the correct criteria.

112 *Relief was not futile*: Assuming, however, that this Court should consider, as McHugh J does[64], whether relief should be refused because, to grant it, would be futile, I am not convinced that such is the case. In my view, the claimant is entitled to relief from this Court.

113 First, Young CJ in Eq said[65]:

> "there may be errors of process, [but] ultimately I can see no error in his Honour's conclusion. The conclusion he reached was one which he was entitled to reach on the material before him: I can see no appealable error."

As I have shown, there were clear appealable errors. They were not, as the majority in the Court of Appeal thought, merely errors of process. They went to the very heart of the primary judge's failure to take the correct approach as required by the Act. Importantly, they involved disregard for much of the evidence pertinent to the issue that had to be decided.

114 Secondly, Young CJ in Eq postulated a hypothetical case of what would ensue if he were of the view (which he was not) that the errors were sufficient to warrant setting aside the primary judge's decision and "exercising the jurisdiction on the merits in this court"[66]. Such hypothetical speculations can distract the decision-maker from the kind of analysis of evidence and balancing of factors that is essential if the primary decision is to be properly re-exercised. This, in my belief, is the error that happened here. The Court of Appeal majority did not proceed to demonstrate its consideration of the additional evidence and to assign the burden of proof correctly to the respondent who was seeking the "fast track"

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63 cf *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879-880 [65]; 179 ALR 321 at 336-338; *Fox v Percy* (2003) 77 ALJR 989 at 995-996 [32]; 197 ALR 201 at 210.

64 Reasons of McHugh J at [33].

65 *Russo v Aiello* (2001) 34 MVR 234 at 243 [52].

66 *Russo v Aiello* (2001) 34 MVR 234 at 243 [53].

remedy. Instead, Young CJ in Eq contented himself with saying that he "would still reach the conclusion that there was not a full and satisfactory reason given for the delay in this case"[67]. Effectively, this meant that the decision, which had miscarried at trial, was not properly made on appeal[68], despite the demonstration of vitiating errors and despite the seriousness of the consequences for the claimant who was then effectively put out of court.

115 Thirdly, as Hodgson JA pointed out[69], the reasoning of Young CJ in Eq was addressed, in terms, to whether or not the claimant had *given* a full and satisfactory explanation. However, the Act required the decision-maker to address a broader question: whether the claimant *had* such an explanation. That question fell to be answered in a motion brought by the respondent seeking special, peremptory relief before a trial on the merits relying on an affidavit of the respondent's solicitor annexing the claimant's statutory declaration and other material provided to the insurer[70]. In a proper case, where enough was shown to suggest that the merits (including the merits of the "explanation") should be explored at the trial of the action, that was the proper place for the issue to be decided. At trial, not in the "fast track" hearing. On the evidence in the motion before the primary judge in this case, looked at as a whole, this was what should have happened.

116 Fourthly, Young CJ in Eq acknowledged, correctly in my view:

> "It is, of course, a drastic step to take of refusing plaintiffs who have a fairly arguable case in negligence the right to go to trial, especially if the insurer suffers no prejudice in what has occurred"[71].

Yet, whilst mentioning this consideration, his Honour did not, with respect, give it due weight. It required, at the least, a separate demonstration (effectively for the first time) that the claimant did "not *have* a full and satisfactory explanation for the delay". As well, it obliged consideration to be given to whether, in the way the trial had been conducted, the claimant might have *had* such an explanation which would come out more fully in the resolution of the issue at a

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67 *Russo v Aiello* (2001) 34 MVR 234 at 243 [53].

68 See reasons of McHugh J at [29]-[30].

69 *Russo v Aiello* (2001) 34 MVR 234 at 239 [22].

70 cf reasons of Gleeson CJ at [9]-[10]; reasons of Gummow and Hayne JJ at [58]-[59].

71 *Russo v Aiello* (2001) 34 MVR 234 at 243 [50].

trial on the merits which his Honour rightly pointed out was the normal entitlement of both parties.

117 Fifthly, I cannot agree with the suggestion by the other members of this Court[72] that prejudice to an insurer (or person indemnified in respect of motor vehicle liability) is irrelevant to the decision necessitated by s 43A(6) of the Act. In this, I agree with the approach that Young CJ in Eq took in the passage just quoted. It is more consonant with the overall scheme and purpose of the Act and with the discretion reposed in the trial judge. It conforms to several of the Act's provisions.

118 In judging whether evidence constitutes an "explanation" that is "full and satisfactory", it is proper to view the testimony in its entirety and in its context. Two obviously relevant considerations in that regard will be any prejudice that has been suffered by the respondent in consequence of the delay (beyond that which will be imputed to the ordinary operation of the Act) and any prejudice that will be suffered by the claimant by being denied the chance to have a trial on the merits of what may otherwise be an apparently viable and genuine claim, brought upon proceedings commenced (as here) within the outer time limit of three years set by the Act[73].

119 In a claim where there are real doubts about the happening of the accident, questions about the identity of the driver or owner of the motor vehicle, issues raised by the failure to report the matter to the police or fundamental disputes over the injuries and disabilities claimed, what will be an "explanation" and one that is "full and satisfactory" will be different from the case (as here) where no such elements of prejudice to the respondent are present or proved, or even suggested. Likewise, where a claimant is profoundly injured, was initially poorly represented by lawyers and has grave and permanent disabilities, the "explanation" required for the delay and whether it is "full and satisfactory" will be moulded to such circumstances.

120 It is unrealistic to ignore the issue of prejudice in making a decision conferred by the Parliament upon judges obliged to decide whether default in time compliance will prevent a party having a trial of a claim on its merits. Of course, any such prejudice must be judged within the context of the strict scheme established by the Act. But it is not irrelevant to the determination of the acceptability of the "explanation" and whether, in the circumstances, that

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72 See reasons of Gleeson CJ at [7]; reasons of McHugh J at [25]; reasons of Gummow and Hayne JJ at [61].

73 Act, s 52(1)(b) and (4). See also s 52(4A) and (4B).

explanation is "full and satisfactory". The Court of Appeal should have given weight to the primary judge's failure to consider this issue.

121 Sixthly, it is important to take into account the rather unsatisfactory way in which the primary judge's error concerning the burden of proof on the motion led him to conduct the hearing at first instance. In the Court of Appeal[74] the claimant did not eventually press a separate ground of complaint based upon a want of procedural fairness (natural justice) in the proceedings at first instance. However, alike with Hodgson JA[75], and notwithstanding this concession, I am of the view that the way the trial was conducted was highly relevant to the statutory question of whether the claimant "had" a full and satisfactory explanation for the delay in making his claim. As Hodgson JA put it[76]:

> "In this case, until submissions were made before the primary judge, no indication was given by the respondent of the respects in which it alleged the appellants' explanation was less than full and satisfactory. The respondent's notice of motion sought dismissal of the proceedings 'upon grounds set forth in the affidavit of [the solicitor] sworn and filed herein'. That affidavit annexed the first appellant's statutory declaration dated 23 March 1999 and the insurer's letter in response, but did not indicate any grounds on which the explanation in that statutory declaration was said to be less than full and satisfactory. The insurer's letter did not itself specify any reason for not accepting the appellants' explanation. Before the primary judge, the first appellant was not cross-examined on his affidavit.
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> …
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> Notwithstanding that the onus was squarely on the respondent to prove the absence of an explanation, the respondent chose not to specify any respect in which the explanation was said to be deficient, and chose not to cross-examine the first appellant on his affidavit. Whether or not the material actually provided to the court does itself amount to a full and satisfactory explanation, in my opinion it would be quite wrong to draw the inference against the appellants in those circumstances that they do not have a full and satisfactory explanation.
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> …

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74 *Russo v Aiello* (2001) 34 MVR 234 at 239 [19].

75 *Russo v Aiello* (2001) 34 MVR 234 at 239 [20].

76 *Russo v Aiello* (2001) 34 MVR 234 at 239 [18], [21], [22] (original emphasis).

> For my part, particularly having regard to the way the respondent conducted its application, I am not so satisfied. The legislature could have made an application of the kind made in this case depend upon whether or not a claimant had *given* a full and satisfactory explanation, and indeed could have imposed the onus of proof on the claimant. But it did not do so. It made such an application depend upon whether or not the claimant *had* a full and satisfactory explanation, and imposed the onus of proof on the defendant."

122 *Outcome – appeal allowed*: Hodgson JA's approach to the appellate function was correct. So was his analysis of the operation of the Act. His examination of the evidence is thorough and convincing. His conclusion as to the proper outcome in this particular case is compelling. I disagree with the opinions in this Court that reach the contrary result. In my view, they are legally flawed and factually unjust.

Conclusions and orders

123 The Act introduced severe time limits upon claims and proceedings arising out of motor vehicle accidents in New South Wales. That is true. But the application of the time provisions and the determination of whether, in the particular case, default should be fatal for a claimant or should be excused in the circumstances, were committed to judicial decision in an envisaged procedure before a court of justice.

124 Before the claimant was deprived, for time default, of what otherwise appeared to be a significant and strongly arguable cause of action, it was essential that a hearing be conducted in which the nature of the respondent's motion was properly understood by the decision-maker; the burden of proof in the motion was correctly assigned to the party bearing it; and the entirety of the evidence adduced as relevant to the issue to be decided was manifestly taken into consideration in reaching the court's conclusion. None of this happened in the present case. The attempt, on appeal, to correct the primary judge's errors led to further errors on the part of the majority of the Court of Appeal which then, on the basis of these errors, confirmed the primary judge's flawed orders without correctly discharging its own function.

125 My own inclination would have been to remit such a defective proceeding to be re-heard, starting afresh, in the District Court. However, as nothing turns upon my disposition of the appeal, I will content myself by proposing that the orders favoured by Hodgson JA should be adopted.

126 The appeal should be allowed with costs. The judgment of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place of that judgment it should be ordered that the appeal to that Court be allowed

with costs; the judgment of the primary judge set aside and, instead, the insurer's motion for relief under s 43A(6) of the Act should be dismissed.