

DISTRICT COURT OF QUEENSLAND

CITATION: *Eustace v Dubrava and Anor* [2021] QDC 104

PARTIES: **ROSS GRAEME EUSTACE**
(Plaintiff/Applicant)

v

YVETTE DUBRAVA
(First defendant)

and

ALLIANZ AUSTRALIA INSURANCE LTD
(Second defendant/Respondent)

FILE NO: 3988 of 2018

DIVISION: Civil

PROCEEDING: Application

DELIVERED ON: 31 May 2021 (ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 31 May 2021

JUDGE: Dearden DCJ

ORDER: **The application is granted in part, with respect to the proposed amendments to the statement of claim contained at paragraphs 6(c), 8(a), 8(ba) and 8(h).
The application is otherwise refused.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – APPLICATION TO AMEND – where the plaintiff makes a personal injury claim arising out of a motor vehicle collision – where a request for trial date had been signed – where the plaintiff makes an application to amend statement of claim on the first day of trial – where amendments varied significantly from the statement of loss and damage – where the applicant submits that the amendments do not change the evidence to be relied upon – whether the defendant will suffer prejudice

LEGISLATION: *Uniform Civil Procedure Rules 1999* (Qld) rr 377, 470

CASES: *Carswell v KBRV Resort Operations Pty Ltd (No.2)* [2018] QSC 110

COUNSEL: T Nielsen for the plaintiff
R Morton for the second defendant

SOLICITORS: CMC Lawyers for the plaintiff
McInnes Wilson Lawyers for the second defendant

Introduction

- [1] This is an application to amend the claimant's statement of claim by the plaintiff, Ross Graeme Eustace on the first day of trial of his proceedings for personal injury arising out of a motor vehicle collision which occurred on 14 August 2017.
- [2] The application was foreshadowed on Friday 28 May 2021, the last business day prior to trial. The application was preceded by a statement of loss and damage dated and sent 24 May 2021 to the second defendant's solicitors (I will refer collectively to the position of the second defendant as the "the defendant" as a matter of convenience), which varied significantly from the plaintiff's statement of loss and damage dated 17 February 2019.
- [3] The application proceeds pursuant to Uniform Civil Procedure Rules ('UCPR') r.470(1)(b), given that a request for trial date has been filed in these proceedings (unsurprisingly) on 22 January 2021 (document 3). The court's leave is required to amend the pleadings, as the plaintiff seeks in this matter (UCPR r.470(2)(a)). The originating process amendment sought also requires leave pursuant to UCPR r.377.
- [4] The plaintiff refers me to the decision of Martin J in *Carswell v KBRV Resort Operations Pty Ltd (No.2)* [2018] QSC 110, which helpfully reviews relevant case law, and the plaintiff's written submissions identify, equally helpfully, those matters which are relevant to the exercise of this discretion as follows:

Justice Martin then noted the following matters for the exercise of the discretion:

- (a) It is certainly within the power of the court to refuse amendments. The parties are entitled to adjust resolution which may negate against allowing an amendment;
- (b) The nature and importance of the amendment to the party applying cannot be overlooked;
- (c) Prejudice which might reasonably be assumed to follow from the amendments;
- (d) The issue of delay
- (e) Whether the party proffers an indication of what evidence it might seek to lead if it is allowed to amend;
- (f) As to deficiencies or mistakes in the pleading in *Aon*, the High Court said of mistake by the plea to that:

“[82] the need for amendment will often arise because of some error or mistake having been made in the drafting of the existing pleading or in a judgment about what is to be pleaded in it. But it is not the existence of such a mistake that founds the grant of leave under rules such as r.501(a), although it may be relevant to show that the application is bona fide. What needs to be shown for leave to amend to be given, as the cases referred to illustrate, is that the controversy or issue was in existence prior to the application for amendment being made. It is only then that it is necessary for the court to allow it properly to be raised to enable a determination upon it.” (footnotes omitted)

(Exhibit 1 (plaintiff’s submissions on application) para 7).

- [5] The proposed amendments, read in conjunction with the updated statement of loss and damage dated 24 May 2021, add a previously unpleaded claim for psychiatric injury (para 6(c)), with a consequent increase in quantum for general damages from \$12,650 to \$99,900 (para (8)(a)); an increase in future medical expenses; a substantial increase in lost earnings and past wages of 123,854 (para 8(d)); a substantial increase in future economic loss of \$96,960 (para 8(e)); and increase in past gratuitous domestic assistance of \$32,520 (paragraph 8(f)); and a decrease in future domestic/gratuitous (from \$50,000 to \$32,720) (paragraph 8(g)).
- [6] The application also seeks to include an amendment for lost employer funded contributions (paragraph 8(h)). The defendant does not object to some of those amendments, namely the amendment proposed in respect of psychiatric injury (paragraph 6(c) and 8(a)); Medicare (paragraph 8(ba)); and employer funded superannuation (paragraph 8(h)).

Submissions

- [7] The defendant’s submissions (which were made orally, given the lateness of this application) are, as I understand them, as follows:
1. The case, as originally pleaded sought \$15,000 for loss of income as at of the date of the first statement of loss and damage (17 February 2019 – paragraph 2 (e)) (affidavit of Glen McAleese, sworn 31 May 2021 exhibit GJM-3).
 2. The case now pleaded (as per the proposed amendments, reading with it the statement of loss and damage dated 24 May 2021), is a completely new case (exhibit GJM-7, para 2(e) – affidavit of Glen McAleese sworn 31 May 2021),

now claiming past economic loss \$123,854. The basis upon which that loss is now claimed has also changed, given an assertion in the initial statement of loss and damage that the plaintiff was made redundant on 25 January 2018 subsequent to the motor vehicle collision. That assertion, it appears, is no longer made and in any event, I am informed from the bar table by Mr Morton, is a matter of contest.

3. It is submitted, correctly, that there is no material seeking to explain the substantial change in this aspect of the plaintiff's case. Now, it is further submitted, and I accept that in this aspect of the case, as well as in respect of past and future gratuitous care services, the defendant would likely have requested an occupational therapy assessment, had the claim been pleaded as it is now proposed to be pleaded, at an earlier stage.
4. In particular, a statutory declaration by the plaintiff (exhibit 2) tendered by the defendant, reveals a range of physical and psychiatric issues which would need to be disentangled in assessing why the plaintiff left work when he did – an issue of little moment when the relevant quantum was only \$15,000, but of far more significance given the proposed amended pleadings.
5. These issues also flow onto the plaintiff's claim for future economic loss, stemming from psychiatric injuries, now identified in the statement of loss and damage of 24 May 2021 at \$246,960 compared with \$150,000 in the original statement of loss and damage (see affidavit of Glen McAleese sworn 31 May 2021 exhibit GJM-7, para 2(f)).
6. The statement of loss and damage of 17 February 2019 sought \$5000 for past gratuitous assistance (affidavit of Glen McAleese sworn 31 May 2021, exhibit GJM-3 para 5(d)), but the statement of loss and damage of 24 May 2021 seeks \$37,520 (affidavit of Glen McAleese sworn 31 May 2021, exhibit GJM-7, para 5(d)), with an extensive explanation in respect of care provided by a flatmate at the time, pitched (it is submitted) to meet the Civil Liability Act s.59 six hour threshold, but (given the late application to amend pleadings), leaving the defendant no opportunity to explore and test the claim, whether by an occupational therapy assessment, proofing of the flatmate, examination of the plaintiff's then living premises, or otherwise.

7. Even though the claim for future gratuitous services is ameliorated, the defendant has also not been given an opportunity to test that aspect of the plaintiff's claim either.
- [8] The applicant submits, on the other hand, that the amendments do not change the evidence to be relied upon, but rather bring the pleadings to a point where they reflect the evidence proposed to be called in this trial.
- [9] Further, the plaintiff's lawyers, and the defendant both made arrangements for the plaintiff to be psychiatrically examined and for evidence to be called from those psychiatrists. I note, however, that the proposal to amend the pleadings insofar as it covers the psychiatric injury, is one aspect of the application not opposed by the defendants.
- [10] The plaintiff argues that the defendant had put in place arrangements to call the plaintiff's employers to give evidence – anticipating (it is submitted) issues in respect of how the plaintiff's employment ceased after the motor vehicle collision. That, of course, is a matter which seems to be relevant based on the relevant statements of loss and damage that I've referred to.
- [11] The plaintiff further argues that issues in respect of gratuitous services provided to the plaintiff could be ventilated by cross-examination of the plaintiff by the defendant.
- [12] It is further submitted that although there has been delay, that has been explained by the plaintiff's solicitor. The written submissions summarise that explanation in the following terms (exhibit 1, para 15):

...the solicitor for the plaintiff at the time of the request for trial date being signed, did not appreciate that amendments needed to be made to the pleading to take into account the psychological injury and the consequent increases to the damages. This was a controversy which clearly existed in the evidence at that time, because both parties had obtained psychiatric evidence and it was clear from the psychiatric evidence that the plaintiff was arguing that losing his job, inter alia, was due to his accident-related injuries. This had an obvious effect on the claim for economic loss. Similarly, he complained of interference with his activities of daily living such that he required care, and this raised the prospect that there might be damages payable in that regard.

Discussion

- [13] It is clear that the amendments sought are significant and far reaching in the context of this case. The defendant has lost an opportunity to have the plaintiff examined by an occupational therapist, to do so in the context of the plaintiff's living arrangements at the relevant time, and to seek to prove the purported provider of gratuitous services.

- [14] It is also clear that the scale of both past and future economic loss has changed dramatically, as has the basis on which it is claimed. The defendant, is again, undoubtedly prejudiced in being unable to prepare for such an amendment brought at this stage of proceedings.

- [15] The nub of the dilemma in this trial is that the request for trial should not have been signed when it was, by the plaintiff, because the trial was then not ready to proceed; the deficiencies in the pleading which the plaintiff's solicitor Ms Cruz attests to in her affidavit of 27 May 2020 should have been identified long before the last few days before trial; and if necessary, this trial adjourned and an application brought before an applications judge in this jurisdiction, rather than on day 1 of the trial.

- [16] In short, the plaintiff's solicitors have sought to deal with substantial preparation blunders of their own making, but to do so have sought to change the goalposts of this trial at the very last moment, to the detriment of the defendant's entitlement to a fair trial of the claim, and of course avoiding the potential utilising of mediation or otherwise, to settle the case of the plaintiff on the basis on which it is now sought to be pleaded.

- [17] In these circumstances, in my view, the appropriate exercise of this court's discretion having identified those particular problems that I have outlined, is to refuse the application to amend, save to the extent that amendments are consented to by the defendant.

Conclusion

- [18] Accordingly, the application is granted in part, with respect to the proposed amendments to the statement of claim contained at paragraphs 6(c), 8(a), 8(ba) and 8(h). The application is otherwise refused.