

SUPREME COURT OF QUEENSLAND

CITATION: *Kumer v Suncorp Metway Insurance Limited & Ors* [2004] QSC 381

PARTIES: **LESHNI KUMER**
(applicant)
v
**SUNCORP METWAY INSURANCE LIMITED and
LYNIECE JAYNE SMITH and RICHARD LEONARD
PALMER**
(first joint respondents)
and
THE NOMINAL DEFENDANT
(second respondent)
and
**NRMA INSURANCE LIMITED and TIMOTHY
GRAHAM JENNER**
(third joint respondents)

FILE NO: BS 9571 of 2004

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 5 November 2004

DELIVERED AT: Brisbane

HEARING DATE: 4 November 2004

JUDGE: Douglas J

ORDER: **Further submissions invited as to the form of order**

CATCHWORDS: LIMITATION OF ACTIONS - Contracts, Torts and Personal Actions - Application of the Statutes to Particular Causes of Action - Motor Vehicle Insurance – Multiple insurers – Notice given to one insurer – Failure to give notice to the Nominal Defendant within 9 months – *Motor Accident Insurance Act 1994* (Qld), ss 37(3), 39(8)

Motor Accident Insurance Act 1994 (Qld), ss 31, 33, 37, 39(8)

COUNSEL: R D Green for the applicant
K B Weber solicitor for the first respondent
M J Batch solicitor for the second respondent

SOLICITORS: Connor Fox Lawyers for the applicant
 Suncorp Metway Insurance Ltd for the first respondent
 Gadens Lawyers for the second respondent

- [1] DOUGLAS J: Mr Kumer, on 7 November 2001, was travelling along the M1 motorway near the Gateway Arterial exit when his car was hit on its left side by a Mitsubishi Lancer that moved from its lane without warning. He brought his car to a halt but it was then hit in the rear by a Nissan Patrol. It was the impact from that vehicle that injured him. The Nissan had itself been hit by a bus and it seems likely that the collision between the Nissan and the bus was caused by their need to brake suddenly because of the collision between the Lancer and Mr Kumer's vehicle.
- [2] It has subsequently come to the attention of Mr Kumer that it is alleged that another, unidentified vehicle caused the Lancer to take evasive action resulting in its collision with his car. He was unaware of the existence of that unidentified vehicle until he was informed recently by his solicitor of allegations about the existence of such a vehicle by the driver of the Lancer.
- [3] A notice was given by Mr Kumer to the insurer of the Nissan, NRMA Insurance Limited, in respect of his injuries pursuant to s.37(1) of the *Motor Accident Insurance Act* 1994 ("the Act"). It was sent by a letter dated 17 December 2001 and was initially treated as non-compliant by NRMA but by its letter dated 29 July 2003 it advised Mr Kumer's solicitors that he had complied with s.37. No notice was given by Mr Kumer to the Nominal Defendant; he did not then know of the unidentified vehicle. The Nominal Defendant did not discover that he had a claim on foot until about 21 September 2004 although it was aware of the circumstances of the accident earlier from other litigation brought by another injured person.
- [4] The Nominal Defendant is the insurer for the purposes of the Act if the motor vehicle or insurer under its compulsory third party insurance policy cannot be identified; s.31(1)(d). Its liability for personal injury caused by, through or in connection with a motor vehicle is the same as if it had been, when the motor vehicle accident happened, the insurer, under a policy under the Act for that motor vehicle; s.33(1).
- [5] Section 37(1) provides that before bringing an action in a court for damages for personal injury arising out of a motor vehicle accident, a claimant must give written notice of a motor vehicle accident claim to the insurer *or one of the insurers* against which the action is to be brought. Section 37(2) then provides:
- "The notice must be given –
- (a) if it is to be given to the Nominal Defendant because the motor vehicle cannot be identified – within three months after the motor vehicle accident..."
- [6] Sections 37(3) and 37(4) are also relevant and provide:-
- “(3) If notice of a motor vehicle accident claim is not given within the time fixed by this section, the obligation to give the notice continues and a reasonable excuse for the delay must be given in the notice or by separate notice to the insurer but, if a motor vehicle can not be identified and the

notice is not given to the Nominal Defendant within 9 months after the motor vehicle accident, the claim against the Nominal Defendant is barred. (4) If 2 or more motor vehicles were involved in the motor vehicle accident, the insurer to which notice is given under subsection (1) must, within 7 days after receiving it, give a copy of the notice to any other insurer of a motor vehicle involved in the motor vehicle accident.”

- [7] There is also a particular provision made in respect of the Nominal Defendant in s.39(8) as follows:

(8) If a claim against the Nominal Defendant is barred because the claim relates to personal injury caused by, through or in connection with a motor vehicle that can not be identified and the claimant failed to give notice of claim under this division within 9 months after the motor vehicle accident, the Nominal Defendant can not waive compliance with the requirement to give notice within the time allowed by this division, nor can the court give leave to bring a proceeding in a court despite the noncompliance.”

- [8] Where, as here, more than two motor vehicles were involved in the accident, the obligation to give notice imposed by s.37(1) is satisfied by the claimant notifying one of the insurers of the other vehicles involved. It is then incumbent on that insurer to give a copy of the notice to any other insurer of a motor vehicle involved in the accident; s.37(4). The Nominal Defendant would be another such insurer for the purposes of the Act but NRMA did not give it notice. Nor, it seems, did any other insurer give such notice to the Nominal Defendant.

- [9] The notice that was given by Mr Kumer was not, in the circumstances, one “to be given to the Nominal Defendant because the motor vehicle cannot be identified”. It was one to be given to the insurer of the Nissan, NRMA. At the time Mr Kumer was not aware of the existence of the unidentified vehicle. Accordingly, the time limit of three months specified by s.37(2)(a) does not apply to this situation because it was not a case where the notice was one to be given to the Nominal Defendant. Mr Green, for Mr Kumer, also submitted that the obligation to notify the Nominal Defendant pursuant to s.37(2) applied only where the unidentified vehicle was the only vehicle, apart from the claimant’s, involved in the accident. There may be some merit in that submission but, if the claimant were aware of the existence of an unidentified vehicle, prudence would dictate that notice should be given to the Nominal Defendant.

- [10] Section 37(3) then needs to be considered. The notice given to NMRA was given within the time fixed by s.37. It is true that that notice was not given to the Nominal Defendant either by the applicant or by NRMA or another insurer within nine months. It seems to me, however, that when s.37(3) speaks of the notice “not given to the Nominal Defendant” it means the notice “to be given to the Nominal Defendant because the motor vehicle cannot be identified” referred to in s.37(2)(a). Where, as here, notice has been given within the time fixed by the section to one insurer, the section should not be construed as barring a claim against the Nominal Defendant. This follows either because the condition on which s.37(3) is premised, namely giving of notice, has been met or because the notice necessary to satisfy s.37(1) was not one to be given to the Nominal Defendant because the motor vehicle could not be identified. To construe the subsection otherwise would have the result that a claimant in Mr Kumer’s situation, who gives notice to an insurer,

not knowing of an unidentified vehicle, could lose his rights against the Nominal Defendant, not through his own fault but because of the failure of the insurer notified to give that notice to other insurers. That is a construction that, one suspects, would not have been intended by the legislature.

- [11] When one reads s.37(4) in this context it seems to me that the Act is designed to operate by allowing one notice to be given to an insurer which is then obliged to notify any other insurer of another vehicle involved in the accident. Where, as here, a claimant notifies the insurer whose vehicle it believes to be at fault for the accident and is unaware of another unidentified vehicle the obligation to notify the Nominal Defendant does not fall on the claimant but on the insurer which is aware of that vehicle.
- [12] The further hurdle to proceeding successfully against the Nominal Defendant raised by s.39(8) is again conditioned on the claimant failing to give notice of claim under Division 3 of the Act within nine months after the motor vehicle accident. Mr Kumer did give notice under that division. The fact that it was notice to NRMA and not the Nominal Defendant does not disqualify it from consideration or mean that this Court cannot give Mr Kumer leave to bring a proceeding, if that relief is necessary.
- [13] The Court has a discretion to authorise further proceedings based on the claim despite noncompliance. There was previous noncompliance by Mr Kumer with the information provided in his notice which has since been remedied to NRMA's satisfaction. The first and third joint respondents have no objection to the orders sought but it may not be necessary, on the view I have taken, to give leave to commence proceedings against the Second Respondent as Mr Kumer has given the notice required by Division 3. It may simply be enough to declare that Mr Kumer is entitled to commence proceedings against the second respondent, the Nominal Defendant.
- [14] Accordingly, I shall hear further submissions as to the form of the order.