

SUPREME COURT OF QUEENSLAND

CITATION: *Nominal Defendant v Smith* [2016] QSC 227

PARTIES: **NOMINAL DEFENDANT**
(applicant)
v
VIKKI ANN SMITH
(respondent)

FILE NO/S: BS No 9138 of 2016

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 28 September

DELIVERED AT: Brisbane

HEARING DATE: 28 September

JUDGE: Martin J

ORDER: **Application dismissed.**

CATCHWORDS: TORTS – NEGLIGENCE – STATUTES, REGULATIONS, ETC - APPLICABILITY AND EFFECT IN ACTIONS FOR NEGLIGENCE – RELATING TO VEHICLES AND TRAFFIC – PARTICULAR STATUTES, REGULATIONS, ETC – where the applicant sought a declaration that the respondent could not establish that it had made proper search and inquiry for the purposes of s 31(2) of the *Motor Accident Insurance Act 1994* (Qld) – whether it is a prerequisite to the commencement of any proceeding against the Nominal Defendant that there must have been proper inquiry and search which fails to establish the identity of the motor vehicle

Motor Accident Insurance Act 1994 (Qld), s 31(2)

Nominal Defendant v Meakes (2012) 60 MVR 380; [2012] NSWCA 66

COUNSEL: J Rolls for the applicant
K C Fleming QC for the respondent

SOLICITORS: Jensen McConaghy Lawyers for the applicant
CMC Lawyers for the respondent

The Nominal Defendant seeks, by way of an originating application, a declaration that the respondent cannot establish that proper inquiry and search has been made pursuant to s 31(2) of the *Motor Accident Insurance Act 1994* (the Act) to establish the identity of the motor vehicle in the respondent's notice of accident claim form, dated 8 January 2016.

In August 2015, the respondent served a notice of accident claim form, but because it had not been dated, the Nominal Defendant did not accept that it complied with the Act. Nevertheless, the respondent was asked by the Nominal Defendant to advise what steps she had undertaken in order to satisfy the proper inquiry and search requirement imposed by the Act. Those details were eventually provided.

Given the decision I have reached, I do not need to engage in a detailed examination of the circumstances of the alleged accident, or of the steps taken by the defendant to satisfy the requirements contained in s 31(2) of the Act. It provides:

“(2) In any legal proceedings, it is to be presumed that a motor vehicle can not be identified if it is established by affidavit or oral evidence that proper inquiry and search have been made and have failed to establish the identity of the motor vehicle.”

It is submitted for the Nominal Defendant that it is a prerequisite to the commencement of any proceedings against the Nominal Defendant that there must have been proper inquiry and search which fails to establish the identity of the motor vehicle. Further, it is submitted that the satisfaction of this requirement is a condition precedent to any action against the Nominal Defendant. Mr Fleming QC, who appeared for the respondent, accepted the analysis of the legal principles as advanced by the applicant. Notwithstanding that acceptance, I do not agree that the requirements of section 31 of the Act create a condition precedent to an action against the Nominal Defendant.

The argument for the Nominal Defendant that there is such a “condition precedent” is based upon the decision of the New South Wales Court of Appeal in *Nominal Defendant v Meakes* (2012) 60 MVR 380; [2012] NSWCA 66. In that case the court was dealing with the similar provision in the *Motor Accidents Compensation Act 1999* (NSW) which, at the relevant time, provided:

“(1) An action for the recovery of damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle on a road in New South Wales may, if the identity of the vehicle cannot after due inquiry and search be established, be brought against the Nominal Defendant.

...

(2) The inquiry or search may be proved orally or by affidavit of the person who made the inquiry or search.

(3) In respect of any such action, the Nominal Defendant is liable as if it were the owner or driver of the motor vehicle.”

Sackville AJA (with whom McColl JA agreed), said:

“[29] It was common ground on the appeal that s 34(1) of the MAC Act creates a cause of action against the nominal defendant, a condition precedent of which is that there must have been due inquiry and search for the purpose of identifying the motor vehicle and that it must have been impossible thereby to establish the identity of the vehicle.”

Basten JA said:

“[2] ... The key issue on the appeal was whether he was entitled to bring proceedings against the nominal defendant.

[3] The answer to that question turned on whether the respondent had fulfilled the statutory condition for bringing such proceedings, namely that “after due inquiry and search”, he was unable to establish the identity of the vehicle: *Motor Accidents Compensation Act 1999* (NSW), as then in force, s 34(1).”

It will be seen that there is a significant difference between the provisions of the New South Wales legislation and the Act. The New South Wales legislation provides that an action may be brought if the identity of the vehicle cannot, after due inquiry and search, be established.

That is not the position under this Act. It does not require, as a precondition to commencing proceedings, that the proper inquiry and search requirements be satisfied.

The words of s 31(2) provide that a presumption exists “in any legal proceedings”. The term “legal proceedings” is not defined but should be taken to refer to proceedings in the nature of those contemplated by the Act, that is, proceedings seeking damages for personal injury caused by a motor vehicle accident.

Section 31 provides for a presumption in the claimant’s favour, which is dependent upon the claimant showing that “proper inquiry and search” has not revealed the identity of the motor vehicle. It is an element of the cause of action against the Nominal Defendant, not a condition precedent (unlike pre-trial requirements) to bringing an action against the Nominal Defendant. It is for that reason that a plaintiff pleads the presumption and pleads that proper inquiry and search has not established the identity of the motor vehicle.

Mr Fleming submitted that it was premature to seek a declaration. It is more than that. The presumption does not take effect until there are “legal proceedings”. The pre-trial requirements of the Act have not been completed, and so there are no legal proceedings in which the presumption can operate. A declaration should not be made about whether a party can prove an element of its cause of action before the proceedings based upon such a cause of action have commenced.

Mr Rolls submitted that a declaration should be made, because it would bring this matter to a conclusion, and it would prevent the waste of money, which, on his argument, will inevitably follow. It would be charitable to describe the respondent’s position on “proper inquiry and search” as weak. On the material placed before me, it would be most unlikely that she could succeed in satisfying the requirement in s 31(2), but that is not something that the Act requires that she do now. It is for that reason that the application is dismissed.