COURT OF APPEAL

de JERSEY CJ
McMURDO P
DEMACK J

Appeal No 4268 of 1999

KEITH WHITING	First Applicant (First Defendant)
and	
FAI GENERAL INSURANCE COMPANY LTD (ACN 000 327 855)	Second Applicant (Second Defendant0
and	
DESRE JOY RAYNER	Respondent (Plaintiff)

BRISBANE

..DATE 07/06/99

JUDGMENT

de JERSEY CJ: The case does raise a point of significance to the management of personal injuries litigation of the courts. That accounts for a large volume of the work of the District Court in particular. It raises an issue on which minds have apparently differed within the District Court: the interpretation of s 45(4) of the *Motor Accident Insurance Act* 1994 and, particularly, whether, in referring to "a medical examination", the Act should truly be read as confined to the singular. Good sense dictates that each side in litigation like this have a comprehensive, though not unduly extended, opportunity to gather expert medical evidence as to the injuries and disabilities of the plaintiff.

Here, through no fault of its own, the licensed insurer lacks a proper orthopaedic report. In s 45 there is, to my mind, no indication to the contrary of the provision of the *Acts Interpretation Act* 1954 that the singular should be read to include the plural. The learned District Court Judge found that the provision must be read in the singular, while conceding misgivings about the practical consequences of such a reading.

He went on to refer to delay if the action were alternatively stayed pending further examination. But the judge's plain disenchantment with the course he felt compelled to follow, taken with the likelihood that an examination could have been – and still could be – arranged expeditiously were an order for further examination facilitated under s 45, lead to my preparedness to proceed on the basis that the result in the District Court flowed not from discretionary considerations, but from the judge's view that s 45(4) must be read inflexibly as permitting but one examination.

I consider that the then Master's decision in *Turvey v Peterson* (1991) MVR 179, at 180, was right, and should be followed. In other words, the singular in s 45(4) should be read as including the plural, there being no sufficient indication to the contrary. In my opinion leave to appeal should be granted. The orders made in the District Court should be set aside. It should be ordered that the summons for the setting down of the action be dismissed and an order made for the examination of the plaintiff in terms to be agreed upon by the parties or, failing agreement, as order by the District Court.

McMURDO P: I agree. An application for leave to appeal from an interlocutory judgment will not usually be granted unless it appears that the decision from which it is sought to appeal is attended with sufficient doubt to warrant it being reconsidered and also that, supposing the decision

below to be wrong, substantial injustice would result if leave were refused. See *Klef Pty Ltd v Westpac Banking Corporation* (App 8204, 8205/98; Court of Appeal, 16 October 1998, unreported), approving the approach taken in *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-400.

The subject of this application is one of some importance, as s 45(4) of the *Motor Accident Insurance Act* 1994 is regularly relied upon by insurers to obtain more than one medical report. The decision of the primary judge, we are told, has already been relied upon in argument before courts to resist such examinations and in correspondence between plaintiffs and insurers. The applicant/defendants would be placed at a disadvantage such that an injustice could be done were leave not given in this case.

I also agree with the learned Chief Justice that the appeal should be allowed. The learned primary judge's decision was in conflict with *Turvey v Peterson* (1991) 15 MVR 179, where Senior Master Horton QC found that an equivalent section of the *Motor Vehicles Insurance Act* 1936 allowed for a further medical examination where the interests of justice required it. it also seems his Honour's decision was in conflict with a prior decision of his Honour, *Cody v Jones* unreported, judgment delivered 3 April 1998.

Section 32C(a) of the *Acts Interpretation Act* 1954 states that words in the singular include the plural. This is of course subject to the legislation demonstrating a contrary intention. No contrary intention is demonstrated in s 45 of the *Motor Accident Insurance Act* 1994.

Indeed, subs (5) of that section protects a claimant from examinations which are unreasonable or unnecessarily repetitious. A claimant will often have multiple injuries and will need to be examined by a number of specialists in different fields or even, as here, perhaps a number of specialists within a particular specialty of that specialty. On the facts of this case, it would seem to be against the spirit of the legislation and the interests of justice to allow the insurer only one examination by one specialist. I agree with the orders proposed by the Chief Justice.

DEMACK J: I agree with the orders proposed by the Chief Justice and with his reasons and also with the reasons of the President. Mr Cross, who appeared for the respondent here, conceded before the learned District Court Judge that there was an implied power to order further medical examinations. However, that is really not the point in issue.

The point in issue is whether the insurer can request more than one medical examination. In order words, whether the orderly preparation of a case may proceed without the expense of Chamber applications.

It seems to me, as the President has said, that there are many instances where medical specialties have developed to the point where more than one area of specialty may be involved. Consequently, more than one examination may be justified. The protection against an excess of examinations is provided by s 45(5) which says that:

> "However, the claimant is not obliged to undergo the examination if it is unreasonable or unnecessarily repetitious."

It seems to me that that is sufficient protection against unnecessary examination but that there can be more than one seems to me to be clear for the reasons delivered.

de JERSEY CJ: The orders are as indicated by me.

MR DOUGLAS: Your Honour, there are issues of costs. There are really four lots of costs. There was a set of costs which his Honour ordered against the applicant at first instance in respect of the two summons involved, also the costs of the application for leave to appeal and, in effect, the costs of the appeal and consequence. I ask for those costs.

de JERSEY CJ: What do you say, Mr Cross?

McMURDO P: Is it appeals cost fund a point of this?

MR CROSS: Yes. I'm just tossing that over in my mind. It's a -----

de JERSEY CJ: But you contributed to it. You put that position before the judge that the section should be read inflexibly, in the singular. That's right, isn't it?

MR CROSS: Yes. That was -----

de JERSEY CJ: I thought the only thing you had going for you was that you did alert him to an implied jurisdiction to make an order.

MR CROSS: Yes. That was done, both in written form and oral form at the hearing.

de JERSEY CJ: So you gave him an out which he didn't use.

MR CROSS: Yes. And the reason we were there in the first place is that an experienced firm found itself in bother perhaps unnecessarily.

de JERSEY CJ: You really did, in substance, bring about the problem, didn't you, by taking the point?

MR CROSS: With respect, Your Honour, if it was submitted that the power was there to make it if he so chose, regardless of his interpretation of s 45(4) of the *Motor Vehicles Insurance Act*, in essence he should have found that he had the power. Well he knew he had the power, it was conceded, but he still didn't take that opportunity.

McMURDO P: You'd say too, that you weren't given a panel of three as you should have been, so you were entitled to refuse the -----

MR CROSS: I was given a panel of three, however -----

McMURDO P: Were you given a panel of three the second time?

MR CROSS: Yes.

McMURDO P: You were.

MR CROSS: I concede we were given a panel of three, however that three weren't available in -----

de JERSEY CJ: Have you finished?

MR CROSS: Yes, Your Honour.

de JERSEY CJ: Thank you. Nothing else you want to say, of course.

MR DOUGLAS: No.

de JERSEY J: I consider that with relation to costs an order that all costs be the defendant's costs in the cause would appropriately reflect the defendant's success in this appeal and allow for the extent to which the plaintiff contributed to the development of the problem which led to the parties having to come here. So I would set aside the costs orders made in the District Court and order that the costs of and incidental to the hearing of the plaintiff's application for the setting down of the action, of the defendant's application with relation to medical examination, of the defendant's application for leave to appeal, and the hearing of the appeal, all be the defendant's costs in the cause.

McMURDO P: Yes, I agree.

DEMACK J: I agree.

de JERSEY CJ: Those then are the orders in relation to costs.