SUPREME COURT OF QUEENSLAND

CITATION:	*Murchie v Big Kart Track P/L & Anor* [2002] QCA 339
PARTIES:	**SHARON LYNETTE MURCHIE** (plaintiff/appellant) **v** **THE BIG KART TRACK PTY LTD** ACN 010 342 104 (first defendant/first respondent) **GREGORY NEALE RYAN** (second defendant/second respondent)
FILE NO/S:	Appeal No 2566 of 2002 SC No 2569 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2002
JUDGES:	Davies and Jerrard JJA and Wilson J Judgment of the Court
ORDERS:	**1. That the Notice of Appeal be amended to add Gregory Neale Ryan as a respondent to the appeal.** **2. That the appellant furnish to the Registrar as security for the respondents' costs of the appeal the amount of $10 000.00 or property to the value of $10 000.00 by 4 pm on 30 September 2002 in such form as the Registrar may require, whether by payment of money or otherwise** **3. That failing the furnishing of such security by that time the appeal stand dismissed with costs without further order** **4. That the costs of this application be costs in the appeal**
CATCHWORDS:	APPEAL AND NEW TRIAL - APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS AND SECURITY FOR COSTS – SECURITY FOR COSTS – where judgment entered for defendants at trial – where plaintiff appealed – where plaintiff/appellant wished to adduce fresh evidence – where plaintiff/appellant had insufficient means to satisfy costs order if unsuccessful on appeal – where plaintiff/appellant's

prospects of success on appeal were poor – whether the Court of Appeal should exercise its discretion and make an order for security for costs against the plaintiff/appellant

Uniform Civil Procedure Rules 1999 (Qld), r 772(1)

Borland v Makauskas [2000] QCA 521; Appeal No 6935 of 2000, 20 December 2000, referred to
Calin v Greater Union Organisation Pty Ltd (1991) 173 CLR 33, referred to
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, referred to
Jackson v Coal Resources of Queensland Ltd [1999] QCA 265; Appeal No 3262 of 1999, 15 July 1999, followed
Orr v Holmes (1948) 76 CLR 632, referred to
Thiess v TCN Channel Nine Pty Limited (No 5) [1994] 1 Qd R 156, referred to

COUNSEL: D O J North SC for the respondents
The appellant appeared on her own behalf

SOLICITORS: Moray & Agnew for the respondents
The appellant appeared on her own behalf

[1] **THE COURT:** This is an application for security for the costs of appeal. The plaintiff appellant filed a Notice of Appeal on 18 March 2002. In the court heading on the front page of the Notice of Appeal she named The Big Kart Track Pty Ltd (ACN 010 342 104) as respondent and Gregory Neale Ryan as "not a party to the appeal". However, on the final page of the Notice of Appeal, where she was required to provide the "Particulars of the Respondent", she named both The Big Kart Track Pty Ltd and Gregory Neale Ryan. This application was filed on 29 May 2002 on behalf of both The Big Kart Track Pty Ltd and Gregory Neale Ryan, who were described as first respondent and second respondent respectively. It would appear that all parties considered both defendants at trial to be respondents to the appeal. We therefore order that the Notice of Appeal be amended to name Gregory Neale Ryan as second respondent.

[2] The applicants (the respondents to the appeal) were the defendants at first instance. For convenience, we shall refer to them as "the defendants" and to the respondent to the application (who is the appellant) as "the plaintiff".

[3] On 30 January 1999 the plaintiff received serious injuries rendering her a paraplegic in a go-kart accident at the Big Kart Track at Landsborough in the Sunshine Coast hinterland. She was then aged 30. She sued the first defendant, which conducted the facility, and the second defendant, who was the driver of the go-kart with which her go-kart collided, for damages for negligence. The proceeding was tried before a Supreme Court judge and jury over six days in February 2002. At trial both senior and junior counsel appeared for the plaintiff, instructed by solicitors.

[4] These were the questions put to the jury and their answers:

1. Question: Did any negligence by the Big Kart Track Pty Ltd cause the injuries to Sharon Murchie on 30 January 1999?

   Answer: No.

2. Question: Did any negligent driving by Gregory Ryan cause the injuries to Sharon Murchie on 30 January 1999?

   Answer: No.

3. Question: On 30 January 1999, did Sharon Murchie drive in the practice session with full knowledge of the nature and extent of the risk of injury and voluntarily accept that risk?

   Answer: Yes.

4. Question: Did any negligent driving by Sharon Murchie cause the accident on 30 January 1999?

   Answer: Not required to answer.

5. Question: If the answer to question 4 is yes – to what extent, expressed as a percentage, did her negligent driving cause the accident?

   Answer: Not required to answer.

6. Question: In what sum do you assess the plaintiff's damages for pain, suffering and loss of amenities?

   Answer: $90,000.00

7. Question: In what sum do you assess the plaintiff's general damages for future residential modifications?

   Answer: $159,885.00.

[5] The plaintiff filed a notice of appeal. She prepared and filed that notice and appeared on the present application as a litigant in person.

[6] Pursuant to rule 772(1) of the *Uniform Civil Procedure Rules* -

> "**Security for costs of appeal**
>
> **772.(1)** The Court of Appeal.....may order an appellant to give security, in the form the court considers appropriate, for the prosecution of the appeal without delay and for payment of any costs the Court of Appeal may award to a respondent."

The court has an unfettered discretion whether to order security and, if so, in what amount. The fact that the plaintiff has already "had her day in court" and lost, her impecuniosity, and her prospects of success on appeal are factors relevant to the exercise of that discretion.

[7] It is clear that the plaintiff is without the means to satisfy an order for costs against her if the appeal fails. She puts that down to the accident for which, she submits, she was blameless. However, as Chief Justice de Jersey observed in *Jackson v Coal Resources of Queensland Ltd* [1999] QCA 265; Appeal No 3262 of 1999, 15 July 1999 -

> "The circumstance that [the appellant's] impecuniosity may have been a substantial result of the accident has diminished significance at this appeal level by contrast with its arguable significance at first instance."

[8] In these circumstances attention must be focused on the plaintiff's prospects of success on appeal, because the Court will not readily shut out a litigant with potential merit. Of course, it is not for the Court to prejudge the outcome of the appeal on an application for security for costs, but if her prospects are bleak, as they were described by senior counsel for the defendants, that would be a powerful factor in favour of ordering security.

[9] The plaintiff wishes to introduce fresh evidence on appeal on several issues. This Court will allow an appellant to do so only where that evidence could not, with reasonable diligence, have been available at trial and where it is such that it would probably have had an influence on the result of the case: *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404; *Orr v Holmes* (1948) 76 CLR 632. The Court's approach to these questions needs be more cautious when the trial has been before a jury, given its reluctance to interfere with jury decisions on questions of fact (as to which see *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 41; *Thiess v TCN Channel Nine Pty Limited (No 5)* [1994] 1 Qd R 156 at 172 - 173; *Borland v Makauskas* [2000] QCA 521; Appeal No 6935 of 2000, 6 December 2000.

[10] During the plaintiff's evidence in chief she identified as hers a signature on the front page of a form headed "Release and Waiver of Liability Assumption of Risk and Indemnity Agreement" and bearing the date of the accident, which her counsel showed her. There were also very wide exclusion clauses printed on the back of the form, but she denied that they had been there on the day. The front of the form was

tendered as exhibit 7. The following words appeared near the top of the form (after the heading, a description and location of the scheduled events, and the date) -

> "I have read this release and waiver of liability, assumption of risk and indemnity agreement, fully understand its terms, understand that I have given up substantial rights by signing it, and have signed it freely and voluntarily without any inducement, assurance or guarantee being made to me and intend my signature to be a complete and unconditional release of all liability to the greatest extent allowed by law."

There was then provision for about 30 people to insert their names, signatures, clubs and kart numbers. The plaintiff's name and the signature she identified appeared about three-quarters of the way down the page. In cross-examination, she confirmed that it was her signature, but insisted that the back of the document had been blank. The plaintiff wishes to adduce fresh evidence from a document examiner that the signature was a forgery.

[11] There was other evidence that she was aware of the risks inherent in the activity in which she engaged and that she voluntarily assumed those risks. It is not possible to know whether the jury arrived at their conclusion about the voluntary assumption of risk on the basis of her signing that document, or the other evidence, or a combination of the two. However, be that as it may, the plaintiff has not shown that with reasonable diligence she could not have produced evidence of forgery at trial. Her prospects of being allowed to adduce this further evidence on appeal are very poor.

[12] Other copies of the standard form release document (including the printed terms on the back), which the plaintiff had signed on earlier occasions, were in evidence (exhibits 17 and 18). The plaintiff wishes to adduce evidence that her partner, Mr Thompson, obtained another copy of the indemnity form from the first defendant about a fortnight after the accident, and it, too, was blank on the back. She wishes to lead evidence that her solicitors had that copy at the time of trial. In fact, Mr Thompson gave evidence that what he saw on that occasion was a separate piece of paper containing something similar to what appeared on the back of exhibit 7. She wishes to lead evidence from various club members that the back of the form was blank. In fact a number of witnesses gave evidence to the effect that the release contained the terms on the back. The plaintiff's prospects of persuading the Court on appeal that their evidence could not, with reasonable diligence, have been produced at trial are slim.

[13] The plaintiff wishes to put in evidence an accident report form signed by Mr Gillespie, the secretary of the Sunshine Coast Kart Club, to contradict some of his oral evidence about where she landed after the accident. However, this form was clearly available to her at the time of the trial, and it is most unlikely that she would be allowed to introduce it on appeal. Similarly she wishes to rely on evidence of a number of witnesses to contradict Mr Gillespie, but there is nothing to suggest they were not available at the time of the trial.

[14] The plaintiff has raised a number of issues about the evidence of the second defendant, but she would have difficulty persuading the Court on appeal that these were not matters for the jury to assess.

[15] The jury were sent out to consider their verdict on a Friday afternoon. After discussion with counsel (in open court), the trial judge allowed them to go home for the weekend, and to resume their deliberations on the Monday morning. That course was entirely proper in a civil trial, and the plaintiff has no prospect of her appeal being upheld because it was adopted. Nor is there anything to support her assertion that the members of the jury were confused about the decisions they had to make. The questions put to them were quite clear.

[16] The plaintiff's prospects of success on appeal are poor. We are satisfied that this is a proper case in which to order security for costs.

[17] The defendants relied on an assessment of their costs of appeal (on the standard basis) prepared by a costs assessor. The total amount is $13,477.00, including $1,344.80 for its costs of this application. In all the circumstances, we would order security in the amount of $10,000.00.

[18] We would make the following orders:

(i) *that the Notice of Appeal be amended to add Gregory Neale Ryan as a respondent to the appeal;*

(ii) *that the appellant furnish to the Registrar as security for the respondents' costs of the appeal the amount of $10,000.00 or property to the value of $10,000.00 by 4 pm on 30 September 2002 in such form as the Registrar may require, whether by payment of money or otherwise;*

(iii) *that failing the furnishing of such security by that time the appeal stand dismissed with costs without further order;*

(iv) *that the costs of this application be costs in the appeal.*