SUPREME COURT OF QUEENSLAND

CITATION:	*Till v The Nominal Defendant* *Mulcair v Puckering & Ors* [1999] QCA 490
PARTIES:	**PETER TILL** (Plaintiff/Respondent) v **THE NOMINAL DEFENDANT** (Defendant/Appellant)
FILE NO/S:	Appeal No 2676 of 1999 SC No 73 of 1997
ORIGINATING COURT:	Supreme Court at Mackay
PARTIES:	**DENISE DOROTHY MULCAIR** (Plaintiff/Appellant) v **DAVID JOHN PUCKERING** (First Defendant/Respondent) **RONALD FREDERICK OLIVER** (Second Defendant/Respondent) **VACC INSURANCE CO LIMITED** ACN 004 167 953 (Third Defendant/Respondent)
FILE NO/S:	Appeal No 2558 of 1999 DC No 34 of 1998
ORIGINATING COURT:	District Court at Gladstone
DIVISION:	Court of Appeal
PROCEEDING:	General civil appeals
DELIVERED ON:	26 November 1999
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 1999
JUDGES:	Davies and Pincus JJA and Jones J
ORDER:	**In Appeal No 2676 of 1999:** **1. appeal allowed;** **2. orders made below set aside;** **3. order that the respondent pay the appellant's costs here and below;** **4. order that the respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.** **In Appeal No 2558 of 1999: appeal dismissed with costs.**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – REFERENCE TO FRAMEWORK OF STATUTE – RULES OF CONSTRUCTION – GENERALLY – Interpretation of s 41(6) *Motor Accident Insurance Act* 1994 – whether the denial of an admission of liability is precluded – context of the Act – statutory consequences of an admission of liability – whether s 41(6) merely restates the general law

Motor Accident Insurance Act 1994, s 41(6)

ESTOPPEL – GENERAL PRINCIPLES – Whether detriment suffered as a consequence of any act or omission in reliance on the admissions – whether unconscionable for the insurers to deny liability

Morris v FAI General Insurance Company Ltd [1996] 1 QdR 495, followed
The Commonwealth v Verwayen (1990) 170 CLR 394, followed

INSURANCE – THIRD PARTY LIABILITY INSURANCE – MOTOR VEHICLES – RIGHTS AND LIABILITIES OF INSURER IN RESPECT OF DEFENCE AND COMPROMISE – QUEENSLAND – Whether insurer permitted to deny liability once admitted – whether precluded by the *Motor Accident Insurance Act* 1994 or general law principles

Motor Accident Insurance Act 1994, s 41(6)

In Appeal No 2676 of 1999:

COUNSEL: Mr R J Douglas SC, with him Mr K N Wilson, for appellant
Mr J A Griffin QC, with him Mr J D Costello, for respondent

SOLICITORS: Walsh Halligan Douglas for appellant
Sciacca's Lawyers & Consultants, town agents for Barry, Beaverson & Stenson of Mackay, for respondent

In Appeal No 2558 of 1999:

COUNSEL: Mr D V C McMeekin SC for appellant
Mr R J Douglas SC, with him Mr K N Wilson, for respondents

SOLICITORS: Quinlan Millar & Treston, town agents for V A J Byrne & Co of Gladstone, for appellant
McInnes Wilson, town agents for McInnes Wilson of Maroochydore, for respondents

[1] **THE COURT:** These are two appeals involving the same questions. Those questions arise in the following way. In each case an insurer[1] made an admission of liability under s 41(1)(b) of the *Motor Accident Insurance Act* 1994 ("the Act") but, in its defence in an action commenced by the claimant, denied liability. The principal question is whether the Act precludes such a denial. If it does not there is a second question, whether the insurer is, in any event, precluded by its admission from making such a denial. Only that second question, if it arises, may require consideration of the facts in each case.[2] The first question, however, requires consideration of s 41(6) of the Act, the principal provision relied on for an affirmative answer, and the context in which it appears.

[2] The objects of the Act are stated in s 3 to include:

> "(c) to encourage the speedy resolution of personal injury claims resulting from motor vehicle accidents".

[3] Divisions 2 to 5 of Part 4 of the Act, headed "CLAIMS" contain provisions requiring pre-litigation disclosure and negotiation aimed at resolution of personal injury claims by agreement before litigation has commenced.[3] Division 2, headed "Duty to notify accidents and claims and provide information", requires the driver, person in charge or owner of a motor vehicle involved in an accident, and a person who proposes to claim damages for personal injuries arising from the accident, to notify the insurer, within a limited time, giving certain particulars of the accident and, in the latter case, of the injury;[4] and requires the person in charge or owner of a motor vehicle involved in an accident out of which personal injury arises to provide, within a limited time, any information about the accident that the insurer may reasonably require.[5]

[4] Division 3, headed "Claims procedures" then requires a claimant, within nine months[6] after the accident or the first appearance of symptoms of the injury, to give written notice of claim to the insurer, such notice to contain a sworn statement containing certain prescribed information and an offer of settlement or a sworn statement of the reasons why such offer cannot yet be made.[7] It also imposes a moratorium on the bringing of proceedings of six months from the giving of the notice of claim.[8]

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1 In the first appeal it was the Nominal Defendant but by s 18 of the *Motor Accident Insurance Act* 1994 the Nominal Defendant is relevantly taken to be a licensed insurer.

2 Cf *The Commonwealth v Verwayen* (1990) 170 CLR 394.

3 Part 4 also contains a Division (Division 6) regulating proceedings in court.

4 Section 34.

5 Section 35.

6 Three months in the case of the Nominal Defendant.

7 Section 37.

8 Section 39(5)(a); unless liability has been disputed at least in part.

[5] It then, by s 41, the section relied on here, imposes two obligations on the insurer. First it must, within six months of receiving notice of claim:[9]

> "(a) take reasonable steps to inform itself of the circumstances of the motor vehicle accident out of which the claim arises; and
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> (b) give the claimant written notice stating –
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> (i) whether liability is admitted or denied; and
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> (ii) if liability is admitted – whether it is admitted in full or in part; and
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> (iii) if liability is admitted in part – the extent (expressed as a percentage) to which liability is admitted; and
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> (c) if the claimant made an offer of settlement in the notice of claim, inform the claimant whether the insurer accepts or rejects the offer or, if the claimant did not make an offer of settlement in the notice, invite the claimant to make a written offer of settlement."[10]

Secondly it must, as soon as practicable after it receives notice of claim:

> "(a) make a fair and reasonable estimate of the damages to which the claimant would be entitled in an action against the insurer; and
>
> (b) make a written offer (or counteroffer) of settlement to the claimant setting out in detail the basis on which the offer is made, or settle the claim by accepting an offer made by the claimant."[11]

[6] Then follow provisions requiring that any offer or counter offer be accompanied by copies of medical reports or other assessments or material in the offeror's possession helpful to the making of a proper assessment of the offer[12] and that any offer or counter offer must be accepted or rejected within three months of its receipt.[13]

[7] Two statutory consequences follow from an admission of liability pursuant to s 41. One is that the insurer must pay for hospital, medical and pharmaceutical expenses reasonably incurred.[14] The other is that it must, at the claimant's request, ensure that reasonable rehabilitation services are made available to the claimant.[15] The former of those obligations is contained in Division 3; the latter in Division 5 headed "Rehabilitation".

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9 That period would ordinarily coincide with the moratorium period fixed by s 39(5(a)(i).

10 Section 41(1).

11 Section 41(2).

12 Section 41(4).

13 Section 41(5).

14 Section 42.

15 Section 51(3).

[8] The statute also provides for one consequence of a denial of liability. This is contained in s 41 in the following terms:

> "(7) If –
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> (a) the insurer denies liability or admits liability to the extent of 10% or less; and
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> (b) the insurer's liability is later established in a proceeding before a court to the extent or [sic] 80% or more;
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> the court must award costs in favour of the claimant on a solicitor-and-client basis unless the insurer establishes good reason why it should not."

[9] From none of the provisions so far discussed could there be inferred an intention that, where an insurer chooses to make an admission pursuant to s 41, that admission will be irrevocable even after litigation has commenced. The object of these provisions appears to be rather to encourage early steps to be taken to resolve the claim[16] by agreement including, where an admission of liability is appropriate, the making of that admission.

[10] Further encouragement is given to that end by Division 4, headed "Cooperation between claimant and insurer" which obliges a claimant to give further specified information reasonably required by the insurer and to undergo examination and assessment by an agreed expert[17] and obliges the insurer to provide certain specified information to the claimant;[18] and by Division 5 headed "Rehabilitation" which, in addition to the provision referred to earlier, enables an insurer, at its own cost, to make rehabilitation services available to a claimant on its own initiative or at the claimant's request whether or not any admission of liability has been made.[19] All of these provisions are intended to operate in the period before commencement of litigation.

[11] It is in that context that s 41(6) must be considered. It provides:

> "(6) An admission of liability by an insurer under this section –
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> (a) is not binding on the insurer on another claim arising out of the same motor vehicle accident;[(20)] and
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> (b) is not binding on the insurer at all if it later appears the admission was induced by fraud."

[12] The plaintiffs in each action submitted that that provision indicated a statutory intention that in all other cases an admission of liability would be binding on an insurer in the sense of being an irrevocable admission even after litigation has commenced.

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16 The object stated in s 3(c); see par [2] above.

17 Section 45.

18 Section 47.

19 Section 51.

20 Cf s 44(3).

[13] Section 41(6) does no more than restate the general law. Under the general law an admission of liability by a person in respect of one claim would not be binding on him or her in respect of another claim even if the second claim arose out of the same event. And an admission of liability induced by fraud could never be binding on the person making the admission. The general law position is that an admission of liability will be binding only where the party to whom the admission was made has acted or omitted to act in reliance on it in circumstances where it would be unconscionable to permit departure from it.[21]

[14] Why would s 41(6) simply restate the general law? If it were intended to apply generally there would seem to be no point in it. But if it is intended to make abundantly clear that such admissions are not to be binding even for the purpose of the pre-litigation regime for the speedy resolution of personal injury claims, established by Divisions 2 to 5 of Part 4, it perhaps makes more sense.

[15] In any event, to say that, in certain circumstances, an admission cannot be binding, even for the purposes of the pre-litigation regime, is not to imply that otherwise, contrary to clear principles of the general law, an admission will, for ever and in all circumstances, be binding. For these reasons we do not think that s 41(6) gives rise to the inference contended for.

[16] Nor do we think it can be drawn from any other provisions of the Act. Reference was made earlier to two consequences of an admission of liability made pursuant to s 41; liability to pay medical and pharmaceutical expenses and liability to ensure that reasonable rehabilitation services are made available to the claimant. In each case there is a provision that the insurer may recover payment or costs from the claimant if it later appears that this was induced by fraud.[22] Again they state the general law position. Absent fraud, such payments or costs would not ordinarily be recoverable. But it cannot be implied from the fact that these costs and payments are not recoverable that the admission which required them to be incurred is irrevocable.

[17] In a statutory scheme such as we have outlined, aimed at encouraging the resolution by agreement of personal injury claims at an early stage and before litigation has commenced, and to that end encouraging insurers to make early admissions of liability, an intention, by implication only, to make such admissions irrevocable except where induced by fraud ought not, in our opinion, to be too readily drawn. And here, as we have indicated, those provisions relied on for that implication do not support it. We would therefore conclude that the legislature did not intend to alter the general law in this respect.

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21 *The Commonwealth v Verwayen* at 444, 455 – 456; see also at 413, 422; *Morris v FAI General Insurance Company Ltd* [1996] 1 QdR 495.

22 Section 42(3); s 51(10).

[18] It should be mentioned that reference was made, here and below, to some New South Wales decisions[23] upon a similar but materially different statute.[24] However it was common ground, supported by a perusal of that Act and those cases, that no assistance can be derived from them in answering this question.

[19] Before turning to the second question something should be said about the way in which these questions came before the Court. In Appeal No 2676 of 1999 the plaintiff had by summons sought a declaration that the Nominal Defendant was bound by its acceptance of liability pursuant to s 41 and for orders that paragraphs of its defence denying liability and its counterclaim relying on that denial be struck out. In Appeal No 2558 of 1999 the questions, which had been raised by amendment to the plaintiff's pleading, were ordered to be tried separately and were so tried.

[20] In each case the plaintiff had full opportunity to give or call evidence. In neither case was it proved or even asserted that the plaintiff suffered any detriment in consequence of any act or omission in reliance on the admissions. Nor was any other evidence adduced or reason advanced which would make it unconscionable for the insurer in either case to deny liability. It is plain therefore that, in neither case under the general law could any estoppel arise.

[21] It follows from the above reasoning that the following orders should be made:-
In Appeal No 2676 of 1999:

1. appeal allowed;
2. orders made below set aside;
3. order that the respondent pay the appellant's costs here and below;
4. order that the respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.

In Appeal No 2558 of 1999: appeal dismissed with costs.

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23 In particular *Government Insurance Office of New South Wales v Phillips* NSWCA No 40245 of 1992, 27 August 1992, unreported, Butterworths Unreported Judgments BC9201645 and *Ricketts v Callan* (1992) 15 MVR 220.

24 *Motor Accidents Act* 1988 (NSW).