SUPREME COURT OF QUEENSLAND

CITATION:	*Murison & Anor v Nominal Defendant* [2012] QSC 221
PARTIES:	**SANDRA ELIZABETH MURISON** (first plaintiff) **GEORGINA HAMILTON** (second plaintiff) **v** **NOMINAL DEFENDANT** (defendant)
FILE NO:	BS3631/11
DIVISION:	Trial
PROCEEDING:	Trial of separate issue
DELIVERED ON:	17 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	9 July 2012
JUDGE:	Margaret Wilson J
ORDERS:	
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – UNINSURED VEHICLE – LIABILITY OF NOMINAL DEFENDANT – RECOVERY BY NOMINAL DEFENDANT FROM OWNER OR DRIVER – where deceased was owner of an uninsured vehicle – where plaintiffs claim damages for loss of dependency and loss of services arising out of his death – where issue ordered to be tried separately before trial of other issues – where plaintiff's claim depends on whether the deceased could have "maintained an action and recovered damages" within meaning of s 17 *Supreme Court Act* 1995 (Qld) – whether deceased could have maintained an action and recovered damages within the meaning of s 17 *Supreme Court Act* if nominal defendant were entitled to an equitable set-off of its claim under s 60 *Motor Accident Insurance Act* – whether Nominal Defendant would have been entitled to such equitable set-off *Imperial Acts Application Act* 1984 (Qld) *Motor Accident Insurance Act* 1994 (Qld), s 33(1), s 52(4), s 60,

Supreme Court Act 1995 (Qld), s 17, s 18,
Uniform Civil Procedure Rules 1999 (Qld), r 173

Forsyth & Another v Gibbs [2008] QCA 103, cited.
Hill v Ziymack (1908) 7 CLR 352, cited.
Nominal Defendant (Qld) v Taylor (1982) 154 CLR 106, cited.
Rawson v Samuel (1841) Cr & Ph 161; 41 ER 451, cited.

COUNSEL: S J Given for the plaintiffs
M T O'Sullivan for the defendant

SOLICITORS: Geldard Sherrington for the plaintiffs
Gadens for the defendant

[1] **MARGARET WILSON J**: In this proceeding the plaintiffs claim damages for loss of dependency and loss of services arising out of the death of Dale John Carey in a motor vehicle accident on 6 November 2009.

[2] At the time of the accident the deceased was a passenger in a motor vehicle driven by Michael George Cutajar. The defendant has admitted that Mr Cutajar was negligent.

[3] The deceased was the owner of that vehicle, which was an uninsured vehicle within the meaning of the *Motor Accident Insurance Act* 1994 (Qld).

[4] The defendant has pleaded (inter alia):

> "6. Further, the Defendant states:-
>
> (a) Pursuant to s.17 of the *Supreme Court Act 1995*, the Deceased, had he not died, would not have been entitled to maintain and recover damages in a civil action;
>
> (b) In consequence, no action for wrongful death can be brought by the Plaintiffs pursuant to s. 18 of the aforesaid Act;
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> (c) If the Deceased had lived and brought a personal injuries claim on his own behalf, then the Defendant had rights of recourse against him, as owner of the uninsured vehicle, and any claim against Cutajar would have been pointless as the damages that might be awarded were recoverable by the Defendant from the Deceased, had he lived, pursuant to s.60 of the *Motor Accident Insurance Act 1994*;
>
> (d) S.52(1) of the *Motor Accident Insurance Act 1994* provides that any action must be brought against an insured person and the insurer as joint Defendants;
>
> (e) If judgment was given in favour of the Deceased in his claim for personal injury, had he lived, then judgment must be given against the insurer, the Defendant, not the insured

person, pursuant to s.52(4) of the *Motor Accident Insurance Act 1994*;

(f) The Deceased had to have an entitlement to maintain and recover damages from the Defendant before the Plaintiffs can claim and recover;

(g) Pursuant to rule 173 of the *Uniform Civil Procedure Rules 1999* a Defendant may rely on a set off as a defence to all or part of the claim made by the nominal Plaintiff (Deceased) whether or not it is also included as a counter claim;

(h) The Defendant is entitled to recover *'as a debt'* any money, to which the Deceased would have entitled [sic], pursuant to s.60 of the *Motor Accident Insurance Act 1994*;

(i) In consequence, the Defendant would be entitled to set off, as a Defence in any claim by the Deceased, his debt pursuant to s.60 aforesaid;

(j) In consequence, had the Deceased lived, there was no prospect, or entitlement, of him recovering damages in respect to any injuries occasioned to him in the accident;

(k) In the premises, this precludes any prospect that the Plaintiffs can claim pursuant to s.18 of the *Supreme Court Act 1995*;

(l) This is because the Plaintiffs cannot establish that the Deceased, had he lived, was entitled to maintain and recover damages in respect to any injuries suffered by him in the pleaded accident; and

(m) Further, and alternatively, the Defendant states that the Notice of Accident Claim Form (Fatal Injury), dated 8 October 2008, nominated the Second Plaintiff as a Dependant but made no mention of the said James Hamilton, and in the circumstances, no valid claim for damages can be made by or on behalf of the said James Hamilton.[1]"

[5] The question raised by paragraph 6 of the defence was ordered to be tried separately and before other issues in the proceeding are tried.[2] Strictly sub-paragraph (m) of paragraph six raised a different issue from the other sub-paragraphs. The order was nevertheless taken to refer to the issue raised by sub-paragraphs (a) - (l).

The defendant's contention

[6] Sections 17 and 18 of the *Supreme Court Act* 1995 (Qld) provide:

"**17 Liability for death caused wrongfully**

Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover

1 Defence filed 16 June 2011.
2 Order P McMurdo J 18 May 2012.

damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to crime. (Emphasis added)

18 Actions how brought

(1) Every such action shall be for the benefit of the spouse, parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the executor or administrator of the person deceased and in every such action the court may give such damages as the court may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before mentioned parties in such shares as the court shall find and direct.

(2) For subsection (1), the spouse of a deceased person includes a de facto partner of the deceased only if the deceased and the de facto partner lived together as a couple on a genuine domestic basis within the meaning of the *Acts Interpretation Act 1954*, section 32DA—

(a) generally—

(i) for a continuous period of at least 2 years ending on the deceased's death; or

(ii) for a shorter period ending on the deceased's death, if the circumstances of the de facto relationship of the deceased and the de facto partner evidenced a clear intention that the relationship be a long term, committed relationship; or

(b) if the deceased left a dependant who is a child of the relationship—immediately before the deceased's death.

(3) Subsection (2) applies despite the *Acts Interpretation Act 1954*, section 32DA(6).

(4) In this section—

child of the relationship means a child of the deceased person and the de facto partner, and includes a child born after the death.

dependant, of a deceased person, includes a child born after the death happens who would have been wholly or partially dependant on the deceased person's earnings after the child's birth if the person had not died."

[7] In essence the defendant contends that the deceased could not have "maintain[ed] an action and recover[ed] damages" because:

(a) an amount equivalent to the damages would have been recoverable by it as a debt from the deceased pursuant to s 60 of the *Motor Accident Insurance Act*; and,

(b) it would have been entitled to set-off that amount against the damages.

Discussion

[8] Sections 17 and 18 of the *Supreme Court Act* confer a right of action on dependants in respect of negligence which resulted in the death of their provider. As Mason and Brennan JJ said in *Nominal Defendant (Qld) v Taylor*:[3]

> "The existence of liability in an action for damages on the part of the wrongdoer to the deceased bread-winner is an essential condition of the plaintiffs' cause of action …"

[9] The *Motor Accident Insurance Act* 1994 (Qld) provides for a compulsory third-party insurance scheme covering liability for personal injury (including fatal injury) arising out of motor vehicle accidents. A policy of insurance, in terms of a schedule to the Act, comes into force when a vehicle is registered or its registration is renewed. The insurance provides cover against liability for personal injury caused by, through or in connection with the insured motor vehicle anywhere in Australia. The policy provides:

> "**Insured person**
>
> The person insured by this policy is the owner, driver, passenger or other person whose wrongful act or omission in respect of the insured motor vehicle causes the injury to someone else and any person who is vicariously liable for the wrongful act or omission."

[10] By s 52(4), a judgment given in favour of the claimant in an action for damages for personal injury arising out of a motor vehicle accident must be given against the insurer and not against the insured person.

[11] An unregistered vehicle is an uninsured vehicle. For the purposes of the statutory scheme, the Nominal Defendant (the defendant in this proceeding) is the insurer.[4] Section 33 (1) provides:

> **"33 Nominal Defendant as the insurer**
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> (1) The Nominal Defendant's liability for personal injury caused by, through or in connection with a motor vehicle is the same as if the Nominal Defendant had been, when the motor vehicle accident happened, the insurer under a CTP insurance policy under this Act for the motor vehicle."

[12] Section 60 provides:

> "**60 Nominal Defendant's rights of recourse for uninsured vehicles**

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3 (1982) 154 CLR 106 at 110.

4 *Motor Accident Insurance Act* s 31(1)(c). Reprint 5B was in force at the time of the accident.

> (1) If personal injury arises out of a motor vehicle accident involving an uninsured vehicle, the Nominal Defendant may recover, as a debt, from the owner or driver of the vehicle (or both) any costs reasonably incurred by the Nominal Defendant on a claim for the personal injury.
>
> (2) It is a defence to an action by the Nominal Defendant under this section—
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> (a) as far as recovery is sought against the owner—for the owner to prove—
> (i) that the motor vehicle was driven without the owner's authority; or
> (ii) that the owner believed on reasonable grounds that the motor vehicle was insured; and
>
> (b) as far as recovery is sought against the driver—for the driver to prove that the driver believed on reasonable grounds that the driver had the owner's consent to drive the motor vehicle and that the motor vehicle was insured.
>
> (3) The Nominal Defendant may bring a proceeding for recovery of costs under this section before the costs have been actually paid in full and, in that case, a judgment for recovery of costs may provide that, as far as the costs have not been actually paid, the right to recover the costs is contingent on payment.
>
> (4) This section does not affect rights of recovery that the Nominal Defendant may have, apart from this section, against the insured person."

[13] It was common ground that "costs" in s 60 would include damages, costs the Nominal Defendant was ordered to pay the claimant, and the Nominal Defendant's own costs of the litigation.

[14] Any damages the deceased might have recovered from the Nominal Defendant would in turn have been recoverable by it from the deceased as owner of the vehicle.[5]

[15] Counsel for the defendant submitted that had the deceased survived and brought a claim against it, it would have been entitled by way of defence to set off the amount it would have been entitled to recover as a debt pursuant to s 60.

[16] The Statutes of Set-Off, which were Imperial Statutes passed in the eighteenth century, allowed the set-off at law of mutual debts. In Queensland they were incorporated into the law of the colony[6] and continued after Statehood,[7] but were repealed by the *Imperial Acts Application Act* 1984 (Qld).[8] There is controversy about whether r 173 of the *Uniform Civil Procedure Rules* 1999 (Qld) accords a

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5 In *Taylor v The Nominal Defendant (Qld)* [1981] Qd R 125 Kelly J (with whom Lucas SPJ and Sheahan J agreed) made a similar observation about s 4G of the *Motor Vehicles Insurance Act* 1936.

6 *Herbst v Mayes Ex Parte Mayes* [1903] QWN 29.

7 *Phillips v Mineral Resources Development Pty Ltd* [1983] 2 Qd R 138 at 147, 148.

8 *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 at [36].

substantive right to a set-off at law, but it is not necessary to enter into debate on that, since the defendant relied on equitable set-off.

[17] In *Forsyth & Another v Gibbs*[9] Keane JA (with whom McMurdo P and Fraser JA agreed) considered the availability of set-off in equity. His Honour said:

> "[9] Consistently with the technique of equity, which does not seek to define what an elephant is but knows one when it sees one, the principles governing the availability of equitable set-off of cross-claims are couched in open textured terms, such as 'sufficient connection' and 'unfairness'. In some cases, it will be necessary to engage in an evaluation of a range of facts which might establish 'sufficient connection' or 'unfairness' of the relevant kind. But the principles to be applied are not so vague or subjective that it is never possible to determine, for the purposes of an application for summary judgment, that the facts alleged by a defendant simply fall short of what is required.
>
> [10] It is important to emphasise that the availability of an equitable set-off between cross-claims does not depend upon an unfettered discretionary assessment of whether it would be 'unfair' in a general sense for a plaintiff to insist on payment of the debt owed to it while the cross-claim remains unpaid. It is essential that there be such a connection between the claim and cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim.[10]"

[18] His Honour considered a number of cases: in some of them the necessary connection was established, and in others it was not. In *Forsyth & Another v Gibbs* the appellants as trustees of a superannuation fund sued to recover as a debt moneys lent to the respondent. The respondent resisted the appellants' application for summary judgment on the basis he was entitled in equity to set-off amounts said to be recoverable by him from a company of which the male appellant was a director and from the male appellant personally. His Honour considered that, even if the claims the respondent sought to set-off were ultimately established, the liabilities could not be said to impeach the appellants' claim because the transactions which gave rise to them were entirely distinct from the loans in respect of which the appellants sued.

[19] In the present case counsel for the plaintiff submitted that equitable set-off would not have been available because the defendant's right of recovery against the deceased would have been founded upon a statutory cause of action entirely independent of the deceased's claim. I do not accept that submission. Adopting Keane JA's summation of what is required for equitable set-off, there would have been such a connection between a claim by the deceased for damages and a cross-claim by the defendant for recovery of its "costs" under s 60 that the cross-claim would have impeached the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim.

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9 [2008] QCA 103.

10 Cf *United Dominions Corporation Limited v Jaybe Homes Pty Ltd* [1978] Qd R 111 at 116 – 117; *Hill Corcoran Constructions Pty Ltd v Navarro & Anor* [1992] QCA 17.

[20] The next submission made by counsel for the plaintiff was:

> "It cannot even be said that the Nominal Defendant reaches the point of a cross demand because its claim under s 60 would remain unascertained, and could not be ascertained, until after [the deceased's] claim was litigated, contributory negligence, if any, was determined, judgment for the claim was entered and paid, the [deceased's] costs assessed and paid, and, in particular, the Nominal Defendant's own costs are determined."[11]

[21] He referred to *Hill v Ziymack.*[12] In that case the plaintiff had recovered damages for conversion. There was an unsettled account between the parties to the litigation relating to dealings and transactions affecting the property in respect of which the action was brought. The defendant sought to restrain the plaintiff from issuing execution on the verdict, claiming to be entitled to an equitable set-off of the balance of the account. The High Court held that the defendant had no entitlement to an equitable set-off. Griffith CJ approved and applied the reasoning of Lord Cottenham LC in *Rawson v Samuel*:[13]

> "It was said that the subjects of the suit in this Court, and of the action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject matters are, therefore, totally distinct; and the fact that the agreement was the origin of both does not form any bond of union for the purpose of supporting an injunction.
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> The question then comes to this: Is the defendant, in a suit in this Court for an account, the balance of which I will suppose to be uncertain, to be restrained from taking out execution in an action for damages against the other party to the account, until after the account shall have been taken, and it shall thereby have been ascertained that he does not owe to the defendant at law, upon the balance of the account, a sum equal to the amount of the damages? If so, it cannot be upon the ground of set off, because there is not at present any balance against which the damages can be set off; nor can it be because the damages are involved in the account, for certainly they can form no part of it.
>
> We speak familiarly of equitable set off, as distinguished from the set off at law; but it will be found that this equitable set off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient: *Whyte v. O'Brien*; [14] although it is difficult to find any other ground for the order in *Williams v. Davies*,[15] as reported. In the present case, there are not even cross demands, as it cannot be assumed that the balance of the account will be found to be in favour of the defendants at law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted, upon the balance of an unsettled account, to the party against whom the damages have been recovered? Suppose the balance should be found to be due to the plaintiff at law, what compensation can be made to

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11 Supplementary Submissions of the Applicant Plaintiffs para 7.3.
12 (1908) 7 CLR 352.
13 (1841) Cr & Ph 161 at 178; 41 ER 451 at 458.
14 1 S & S 551.
15 2 Sim 461.

> him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion. What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them? If they have no such equity, there can be no good ground for the injunction."

[22] In the present case that component of the Nominal Defendant's "costs" under s 60 which related to damages payable to the deceased would have been immediately ascertained upon the quantification of the deceased's claim. As counsel for the defendant submitted, one would have set off the other, with the result that the deceased recovered nothing. Any legal costs to which the Nominal Defendant would have been entitled under s 60 would have been recoverable by cross-claim.[16]

[23] Finally, counsel for the plaintiff referred the Court to a statement by Murphy J in his dissenting judgment *Nominal Defendant (Qld) v Taylor*[17] to the effect that a beneficial approach protective of dependants' remedies for the death of their provider should be adopted in construing statutes relating to motor vehicle insurance. He submitted that equity dictated against the defendant's plea.

[24] The present case does not turn upon the interpretation of the *Motor Accidents Insurance Act*, but upon the interpretation of s 17 of the *Supreme Court Act* and the application of an equitable principle. Ultimately, the questions for determination are:

(i) whether the deceased could have maintained an action and recovered damages within the meaning of s 17 of the *Supreme Court Act* if the Nominal Defendant were entitled to an equitable set-off of its claim under s 60 of the *Motor Accident Insurance Act*; and

(ii) whether the Nominal Defendant would have been entitled to such an equitable set-off.

[25] In my view those questions should be answered:

(i) no;

(ii) yes.

[26] I will hear counsel on the form of the orders the Court should make, and on costs.

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16 Transcript 9 July 2012 pages 1-14 – 1-15.

17 (1982) 154 CLR 106 at 116