SUPREME COURT OF QUEENSLAND

CITATION:	*Cameron v RACQ Insurance Limited* [2013] QSC 124
PARTIES:	**GARY CAMERON by his Litigation Guardian FAYE RAWLINSON** (applicant) **v** **RACQ INSURANCE LIMITED (ABN 50 009 704 152)** (respondent)
FILE NO:	3476 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2013
JUDGE:	Applegarth J
ORDER:	**Order as per draft**
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – GENERALLY – QUEENSLAND – where the applicant was injured in a motor vehicle accident – where the applicant requests information pursuant to s 47 of the *Motor Accident Insurance Act* 1994 (Qld) – where the respondent declined the request – whether an order should be made requiring the respondent to provide requested information *Motor Accident Insurance Act* 1994 (Qld), s 35, s 47 *Faraji v Dambarage* [2012] QDC 137, cited *Gitsham v Suncorp Metway Insurance Ltd* [2002] QCA 310; [2003] 2 Qd R 251, cited *Suncorp Metway Insurance Ltd v Brown* [2004] QCA 325; [2005] 1 Qd R 204, cited *Suncorp Metway Insurance Ltd v Hill* [2004] QCA 202; [2004] 2 Qd R 681, cited
COUNSEL:	G C Cross for the applicant K N Wilson SC for the respondent
SOLICITORS:	Colin Patino & Co for the applicant Cooper Grace Ward for the respondent

[1] The applicant suffered a traumatic brain injury on 26 May 2008, as a result of a collision with a truck whilst cycling to work. The accident occurred some time between 5.30 am and 6.02 am. The applicant did not have lights on his bicycle. The driver of the truck that struck the applicant apparently did not see him.

[2] The state of light at the time of the collision is a critical issue. The precise time at which the collision occurred (and therefore the state of any daylight and/or moonlight at that time) is important. The time at which the driver of the truck made two mobile telephone calls to his employer very shortly after the incident will enable the time of the incident to be established with more precision.

[3] The applicant has requested information from the insurer of the vehicle about the telephone calls, including production of the telephone records or a signed authority of the owner of the mobile phone that made each call so that telephone records can be supplied by the company which provided the service. The request for this information sought the cooperation of the respondent pursuant to s 47 of the *Motor Accident Insurance Act* 1994 (Qld) ("the Act"). The respondent insurer declined the request, and the applicant seeks orders to enforce the respondent's statutory duty to cooperate with the claimant under s 47 of the Act.

[4] The respondent opposes an order requiring it to provide the requested information and submits that the request:

(a) does not seek documents in the insurer's possession;

(b) does not seek information about the circumstances of the accident;

(c) does not seek information about the reasons for the accident;

(d) is outside the ambit of s 47 of the Act; and

(e) is not a reasonable request for documents or information.

Relevant provision

[5] Section 47 of the Act provides:

"**47 Duty of insurer to cooperate with claimant**

(1) The insurer must cooperate with a claimant and, in particular –

(a) must provide the claimant with copies of reports and other documentary material in the insurer's possession about the circumstances of the accident or the claimant's medical condition or prospects of rehabilitation; and

(b) must, at the claimant's request, give the claimant information that is in the insurer's possession, or can be found out from the insured person, about the circumstances of, or the reasons for, the accident.

> (2) The insurer must –
>
> (a) provide the claimant with copies of reports and other documentary materials within 1 month after receiving the notice of claim under division 3 or, if the reports or materials come into the insurer's possession later, within 1 month after they come into the insurer's possession; and
>
> (b) respond to a request under subsection (1)(b) within 1 months after receiving it.
>
> (3) If the claimant requires information provided by an insurer under this section to be verified by statutory declaration, the information must be verified by statutory declaration.
>
> (4) If an insurer fails, without proper reason, to comply fully with a request under this section, the insurer is liable for costs to the claimant resulting from the failure."

[6] This provision appears in legislation which has as one of its principal objects the speedy resolution of personal injury claims resulting from motor vehicle accidents, and to avoid their determination by courts wherever possible.[1] The legislature has imposed a broad general duty upon a claimant to cooperate with an insurer[2] and a broad general duty upon an insurer to cooperate with a claimant. The general duty of the insurer to cooperate is not confined to the particular matters stated in s 47(1)(a) and (b). However, the provision of the documentary material referred to in subsection 47(1)(a) and the information referred to in subsection 47(1)(b) are important, practical examples of the duty to cooperate with a claimant.

[7] In a case in which documentary material in the insurer's possession does not reveal certain information about the circumstances of the accident, or the reasons for it, the insurer's duty to cooperate under s 47, and the specific obligation under s 47(1)(b) to give, at the claimant's request, information that is in the insurer's possession or "can be found out from the insured person" about the circumstances of, or the reasons for, the accident, assume importance. Information of that kind which is not in the insurer's possession may be able to be found out from the insured person because the insured person knows of it, has documents in its possession that reveal it or can obtain that information relatively easily. For example, records held by an entity which was engaged by the insured person at the time an accident occurred may record details of the accident and it might be reasonable to expect that information to be found out from the insured person by asking the insured person to request the information from its agent. On the other hand, it may not be reasonable to expect the insured person to make inquiries of complete strangers. It is unnecessary and inappropriate to attempt to define the circumstances in which the insurer's duty to cooperate will extend to seeking information from the insured person which may require the insured person, in turn, to locate records that are no longer in its possession or seek copies of those records from another party with

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1 *Suncorp Metway Insurance Ltd v Hill* [2004] 2 Qd R 681 at 688 [23].

2 *Suncorp Metway Insurance Ltd v Brown* [2005] 1 Qd R 204 at 207 [14].

which the insured person was in a contractual relationship. The issue is whether there is a duty under s 47 in the particular circumstances of this case.

Background

[8] The extensive injuries that the applicant received on 26 May 2008 means that he will never be able to give evidence about what occurred that day. The evidence that is presently available to him puts the time of the accident between 5.30 am and 6.02 am. A police report indicated that the accident occurred between 5.45 am and 5.56 am. The applicant's notice of claim, unsurprisingly in the circumstances, nominated 5.45 am as the time. The driver told police that he left Logan Village for work at about 5.30 am. The police suggested to him that the accident occurred at about 5.50 am which he accepted, but then in answer to a question about the time he said, "It would have been around something like half past five."

[9] The driver was interviewed by the insurer's investigator on 22 March 2009. In that statement he recounted hearing a loud bang when he was about three kilometres north of Logan Village, having no idea what he had collided with and then doing a U-turn. He did not see anything on the road, and telephoned his employer to tell him that he had hit something. He then terminated the call and walked a short distance along the road where he came across a pushbike on the shoulder of the road and then in the darkness made out the figure of the applicant. He placed his jumper over the injured applicant and comforted the applicant, rang his employer and asked his employer to contact the police and the ambulance.

[10] The driver's employer gave a statement on 23 May 2009 in which he recalled receiving a telephone call from the driver "shortly before 6 am". His recollection is that "about ten minutes later" he received another phone call from the driver advising him that a man on a pushbike had been hit and that he should call the ambulance.

[11] Unfortunately, it appears that the respondent's investigator did not obtain telephone records from the driver or his employer (each of whom is an "insured person" under the Act) so as to identify the time at which the driver made each call to his employer.

[12] It appears that an ambulance was called at around 6.02 am, and it is to be assumed that the driver's second telephone call to his employer happened just before that.

[13] The employer's recollection that there was possibly ten minutes between the driver's calls to him may be unreliable and is a poor substitute for telephone records which would identify the time of each call. The driver's witness statement does not support the proposition that there was a gap of ten minutes between each call that he made to his employer.

[14] A statutory declaration made on 12 June 2012 by a claims management officer of the respondent based upon his inquiries states that the accident happened "at approximately 5.30 am to 5.45 am," but the basis for this conclusion is not clear. It apparently was made without reference to telephone records and is inconsistent with the police report which suggests that the incident occurred between 5.45 am and 5.56 am.

[15] The respondent's engineering expert proceeded on the basis that the accident occurred between 5.30 and 5.45 am. He reports:

> "Astronomical tables indicate that on the day of the Accident sunrise in Brisbane was at 6:27am (first light 6:02am). The position of the moon (Phase 73%) at 5:45am was indicated to be WNW at about 70 degrees altitude. This indicates that there would have been no sunlight but possibly some moonlight (depending on cloud cover) at the time of the Accident."

It is not clear whether "first light" has a particular meaning such as the beginning of morning nautical twilight. In any event, if the incident occurred shortly before 6 am then any twilight and any moonlight may have provided some slight natural illumination. If "first light" literally means the first time there is any discernible light from the sun and if first light at the location of the accident coincided with first light in Brisbane, then any natural illumination would have been from moonlight (depending on cloud cover).

[16] In summary, whether the incident occurred close to 5.30 am or close to 6.02 am has yet to be resolved and the precise time of the incident is relevant to the amount of natural light (if any) then available to the driver to see the applicant on his bicycle. The time of the telephone calls made by the driver will assist in determining the time of the accident with greater precision.

[17] The plaintiff's solicitors have had preliminary discussions with an experienced engineer, who will be instructed to prepare an expert report which will deal with, among other things, how light it was at the time of the incident. The preparation of that report will be assisted by the provision of information or instructions about the time of the incident, based upon the time of the telephone calls.

[18] If the relevant telephone calls were made at a time when it was "pitch black," then the driver's detection of the applicant's presence on a bicycle prior to the accident would depend entirely upon the illumination provided by the lights of the truck.

Requests made pursuant to s 47 and the insurer's response

[19] On 6 December 2012 the applicant's solicitor requested pursuant to s 47 the mobile telephone records of the driver to cover the period from 5 am to 6.15 am on 26 May 2008. On 12 December 2012 the respondent's solicitors advised that the request was outside the scope of s 47, and that to disclose the mobile telephone records of the insured for the relevant period may result in the disclosure of certain information irrelevant to the circumstances of, or reasons for, the accident and would be an intrusion into the privacy of the driver. Notably, the respondent's insurer did not suggest that the mobile telephone records no longer existed or could not be obtained. The legitimate concern about the width of the request and the privacy of the driver might have been addressed by redacting records so that they were confined to a more limited period of time, such as the period from 5.30 am to 6.05 am and that any details which were truly private within that period be redacted.

[20] The respondent's solicitors indicated they were prepared to obtain instructions from the driver about his use of his mobile phone during the period and details about the approximate timing of the calls or messages.

[21] In later correspondence the applicant's solicitor indicated that the purpose of the request was not only to ascertain whether the driver was using his mobile phone whilst driving on the day of the accident but also to try to calculate with a greater degree of accuracy the precise time of the incident and the visibility at that time. On 27 December 2012 a claims officer for the respondent gave a statutory declaration in response to the s 47 request, and based upon the inquiries made by him he stated:

> "4. Enquiries I have caused to be made with the driver of the insured vehicle reveal that he states he was not talking on a mobile phone at the time of the accident.
>
> 5. The driver of the insured vehicle says that the mobile phone that he used after the accident was that belonging to his employer.
>
> 6. Enquiries that I have caused to be made with the employer, Enlex Pty Ltd trading as Impact Drilling reveal that the business was sold in December 2008 and:
>
> The employer is 90% sure that the phone was the driver's phone and not a work phone but is not 100% certain.
>
> The employer has disposed of the company's phone records which have been destroyed.
>
> As such, I am unable to produce or caused to be produced such phone records as requested."

[22] A further request was made dated 25 January 2013 pursuant to s 47. It posed questions about the use of the mobile phone, sought clarification about which mobile phone was used, and sought relevant telephone records or a signed authority for those records to be obtained. The respondent's solicitors advised on 28 February 2013:

> "The request is fishing, oppressive and at highest goes only to credit. If a CTP insurer was obliged to seek out and garner such information in this case, on the above material, then, by parity of reasoning, it would be obliged to afford the material in almost every case where lookout was an issue.
>
> In the premises, you ought bring any application that you see fit on behalf of the claimant. Should it be brought, and fail, we will seek an order for costs, including an order that the costs be paid forthwith, not in any event and on an indemnity basis. We say that in light of the response we have given above."

[23] The correspondence enclosed a statutory declaration of the driver which stated, among other things:

> "I advise that at the time of the accident:
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> (a) I did have a mobile phone with me in the insured motor vehicle.
>
> (b) I was not engaged in the use or attempted use of that mobile phone at the time of the accident."

This response did not reveal the mobile phone number, the time or times which it was used to phone the employer shortly after the incident or claim that records of those telephone calls could not be obtained by either the driver (if the phone used was his) or by the employer from the company with which it contracted for the telephone service (if the phone was the employer's phone).

[24] The applicant's solicitors foreshadowed the present application and advised, among other things, that the telephone records would assist in identifying more precisely the time of the incident, and that the applicant's solicitors intended to instruct an expert to prepare a report which would deal with, among other things, how light it was at the time of the incident.

[25] At no time during the course of correspondence leading up to the filing of the application or in the affidavits filed in response to it, has the respondent asserted that either insured person would not be prepared to answer the questions posed in the request dated 25 January 2013 or were not prepared to provide the requested authority to obtain telephone records from the relevant service-provider.[3]

The respondent's contentions as to why an order should not be made

[26] The respondent submits that the applicant has been provided "with more than sufficient documents and information to know what the case against him is." Insofar as the request is sought to determine the precise time of the accident (and the state of light at that time) the respondent submits that the applicant has the police report and has been provided with the ambulance records. However, these records do not determine the precise time of the incident and the information which the respondent has supplied to date provides conflicting accounts of when it occurred. The requested telephone records, if available, would assist in determining the precise time of the incident. Remarkably, the respondent has not said that the driver or the employer cannot obtain these records, from the relevant service-provider.

[27] The applicant cannot obtain these records under the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). The applicant must sign a certificate of readiness certifying that he is "in all respects ready for the (compulsory) conference and the trial". The proper conduct of a compulsory conference will be assisted by the information. An action for damages cannot be brought until there has been such a conference, and the compulsory conference is a significant event in the scheme established by Part 4 of the Act.[4] Parties must certify various matters and investigations are expected to be completed before such a compulsory conference. Unless an order for damages is affected by factors not reasonably foreseeable at the time of the exchange of mandatory final offers at the conference, the Court must not award costs to a party concerning investigations or gathering of evidence after the conclusion of the compulsory conference.

[28] The provision of the telephone records will enable the parties to prepare for the compulsory conference, including obtaining appropriate expert advice, with more and more reliable information about the precise time of the incident and therefore the state of any daylight and moonlight at that time.

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3 As to the provision of a written authority to obtain records see *Suncorp Metway Insurance Ltd v Brown* supra.

4 *Gitsham v Suncorp Metway Insurance Ltd* [2003] 2 Qd R 251 at 255 [16].

[29] The applicant would not have been required to request these telephone records if they had been accessed in a timely fashion by the respondent and the respondent's investigator shortly after the incident or if the respondent had provided a response to one of the earlier requests for the telephone records on the basis of a statutory declaration which stated the time the telephone calls were made, based upon a review of records obtained form the telephone service-provider.

[30] The respondent submits that the request of 25 January 2013 does not seek documents in the insurer's possession. This may be so. But this simply means that the request does not engage the specific duty referred to in s 47(1)(a). It is not a sufficient response to the general duty imposed by s 47 or the specific duty to provide information pursuant to s 47(1)(b).

[31] Next, the respondent submits that the request does not seek information about the circumstances of the accident. I do not accept this submission. The request seeks information about the time of the incident by seeking information about the time of a telephone call that was made a very short time after the incident. If that information is not presently known by the insurer, it is information of a kind that can be found out from the insured person and accordingly is subject to the general duty to cooperate under s 47 or the specific obligation imposed by s 47(1)(b).

[32] It is unnecessary to determine whether the request also seeks information about the reasons for the accident.

[33] I do not accept the respondent's submission that the request is outside the ambit of s 47 of the Act. The applicant has asked for information that can be found out from the insured (being the driver or the employer). If the driver or the employer has never had occasion to look at the relevant call records, then information about the timing of the calls can be found out from the insured person by having the insured person make a request of its service-provider to provide the details, assuming they are available from the service-provider.

[34] Finally, the respondent submits that the request is not a reasonable request for documents or information. I do not agree. The request is not oppressive. The telephone numbers are readily ascertainable. It is not said that the insured persons are not prepared to cooperate or could not be required to cooperate with the respondent in accordance with their obligations as insured persons under s 35 of the Act. It is not said that responding to the request will be an expensive exercise. The applicant presently does not have recourse to the disclosure provisions of the *UCPR* to obtain the records by means of non-party disclosure. Reasonable steps to obtain the records should not await the commencement of proceedings for damages. The costs incurred by objecting to production of the records must be significant. The records are relevant and their provision will facilitate preparation for and conduct of the compulsory conference.

[35] The request relates to the time of the telephone calls which is highly relevant to the time of the incident and the state of any natural light at that time. The request is a reasonable request for documents or information.

[36] The requested telephone records incidentally may serve to either corroborate or contradict the driver's evidence that he was not engaged in the use or attempted use of the mobile phone at the time of the incident. The applicant's submissions to me do not seek an order on that basis. However, provision of the telephone records will

have the incidental benefit of presumably corroborating the driver's evidence. If they do, then the compulsory conference will be better informed and if, contrary to the driver's statutory declaration, he was using the mobile phone at the time of the incident then the applicant's case on liability will be enhanced.

[37] The duty under s 47 does not extend to every piece of information which might corroborate other information. However, one incidental aspect of the provision of the telephone records will be to either confirm or contradict the driver's evidence about his use of the mobile phone at the time of the incident.

Conclusion

[38] The applicant has established grounds for the making of an order to enforce the respondent's duty under s 47. The applicant proposed a form of order which appears to be in a suitable form and reflects the form of order made in *Faraji v Dambarage*.[5] No submissions were made concerning the form of the order and I intend to make an order in that form, subject to amending the date in paragraph one from 13 May 2013 to 29 May 2013.

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5 [2012] QDC 137.