SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

Writ No 24 of 1996 (Maryborough District Registry)

CHRISTOPHER BRETT RYAN

Plaintiff

and

CHARLES EDWARD PONT First Defendant

and

FAI GENERAL INSURANCE Second Defendant

BRISBANE

..DATE 12/06/97

JUDGMENT

HIS HONOUR: I have prepared reasons, gentlemen. I will now publish them to you.

MR HOLYOAK: Your Honour, I am instructed to ask for costs to follow the event of the application.

HIS HONOUR: Mr Given?

MR GIVEN: I can't oppose the order and ask that execution be postponed until the general costs of the action are determined.

MR HOLYOAK: I have no instructions regarding that. It is my submission that we should have the costs of the application; it stands and falls by itself. A matter which ought to be necessarily reserved.

HIS HONOUR: Mr Given, anything in reply on that subject?

MR GIVEN: No, Your Honour.

HIS HONOUR: I see no reason to make the order you seek, Mr Given, in the circumstances.

The application is dismissed.

I order that the plaintiff pay to the defendants their costs of and incidental to the application to be taxed.

IN THE SUPREME COURT OF QUEENSLAND Writ no. 24 of 1996

HELD AT MARYBOROUGH

BETWEEN:

CHRISTOPHER BRETT RYAN Plaintiff

AND:

CHARLES EDWARD PONT First Defendant

AND:

FAI GENERAL INSURANCE Second Defendant

JUDGMENT - HELMAN J.

Judgment Delivered 12 June 1997

This is an application by the plaintiff in this action, which was begun by a writ of summons issued out of

the Maryborough District Registry on 9 August 1996, for an order under Order 36 Rule 5 of the *Rules of the Supreme Court* that judgment be given for him against the defendants for damages to be assessed, or alternatively for a declaration that “the Second Defendant's correspondence to the Plaintiff's Solicitor of the 26th July 1996 constituted an agreement for the admission of the Defendants' liability for the Plaintiff's damages in this action”. In addition, the plaintiff seeks an order under Order 39 Rule 52 that the assessment of his damages take place at the next sittings of the District Court at Maryborough, or such other time as the District Court may be available. (The plaintiff could of course obtain the last-mentioned relief without any order of the Court if judgment were given for damages to be assessed and no provision were made by the judgment as to how they are to be assessed, because Order 39 Rule 52(1) provides that where judgment is given for damages to be assessed, and no provision is made by the judgment as to how they are to be assessed, “the damages shall, subject to the provisions of this order, be assessed by a Master, District Court Judge or a registrar at the option of the party entitled to the benefit of the judgment .. “)

The plaintiff's action is for damages for personal injuries arising out of the alleged negligence and, or alternatively, breach of duty of the first defendant for which the second defendant is, it is alleged, also liable. The action arises out of a motor vehicle collision: the plaintiff alleges, in his statement of claim delivered on 8 January 1997, that on or about 29 January 1996 he was riding his motor cycle at an intersection in Maryborough when a motor car driven by the first defendant collided with the motor cycle causing the plaintiff to be injured. The plaintiff says the collision was caused by the first defendant's negligence. The second defendant is the insurer of the first defendant's car. A defence, a copy of which is not before me, was delivered on 14 January 1997.

The plaintiff's claim is subject to the provisions of the *Motor Accident Insurance Act* 1994, which came fully into force on 1 September 1994. Part 4 of the Act regulates claims of the kind the plaintiff is making in this case. An admission by the second defendant pursuant to Division 3 (*Claims procedures*, ss.37-44) is the foundation for the plaintiff's application. The plaintiff gave written notice of his claim to the second defendant. The notice was dated 17 June 1996 and was sent on 19 June 1996 by his solicitors. The second defendant responded in a letter dated 26 July 1996 to the plaintiff's solicitors:

> "RE: **MOTOR VEHICLE ACCIDENT: 29/01/96 OUR INSURED: CHARLES PONT YOUR CLIENT: CHRISTOPHER RYAN**
>
> We have your client's Notice of Claim dated 17/06/96, forwarded under cover of your letter dated 19/06/96. We are satisfied the notice has been given as required.
>
> We advise that liability in this matter is admitted.
>
> We enclose a copy of Dr Coleman's report of the 18/07/96 for your records.
>
> Furthermore we ask that you forward documentation to support your client's economic loss.
>
> We await your response."

That notification was, it appears, an attempt by the second defendant to comply with s.41, which, so far as it is material, is as follows:

> "**Insurer must attempt to resolve claim**
>
> **41.(1)** Within 6 months after an insurer receives notice of a motor vehicle accident claim under this Division, the insurer must-
>
> (a) take reasonable steps to inform itself of the circumstances of the motor vehicle accident out of which the claim arises; and
>
> (b) give the claimant written notice stating-

(i) whether liability is admitted or denied; and

(ii) if liability is admitted-whether it is admitted in full or in part; and

(iii) if liability is admitted in part-the extent (expressed as a percentage) to which liability is admitted; and

(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.

(2) As soon as practicable after an insurer receives a notice of a claim under the Division, the insurer must-

(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 counter-offer) 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.

. . . .

(6) An admission of liability by an insurer under this section-

(a) is not binding on the insurer on another claim arising out of the same motor vehicle accident; and

(b) is not binding on the insurer at all if it later appears the admission was induced by fraud."

The second defendant did not comply strictly with s.41 because it did not state whether it admitted liability in full or in part only, as required by s.41(1)(b)(ii). On the view that I have reached on this application, however, it is not necessary for me to consider the question of the second defendant's failure to comply strictly with s.41.

Order 36 Rule 5 provides:

> **“[36.5] Judgment or order upon admissions of facts**
>
> **5** When admissions of fact have been made in a cause, either on the pleadings or otherwise, any party may, at any stage of the cause, apply to the Court or a Judge for such judgment or order as upon such admissions the party may be entitled to, without waiting for the determination or any other question between the parties; and the Court or a Judge may, upon such application, make such order, or give such judgment, as may be just.”

While doubts have been expressed as to whether that rule permits other than a final judgment, a practice of ordering on its authority that judgment be entered for damages to be assessed is now well established: see the unreported decision of White J. in *Sherman v. Hoffman* (no. 1392 of 1992, 6 February 1995). It was not suggested before me that that practice should not be followed on this application, provided of course that this was a case in which the rule could otherwise be relied upon.

Order 36 Rule 5 may be invoked by a party when admissions of fact have been made *in a cause*, either on the pleadings or otherwise. The word “cause” is defined in s.241 of the *Supreme Court Act* 1995 as including “any suit action or other originating proceeding between a plaintiff and a defendant”. The cause in this case is, as I have mentioned, an action begun by writ of summons: see the definition of “action” in s.241 (“‘action’ means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court”) and Order 2 Rule 1(5) (“Causes commenced by writ of summons are called actions”).

Mr Holyoak, who appeared for the defendants, argued that the admission relied on had not been made in the cause. It was conceded in argument by Mr Given, who appeared for the plaintiff, that, as he put it, “[t]he words ‘in a cause’ mean admissions after issue” (transcript p.30, lines 17-18), but Mr Given went on to argue that the words “or otherwise” contemplate “admissions prior to the issue of proceedings” (transcript p.30, lines 24-25). Mr Given said that recent unreported decisions showed that

judgments for damages to be assessed had been entered in cases in which admissions made before action had been relied on: see the unreported decisions of Mackenzie J. in *Walker v. Floyd & Anor* (no. 2429 of 1995, 6 December 1996) and of Fryberg J. in *Butler v. Walker & Anor* (no. 1984 of 1996, 29 January 1997). Mr Given accepted nevertheless that the argument advanced in this case by Mr Holyoak had not been advanced in those cases (transcript p. 30, line 32).

Mr Given's submission is at odds with the natural meaning of the words of the rule, in my view. The expression “in a cause, either on the pleadings or otherwise” is elliptical and plainly means “in a cause on the pleadings, or in a cause otherwise than on the pleadings”; i.e., whether the admissions have been made on the pleadings or by some other means they must have been made in the cause. That means, consistently with Mr Given's concession, that they must have been made after the proceedings were instituted and not before. That conclusion is in accord with the observations of Asche C.J. concerning the words “in a proceeding” in Rule 35.04 of the *Rules of the Supreme Court* 1987 (N.T.), which was not materially different from Order 36 Rule 5, in *Civil & Civic v Pioneer Concrete* (1991) 103 F.L.R. 196 at pp.207-209. The admission relied on in this case, having been made before the issue of the writ of summons, was therefore not made in the cause. For that reason the plaintiff's application under Order 36 Rule 5 fails.

In support of the plaintiff's application for the declaration, Mr Given relied on the decision of the Full Court in *Newton, Bellamy & Wolfe v. S.G.I.O.* [1986] 1 Qd.R. 431, which was an action in which the final relief sought was a declaration. What is sought here is an interlocutory declaration, as to which see: *International General Electric Co. of New York Ltd v. Commissioner of Customs and Excise* [1962] Ch. 784 at p.789 per Upjohn L.J.; P.W. Young, *Declaratory Orders*, 2nd ed. (1984), para.2403, pp.213-214; and Meagher Gummow and Lehane, *Equity, Doctrine and Remedies*, 3rd ed. (1992), para. 1931, p.489.

Leaving aside, however, any difficulty arising from the interlocutory character of the declaration sought, I conclude that this case is distinguishable from *Newton, Bellamy & Wolfe v. S.G.I.O.* In that case solicitors acting for the executors of the estates of a husband and wife killed in a motor vehicle collision gave the insurer under the *Motor Vehicles Insurance Act* 1936-1979 of the driver of a motor vehicle notice of their clients' intention to institute actions for damages on behalf of the estates of the deceased and on behalf of the son of the deceased, who was then a minor. Before proceedings were begun the insurer wrote asking for details of the claims adding that it was confirmed that liability was not in issue. A writ was eventually issued but only after the expiration of the limitation period. A statement of claim was delivered. A defence was delivered in which liability was denied and it was pleaded that the actions were statute-barred. A second writ was issued claiming a declaration that the correspondence between the solicitors for the plaintiffs and the insurer constituted an agreement for the admission of a liability and not to plead to set up any limitation period. Declarations in those terms were made on a motion before the chamber judge. The insurer appealed. The appeal was dismissed. Andrews A.C.J. and Derrington J. observed that the arrangement was supported by consideration and continued:

> “The insurer by accepting liability offers the other party an inducement and impliedly requests him to forebear from taking action with avoidance of costs of formal proceedings at the expense of the insured. Once the negotiations are thus commenced the potential for saving is created and the insurer is bound to pay something, however ultimately it is to be assessed, to that other party.
>
> Here negotiations continued for some time to determine whether the appellant would pay the respondent his damages without the need for the latter to commence an action. In our view an agreement is implicit in the facts constituting the history of the matter, following upon the confirmation that liability was not an issue.” (p.437).

The evidence in this case does not support a conclusion that an agreement is implicit in the facts constituting its history, or that there was consideration for the second defendant's admission of liability. There is no evidence of forbearance by the plaintiff in response to the second defendant's letter of 26 July 1996: the writ was issued on 9 August 1996. Even if the second defendant's admission of liability is taken as an offer - and it should be borne in mind that the insurer was merely attempting to comply with its obligation under s.41 - it was an offer which was not accepted and no consideration was forthcoming. Mr Given submitted that the plaintiff's making the application under Order 36 Rule 5 constituted consideration, but there is, in my view, no substance in that submission: there was no implied request of the type referred to by the majority in *Newton, Bellamy & Wolfe v. S.G.I.O.* to take such a step.

It follows that the application should be dismissed. I shall invite submissions on costs.