SUPREME COURT OF QUEENSLAND

CITATION:	*Cassie v Bogdan & Anor* [2004] QSC 275
PARTIES:	**JULIE ANN CASSIE** (plaintiff) **v** **PENELOPE ALICE BOGDAN** (first defendant) and **SUNCORP METWAY INSURANCE LTD** (second defendant)
FILE NO:	SC No 2056 of 2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	1 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2004
JUDGE:	Chesterman J
ORDER:	**1. That the defendants disclose to the plaintiff's solicitors any copies of statements made by the first defendant to a police officer, or copies of notes made by a police officer of an interview with the first defendant, in their possession within seven days;** **2. That subsequent to that disclosure occurring, or to the solicitors for the defendant filing an affidavit deposing to the fact that there is no such statement or record in their possession, leave is given to the defendants to amend the Defence in accordance with JJP2 to the affidavit of John Power filed 12 August 2004;** **3. That the defendants pay the plaintiff's costs of and incidental to the application and any costs wasted by reason of the amendment on the standard basis**
CATCHWORDS:	PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – where the plaintiff commenced proceedings against the defendants claiming damages for psychiatric illness – where the defendants made certain admissions as to liability – where the defendants then brought an application seeking to amend pleadings so as to withdraw the admissions – whether leave of the Court should

be given under r 188 *Uniform Civil Procedure Rules* 1999 (Qld) to withdraw admissions

Uniform Civil Procedure Rules 1999 (Qld), r 188

Coopers Brewery Ltd v Panfida Foods Ltd (1992) 26 NSWLR 738, followed
Cropper v Smith (1884) 26 Ch D 700, followed
Queensland v J L Holdings Pty Ltd [1996-1997] 189 CLR 146, followed
Clough and Rogers v Frog (1974) 48 ALJR 481, followed
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455, considered

COUNSEL: Ms C C Heyworth-Smith for the plaintiff
Mr J J Clifford QC, with Mr D R Kent, for the first and second defendants

SOLICITORS: Maurice Blackburn Cashman for the plaintiff
Walsh Halligan Douglas for the first and second defendants

[1] At 3.20 pm on 19 March 1999 the first defendant was driving her motor car along a suburban street in Silkstone adjacent to the Silkstone State School. An eight year old girl who attended the school crossed the road and was struck by the defendant's car. She suffered serious injuries. The plaintiff was employed as the registrar of the school. She received news of the accident shortly after it occurred and went immediately to the scene where she gave assistance to the child, telephoned the police and the ambulance, and supervised other children in the vicinity.

[2] On 4 March 2002 the plaintiff commenced proceedings against the first defendant and her insurer claiming damages by way of compensation for a psychiatric illness said to have been induced by her experiences at the scene of the accident.

[3] The Statement of Claim alleges, in essence, that:

(a) the collision between the school child and the first defendant's car was caused by the latter's negligent driving, particulars of which are given and which consist essentially of driving too fast and not keeping proper lookout.

(b) as a result of the negligent driving the plaintiff has suffered personal injuries which are particularised.

Apart from alleging that the plaintiff was employed at the school, and responded to the collision in the manner I have described, the Statement of Claim does not plead particular facts which might give rise to a duty of care on the first defendant to prevent occasioning psychiatric injury to the plaintiff.

[4] Paragraph 6 of the Statement of Claim contained the allegation of negligent driving and supporting particulars. By paragraph 4 of their Defence the defendants pleaded:

'As to the allegations contained in paragraph 6 of the Statement of Claim, the Defendants admit that the motor vehicle accident was

> contributed to by the negligence of the First Defendant, for which the Second Defendant is liable for the reasons set out in the said paragraph. The Defendants also say that the motor vehicle accident was contributed to by the negligence of Leanne Joy Wernowski for suddenly and without warning moving into the path of the First Defendant's motor vehicle.'

[5] The defendants intend to deliver an Amended Defence. One of the proposed amendments cannot be made without the leave of the court because it involves withdrawing the admission contained in paragraph 4 of the Defence. The proposed Amended Defence reads:

> '4. As to the allegations contained in paragraph 6 of the Statement of Claim, the Defendants deny as untrue that the motor vehicle accident was caused by the negligence of the First Defendant.'

The proposed new pleading then sets out nine particulars, each of which describes the first defendant driving in terms which indicate there was no lack of care for the safety of school children in the vicinity of the school. The proposed amended pleading also adds paragraph 5A and paragraph 6, which explicitly deny, with appropriate particulars, (i) the existence of a duty in the first defendant to take reasonable care to avoid causing psychiatric injury to the plaintiff, and (ii) that the plaintiff's psychiatric injury was caused by the manner in which the first defendant drove.

[6] *UCPR* 188 provides that a party may withdraw an admission made in a pleading only with the court's leave. The plaintiff opposes the defendants' application for leave to amend paragraph 4 of the Defence.

[7] In April 2000 the plaintiff gave the second defendant the notices required by s 34 and s 37, respectively, of the *Motor Accident Insurance Act* 1994 (Qld) ('the Act').

[8] On 17 April 2000 a claims clerk employed by the second defendant discussed the plaintiff's claim 'with a representative of legal services at Suncorp.' The legal officer's advice was that:

> 'There isn't enough information yet to determine whether nervous shock claim can be made … The claimant will recover 100% from our insured even if the child bears the most responsibility. However if the child is the sole cause of the MVA then no claim can lie for nervous shock.'

In June and December 2000 the claims clerk received reports from an insurance adjuster. Having read them she:

> '… came to the conclusion that Suncorp should admit partial liability, because if there was only 1% negligence in our insured, the Plaintiff would be successful to the extent of 100%.'

[9] On 19 December 2000 the second defendant wrote to the plaintiff's solicitors:

> '… we have informed ourselves of the circumstances of the motor vehicle accident out of which your client alleges her claim arises.
>
> Based on the information available at the time and for the purposes of our obligation under s.41(1)(b)(i) and (ii) of the … *Act*, but not otherwise, we hereby give notice that we admit liability in full for the circumstances giving rise to the claim only.
>
> We do not admit that your client suffered a nervous shock injury … and therefore do not admit liability for your client's claim …'

[10] On 1 May 2002 the clerk conferred with a solicitor employed at Messrs Walsh Halligan Douglas, solicitors for the defendants in the action. He advised:

> '… that if Suncorp Metway's driver was found only 1% to blame, Suncorp Metway would be liable for nervous shock subject to medical causation being established … [M]y thinking at this stage was to consider whether Suncorp Metway could blame anyone else for the Plaintiff's nervous shock … [S]uch an approach was probably a "long shot" …'

The Defence was filed the next day, 2 May 2002.

[11] The defendants have now engaged Senior Counsel. On 20 April 2004 the defendants' solicitors inspected the scene of the collision with Mr Clifford QC and a witness to the accident, Lorelle Scott, who was driving her car behind the first defendant at the critical time. Both vehicles were travelling at about 40 kph. According to the statement Ms Scott gave to the investigating police officer, she:

> '… saw a little girl on the footpath on the left hand side … and she was running towards my vehicle, but was still on the footpath and I saw that she was about level with the front of the vehicle in front of me and then she just suddenly changed direction and ran about 2 paces in the opposite direction.
>
> All of a sudden she just ran onto the road and into the path of the vehicle in front of me.'

[12] The statement given by Ms Scott to the defendants' loss adjuster recounts:

> '… I was driving … at a speed of approximately 35 kph … behind a silver/grey sedan … I observed a young girl on the southeast corner of the intersection. She was running in a southerly direction towards Blackstone Road and then she appeared to change her mind and I thought she was going to come back towards the corner. She then appeared to change her mind again and attempted to run across Blackstone Road, in front of the vehicle that was travelling in front of mine. The driver of the … vehicle braked and appeared to stop pretty much straight away … The young girl was hit by the front of the … sedan …'

[13] Mr Clifford QC has advised the defendants' solicitors:

> '… that the Defendant had quite good prospects of winning the case on the basis that there was no negligence in the First Defendant driver and … this application to withdraw the partial admission of liability should be made.'

[14] The collision was investigated by Senior Constable Young of the Ipswich police station and Constable Kaatz of the Ipswich Traffic Branch. Both officers have compiled reports of their investigations. They identified four witnesses to the collision: Stacey Field, Dellmay McCann, Lorelle Scott and Lauran Coghlin. Although the affidavit material does not say so, it is very likely that the police also interviewed the first defendant. Photographs of the scene of the collision were taken by the police officers. Some of these show skid marks apparently left by the first defendant's vehicle. Statements from the four witnesses named were taken by police officers and by loss adjusters appointed by the defendants. The statements have been annexed to the affidavits filed in support of the application. All the witnesses are available to give evidence. The location has not changed since the accident.

[15] The action has progressed substantially towards being ready for trial, although it is fair to say that the defendants have not been as diligent as they should have been in their preparation, or in meeting the plaintiff's legitimate requests to proceed to mediation and trial, if settlement does not occur at mediation. The action is not yet ready for trial though it should not take long to prepare. It has not been set down for trial and no request for trial dates has been made.

[16] The defendants put the application to withdraw the admission on the basis that the evidence assembled to date shows there is a genuine dispute as to whether the first defendant drove negligently *viz a viz* the injured child. The admission that there was a degree of negligence was based upon the advice of a legal officer and solicitor who rejected the possibility that the defendants could succeed in denying that she had driven without reasonable care for the safety of the child. The advice of senior counsel is that there are good prospects of refuting that part of the plaintiff's case. The applicants accept that they have delayed in making the application, but submit that there is no relevant prejudice to the plaintiff. The evidence germane to the issue is available and the withdrawal of the admission will not materially delay the plaintiff in obtaining a trial.

[17] The plaintiff strenuously resists the application. Her counsel submits:

> (a) There can be no genuine dispute about the first defendant's being at least partly liable for the child's injury so the withdrawal of the admission would be futile and lead to the unnecessary incurring of costs. The evidence exhibited to the affidavits in support of the application and relied on to show an arguable case of liability does not in fact raise a doubt about liability.
>
> (b) The defendants have delayed inordinately in making enquiries into the circumstances of the collision and taking advice on whether they could, or should have, denied liability for the collision. Further the defendants have not received any

> additional information since December 2000 when the admission of liability was made. All that has happened is that senior counsel has expressed a different opinion on the facts.
>
> (c) The plaintiff will be prejudiced by the withdrawal of the admission. The collision occurred five and a half years ago. It cannot be expected the witnesses will now have a fresh recollection of events. There is now no prospect of obtaining witnesses in addition to those identified by the police officers.

[18] Before dealing with these matters it is appropriate to consider the relevant legal principles:

> 'The over-riding consideration in any curial proceedings must always be that the court should, as far as possible, ascertain the true facts and base its judgment on them.'
> Per Rogers J in *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 742.
>
> '… It is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.'
> Per *Bowen LJ in Cropper v Smith* (1884) 26 Ch D 700 at 710 approved in *Queensland v J L Holdings Pty Ltd* [1996-1997] 189 CLR 146 at 152-3 per Dawson, Gaudron and McHugh JJ.

In the latter case, at 154, it was pointed out that the interests of the efficient management of cases and the orderly preparation of actions for trial, and their prompt disposition, is not an objective which would justify shutting a party out from litigating a case which is fairly arguable.

> 'Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.'

[19] In the same case Kirby J pointed out (at 167) that the discretion to allow amendments to pleadings:

> '[is] typically expressed in the widest language … to afford a large discretion to the judge … The basic principle … is that the power must be exercised … to do justice according to law.'

His Honour pointed out (at 169) that factors which tend in favour of allowing an amendment include:

> (a) That the amendment is the only way in which the two issues and the real, factual, merits can be litigated.
>
> (b) That the proposed amendment is important to the rights of a party particularly where it provides a complete answer to a claim.

This last point was also emphasised in *Clough and Rogers v Frog* (1974) 48 ALJR 481, in which the court said amendments to a Defence should have been allowed two days before a trial was due to start.

[20] The plaintiff's submissions should be assessed according to these principles.

[21] The first point taken, that the withdrawal of the admission would be pointless because there is no prospect that a court would find the first defendant did not drive without reasonable care, has a degree of substance. The law sets a high standard for motorists who drive past primary schools when children are assembling or dispersing.

[22] I have set out the accounts given by the witness Scott, which tend to show that the first defendant drove with the requisite degree of care. I have not set out the statements of other witnesses which suggest that the child should have been visible for some time before she commenced to cross the road and that she did so at a walk rather than precipitately. If the trial judge accepted that evidence, there may be a finding of negligent driving. The real point is, of course, that no finding of that fact can be made on this application. There is a real issue of fact to be determined in relation to the manner in which the first defendant drove. Despite the law's solicitude for children it is not beyond reasonable possibility that the proper finding will be one of no negligence in the driving. If that finding were made the action would be concluded in favour of the defendants. The point is one, therefore, of importance to the defendants and it is one which is fairly arguable. This consideration tends strongly in favour of allowing the amendment.

[23] The second point taken is that the defendants have delayed excessively in bringing this application and in making the enquiries which have led them to conclude it should be made. There is also substance in this complaint but I think the applicants are right in their submission that delay itself is not important. What matters is prejudice to an opposing party caused by delay in withdrawing an admission. It is for this reason that such application should be made promptly: the passage of time is likely to give rise to prejudice. Where delay is, by itself, likely to cause prejudice is where the withdrawal of an admission will delay the opposing party in the future. That is to say an amendment which will cause the adjournment of a trial, or the loss of trial dates which have been allocated, constitutes definite prejudice because of the consequent delay in obtaining a hearing. This prejudice will, depending on other circumstances, be a strong factor against the withdrawal.

[24] There is no such prejudice in this case. The action is not yet ready for trial and has not been allocated trial dates. The parties desire mediation before proceeding

further. If the Defence is amended there should be no material delay to the progress of the action. This is an important factor.

[25] Nor is there any discernible prejudice in the plaintiff being required to prove the negligent driving. No doubt the action would be easier for her if the admission remained extant, but that is not the test. Actions should be determined on their merits, not on some artificial construct of an admitted fact, which may be erroneous. The delay in making the application to amend has not led to a loss of evidence. The affidavit of the plaintiff's solicitor in opposition to the application does not depose to any difficulty the plaintiff might have in presenting a case of negligent driving. Mr Koutsoukis says only that:

> 'No investigative steps have been taken on behalf of the Plaintiff in respect of liability as a result of the second Defendant's admission of liability first conveyed in their correspondence of 19 December 2000 and then pleaded in the … defence …'

That is no doubt true, but it does not say that no investigations were made between the date of the accident, 19 March 1999, and 19 December 2000, when the admission was first made. Nor does it say that investigations now conducted from the witnesses who have been identified will be inadequate for the plaintiff's case.

[26] The plaintiff's counsel pressed me with the decision of the Court of Appeal in *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 Qd R 455, but that case seems only to establish that the exercise of discretion by a judge to allow or refuse the withdrawal of an admission will rarely be disturbed on appeal because the discretion is broad and unfettered. The case is also authority for the proposition that ordinarily leave to withdraw an admission will be refused unless there is an explanation to show why the admission was made in the first place and why it should be withdrawn. Such an explanation has been provided by the applicants. The clerk and the solicitor thought a finding of careless driving was inevitable. The opinion of Senior Counsel is that it is not. There is evidence to support the second opinion.

[27] The judgments in *Ridolfi* may contain a hint that the underlying purpose of the *Uniform Civil Procedure Rules*, to facilitate the just and expeditious resolution of disputes economically, may militate against the grant of leave to withdraw admissions, which is not 'to be had for the asking' (per de Jersey CJ at 458 and per Williams JA at 461). These remarks are not easy to reconcile with the definite statement of principle expressed by the High Court in *J L Holdings*, which clearly subordinates the interests of efficiency and procedure to the interests of the judicial determination of disputes according to their merits.

[28] For the reasons I have expressed the discretion should be exercised in favour of allowing the amendment to withdraw the admission. There is a real question to be tried, the resolution of which may determine the action in the defendants' favour. There is no relevant prejudice to the respondent despite the application coming late. Leave should, however, be given on a condition. The defendants have supplied the plaintiff's solicitors with copies of statements given to the police and their assessor from the witnesses identified by the police, but they have not supplied a copy of any statement given by the first defendant to a police officer. Such a document may be privileged in their hands, but could be obtained by the plaintiff from the police

service. To avoid delay and expense, it is fair that the defendant should supply any copy of such a statement.

[29] Accordingly, I order that the defendants disclose to the plaintiff's solicitors any copies of statements made by the first defendant to a police officer, or copies of notes made by a police officer of an interview with the first defendant, in their possession within seven days. Upon that disclosure occurring, or the solicitors for the defendants filing an affidavit deposing to the fact that there is no such statement or record in their possession, I give leave to the defendants to amend the Defence in accordance with JJP2 to the affidavit of John Power filed 12 August 2004. I order the defendants to pay the plaintiff's costs of and incidental to the application and any costs wasted by reason of the amendment, to be assessed on the standard basis.