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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Townsville Writ No S274 of 1998
Cairns No 511 of 2002

RICHARD BRUCE KELLY

Applicant/Plaintiff

and

DAVID PAUL GLOVER

Respondent/First Defendant

and

AUSTRALIAN ASSOCIATED MOTOR INSURERS
LTD (ACN 004 791 744)

Respondent/Second Defendant

CAIRNS

..DATE 25/10/2002

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application by the plaintiff in an action for leave pursuant to rules 62 and 69 of the Uniform Civil Procedure Rules, to join a defendant in the action, notwithstanding that the limitation period for suing the proposed new party has passed. In the alternative, counsel on behalf of the applicant relies upon section 81 of the Supreme Court Act of 1991 as founding a power for the Court to accede to this application.

The plaintiff, in his action, alleges that he was injured whilst he was a passenger in a motor vehicle which, on the 21st of November 1996, after striking a bicyclist, left the roadway and overturned. He sustained injuries to his eyes, which were cut by glass, to his head and to his shoulder.

He nominated as the driver a person by the name of David Paul Glover, the first defendant in the statement of claim. By defence, the first defendant, Mr Glover, and the second defendant, the licensed insurer, initially admitted that Mr Glover was the driver. Subsequently the licensed insurer received information to the effect that the driver of the vehicle was in fact Mr John Smith, who was the owner of the subject vehicle. Upon receiving this information the second defendant sought leave to withdraw the admission that it had made to the effect that the first defendant was the driver. Leave was given by order of this Court in May of 2002.

The first indication that was given to the plaintiff that the second defendant wished to withdraw that admission was on the

7th of November 2001. That date is important, because the period within which the plaintiff could seek an extension of time to join Mr Smith as a defendant, if he sought to make such an application, would have to be made by the 7th of November 2002. The fact that such an application could be made on the basis of a newly discovered fact is a factor to be taken into account if I come to the view that the applicant's knowledge about Mr Smith being the driver, in fact, newly came to him.

The application is opposed on the basis that the plaintiff must have known who the driver of the vehicle was at the time of this incident. The circumstances are that in the late afternoon the plaintiff accepted a lift in the vehicle from Ingham to his home. When the journey commenced the vehicle was indeed being driven by Mr John Smith, and there were three other occupants in the vehicle. The plaintiff occupied the front passenger seat. On the floor of that compartment he placed groceries which he had purchased for himself that afternoon.

The vehicle travelled to Trebonne where the party stopped at the hotel and there had some drinks. The plaintiff, in evidence, said they were at the hotel for about half an hour and he had one beer. It was put to him that the party was at the hotel for between one and a-half to two hours, and that a great deal more alcohol was consumed. The plaintiff admits that he had had, earlier in the afternoon, two beers.

Whatever time elapsed at the hotel, when the group was to depart the plaintiff again took a position in the front passenger seat, where he had left his groceries on the floor. When he entered the vehicle he had to place his feet in a comfortable position around those groceries. He said that he did not take any notice of who in fact was driving the vehicle at that time.

The distance to where the incident occurred was somewhere between the estimate of two kilometres and five kilometres. The plaintiff swears, both in his affidavit and in oral evidence before me, that in that course of that journey he did not take any notice of who the driver was. He was, firstly, concerned with keeping the setting sun, towards which the vehicle was driving, from his eyes. He spent most of the time of that short journey looking out the side window. He does not recall there being any conversation which identified the driver to him.

After the impact, when he recovered his senses, the plaintiff noticed that the vehicle was upside down; that he was hanging from the seat belt; and that in the driving compartment of the upturned vehicle was the man David Glover. He was in that position kneeling on what would have been the roof of the vehicle.

In his affidavit the plaintiff says that there was some discussion at the scene in which he heard the man Glover say that he was driving the motor vehicle at the time of the incident. The respondent to this application urges upon me that I would not accept that version of events, the submission being that it was highly unlikely that, in the circumstances, the passenger in the front seat would not know who the driver was at that time.

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It was also suggested that because Mr Glover lived in a different direction to where the plaintiff expected to be dropped off at his home, that it would be a further indication that it was probably Mr Smith who was driving because Glover did not know where the plaintiff lived, and the fact that there was no conversation by the driver asking the plaintiff where he lived would be an indication that it was someone who knew, i.e. the first respondent who was in fact driving.

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These are all matters that one would take into account when weighing up the credibility of a witness. There is credible evidence which indicates that it was indeed Mr John Smith who was driving the motor vehicle. But what I have to determine here is: what was the plaintiff's knowledge as to who was driving?

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It is correctly asserted that the plaintiff has the evidentiary onus of proving what was his state of knowledge. But the only evidence which goes to his state of knowledge comes from the plaintiff himself, and that evidence is

uncontested. It is uncontested in the sense that there is no statement made by the plaintiff which is inconsistent with that being the state of his knowledge, and there are no circumstances of sufficient weight which compel me to conclude that he must have had knowledge, despite his sworn evidence before me that he did not have knowledge.

These proceedings, of course, are of an interlocutory nature. Questions of credibility may no doubt arise again in the context of the hearing. There may be other matters to put to the plaintiff in the context of another hearing. His credibility might suffer by reason of other matters being put to him, but I have to decide the question of credibility in the context of the evidence which is before me at the moment, and that essentially is that the plaintiff has sworn as to what was his state of knowledge about who was driving the motor vehicle, and there is no contrary evidence of sufficient weight which would lead me to conclude that his evidence should not be accepted.

I have come to the view therefore that whilst this question as to who was driving the motor vehicle remains to be determined, that Mr John Smith should be joined as a defendant in the action. There is evidence before me which, if accepted, would lead to a finding that Mr Smith was the driver.

Rule 69 relevantly provides in subrule 2 as follows:

"(2) However the Court must not include or substitute a party after the end of the limitation period unless one of the following applies -

(a)(iii) The proceeding was started in or against the name of the wrong person as a party, and if the person is to be included or substituted as a defendant or respondent, the person is given notice of the Court's intention to make the order; or

(iv) The Court considers it doubtful the proceeding was started in or against the name of the right person as a party, and if a person is to be included or substituted as a defendant or respondent, the person is given notice of the Court's intention to make the order."

Those two provisions appear to me to be relevant and I should find that I am satisfied on the several affidavits of Mr Bernard Leslie Kross filed herein today by leave that Mr John Smith has been properly served with the application and the supporting material.

It is submitted on behalf of the respondents that it is not necessary for John Smith to be included for the issue between the plaintiff and the present respondents to be determined. The end consequence of that submission, in my view, is that if the Court proceeded with its present parties and without Mr Smith, there could be a result that the plaintiff fails to prove that Mr Glover was the driver and it would mean, therefore, his action would fail. He would not then be in a position to commence a new action without being relieved of the consequences of the expired limitation period. He would not have any right to seek such leave under the Limitation Act

because of his knowledge gained on the 7th of November 2001 that Mr Smith was thought to be the driver.

In all the circumstances, it seems to me that the determination of all issues to which this event gives rise requires that Mr Smith be joined as a third respondent. I am satisfied that the requirements of the UCPR have been satisfied and, if that were not the case, I would unhesitatingly rely upon section 81 of the Supreme Court Act 1991 to found the discretion which I propose to exercise.

In this regard, I have been referred to the case of Draney v Barry [1999] QCA 491 where the President and Pincus JA each express the view that the general discretion under section 81 allows a cause of action, and I would anticipate also adding an additional party, notwithstanding that the specific test required by the UCPR are not satisfied.

My orders therefore will be that the plaintiff be given leave to include John Lester Smith as the third defendant to the action, notwithstanding that the limitation period has expired.

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HIS HONOUR: With respect to the costs thrown away by the adjournment of this application to today's date, I order that the plaintiff pay the defendants' costs of and incidental to that adjournment, to be assessed on a standard basis.

With respect to costs of the application generally, they
should be reserved to the trial Judge.

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