## EXTENSION OF TIME: SOLICITOR'S OVERSIGHT, NEGLECT OR DEFAULT

"God forbid", said Abbott, C.J. in *Montriou* v. *Jeffries*,[1] "that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." A modern illustration of this *dictum* is to be found in the increasing number of applications for an extension of the time prescribed by statute for the giving of a notice of action where the cause of the delay in giving such notice is some oversight, neglect or default on the part of a solicitor. Such applications arise most frequently pursuant to s.30(2)(b)(ii) of the Motor Vehicles (Third Party Insurance) Act[2] in respect of notices of intended action to the Nominal Defendant, and most of the principles applicable to such applications have been laid down in decisions under that section. However, there is very little difference between the words of that section and the words of the sections of other Acts which provide for the extension of a period for giving notice and accordingly it is submitted that the decisions under the Motor Vehicles (Third Party Insurance) Act, at least so far as they relate to a solicitor's default as a ground for extension of time, are equally applicable to applications under other Acts.

Section 30(2)(b)(ii) of the Motor Vehicles (Third Party Insurance) Act, so far as relevant, provides:

> No action to enforce any such claim (i.e. a claim in respect of death or personal injury resulting from the use on a public highway of an uninsured or unidentified motor vehicle) shall lie against the nominal defendant unless notice of intention to make a claim is given by the claimant to the nominal defendant . . . within a period of three months after the occurrence out of which the claim arose, or within such further period as the court, upon sufficient cause being shown, may allow.

Applications under this section are made to the Prothonotary on summons supported by affidavits. It has been held that whether or not the facts found on such an application amount to sufficient cause is a question of law,[3] and accordingly the unsuccessful party before the Prothonotary has a right of reference to a judge in chambers, from whom an appeal or reference lies to the Full Court.

The earliest of the decisions to be considered is that of Brereton, J. in *Dunne* v. *The Nominal Defendant*,[4] which was an appeal by way of reference from the Prothonotary's order granting an extension of time for serving notice on the nominal defendant pursuant to s.30(2)(b)(ii) of the Motor Vehicles (Third Party Insurance) Act. The Prothonotary found that the applicant had been knocked down and injured on 18th March, 1953, that she had spent eleven days in hospital and thereafter had been confined to her residence for some time. On 24th March a friend of the applicant was authorised to seek legal advice, as a result of which certain steps were taken by her solicitor. On 7th June, her solicitor collapsed, and it was not until 24th June, six days after the expiry of the three month period, that another solicitor in his employ who took over the matter gave notice by letter to the Nominal Defendant, he having previously been unaware of the requirements of the Act. Because of her injuries the applicant did not personally consult her solicitor until 15th July, and it was not until 27th July that the solicitor handling the matter realised that the notice was out of time.

Brereton, J. indicated that in his opinion the delay was caused by the

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[1] (1825) 2 C. & P. 113, 116 (N.P.).
[2] Motor Vehicles (Third Party Insurance) Act, 1942-1951 (N.S.W.), Act No. 15, 1942-Act No. 59, 1951.
[3] *Smith* v. *The Nominal Defendant* (1955) 72 W.N. (N.S.W.) 369, 371.
[4] (1954) 71 W.N. (N.S.W.) 87.

failure of the applicant's solicitor to give the prescribed notice within three months, which failure was contributed to both by the applicant's own condition, which prevented her calling at or telephoning her solicitor's office, and by her solicitor's own medical condition.

In the course of his judgment upholding the Prothonotary's decision, his Honour made the following observations:

> What is a sufficient cause depends, in my judgment, firstly on the extent of the delay. That may not be invariably the case, but it seems to one that by and large a short delay can be sufficiently excused more readily and for less weighty reasons than a long delay. It may well be that an office boy given a letter to post containing a notice of action puts it in his pocket and forgets to post it. That may excuse a delay of a few days but would hardly excuse a delay of three months. Secondly, I think that what is sufficient must depend on reasons personal to the person responsible for the delay whether or not that person is the prospective plaintiff. What is sufficient for one person in one particular set of circumstances may not be sufficient for another in another set of circumstances. Generally speaking, I should think that when a solicitor is responsible, grave and weighty reasons would have to be shown before one could regard them as sufficient, because he is a person necessarily charged with the responsibility of attending to matters of this sort. But again, one must look at the length of the delay and the circumstances of it. . . .
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> I am certainly not prepared to hold that every oversight by a solicitor who has been properly instructed, every failure by him to give notice in time, would amount to a sufficient excuse. I do not consider for a moment that the Legislature intended that the Section can be rendered virtually nugatory by allowing every solicitor who forgot to give notice in time, to come along to the Court and say, 'This is my oversight; it is not the prospective plaintiff's fault and therefore a sufficient cause has been shown.' Solicitors are expected to know the requirements of statutes and to comply with them, and they must take the consequences if they fail to do so. But the circumstances here are such that I think, in view of the shortness of the delay, in view of the state of the solicitor's health at the time, and in view of the state of the applicant's own health at the time, I can regard the solicitor's failure in this particular instance as being a sufficient cause.[5]

The next decision in point is *Delaney* v. *Flynn*,[6] a decision of the Full Court[7] on appeal from the decision of a judge in chambers reversing on reference a decision of the Prothonotary. The applicant had issued a Supreme Court writ in respect of an injury which also fell within the provisions of the Workers' Compensation Act.[8] The writ having lapsed by reason of the failure to file a declaration within one year, it was necessary to obtain the leave of the court pursuant to s.63(3) of the Act to commence fresh proceedings out of time. The first writ had expired on the 16th November, 1952 and on 17th October in that year the applicant's solicitor wrote to his client requesting her instructions as to certain settlement negotiations. She had flown to Perth to see her sick mother and failed to answer the letter. Herron, J.[9] considered that the failure to renew the writ was due partly to the probability of settlement and partly to the failure of the applicant to contact her solicitor. The appeal was dismissed and the applicant given leave to commence proceedings out of time.

The major part of the court's judgment is concerned with the jurisdiction of the Prothonotary to have heard the application in the first instance and the existence of a right of appeal to the Full Court, but the following extracts from

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[5] *Id.* at 89.
[6] (1955) 55 S.R. (N.S.W.) 520.
[7] Maxwell, Herron and Maguire, JJ.
[8] Workers' Compensation Act, 1926-1954 (N.S.W.), Act No. 15, 1926-Act No. 18, 1954.
[9] (1955) 55 S.R. 520, 523-24.

the judgments delivered are relevant to the present question:

> I think it fairly states the matter shortly to put it this way, that the ground on which his Honour reached a conclusion that there was sufficient cause was that any default which existed was really the fault of the legal adviser of the applicant. In my opinion that would be sufficient cause within the section, and therefore his Honour's decision on the merits was right.[10]

> I agree that it is a reasonable thing to do to make an order for the extension of the prescribed period, if the applicant's case has been allowed to lapse through what has been described by the learned presiding Judge, my brother Maxwell, as the fault of the legal adviser of the applicant. I would not, however, like it to be thought for one moment that I subscribe to any view that this means that the legal adviser to the applicant fell short in any way of the proper professional standards required of him. . . . I do not wish to deal with the merits of the matter except to say that a case where the action ceases or comes to an end because the writ expires is a matter which solely is, I think, the concern of the solicitor and not the applicant herself, and it is a foundation for saying that sufficient cause has been shown or that it would be reasonable to make an order for the extension of the prescribed period.[11]

In making the order of the court, Maxwell, J. associated himself with the above remarks concerning the reference to the default of the solicitor.[12]

*Martin* v. *The Nominal Defendant*[13] is a decision of Walsh, J. in chambers upholding on reference the decision of the Prothonotary granting an extension of time for service of notice of intended action pursuant to s.30(2)(b)(ii) of the Motor Vehicles (Third Party Insurance) Act. The applicant in this case was found to have consulted a solicitor comparatively shortly after his accident and to have assumed that the solicitor would take any necessary action. There was some misunderstanding between the applicant and the solicitor as to the nature of the instructions given, and particularly whether they were instructions to take up the case or advices that the solicitor would later be instructed. Certainly the applicant did ask for legal advice as to his position, and he was found to have acted reasonably throughout. Thereafter the applicant instructed a second solicitor to act on his behalf and after giving advice as to the importance of the statutory time limits, such solicitor became aware, about 22nd September, 1953, that no notice had been given to the Nominal Defendant, the three month period having then expired.

A notice was given on 30th October, the second solicitor taking the view that no notice could be given before the time had been extended; and the applicant having applied for legal assistance, he did not wish to seek an extension of time until the result of such application was known. It was only when such a course was suggested by the Public Solicitor that the second solicitor realised that a notice could be given before obtaining the court's leave to do so. His Honour felt that the second solicitor could not be said to have been dilatory but that he was "cautious and inexperienced in this particular type of action and, as a result, failed to act as promptly as he should have acted in relation to the giving of notice. If that failure was caused, in part, by a mistake, I think it was a *bona fide* mistake, and, in any event, any failure on his part was not attributable to any mere carelessness or inattention."

In delivering his reserved judgment his Honour referred to the fact that the only then reported decision on an application under this section of the Motor Vehicles (Third Party Insurance) Act appeared to be *Whitgob* v. *The*

[10] *Id.* at 523, *per* Maxwell, J.
[11] *Id.*, *per* Herron, J.
[12] *Id.* at 525.
[13] Unreported. Judgment delivered 7th July, 1954.

*Nominal Defendant*[14] and for that reason set out in detail some of the considerations which he felt are applicable to such applications, namely:

1. The time for giving notice may be extended after the expiration of the prescribed period of three months.
2. Each case must be decided on its own particular facts and it is not desirable or proper to attempt to define what constitutes or does not constitute "sufficient cause".
3. There is an onus on the applicant to establish sufficient cause for not giving the notice within the prescribed period.
4. Sufficient cause must be found to have operated not only during the three months period but also during the period after the three months had expired but before notice was given.
5. The length of time before a notice is given is a circumstance to be considered but no particular period of delay is conclusive.
6. A mistake of law can constitute sufficient cause but is not necessarily a sufficient cause.
7. "Where delay has been due, in whole or in part, to the ignorance, mistake, carelessness or other default of the applicant's solicitor or some other legal adviser, this circumstance will not necessarily entitle the applicant to succeed, nor will it necessarily preclude him from succeeding. In this regard also, each case must be considered on its own facts."

His Honour then went on to consider in some detail the principle relating to default on the part of a legal adviser:

> This last point is one which, I think, is worthy of some elaboration; particularly as it was contended before me for the present appellant, that an applicant could never be entitled to be excused, if his failure to give the notice was due to the negligence of his solicitor, so that he would be entitled to bring an action against the solicitor for that negligence and so would not be left without any remedy if unable to proceed with an action against the Nominal Defendant. In *Re Coles & Ravenshear* (1907) 1 K.B.1, the Court of Appeal considered an application for special leave to appeal to that court, such leave being sought because the time prescribed for appeal had expired. The court held that where the failure to appeal in time was due to a mistake made by counsel there was not sufficient ground for granting special leave. All the members of the court took the view that earlier authorities required them to hold that a mistake by counsel or solicitor or solicitor's clerk could not justify the granting of leave to appeal, which could only be granted where special circumstances existed. Two members of the court regretted that they were constrained by authority to refuse the application, and stated that if they had been free to exercise their own judgment they would have granted the application. Several statements are contained in the judgments as to the undesirability of a discretion vested in a court being fettered by any hard and fast rule as to the circumstances in which the discretion ought to be exercised.
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> In my opinion, in dealing with an application under the Act now being considered, there is no authority which requires a judge to hold that a mistake made by a legal adviser cannot be considered as constituting sufficient cause. As I have already said, it has been laid down in many cases, including the case in the House of Lords quoted above[15] that such applications should be decided upon a consideration of the words of the particular case, and the court should not be fettered by any rigid rule as to what may or may not constitute sufficient cause. . . .
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> I think it is clear that the Full Court (in *Delaney* v. *Flynn supra*) decided that sufficient cause could be shown where the default was that

[14] (1952) 69 W.N. (N.S.W.) 1.
[15] *Shotts Iron Co. Ltd.* v. *Fordyce* (1930) A.C. 503.

> of a solicitor and not that of the applicant, and that a failure by a solicitor to take the proper steps could itself be regarded as establishing sufficient cause for an extension of time. But I do not think that the court decided or intended to decide that in every case where the applicant was not personally to blame, but the fault lay with his solicitor, that an extension of time must necessarily and always be granted. The decision that the failure of the solicitor amounted to sufficient cause should be regarded as a decision upon the case before the court, and not as laying down an invariable rule.

On the facts of the case as set out above, and in the light of these principles, his Honour dismissed the appeal and affirmed the order of the Prothonotary granting an extension of time.

The next case in point is *Smith* v. *The Nominal Defendant*,[16] a decision of McClemens, J. on reference from the Prothonotary. The applicant was injured on 7th May, 1954 in a collision involving an uninsured motor vehicle, so that it was necessary for proceedings to be taken against the Nominal Defendant and for notice to be given to the Nominal Defendant within three months.[17] The applicant caused a solicitor to be instructed within one week and personally confirmed these instructions some three weeks later. Neither the applicant nor his solicitor were aware of the statutory provisions, but on becoming aware of them in March 1955 the solicitor acted promptly in informing the applicant, serving notice on the Nominal Defendant and applying to the court for sufficient extension of time to validate the notice.

The Prothonotary dismissed the application, relying partly on the observations of Brereton, J. in *Dunne* v. *The Nominal Defendant* that "when a solicitor is responsible (for the delay) grave and weighty reasons would have to be shown before one could regard them as sufficient because he is a person necessarily charged with the responsibility of attending to matters of that sort".[18]

McClemens, J., in the course of his judgment reversing the Prothonotary's decision and extending the time for giving notice, made the following comments:

> The solicitor who was consulted gave evidence before me. He was completely frank and honest about the matter and gave me the impression that, without my palliating in any way the seriousness of the omission, it is the sort of mistake that any solicitor whose activities were purely conveyancing might make, and as Abbott, C.J. said in *Montriou* v. *Jeffreys*: 'God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law'. After all, there are so many Acts of Parliament operating in this State which provide for so many and divergent limitations of action that it is hard to keep up with them. The solicitor has frankly sworn that he was completely unaware of the provisions of s.30 of the relevant Act, but the matter of real significance here is the interest of the injured claimant, who sets things in train a week, or at the most, a month after the accident and believed his claim was being taken care of.[19]

His Honour then went on to express the opinion that the decision in *Dunne* v. *The Nominal Defendant*, by which the Prothonotary appeared to have regarded himself as bound, was either a decision on its own facts, in which case it is no authority for any proposition of law at all, or if it did purport to lay down principles of law, is inconsistent with the decision of the House of Lords in *Shotts Iron Co. Ltd.* v. *Fordyce*[20] and certain observations in *Latter* v. *The Council of the Shire of Muswellbrook*,[21] where Latham, C.J. cited with approval

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[16] (1955) 72 W.N. (N.S.W.) 369.
[17] Motor Vehicles (Third Party Insurance) Act *supra*, s.30(1) (b) which is in similar terms to s.30(2) (b) (ii).
[18] (1954) 71 W.N. (N.S.W.) 87, 89.
[19] (1955) 72 W.N. (N.S.W.) 369, 370.
[20] (1930) A.C. 503.
[21] (1936) 56 C.L.R. 422.

the following remarks of Low, J. in *Hook* v. *Hook and Brown*: "I do not see how the law is to be administered so as to be acceptable to reasonable persons unless allowance is made for the want of knowledge on the part of persons in humble life."[22]

His Honour then disagrees with Brereton, J.'s reference to "grave and weighty reasons" in the case of fault on the part of the solicitor on the ground that those words do not appear in s.30, "sufficient cause" and that alone being the test there laid down; and he feels the true rule to be applied is that stated by the Prothonotary in *Whitgob* v. *The Nominal Defendant*:

> Firstly, it is not enough for an applicant for an extension of the prescribed period merely to prove that his failure was due to a mistake, or to his ignorance of his rights. The court must judge whether under all the circumstances of the case as they appear from the evidence before it the mistake is one which furnishes sufficient ground, and likewise in the case of ignorance, if so found. Secondly, the fact that the applicant was ignorant of his rights does not in itself disqualify him and the court must consider such ignorance, if established, in the light of all the circumstances disclosed in the evidence. . . . I feel it necessary to state that the decision in each case must depend on the particular facts therein. The words 'sufficient cause' should not be rigidly defined as including case A and not case B, but the determination should be left as a question of fact applying the words of the statute in their ordinary connotation.[23]

This statement his Honour felt should be qualified by the decision in *Shotts Iron Co.* v. *Fordyce*[24] in that the determination of the existence of a sufficient cause is a question of law on the facts found, and not a question of fact.

For these reasons his Honour considered that he should not follow the decision in *Dunne* v. *The Nominal Defendant*, particularly in view of the decision of the Full Court in *Delaney* v. *Flynn*,[25] and in deciding that this was a proper case in which to exercise his discretion to extend the time made the following comments:

> It would in my view be patently unjust that the injured person, who is taken from the scene of the accident so injured that his arm has to be amputated, should be deprived of the right to exercise his cause of action by reason of the fault of his solicitor when he has acted with all possible promptness, unless on the true construction of the statute, which is the source of all his legal rights in this regard, he is excluded.[26]

In *Onions* v. *Government Insurance Office of New South Wales*[27] the question of a solicitor's error arose only incidentally to the principal question and was not a ground for the decision. The question at issue in the case was the correctness of a decision of the Prothonotary granting an extension of time under s.15(2)(b)(ii) of the Motor Vehicles (Third Party Insurance) Act for the service of notice of claim on the authorised insurer, it not having been possible to serve the person who was thought to be the owner of the vehicle. The appeal against the Prothonotary's decision was allowed principally because the applicant was able, at the time the judgment was delivered, to pursue his remedies against the true owner of the vehicle. The error on the part of the solicitor in this case was that he caused a search to be made against the registered owner of the motor vehicle at the wrong date, namely 3rd September, 1954 instead of 23 September, 1954, and in the intervening period the motor vehicle in question had changed hands. In these circumstances Maguire, J. upheld the respondent's submission that the only error of the solicitor was irrelevant because its sole effect was to delay proceedings against the true owner of the

[22] (1917) P.56, quoted (1936) 56 C.L.R. at 434-35.
[23] (1951) 69 W.N. (N.S.W.) 1, 2.
[24] *Supra.*
[25] *Supra.*
[26] (1955) 72 W.N. (N.S.W.) 369, 373-74.
[27] (1956) 73 W.N. (N.S.W.) 279.

vehicle.

The following observations of his Honour in the course of his judgment relate to the effect of a solicitor's error:

> The Prothonotary, in acceding to the applicant's contention when the summons was before him, was largely influenced by the view which he formed that there had been a mistake on the part of the solicitor which led to the delay between February 1955 and December 1955, and he was of opinion that such mistake in the circumstances of the present case, amounted to 'sufficient cause' within the meaning of the subsection he was considering. It is clear from a number of decisions that mistake or default on the part of a solicitor can in a particular case be regarded as sufficient cause.[28]

The most recent essay in the construction of s.30(2)(b)(ii) of the Act is that of the Full Court[29] in *Sophron* v. *The Nominal Defendant*[30] where the ground of the application for extension of time was again "fault" on the part of a solicitor. The applicant, a foreigner, who experienced some difficulty with the English language, was injured in a collision with an unidentified motor vehicle near Bega on 6th April, 1954. He remained in hospital in Bega for several days and thereafter he proceeded to Sydney where, on 13th April, he instructed a solicitor to issue a writ on his behalf. The solicitor advised him as to the possibility of an action against the Nominal Defendant and the applicant was to make inquiries at Bega on his way home, he residing in Victoria. These inquiries proved fruitless and in May 1954 the applicant wrote to his solicitor a letter which made no reference to the owner of the vehicle.

In April the applicant's solicitor, who knew of the relevant provisions of the Act, gave the conduct of the matter to an articled clerk in his office who was a final year law student and accustomed to prepare cases for trial, but who had no experience of matters involving the Nominal Defendant. On seeing the letter from the applicant in May, the clerk assumed that no information was available as to the driver of the vehicle and directed his attention to the Act without noticing the time limit imposed. Institution of proceedings was delayed pending the receipt of details of out-of-pocket expenses and further medical treatment which the applicant was to undergo. When this information was available in October 1954 the clerk again directed his attention to s.30 of the Act and noticed the provisions as to the time limit for giving notice. Notice was thereupon given on 21st October, 1954 and the Nominal Defendant asked to consent to the notice being given out of time. On 5th November, 1954 the solicitor for the Nominal Defendant advised the applicant's solicitors that there was no power to give this consent. On 31st October, 1955 application was made to the Prothonotary for an extension of time. No explanation was offered for the delay from November 1954 to October 1955.

The Prothonotary found that the whole fault lay at the door of the applicant's solicitor, presumably including thereby his articled clerk, and feeling himself bound so to hold by the decision of the Full Court in *Delaney* v. *Flynn* stated that he proposed in all cases where it was shown that any default in giving the requisite notice was the fault of the legal adviser of the applicant to hold that sufficient cause for extension of time had been shown. Accordingly he granted the extension of time asked by the applicant. From this decision the Nominal Defendant appealed to a judge in chambers, by whom the matter was referred to the Full Court, which, by a majority of two to one, upheld the appeal and discharged the Prothonotary's order with costs against the applicant.

The majority judgment of the court dealt first with the question whether the applicant was required to establish sufficient cause only within the statutory

[28] *Id.* at 282.

[29] Owen, Herron and Manning, JJ.

[30] As yet unreported. Judgment delivered 24th October, 1956. Special leave to appeal from this decision to the High Court has been granted.

three month period or whether sufficient cause is required to be shown to exist at the date of the application, it being held that on the authorities and the correct interpretation of the section sufficient cause must be shown at the time of the application. The judgment then goes on to deal with the question of fault on the part of the solicitor in the following terms:

> We are of opinion that different considerations apply to those which induced the Prothonotary to find as he did. He felt bound to conclude that if the fault was that of the solicitor who had been consulted by the proposed plaintiff, then sufficient cause had necessarily been made out. Whilst we sympathise with him in his unenviable task of attempting to reconcile the conflicting decisions, we are of opinion that there is no such rule.
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> In our view the approach to such problems as that now under consideration is as stated by Lord Sankey in *Shotts Iron Co.* v. *Fordyce* (1930) A.C. 503 at 508, as follows:
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> 'Once again I would like to protest against the great number of cases which are so often cited upon this Act. I prefer to go back if possible to the words of the statute, and not to consider such words through a vista of decisions, most of which deal with the facts of the particular case under consideration. I entirely agree with what was said by the Lord Justice Clerk in this case: "one would have thought that the question of whether reasonable cause existed for abstaining from making a claim, under any set of circumstances, presented *prima facie* a simple problem for solution. That, however, is not so. The problem is, if I may say so, rather obscured than illuminated by the mass of case law by which it is surrounded, if not submerged." '
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> In our view one should go back to the words of the statute, which require the claimant to show that 'sufficient' cause exists for making an order. The problem is not assisted by substituting some other adjective such as 'substantial' for 'sufficient' (*cf. Whitgob* v. *Nominal Defendant* 69 W.N.1). In determining the sufficiency of the cause shown, regard must be had to all the circumstances.
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> It is not desirable or proper to attempt to lay down any rigid definition as to what does or does not constitute sufficient cause (*Martin* v. *Nominal Defendant, per* Walsh, J. (unreported)). But some of the matters which may be material for consideration are the reason for failure to give notice within the prescribed period, the reason for further delay and the events which transpired after the expiration of such period, the extent to which the applicant personally was blameworthy, the respective position of the parties and the probability of prejudice to each of them.
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> We agree with the statement of Brereton, J. in *Dunne* v. *Nominal Defendant* (71 W.N. 87) as follows: 'By and large a short delay can be sufficiently excused more readily and for less weighty reasons than a long delay.'
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> As was pointed out by Jordan, C.J. in *Blandford* v. *Fox* (45 S.R. 242 at 245), the statutory provision which enables an action to be brought against the nominal defendant where a claimant alleges that an offending vehicle cannot be identified, while most beneficial, is open to abuse.
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> The fact that failure to give notice has been due to the neglect or default of a solicitor retained by the claimant to prosecute his claim is a factor to be considered and the weight to be given to such a circumstance must vary in each case. But we think it is quite clear that this circumstance will not necessarily entitle the applicant to succeed any more than it will necessarily preclude him from succeeding.
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> The Prothonotary regarded the decision of this court in *Delaney* v. *Flynn* (55 S.R.520) as laying down an invariable rule. But we do not think that case is authority for anything more than that, having regard to

the terms of section 63(3) of the Workers' Compensation Act, and having regard to the facts proved, the failure of the solicitor to give notice warranted an extension of time in that case.

Because in our view the Prothonotary was in error in his approach to the matter, it becomes necessary for us to determine the way in which the rules above stated should be applied to the facts of the case. The matter is far from easy. There are some circumstances which are not satisfactorily explained. For example, while the solicitor's clerk was ignorant of the terms of the section, the solicitor does not say that he was unaware of the necessity to give notice. Further, no explanation has been given for the delay of twelve months in making the application after notice was given. Whilst we have no doubt that the solicitor and his clerk have been quite truthful, and we appreciate that the applicant himself was under a handicap, we do not think that the cause shown is sufficient to justify a delay of as long again as the prescribed period.

In delivering the dissenting judgment, Herron, J. dealt firstly with the facts of the case and then with the principles to be applied in applications for extension of time. He then considered the effect of a solicitor's default in the following terms:

I turn to the question of 'sufficient cause' where the delay in giving the notice within the statutory time was due to the ignorance, mistake, carelessness or other default of the applicant's solicitor. As already indicated this circumstance will not necessarily entitle the applicant to succeed nor will it necessarily preclude him from succeeding. Each case must be considered on its own facts. In three cases in our own courts it has been decided that sufficient cause was shown where the cause was the default of the applicant's legal adviser. There is no authority which requires a judge to hold that a mistake made by a legal adviser cannot be held to constitute sufficient cause.

His Honour then went on to deal with the decisions in *Dunne* v. *The Nominal Defendant, Delaney* v. *Flynn, Martin* v. *The Nominal Defendant* and *Smith* v. *The Nominal Defendant,* and continued:

In England the default of a solicitor or of counsel was thought at one time to be fatal to an application to extend time, e.g. for filing notice of appeal. In *Re Coles and Ravenshear* ((1907) 1 K.B.1) the Court of Appeal considered an application for special leave to appeal as the time prescribed by the rules for appealing had expired. In that case, counsel had misconstrued the rule and, as a result of the advice given, the appeal was out of time. It was there held that the fact that the delay was due to the mistake of the legal adviser did not constitute a ground for granting the special leave which the rule required. At that time there was a current of authority which the courts felt compelled them to refuse leave in such cases. In 1908 this view was somewhat relaxed in *Baker* v. *Faber,* ((1908) W.N.9), but again, in 1924, a fetter on the court's discretion, where the delay was due to the slip of a legal adviser, was reimposed and *In Re Coles and Ravenshear* was applied, despite an alteration to the relevant rule in 1909.

Finally in *Gatti* v. *Shoosmith* ((1939) 1 Ch. 828) the earlier decisions mentioned were not followed and the Court of Appeal held that the default of a managing clerk of the appellant's solicitors may be sufficient cause to justify an extension of time, but that the discretion would not necessarily be exercised in every set of facts. The following passage from the judgment of the Master of the Rolls, Sir Wilfred Greene fully states the position:

'On consideration of the whole matter, in my opinion, under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be" because it is

not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time, and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.'

I apply these considerations to the present appeal.

I agree with the Prothonotary that sufficient cause has here been shown. The application is entirely *bona fide* and the respondent, his solicitor and the articled clerk have placed the facts honestly before the court. In the forefront of consideration is the fact that the respondent at all times lived in another State and prior to the hearing of this application had only been in Sydney on one occasion, in April 1954, when he instructed his solicitor to take proceedings. He was, as I have pointed out, not Australian born and had had no previous association with a claim for personal injuries. He placed the matter in the hands of his solicitor promptly and he was entitled to believe that his claim would be instituted according to law. So far as the solicitor was concerned, it is not unreasonable for him to entrust the conduct of the matter to a senior articled clerk, and whilst it is difficult to understand how the latter came to overlook the provision of s.30 as to notice, I have no reason to doubt the truth of his affidavit. Between April and October the delay in taking further steps has been explained and the notice was given upon the terms of s.30 being brought to the clerk's attention. The notice itself was full and sufficient, but the fact remains that it was three months out of time.

That fact that the summons was not issued until the end of October 1955 was relied upon strongly by counsel for the appellant. While this is a circumstance to be considered, I do not think that in this case it requires a different result. It is not a case where no notice at all has been given, and I do not think that the delay in bringing the matter before the court, unexplained though it is, should outweigh other considerations, for I do not think that the Nominal Defendant or his solicitors were entitled to await the decision of the court before acting on the notice of the 21st October. Such inquiries as were open could and should have been made promptly on receipt of the notice.

A consideration of these decisions raises the problem of the principle or principles which can be extracted from the judgments and which ought to be applied to like applications in the future: and while it can certainly be said that reconciliation of the decisions and the determination of the rule or rules to be applied presents no easy task, yet it is submitted that there are at least some principles which can be said to be definitely established, and the failure to apply which would constitute a ground for reconsidering the decision in question. These are:

1. The relevant facts are the facts concerning the failure to give notice within the prescribed period and such delay as may thereafter occur before notice is given. The facts surrounding the period between the giving of notice and the application to the court for leave to give notice out of time may also be relevant.
2. The relevant facts are to be found by the Prothonotary, or where there is a reference to a judge in chambers, which is in the nature of a rehearing, by the judge.
3. It is a question of law whether on the facts shown there is sufficient cause for granting an extension of time.
4. The default (and in "default" is included omission, oversight, error,

ignorance or neglect) of the applicant's solicitor is a fact to be considered on the application and may constitute sufficient cause for granting an extension of time.

5. The default of the applicant's solicitor does not of itself necessarily constitute sufficient cause.
6. The facts which are alleged to constitute sufficient cause should be weighed in the light of considerations personal to the person responsible for the delay.
7. Each application must be decided on its own particular facts.
8. In deciding whether or not in any case sufficient cause exists for the granting of an extension of time, there are certain factors which should be taken into consideration. These factors include:
   (a) the length of the delay;
   (b) the reason for failure to give notice within the prescribed period;
   (c) the reason for further delay, if any;
   (d) the events which transpired after the expiration of the prescribed period;
   (e) the extent to which the applicant personally was blameworthy;
   (f) the respective position of the parties;
   (g) the probability of prejudice to each of them;
   (h) the purpose of the limitation on giving of notice imposed by the Act.

It may perhaps be suggested that the principles and factors referred to above are in conflict with the principle laid down by all the cases in point, namely that each case should be decided on its own particular facts and the discretion of the court in each case should be unfettered. But to refer to a set of factors or principles to be taken into account in arriving at a decision is a different matter from laying down an inflexible rule to force the court to a particular conclusion in a given set of facts; and it is submitted that the factors set out in paragraph 8 above fall into the former rather than the latter category. Certainly the principles in paragraphs 1 to 7 are inflexible in their operation; but again they in no way constrain the court to arrive at any particular decision in any particular set of facts—they merely indicate the method by which the court should exercise its discretion. It is inevitable that in every field in which there is a discretion to be exercised there should be laid down some principles to guide the court in the exercise of its discretion, for even to say that the court shall have a completely free discretion in a certain field is to lay down such a principle, quite apart from the question of defining the field within which the discretion is to be exercised.

The major problem which appears to be raised for consideration by these decisions relating to the extension of time is that of what the court will do in future applications where the sole cause of the failure to give notice has been the default of a solicitor, and this problem also raises the incidental question of what course should be taken, both by the solicitor and by the applicant, in such a case.

It is submitted that in attempting to resolve the problem, three factors should be considered. The first is the intention of the legislature in introducing into the Act the section under which the application is made; the second is the body of decided cases on the section, which has already been dealt with above; and the third is the interests involved in the situation giving rise to the application.

As to the first of these matters, there can be no dispute that while the legislature undoubtedly intended to protect the interests of the Nominal Defendant in imposing a time limit for the making of claims against the fund administered by him, nevertheless the purpose of including a discretion in the court to extend the time must have been to protect the interests of an applicant

who for "sufficient cause" has not made a claim against the Nominal Defendant within the time limited by the Act.

Perhaps the best analysis of the purpose of the section under consideration and one that has been approved in subsequent decisions is that of Brereton, J. in *Dunne* v. *The Nominal Defendant.*

> The object of the section in my view is, firstly, to guard against sham claims being made relating to some date in the remote past, claims which could never be adequately investigated by a person in such circumstances as the nominal defendant; and, secondly, perhaps to guard against claims being made against a nominal defendant which could and should be made against the actual driver of the motor vehicle concerned. A third object, no doubt is to enable the nominal defendant who, unlike an ordinary defendant, knows nothing of the accident to investigate fully before, as has been said, "the scent is cold". But it is to be noticed that the section imposes no absolute bar upon the giving of notice "out of time". It is all very well to say that the section is there for a definite purpose and three months' limitation is imposed for a definite reason. It is equally true to say that the liberty to extend time is there for a definite purpose. . . .[31]

Apart from the effect of decided cases and the intention of the legislature, the other factors which it is submitted should be considered by the court in reaching a decision in any particular case are the interests involved in such a decision, the most significant of which and those which are inevitably involved in every application for extension of time are the following:

1. The general interest of the community, the Nominal Defendant and the authorised insurers who contribute to the fund out of which claims against the Nominal Defendant are met in preventing the making of fraudulent claims and in allowing the Nominal Defendant, who has not been personally involved in the accident out of which the claim arises, an opportunity of investigating each claim while there is still some chance of locating the vehicle which actually caused the injury. A closely related interest is the special interest of the Nominal Defendant and the authorised insurers who contribute to the fund in having a claim made out of time rejected so that the risk of an award being made against the fund is eliminated. And these interests cannot be lightly dismissed for in many cases where claims have been made on the Nominal Defendant out of time the investigations carried out by him have resulted in the location of the offending vehicle. Thus it cannot be said in any application for extension of time that to grant the extension would not be to prejudice the Nominal Defendant; for who is to say in any particular case that it would not have been possible to trace the offending vehicle if inquiries had been promptly instituted.

This interest is clearly involved in the argument that a solicitor employed by an applicant is the agent of the applicant and the applicant is bound by the default of his solicitor. The solicitor is expected to know the law and to be able to advise the applicant and protect his interests. It is no fault of the Nominal Defendant that default has been made by the solicitor and therefore there is no reason why the Nominal Defendant should be prejudiced by reason of the fault of the applicant's agent and legal adviser.

But while the interest of the Nominal Defendant would require the applicant to fail in every case, nevertheless it is quite clear, both from the words of the section and from the decisions referred to above, that in some cases at least such interest is to be subordinated to the interest of the applicant and/or his solicitor, and that such subordination may take place where the applicant's solicitor is solely at fault.

2. The second interest involved in such an application is the interest of the applicant himself in being allowed to claim against the Nominal Defendant in respect of his injuries. This interest is typified in the argument which finds

[31] (1954) 71 W. N. (N.S.W.) 87, 88.

expression in the following passage from the judgment of McClemens, J. in *Smith* v. *The Nominal Defendant*:

> It would in my view be patently unjust that the injured person . . . should be deprived of the right to exercise his right by reason of the fault of his solicitor when he has acted with all reasonable promptness. . . .[32]

Perhaps, however, it may be suggested that the interest of the applicant in recovering damages for his injuries does not necessarily require the granting of an extension of time in every case—that if the applicant has in fact acted promptly and reasonably then he will have an action for negligence[33] against his solicitor for the latter's default in giving notice and therefore would not be debarred from relief if leave to claim against the Nominal Defendant were refused. However, it is submitted that an action for negligence would not automatically lie against the solicitor for failure to give notice, and so it might well be that an applicant who had been refused an extension of time against the Nominal Defendant might also fail in an action for negligence against his solicitor.

The judicial officer who refuses the extension of time may well consider that the applicant has a good cause of action against his solicitor, but that judicial officer is not the tribunal which adjudicates in such action. When to this difficulty is added the uncertainty of an action for professional negligence, and the unpredictability of verdicts under the jury system at present applying in New South Wales, the result will almost inevitably be that the interests of the faultless applicant are not always protected. There may be cases when an applicant would fail to have the time extended and would subsequently fail in an action against his solicitor, just as there may be cases in which an extension is granted although the applicant would have succeeded in an action against the solicitor.

What is suggested is that the interests of the applicant require that in all cases he should either be entitled to an extension or he should have an action against the solicitor. The interests of the Nominal Defendant and the solicitor would, however, demand that he should not be entitled to both remedies in any individual case.

A subsidiary interest of the applicant arises in connection with the question of costs. Where an application for extension of time is granted, it is usual for the applicant to be ordered to pay the respondent's costs, and where the application fails costs are almost invariably awarded against the applicant. Three principal questions appear to arise:

(a) Should the costs awarded to the respondent be paid by the applicant or by the defaulting solicitor?

(b) If the application is successful, is the defaulting solicitor entitled to recover from the applicant his own costs and/or his disbursements?

(c) If the application fails, is the defaulting solicitor entitled to recover from his client his own costs and/or his disbursements associated with the application and, in addition, is he entitled to the costs and/or disbursements of the investigation of the facts surrounding the accident and of compliance or part compliance with the requirement of due inquiry and search?

There does not appear to be any decided authority on any of these questions, but it is submitted that the interests of the faultless applicant clearly require the costs in each case to be met by the solicitor.

3. The third principal interest involved in such applications is the interest of the solicitor in having the application for extension of time granted, which arises from the possibility of his being sued for negligence by the applicant, should the application be refused; and closely allied to this interest is the pecuniary interest in having the costs referred to above paid by the applicant.

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[32] (1955) 72 W.N. 369, 373-74.

[33] An action against a solicitor for negligence is normally framed in contract (*Groom* v. *Crocker* (1939) 1 K.B. 194).

At first sight it might perhaps appear that in a set of circumstances such as the present, where only one or at the most two of a trio of conflicting interests can be satisfied, the interest which should suffer is that of the person who is most in default; and in the present situation there can be no doubt that the person most in default is the solicitor. But it is clear from the decisions on the question that the test which is in fact applied is not the "greatest default" test, but the test of whether the reason for the oversight or error amounts to an indefinite quantity described as "sufficient cause".

It is the indefiniteness of this test which makes this field of law so uncertain and makes the position of the defaulting solicitor such an unenviable one. For, just as the applicant must decide whether he will retain the defaulting solicitor to act on his behalf in an application for extension of time or obtain the advice of another solicitor, so the defaulting solicitor whose instructions have not been withdrawn must decide whether he should apply to the court for an extension of time, perhaps jeopardising his professional reputation and running the risk of comment and an action for negligence, or whether he should attempt to reach some compromise with the applicant whereby the matter is finalised by the payment of some sum by the solicitor to the applicant. And the dilemma as thus posed takes no account of the questions of costs that have been raised above, and which in even the simplest of cases would involve a not inconsiderable sum.

What this consideration of the interests involved seems to suggest is that, at least in this branch of the law where the interests of professional men are so vitally concerned, there may be much to be said for the proposition that there should be certainty in the law rather than a discretion in the court to dispense what appear to be the requirements of justice and equity in each particular case.

Perhaps the number of cases in which the difficulties outlined above arise could be reduced were the New South Wales legislature to pass an Act which sets out in one place the time limits applicable to all causes of action against all persons. Such Acts are in force both in England and in Victoria,[34] and if there was set out in such an Act the names of all bodies to which a special time limit is applicable in respect of the commencement of an action, then the number of applications based on a solicitor's ignorance of the relevant statutory provisions should be drastically reduced. But still the problems would inevitably arise from time to time, even if in a more modified form, and at less frequent intervals.

If then certainty is to be introduced into this branch of the law in lieu of the present rules which might perhaps be felt not to give sufficient protection to the interests of the professional persons involved, it can only be by the introduction, either by the courts or by legislature, of the principle that in all cases default on the part of a solicitor either will or will not be a sufficient cause for granting an extension of time. Of the two possible suggested principles, that of granting an extension wherever the reason for not giving notice within time is the fault of the solicitor seems to be precluded both by the judgments already given on the section and by the fear expressed in certain of the judgments that the effect of imposing a time limit for the giving of notice would be rendered virtually nugatory if the applicant's solicitor could come to the court and say: "This extension must be granted since the cause of the delay in giving notice has been occasioned by my default." The other possible principle, that of excluding a solicitor's neglect as a ground for granting an extension of time, is equally in conflict with the authorities, but would not be open to the second objection to the first suggested principle. It is realised, of course, that if the principle of

[34] In England by the Limitation Act, 1939 (Eng.), 2 & 3 Geo. 6, c.21, as amended by the Law Reform (Limitation of Actions) Act, 1954 (Eng.), 2 & 3 Eliz., c.36, which Act is based on the Report of the Committee on the Limitation of Actions (*Cmd.* 7740). In Victoria by the Limitation of Actions Act 1955 (Vic.).

excluding solicitor's neglect as a ground for granting an extension is adopted, the interests of applicants in a number of cases must be adversely affected, but if certainty is to be achieved in this field, it is inevitable that the interests of some persons should suffer. Solicitors are retained and paid by clients for their specialised knowledge of the law and are expected to be conversant with the relevant applicable principles. The applicant is free to select his own solicitor, and in the event of his default the applicant is not necessarily left without remedy. For these reasons it is submitted that if the difficulties manifest in this branch of legal principle are to be resolved by the introduction of certainty into the law, then the correct principle would be to exclude solicitor's neglect as a ground for extension of time rather than to make it inevitably such a ground.

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