PARTIES:	GILBERT PRESTON SESAR v COLIN DOUGLAS SMITH & ORS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	Interlocutory Application
FILE NO:	103/97
DELIVERED:	13 November 1997
HEARING DATES:	10 July; 7 and 21 August; 24 October 1997
JUDGMENT OF:	The Master

CATCHWORDS:

PRACTICE - Northern Territory - pleadings - particulars - common design

PRACTICE - Northern Territory - summary judgment - O23 Supreme Court Rules - joint tortfeasors - whether one defendant entitled to summary dismissal by reason of evidentiary deficiencies in plaintiff's case

TORT - Northern Territory - joint tortfeasors - common design - concerted action to a common end

CASES FOLLOWED

Mutual Life & Citizens Assurance Co Ltd v Evatt
(1970) 122 CLR 628
The Koursk (1924) P 140
Thompson v ACTV 71 ALJR 131
Wickstead v Browne (1992) 30 NSWLR 1
Wilson v Union Insurance Co 112 FLR 166

REPRESENTATION:

Counsel:

Plaintiff:	Mr Bruxner
Defendant:	Mr Wyvill

Solicitors:

Plaintiff:	Mr McLaren
Defendant:	Morgan Buckley

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
103/97 (9711941)

Between:
GILBERT PRESTON SESAR
Plaintiff
and
COLIN DOUGLAS SMITH and ORS
Defendants

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 13 November 1997)

The plaintiff alleges that on 23 May 1994 he was assaulted and beaten (the "acts") by the first five defendants, and that the sixth defendant was involved as part of a "common design". This is pleaded in the amended statement of claim as follows:

"1.2 the sixth defendant assisted and/or acquiesced in the perpetration of the acts by:

1.2.1 keeping lookout for the first to fifth defendants; and/or

1.2.2 by consciously refraining from exercising or attempting to exercise her authority as a serving member of the Northern Territory Police Force to prevent the perpetration and/or continuation of the acts.

2. The acts were perpetrated in furtherance of a common design of the first to sixth defendants, or some of them, to injure and/or intimidate the plaintiff.

3. In the premises, each of the first to sixth defendants who shared the common design has wrongfully assaulted and beaten the plaintiff."

To be constituted joint tortfeasors there must be "concerted action to a common end" (see ***The Koursk*** (***1924) P. 140***, 156 and ***Thompson v ACTV 71 ALJR 131,132***). "Concerted" is defined in the Macquarie Dictionary as "1.contrived or arranged by agreement; prearranged; planned or devised: concerted action. 2. involving the cooperation and combined forces of those concerned: a concerted effort." Presumably, the allegation of a "common design" is intended to encapsulate this concept and, while it is not entirely clear whether it is alleged that the common design was prearranged or spontaneous, the word "design" suggests the former.

The material facts pleaded in paragraph 1.2.1 seem to relate to "assistance" and it is arguable that they may form the basis for a conclusion that the sixth defendant was a party to a common design. Those pleaded in paragraph 1.2.2 do not appear to relate to "assistance", but may relate to "acquiescence". There was little argument directed to this point, and I was not referred to any evidence or authority as to the powers and duties of a police officer in the circumstances of the sixth defendant. Even on the assumption that the sixth defendant had a duty to intervene, or express dissent as to the actions of the other defendants, this does not necessarily suggest concerted action.

It is suggested by Professor Fleming in the eighth edition of The Law of Torts at page 256, that the common law applicable to principals in the second degree may be relevant as to the requisite degree of participation and may include a person who aids and abets. A conspirator may be liable merely by being present. (see also Williams - Joint Torts and Contributory Negligence at page 11). If the sixth defendant was party to a common design, it is arguable that, by acquiescing as alleged, she is liable as a joint tortfeasor.

The difficulty is that the allegation of a common design is not supported by any material facts or particulars. (See O.13.02(1)(a) and O.13.10(1)). The defendants, and in particular the sixth defendant, may reasonably expect that there would be particulars as to how the common design arose, but these have not been provided.

There is also a question as to whether there is evidence to support the allegation contained in paragraph 1.2 as supported by the particulars contained in sub-paragraph 1.2.1.

The plaintiff deposes that he left his vehicle to "make some deals" with a person he met at the casino. That person was not there and he returned to his vehicle where he saw the fourth defendant crouching nearby. The plaintiff was told not to move, but ran away, and was surrounded by the defendants whom he now knows to be police officers.

He says he was struck a number of blows by the defendants, except the sixth defendant, who was watching. At one stage, when he was on the ground, he saw the sixth defendant's legs, facing in his direction.

The defendants have filed affidavits in support of this application, however, the plaintiff's counsel has objected to part of this evidence. He provided a document setting out the evidence objected to and the grounds for objection, which objections I consider to be valid. In particular, I am unable to derive any assistance from the bald assertion that the circumstances leading to the arrest of the plaintiff were lawful and no illegal or negligent acts were committed. The sixth defendant has not specifically denied the allegations in paragraph 1.2 of the amended statement of claim.

There is no evidence which may reasonably form the basis for the allegation that the defendant was keeping a lookout for the other defendants.

As to the application for summary relief I adopt, with respect, the words of Kearney J. in ***Wilson v Union Insurance Co***. ***112 FLR 166***, at page 181 "...to be successful (the applicant) must show that the plaintiff's case is unsustainable in fact or in law. Order 23 is intended as a means for dealing with actions which are absolutely hopeless, those so obviously frivolous or unsustainable or untenable that it is plain and beyond rational debate that they cannot succeed. The power under O 23 is to be exercised by a court with great caution; an applicant bears a heavy burden. If the plaintiff shows an arguable case, one which is not unworthy of serious discussion and of evidence being led, a case not hopeless beyond argument, an application under O 23 should be dismissed. The question is whether it would be open to the plaintiff on the pleadings to prove facts at trial which would constitute a cause of action: see ***Mutual Life and Citizens Assurance Co Ltd v Evatt*** ***(1970) 122 CLR 628*** at 631. The affidavit process is unsuitable when facts are in dispute, and this also points to the jurisdiction being exercised only when the case is obvious and clear beyond doubt."

In ***Wickstead v Browne*** ***(1992) 30 NSWLR 1*** at page 11, Handley JA and Cripps JA suggested of such an application that " ... a defendant undertakes the burden of establishing that there is no triable issue. On such an application the defendant bears the onus of proof and where the facts are peculiarly within the defendant's knowledge the plaintiff's action should not be dismissed because of gaps in the case if the necessary evidence might be obtained as a result of discovery or interrogatories."

Further, one of several defendants is not entitled to summary dismissal before trial by reason of evidentiary deficiencies in the plaintiff's case (see ***Wickstead*** at pages 11-12). The reason for this is that relevant evidence may emerge during the course of the proceeding, which is possible if this proceeding continues against the other defendants.

I am not satisfied that judgment against the sixth defendant is appropriate at this stage. However, this issue should remain open until the application insofar as it relates to the other defendants has been resolved.

In the meantime the plaintiff should provide particulars as to the common design alleged in paragraph 2 of the amended statement of claim as such particulars may be relevant to the determination of this application.

Orders:

1. The application is adjourned to a date to be fixed.
2. The plaintiff serve particulars of the common design alleged in paragraph 2 of the amended statement of claim.