SUPREME COURT OF QUEENSLAND

CITATION:	*Smale v Sprott & Anor* [2003] QSC 254
PARTIES:	**LUKE KEVIN SMALE** (plaintiff) **v** **ROBERT PHILLIP SPROTT** (first defendant) **NOMINAL DEFENDANT** (second defendant)
FILE NO/S:	S1224 of 2000
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	11 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2003
JUDGE:	Wilson J
ORDER:	**Application is dismissed with costs.**
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – RIGHTS AND LIABILITIES OF INSURER IN RESPECT OF DEFENCE AND COMPROMISE – QUEENSLAND – where plaintiff claims damages for injuries sustained in a motor vehicle accident – where application for declaration of non-compliance with s 37 *Motor Accidents Insurance Act* 1994 (Qld) and for order that non-compliance be remedied – where inconsistencies between information in s 37 notice and other evidence – whether notice satisfied s 37 INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – RIGHTS AND LIABILITIES OF INSURER IN RESPECT OF DEFENCE AND COMPROMISE – QUEENSLAND – where application by second defendant to obtain copies of witness statements or names and addresses of witnesses and substance of evidence – where s 45 *Motor Accidents Insurance Act* 1994 (Qld) imposes duty on claimant to cooperate with insurer – where duty to give information reasonably asked by insurer about "circumstances of the accident" – where s 48 *Motor Accidents Insurance Act* 1994 (Qld) preserves legal professional privilege – whether legal professional privilege

abrogated

Motor Accident Insurance Act 1994 (Qld), s 37, s 45, s 48
Motor Accident Insurance Regulation 1994 (Qld), s 10

RACQ-GIO Insurance Limited v Ogilvie [2002] 1 QdR 536, referred to
Lau v WorkCover Queensland [2003] 2 QdR 53, cited
Baker v Campbell (1983) 153 CLR 52, cited
Nagan v Holloway [1996] 1 QdR 607, cited
Dingle v Commonwealth Development Bank of Australia (1989) 23 FCR 63, cited
Cockerill v Collins [1999] 2 QdR 26, cited

COUNSEL: KN Wilson SC for the applicant/second defendant
JB Rolls for the respondent/plaintiff

SOLICITORS: McInnes Wilson for the applicant/second defendant
Mullins & Mullins for the respondent/plaintiff

[1] **WILSON J:** The plaintiff claims damages for personal injuries sustained in a motor vehicle accident. This is an application by the second defendant to obtain copies of witness statements taken by the plaintiff's solicitors or alternatively for the names and addresses of such witnesses and the substance of their evidence.

[2] The plaintiff and the first defendant were friends who were in each other's company for several hours before the accident, which occurred at about 4:45 am on Sunday 28 February 1999 on the Bruce Highway at Mango Hill. The plaintiff was a passenger in a Holden Commodore sedan driven by the first defendant which ran off the carriageway and collided with a tree before coming to rest. The accident is alleged to have been caused by the negligence of the first defendant. The plaintiff sustained the following injuries -

(a) severe burns and crush injuries to both lower limbs below the knees;

(b) bilateral femoral fractures;

(c) burn injury to the right thigh;

(d) multiple facial lacerations and contusions.

He was hospitalised until 15 April 1999. Both legs had to be amputated below the knee.

[3] On 13 April 1999, while he was still in hospital, the plaintiff completed a Notice of Claim form under s 37 of the *Motor Accident Insurance Act* 1994 (Qld), which was submitted to FAI Insurance, the first defendant's insurer. Three days later he received a letter from the insurer confirming that the notice complied with the requirements of s 37 of the *Motor Accident Insurance Act* 1994. On 14 October 1999 he received a letter from the insurer admitting liability to the extent of 60% - an admission stated to be made by s 41 of the *Motor Accident Insurance Act* 1994.

[4] The plaintiff commenced this proceeding against the first defendant and the insurer as second defendant by filing a claim and statement of claim on 11 February 2000.

By their defence filed on 15 March 2000 the first defendant and the insurer alleged that the first defendant was intoxicated with alcohol and illegal drugs, and raised defences of no, or a reduced, duty of care, *volenti* and contributory negligence. (The Nominal Defendant was later substituted as second defendant in consequence of the liquidation of the insurer.) In August 2000 the plaintiff's solicitors obtained the four witness statements which are presently in issue. In his amended reply filed on 7 February 2003 the plaintiff alleged that he was unaware of the first defendant's intoxication. On 20 March 2003 he served a list of documents identifying as privileged documents statements and draft statements of witnesses. The second defendant asked for copies of the statements or documents, which were refused, and for particulars of the documents.

[5] One of the objects of the *Motor Accident Insurance Act* 1994 is to encourage the speedy resolution of claims. It seeks to do this by a system of pre-litigation disclosure and by requiring cooperation between the claimant and the insurer.

[6] Division 3 of part 4 (ss 37 – 44) is concerned with "Claims procedures". Pursuant to s 37 a claimant must give a notice of claim within nine months of the accident or the first appearance of symptoms of injury. Then within one month of receiving that notice the insurer must notify the claimant if it is satisfied the notice is in conformity with the section, or, if not satisfied, waiving compliance, or giving the claimant at least a month in which to remedy the non compliance: s 39. Generally proceedings cannot be instituted until the expiration of six months of the notice under s 37, during which time the insurer must attempt to resolve the claim: s 41.

[7] Division 4 of part 4 (ss 45 – 50) is concerned with cooperation between the claimant and the insurer. By s 45 the claimant must cooperate with the insurer and in particular give the insurer information reasonably asked by it about the circumstances of the accident and quantum aspects of the claim.

[8] In the present case the second defendant has submitted that in not supplying the names and addresses of witnesses to the first defendant's and his own alcohol and drug consumption before the accident and in not giving information about it, the plaintiff failed to comply with his obligations under s 37. The argument runs that the second defendant can now seek relief to have the incomplete or misleading s 37 notice remedied, and further, that if the information should have been disclosed under s 37, any privilege in respect of it has been abrogated.

[9] Section 37(1) provided[1] -

> "**Notice to be given by claimant**
>
> **37.(1)** Before bringing an action in a court for damages for personal injury arising out of a motor vehicle accident, a claimant must give written notice of the claim to the insurer, or 1 of the insurers, against which the action is to be brought –
>
> (a) containing a statement, sworn by the claimant, of the information required by regulation; and

[1] In these reasons for judgment references to the *Motor Accidents Insurance Act* 1994 (Qld) are references to the Act as amended up to Act No. 57 of 1997, which counsel agreed was the relevant form of the Act.

(b) containing an offer of settlement, or a sworn statement of the reasons why an offer of settlement cannot yet be made; and

(c) accompanied by the documents required by regulation."

The relevant regulation is s 10 of the *Motor Accident Insurance Regulation* 1994 which provided[2] (so far as relevant) -

"**Claims – Act, s 37**

10.(1) A notice under section 37 of the Act must include particulars (so far as the claimant knows or can reasonably find out the particulars) of –

(a) the claimant including – […]

(b) the circumstances of the accident, including – […]

(vi) details of the claimant's consumption of alcohol or drugs in the period of 12 hours immediately before the accident and, if the claimant was an occupant, but not the driver, of a motor vehicle involved in the accident, details of the driver's consumption of alcohol or drugs in the period of 12 hours immediately before the accident; and

(k) the names and addresses of the witnesses of the accident and –

(i) the name of the police officer who attended at the scene of the accident, or to whom the accident was reported, and the police station where the police officer was stationed; and

(ii) the name of any ambulance officer who attended at the scene of the accident and the place where the officer was stationed".

[10] The second defendant contends that the plaintiff did not comply with his obligations under s 10 of the Regulation in the following respects:

(a) Question 15 on the notice of claim form inquired whether the claimant (ie the plaintiff) had consumed drugs in the 12 hours before the accident. The plaintiff answered "no". However, on admission to the Redcliffe Hospital after the accident he told staff that he had consumed an LSD tablet; on his transfer to the Royal Brisbane Hospital he said he had consumed amphetamines; and he told a psychologist who interviewed him in late 2000 and early 2001 that

[2] In these reasons for judgment references to the *Motor Accidents Insurance Regulation* 1994 (Qld) are references to the Regulation as amended up to SL No. 197 of 1999, which counsel agreed was the relevant form of the Regulation.

he had consumed LSD. He also told the psychologist that prior to the accident he was consuming about 15 cones of marihuana each weekend.

(b) In answer to question 16 about his consumption of alcohol in the 12 hours before the accident, the plaintiff said that he had had a couple of beers between 4:00 and 4:30 the afternoon before the accident. However, he told staff at the Redcliffe Hospital that he had been drinking heavily; and the Royal Brisbane Hospital notes contain the cipher for ethanol or alcohol.

(c) In answer to questions 17 and 18 about the driver (ie the first defendant)'s consumption of drugs and alcohol in the 12 hours before the accident, the plaintiff wrote "Don't know" in each case. However, testing of a blood sample taken from the first defendant at 7:35 am revealed a blood alcohol level of 0.047%, from which it has been estimated that at the time of the accident the level was probably 0.107% and that at the commencement of the journey which culminated in the accident it was probably 0.122%.

(d) Question 19 began -

"Witnesses

Give details of witnesses
(including any who were in the same vehicle as you)"

Against this, the plaintiff wrote "See question 25". His answer to question 25 gave details only of the driver (the first defendant).

[11] I note the inconsistencies between the information supplied in the s 37 notice and other evidence. However, the accuracy of the information supplied and the bona fides with which the plaintiff supplied it are not to be tested on an interlocutory application such as this. Further, it has not been established that, at the time he completed that notice, the plaintiff could reasonably have found out the information apparently contained in statements taken by his solicitors about 16 months later.

[12] In passing I observe that for the purposes of s 10(1)(b) of the Regulation, "the circumstances of the accident" clearly included the plaintiff's and the first defendant's consumption of alcohol and drugs in the 12 hours immediately before the accident. This is clear from sub-para(b)(vi), without any necessity to resort to the decision in *RACQ – GIO Insurance Limited v Ogilvie* [2002] 1 QdR 536 (which was concerned with the meaning of that expression in s 45 of the Act).

[13] I am inclined to the view that "the witnesses <u>of</u> the accident" referred to in sub-para (k) were restricted to those with direct sensory perception of the accident, but I do not finally decide the point. The express inclusion of the police and ambulance officers who attended the scene of an accident would seem unnecessary if the expression were intended to refer to witnesses as to the circumstances of the accident in the broad sense.

[14] For present purposes I accept that when the insurer wrote to the plaintiff's solicitors on 16 April 1999 confirming that the notice complied with the requirements of s 37 of the Act it was not aware that the information provided was incomplete or inaccurate. As I have set out above, the legislative scheme is for a claimant to provide a timely statement of his claim, for the insurer to indicate whether that notice complies with the requirements of s 37, for the insurer to be given time to investigate the claim, for there to be an opportunity to resolve the claim before litigation is commenced, and for the claim to be resolved by litigation if needs be. It is premised on the insurer being given an opportunity to obtain more information than that contained in the s 37 statement (information which may well put a different complexion on liability and or quantum from that in the s 37 notice), and for an unresolved claim to go to litigation. This is achieved by a series of forward steps in the progression of the claim to resolution by agreement or through litigation. There is no obligation on the claimant to supplement or update the information in the s 37 notice (other than to meet an initial assertion that it is a non-complying notice). If the insurer makes an admission based on fraudulently supplied information, that admission is not binding on it (s 41(6)). A claimant who gives false or misleading information is liable to prosecution (s 93). It would be inconsistent with this scheme for an insurer to be able to reopen the question of compliance with the requirements of s 37. (See *Lau v WorkCover Queensland* [2003] 2 QdR 53 at [49] on the similar scheme under the *WorkCover Queensland Act* 1996 (Qld).)

[15] I dismiss the applications for a declaration of non-compliance with s 37 and for an order that such non-compliance be remedied.

[16] By the other limb of its application, the second defendant sought copies of the statements taken in August 2000 pursuant to s 45(1). That provision is in these terms -

> "**Duty of claimant to cooperate with insurer**
>
> **45.(1)** A claimant must cooperate with the insurer and, in particular, must give information reasonably asked by the insurer about –
>
> (a) the circumstances of the accident out of which the claim arose; and
>
> (b) the nature of the injuries resulting from the accident and of any consequent disabilities and financial loss; and
>
> (c) if applicable – the medical treatment and rehabilitation services the claimant has sought or obtained; and
>
> (d) the claimant's past medical history (as far as it is relevant to the injury to which the claim relates), and any claims for compensation for personal injury previously made by the claimant."

[17] It was conceded by counsel for the plaintiff that his client would be obliged to provide these statements to satisfy s 45 were it not for s 48. So far as relevant, s 48 provides –

"**Non-disclosure of certain material**

48.(1) A claimant or insurer is not obliged to disclose information or documentary material under this Division if the information or documentary material is protected by legal professional privilege.

(2) However, in**v**estigative reports, medical reports and reports relevant to the claimant's rehabilitation must be disclosed even though protected by legal professional privilege but they may be disclosed with the omission of passages consisting only of statements of opinion."

[18] Legal professional privilege attaches to confidential communications between a lawyer and a client in which advice is sought or given and to evidence obtained for the purpose of litigation: *Baker v Campbell* (1983) 153 CLR 52 at 66; *Nagan v Holloway* [1996] 1 QdR 607; *Dingle v Commonwealth Development Bank of Australia* (1989) 23 FCR 63. It can be waived by the party in whom the privilege is vested or abrogated by statute – but the latter requires a clear statement of legislative intention: *Cockerill v Collins* [1999] 2 QdR 26.

[19] Section 48 preserves legal professional privilege in relation to material required to be provided under division 4 of part 4 – that is, under s 45, but not information required to be provided under s 37, which is in division 3 of part 4. Counsel for the second defendant submitted that because the plaintiff was required to provide the information apparently in the statements in order to satisfy s 37 but did not do so, he cannot claim privilege in respect of it. In other words, he submitted that the privilege had been abrogated by s 37, and that once it had been abrogated, there was no privilege to be preserved by s 48.

[20] I do not accept this argument. The obligations of the plaintiff under s 37 were to be satisfied as at the time the notice of claim was given. They could not extend to the disclosure of statements subsequently obtained for the purposes of the litigation. That section cannot be read as containing any expression of legislative intent to abrogate privilege in statements subsequently obtained.

[21] The statements do not fall within the rubric "investigative reports" in s 48(2).

[22] Accordingly, this limb of the application also fails.

[23] Order: The application is dismissed with costs.