SUPREME COURT OF QUEENSLAND

CITATION:	*Simpson v. Hopemont Pty Ltd & Anor* [2003] QSC 078
PARTIES:	**BRYAN GEORGE SIMPSON** (Plaintiff) **v** **HOPEMONT PTY LTD 010 745 721** (First defendant) AND **SUNCORP METWAY INSURANCE LIMITED 075 695 966** (Second defendant)
FILE NO:	2026 of 2003
DIVISION:	Trial
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	26 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2003
JUDGE:	Helman J.
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – QUEENSLAND – NOTICE REQUIREMENTS – APPLICATION FOR LEAVE TO BRING PROCEEDINGS DESPITE NON-COMPLIANCE – RELEVANT CONSIDERATIONS. *Motor Accident Insurance Act* 1994 ss. 37(2), 37(4), 39(5)(c), 108(3). *MotorAccident Insurance Amendment Act* 2000. *Horinack v. Suncorp Metway Insurance Ltd* [2001] 2 Qd. R. 266 cited. *Thomas v. Transpacific Industries Pty Ltd* [2003] 1 Qd. R. 328 cited.
COUNSEL:	Mr J.W. Lee for the plaintiff Mr R.N. Alldridge for the first defendant Mr K.F. Holyoak for the second defendant
SOLICITORS:	Keith Scott & Associates for the plaintiff Bain Gasteen for the first defendant

[1] By this originating application, filed on 5 March 2003, the applicant seeks leave to issue proceedings against the proposed defendants Hopemont Pty Ltd and Suncorp Metway Insurance Limited. The application is made under s.39(5)(c) of the *Motor Accident Insurance Act* 1994 as that provision was before the commencement, on 1 October 2000, of amendments made to s.39 by s.20 of the *Motor Accident Insurance Amendment Act* 2000. (Section 108(3) of the principal Act provides that that Act, as in force before the commencement of an amendment made by the *Motor Accident Insurance Amendment Act* 2000, applies to a motor vehicle accident claim arising from a motor vehicle accident that happened before the commencement of the relevant amendment. That provision has the same effect in relation to other provisions of the principal Act relevant to this application.) Section 39(5)(c) provided, so far as it is relevant, that a claimant might bring a proceeding in a court for damages based on a motor vehicle accident claim if the court gave leave to bring the proceeding despite non-compliance with the requirements of division 3 (Claims procedures) of part 4 (Claims) of the Act.

[2] The applicant's claim arises from an injury he allegedly suffered early in 2000 when he was employed by Hopemont to drive a truck. He alleges that as a result of his operating a gear lever on the truck which was difficult and awkward to use he suffered a disabling ankylosed glenohumeral joint.

[3] The applicant failed to comply with s.37(2) of division 3 of part 4 of the Act in not giving notice of his claim to Suncorp Metway Insurance, Hopemont's insurer under the Act, within nine months after the motor vehicle accident or the first appearance of symptoms of the injury. A notice dated 20 January 2003 was given to the insurer, but in addition to its being given outside the nine month period it failed to contain an explanation of the delay in giving it, as required by s.37(4). In the notice under the heading 'Date of Accident' the following appeared: 'Over period of time commencing approximately July 1999 and concluding 10th April, 2000'.

[4] In *Horinack v. Suncorp Metway Insurance Ltd* [2001] 2 Qd. R. 266 it was held that s.39(5)(c) did not confer a general discretion to give leave to bring a proceeding in a court despite non-compliance if the application for leave was made outside the period of limitation applying to the applicant's claim. An application is made when filed: see *Thomas v. Transpacific Industries Pty Ltd* [2003] 1 Qd. R. 328, at p.342 fn 18. In this case a three-year limitation period applies so that the applicant can succeed in his application only in respect of causes of action arising on and after 5 March 2000.

[5] An applicant under s.39(5)(c) is not required to show a *prima facie* case, but the absence of anything to indicate liability in a proposed defendant is a relevant factor in the exercise of the court's discretion, as is some indication that the applicant has a strong case: *Thomas v. Transpacific Industries Pty Ltd*. In this case it cannot be said that the applicant has a strong case of causes of action arising on and after 5 March 2000, but I am not satisfied of the futility of his pursuing them.

[6] In an early account of what happened, a written statement by the applicant dated 22 June 2000, he told of feeling a 'sharp, stabbing pain' across the top of his left shoulder in early January 2000 when he was changing gears in the truck. The pain

was relieved the next day by a cortisone injection administered by a doctor, and that relief came, the applicant said, within five minutes. He continued driving. About five to six days after the injection the pain returned when he changed gears, he said. He continued working, and despite an adjustment made to the gear lever at some unspecified time later, his condition did not improve and he gave up working for Hopemont on 5 April 2000. Before the modification the gear lever on the truck was behind the driver's position and to his left as shown in a diagram in his notice of 20 January 2003. In an application for worker's compensation dated 11 April 2000 the applicant had given 8 January 2000 as the day when the injury happened, although in the same document he answered a question indicating that the injury happened '[o]ver a period of time' and gave this account of it: 'OVER THE LAST THREE MONTHS THE INJURY HAS OCCURRED, BY THE CONSTANT USE OF CHANGING GEARS IN THE TRUCK'.

[7] It follows that a possible conclusion from the evidence is that the applicant's injury was suffered on 8 January 2000 and after that he suffered no further injury but merely a recurrence of pain caused by the injury of 8 January 2000. A report dated 26 July 2000 to WorkCover Queensland by Dr Thomas Parsons, orthopaedic surgeon, tends to support that conclusion. Dr Parsons related the applicant's history - no doubt given to him by the applicant - as follows:

> Mr Simpson is a now 54 year old, left handed man whose work normally involves driving a truck. Until about 8 January this year, he had no problems with his left shoulder. At that time he was driving a truck where the gear lever was placed some distance to the left and behind his body line. This required him to put his left hand out to about 40° of abduction at least and then manipulate the gear lever backwards or forwards or up and down. On this occasion as he pushed the gear lever, he developed severe pain in his left shoulder and felt something "go". The pain persisted and he had difficulty in using the shoulder. He saw Dr Kent the following day and was given a local anaesthetic and steroid injection. After that injection Mr Simpson states his left shoulder was "good" and he could raise his arm up forwards and laterally in a normal fashion. However, with continuing work his pain recurred and the shoulder eventually became stiff. He had a subsequent injection by Dr Kent with unfortunately little benefit and a good deal of pain immediately after.

[8] The doctor's summary included the following:

> Mr Simpson sustained a discrete injury to his left shoulder while changing gears on a truck in January of this year. He probably had a symptom free and fully mobile shoulder prior to this injury and indeed Dr Kent's initial injection appears to have abolished his pain and allowed him full active movements for a while. He subsequently has developed a very substantial capsular contracture in the left shoulder and now has a virtually ankylosed gleno-humeral joint as a result of the injury.
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> …
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> In summary, Mr Simpson's left shoulder condition is predominantly the result of his injury at work in January of this year. A manipulation and possibly arthroscopic examination with hydrodilatation will offer him a more rapid resolution of his symptoms and an earlier return to work.

[9] Another possible conclusion on the evidence - and it must be remembered that the evidence before me will no doubt be substantially supplemented should this claim go to trial – is, however, that although an injury was suffered on 8 January 2000 further injury attributable to the position of the gear lever was suffered by the applicant after that day. It may be that that conclusion is less compelling than the one I have referred to before, but it is I think sufficiently credible to support the application. Accordingly there is, I think, sufficient in the evidence to justify concluding that the applicant can maintain an action arising from an injury or injuries suffered on and after 5 March 2000. His employer could be held liable to compensate him for such injury or injuries because it could be found that it was reasonably foreseeable that the gear lever he was required to operate could cause an injury to his shoulder because of its position before the modification.

[10] There are other considerations relevant to the exercise of the discretion provided for in s.39(5)(c): the reason for the applicant's delay, and possible prejudice to the insurer. The reason for the delay is clear enough: it was thought that the applicant's claim was one governed by the WorkCover scheme until a telephone discussion of 13 January 2003 between the solicitors for WorkCover and the applicant's solicitors and receipt of a letter dated 14 January 2003 from WorkCover's solicitors to the applicant's solicitors. In that letter it was asserted that the compulsory insurance scheme under the *Motor Accident Insurance Act* was the one relevant to the applicant's claim. Given the complexity of the schemes one can readily understand that such nice distinctions can be drawn, and when they are I think the court should be reluctant to conclude that a claimant has been guilty of inexcusable delay in pursuing a claim under one scheme rather than the other.

[11] As for prejudice to Hopemont's insurer, it is said on its behalf that as the truck in question was sold by Hopemont in 2000 and cannot now be found prejudice to the insurer will follow if the application succeeds. I am not persuaded that that is so, as it appears that the truck was a standard model manufactured by a well-known manufacturer with no unusual characteristics until it was modified. As the applicant swears he had suffered his injuries before the modification I can see no reason why the insurer cannot rely on the manufacturer's drawings and specifications, which no doubt would be readily available, in endeavouring to meet the claim, and, if it sees fit, in seeking any redress to which it may be entitled from the manufacturer.

[12] On behalf of the insurer it is also said that its lost opportunity to have the applicant examined by doctors at a time closer than now to the events in question constitutes further prejudice. I am not persuaded of the merit of that contention, since the insurer has access to a number of reports made on the applicant's condition in 2000 and afterwards, including of course that of Dr Parsons, and a report dated 13 June 2000 by Dr Peter Millroy, orthopaedic surgeon.

[13] I should accordingly grant the applicant the leave sought so far as that relates to injuries suffered on or after 5 March 2000. I shall invite further submissions on the form of the order to be made and costs.