

THE SUPREME COURT
OF QUEENSLAND

BRISBANE

DISTRICT COURT APPLICATION NO. 5091 OF 2000
[2001] QSC 036

BETWEEN:

MATTHEW ROBERT OGILVIE

Respondent

AND:

IAN BOWERS AND RACQ GIO INSURANCE LIMITED
ACN: 009 704 152

Applicant

AND: **DISTRICT COURT APPLICATION NO. 5092 OF 2000**

BETWEEN:

RACQ – GIO INSURANCE LIMITED

Applicant

AND: **JODIE STEPHENS**

Respondent

REASONS FOR JUDGMENT

B.W. Ambrose J.

Delivered the 21st day of February 2001

CATCHWORDS: TRAFFIC LAW- STATUTORY COMPENSATION IN RESPECT OF MOTOR VEHICLE ACCIDENTS – application that the respondents further answer a series of liability questions- whether the respondents have reasonably answered the questions on liability- whether the *Motor Accident Insurance Act* 1994 and its corresponding regulations limits the information which may be requested by the insurer- whether “circumstance of the accident” are limited to events contemporaneous with the accident and/or degree of intoxication by drugs or alcohol-

Motor Accident Insurance Act 1994, s45(1)(a) and (7), s39(1) (5),
s37(1), s41(1),
Motor Accident Insurance Regulation 1994, r10(1)(b)(vi)

Counsel: R Treston for the applicant
D Eliades for the respondent

Solicitors: Hunt and Hunt Lawyers for the applicant
Thompson and Royds Lawyers for the respondent

- [1] These are applications by RACQ – GIO Insurance Limited (“the insurer”) pursuant to s 45 (1)(a) of the *Motor Accident Insurance Act* 1994 for orders that each respondent further answer a series of liability questions asked of him/her of them by the insurer pursuant to obligations said to be imposed upon them to do so under s 45 of that Act. The insurer further seeks an order that the respondents be deemed to have given notice to the insurer pursuant to s 39 of the Act on the date upon which the respondent answers the series of liability questions in compliance with the order sought.
- [2] Under s 37(1) of the Act before bringing action for damages for personal injuries arising out of a motor vehicle accident a claimant must give written notice of the claim to the insurer containing a sworn statement containing certain information required by regulations made under the Act.
- [3] Under Regulation 10(1)(b)(vi) of the Act it is provided *inter alia* –
 “(10)(1) A notice under s 37 of the Act must include particulars (so far as the claimant knows or can reasonably find out the particulars) of –
 (a) ...
 (b) ...
 (i)...
 (vi) Details of the claimant’s consumption of alcohol or drugs in the period of 12 hours immediately before the accident and if the claimant was an occupant but not the driver of a motor vehicle involved in the accident details of the driver’s consumption of alcohol or drugs in the period of 12 hours immediately before the accident and...”
- [4] It emerges from the notice of claim given by each of the respondents that they were passengers in a motor vehicle driven by Ian Bowers when he lost control of it as he was negotiating a roundabout or intersection and it collided with a pole near that roundabout/intersection. In the notice of claim given by Stephens, appear the following questions and answers –
 “15 Q. Had you had any drugs – including medication in the 12 hours before the accident If yes, what drugs did you take, type amount and when? A. Yes – some marijuana.

- 16 Q. Had you had any alcohol in the twelve hours before the accident? A. Yes. Q. If yes, what drinks did you have (type, amount and when) A. Quite a bit.
17. If you were a passenger or a pillion passenger; Q. Had the driver or rider any drugs including medication in the twelve hours before the accident? A. Yes. Q. If yes what drugs did he/she take (type, amount and when). A. Marijuana.
18. If you were a passenger or a pillion passenger; Q. Had the driver or rider had any alcohol in the twelve hours before the accident? A. Yes. Q. If yes, what drinks did he/she have (type, amount and when)? A. Two drinks. Two drinks of spirits.
19. ...
22. Q. Who do you think was the person who caused the accident and why do you think that? Name and detailed reasons (eg driver failed to stop at stop sign, driver failed to give way etc. A. Ian Bowers (ie. the driver) Injury 1 driver lost control on a roundabout.
Injury 2 driver ran over leg when we got out of the car.

[5] The respondent, Ogilvie, answered a notice of claim form in the same terms as that answered by the respondent Stephens in these terms –

15. Q. Had you had any drugs including medication in the twelve hours before the accident? A. No
16. Q. Had you had any alcohol in the twelve hours before the accident? A. Six UDL cans.
17. Q. If you were a passenger or a pillion passenger, had the driver or rider had any drugs including medication in the twelve hours before the accident? A. Unknown. Q. If he is, what drugs did he/she take? A. Unknown.
18. Q. If you were a passenger or a pillion passenger, had the driver or rider had any alcohol before the accident? A. Unknown.

[6] The diagram of the accident drawn by the respondent Ogilvie seems to be almost identical with that drawn by the respondent Stephens except that in Stephens' diagram the pole with which the driver, Bowers, collided is described as a "power pole" and that pole is described as a "telephone pole" by Ogilvie.

[7] Unsurprisingly, when the insurer received the notices of claim from each of the respondents, it decided to seek further information from each having regard to what on first sight might appear to be somewhat inconsistent details given in the respective notices of claim.

[8] Under s 39(1) of the Act an insurer must within one month of receiving a notice of claim, give the claimant written notice stating whether it is satisfied that the notice has been given as required under this division.

[9] The insurer gave such a notice to each of the respondents.

[10] Under s 39(5) it is provided –

“(5) A claimant may bring a proceeding in a court for damages based on a motor vehicle accident claim only if -

(a) the claimant has given notice to an insurer, who may be liable on the claim under the statutory insurance scheme as required under this division, or the insurer has waived compliance with the requirement and –

- (i) At least 6 months have elapsed since the notice of the waiver was given; or
- (ii) The insurer has denied liability on the claim; or
- (iii) The insurer has admitted liability but only in part and the claimant has given the insurer written notice that the extent of liability is disputed.”

(b)...

[11] At the present time the insurer has not taken steps contemplated by s 39(5) - no doubt having regard to possible discrepancy in the information provided by each of the respondents in his/ her s 37 Notice of Claim.

[12] Under s 41(1) of the Act, it is provided –

“41(1) Within six months after an insurer receives a notice of a motor vehicle 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”

[13] Under s 45(1) of the Act, it is provided

“45(1) A claimant must cooperate with the insurer and in particular must give information reasonably asked by the insurer about –

- (a) The circumstances of the accident out of which the claim arose and...”

[14] Under s 45(7) it is provided that –

“(7) Any information provided by a claimant under this section must be verified by statutory declaration if the insurer requires it to be verified by statutory declaration”

[15] The insurer sent to each of the respondents, Ogilvie and Stephens, a document containing “liability questions” which were required to be answered by way of statutory declaration. I will set forth the liability questions sent to Ogilvie –

“1. In respect of each claimant please advise the precise times or approximate times in the twelve hours preceding the incident when the claimant was in the presence or vicinity of the insured driver and stating which.

2. In respect of each claimant state the claimant's observations of the behaviour and demeanour of the insured driver in the twelve hours preceding the incident having particular regard to any effect upon the insured driver of the consumption by the driver of any alcohol or marijuana.
3. In relation to the claimant, Ogilvie, look at paragraph 16 of the claimant's s 37 notice sworn 1 June 2000 and advise –
 - (a) the precise times or approximate times in the twelve hours before the incident when the six UDL cans of alcohol were consumed by the claimant;
 - (b) the alcohol strength of the UDL cans consumed by the claimant and the quantity by volume of each UDL can consumed by the claimant.

[16] The respondent, Ogilvie, in reply made a statutory declaration in the following terms –

- “1. In answer to Question 1, I say that I am not required to answer this question in that it is not a request for particulars but rather an interrogatory and therefore not appropriate in respect of a motor vehicle injury claim. In any event, I do not understand the question.
2. In answer to Question 2, I say that I am not required to answer this question in that it is not a request for particulars but rather an interrogatory and therefore not appropriate in respect of a motor vehicle injury claim. In any event, the driver did not appear intoxicated.
3. In answer to Question 3,
- (a) Up to a time approximately 5 hours prior to the collision;
 - (b) The UDL cans were about 5% strength and about 375 mls per can.”

[17] On 18 September 2000 the insurer also sent a list of liability questions to be answered by the respondent Stephens. They are contained in two sheets of paper; one containing questions numbered 4 to 6 and the other containing questions numbered 7 to 12. The questions read as follows:-

4. In respect of each claimant, please advise the precise times or approximate times in the 12 hours preceding the incident when the claimant was in the presence or vicinity of the insured driver and stating which;
5. In respect of each claimant, state the claimant's observations of the behaviour and demeanour of the insured driver in the 12 hours preceding the incident, having particular to any effect upon the insured driver of the consumption by the driver of any alcohol or marijuana.
6. In relation to the claimant Ogilvie, look at paragraph 16 of the claimant's section 37 notice sworn 1 June 2000 and advise
 - (c) The precise times or approximate times in the 12 hours before the incident when the six UDL cans of alcohol were consumed by the claimant;

- (d) The alcohol strength of the UDL cans consumed by the claimant; and the quantity by volume of each UDL can consumed by the claimant.

- 7. In respect of each claimant, please advise the precise times or approximate times in the 12 hours preceding the incident when the claimant was in the presence or vicinity of the insured driver and stating which;
- 8. In respect of each claimant, state the claimant's observations of the behaviour and demeanour of the insured driver in the 12 hours preceding the incident, having particular regard to any effect upon the insured driver of the consumption by the driver of any alcohol or marijuana.

- 9. In respect of the claimant Stephens, please advise

- (a) the precise times or approximate times in the 12 hours before the incident when the insured driver consumed the two drinks of spirits;
- (b) the name of generic brand, and alcohol strength, of the spirits; and
- (c) the quantity by volume of each of the spirits consumed by the insured driver;

- 10. In respect of the claimant Stephens, please advise

- (a) the precise times or approximate times in the 12 hours before the incident when the insured driver consumed marijuana;
- (b) the manner in which the insured driver consumed marijuana (e.g., cigarettes, cones, etc.); and
- (c) by reference to the answer given in (b), the approximate quantity of marijuana consumed by the insured driver (eg. four cigarettes).

- 11. In respect of the claimant Stephens, please advise

- (a) the precise times or approximate times in the 12 hours before the incident when the claimant consumed marijuana;
- (b) the manner in which the claimant consumed marijuana; and
- (c) by reference consumed by the claimant (eg. four cigarettes).

- 12. In respect of the claimant Stephens, please advise

- (a) the precise times or approximate times in the 12 hours preceding the incident when the claimant consumed alcohol;
- (b) the nature (spirits, beer, wine, etc.), name or generic brand and alcohol strength, of the alcohol consumed by the claimant; and
- (c) the quantity by volume of each of the quantities of alcohol consumed by the claimant;

[18] The statutory declaration made by the respondent Stephens in compliance with the insurer's questions read as follows:-

1. In answer to Question 1 I say that I am not required to answer to this question in that it is not a request for particulars but rather an interrogatory and therefore not appropriate in respect of a motor vehicle injury claim. In any event I do not understand the question.
 2. In answer to Question 2 I say that I am not required to answer to this question in that it is not a request for particulars but rather an interrogatory and therefore not appropriate in respect of a motor vehicle injury claim. In any event, the driver did not appear intoxicated to me.
 3. In answer to Question 3:
 - (a) The driver consumed the two drinks of spirits about 5:00pm;
 - (b) The spirits were contained in UDL cans;
 - (c) The cans were standard 375 mls capacity.
 4. In answer to Question 4:
 - (a) I did not see the insured driver consume marijuana.
 5. In answer to Question 5:
 - (a) About midday on 21 April 2000;
 - (b) By smoking;
 - (c) A very small quantity.
 6. In answer to Question 6:
 - (a) About five to eight hours before the collision;
 - (b) I consumed, Woodstock Bourbon UDL cans which I believe is 5% strength;
 - (c) I consumed 3 or 4 UDL cans.
- [19] In my view, it is clear that liability questions 1 and 2 asked of Ogilvie, must be read together. I am unimpressed with the observation in para 1 of the declaration of Ogilvie that “I do not understand the question”. Each question deals with a period of twelve hours preceding the incident in which the respondents were injured at a time when each respondent was in the presence or vicinity of the driver of the vehicle at the time it collided with the pole. Read together, questions 1 and 2 clearly request Ogilvie to state his observations of the behaviour and demeanour of the driver in his presence or vicinity in the twelve hours preceding the collision. Questions 4 and 5 delivered to Stephens are to the same effect.
- [20] In fact the respondent Stephens declares in the second paragraph of her declaration “In any event, the driver did not appear intoxicated to me.” Similarly, the respondent Ogilvie makes the same declaration in the second paragraph of his declaration.
- [21] In my view, the respondents have substantially declared that at the time they were in the presence of the driver during a period of twelve hours preceding the collision, he did not appear to either of them to be intoxicated.

- [22] Each respondent has answered responsively the questions asked of them. I have some difficulty in relating the six answers of Stephens (numbered 1 to 6) to the nine questions asked of her (numbered 4 to 12). This was not a matter canvassed upon the hearing and I assume some error occurred in exhibiting the questions asked of Stephens.
- [23] To the extent that objection is taken to answering the liability questions on the basis that they do not amount to a request for particulars but rather amount to a interrogatory, in my view, this objection is misconceived.
- [24] There is nothing in the Act or Regulations which limits the obtaining of information to a request only for particulars. To the extent that the liability questions may amount to interrogatories, in my view, no valid objection can be made to those questions on that ground.
- [25] It was also contended for the respondents in argument that the seeking of information about “the circumstances of the accident” does not permit questions to be asked or information sought as to the possible intoxication by alcohol or drugs of the driver of the car. It was contended that it was only the circumstances of “the incident” which could reasonably be sought and that intoxication of the driver to the knowledge of either respondent does not come within the category of “circumstances of the accident” to which s 45(1)(a) applies. In my view, such an approach is all together too narrow having regard to the overall intention of the legislation to have a claimant place the insurer in the best possible position to determine whether to wholly or partly admit or to deny responsibility for the claimants’ injuries. The object of the legislation is to have the claimant place the insurer, to the best of his or her ability, in the best position to determine whether to admit or contest liability. On the facts of the present case, the intoxication of the driver and/or of either of the claimants who were passengers in his vehicle at the time when he drove it into a pole at night time after (according to one of the respondents) in any event, having consumed both alcohol and marijuana, goes to both the question of the driver’s liability in tort and also to the responsibility of each of the claimant/passengers to bear some contribution for any injury suffered. In particular it seems that part of the injury for which the respondent, Stephens, claims compensation was caused to her after the collision with the pole when the driver drove the insured motor vehicle over her leg.
- [26] In my view, “circumstances of the accident” are not limited to events contemporaneous with the accident observable perhaps by an independent witness having the opportunity to view it. A circumstance of the accident is any fact to which the occurrence of the accident may be attributed. In my view, upon its proper construction, “circumstances of the accident” within the meaning of s 45(1)(a) encompass all events which appertain to or are causes of the accident in which a claimant suffers personal injury. The term certainly includes the degree of a driver’s intoxication either from drugs or alcohol if they may be causative of a collision to which personal injury is attributed. It would also include intoxication of a claimant by alcohol or drugs should that be relevant to questions of contributory negligence.
- [27] It was contended on behalf of the respondents that the information sought by the insurer by posing the liability questions under s 45 of the Act could be obtained

easily by interrogation should action be commenced. In my view however, this argument gives insufficient weight to the whole object of a claimant cooperating with the insurer which is to avoid if possible, the necessity of a court determination of issues relating to liability for personal injury resulting from a motor vehicle accident.

- [28] The content of the liability questions on the material remains a little uncertain. As I have pointed out, in Exhibit QL2 to the affidavit of Mr Lanyon-Owen filed on 19 December 2000, liability questions are posed to Stephens which are numbered 7 to 12 inclusive on one sheet and there is a further list of liability questions numbered 4 to 6 inclusive on a second sheet.
- [29] The respondents have substantially complied with s 45 by answering upon statutory declaration questions 1 and 2 (Ogilvie) and 4 and 5 (Stephens) reasonably asked of them pursuant to that section. In essence each asserts that the driver did not appear intoxicated to him or her at any time during the period of 12 hours preceding the collision. Stephens, in answer 4, declares that she did not see the driver consume marijuana. Their other answers appear responsive to the questions.
- [30] In my view, the respondents have reasonably answered the questions on liability which seem to have been put to them under cover of the insurer's letters of 18 September 2000. I decline to order that they make further answer.
- [31] I order that the respondents be deemed to have given notice to the insurer pursuant to s 39 of the Act on 30 January 2001.
- [32] I order that the applicant pay to the respondents their standard costs of the application to be assessed.