PARTIES:	JAMES JUSTICE ROBERTSON (by his litigation guardian) WILLIAM IVEY ROBERTSON v MELISSA JANE BARNES and GAVIN CECIL KUHL
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	Appeal From Supreme Court Exercising Territory Jurisdiction
FILE NO:	AP 13 OF 1997
DELIVERED:	2 June 1997
HEARING DATES:	29 May 1997
JUDGMENT OF:	Angel, Mildren and Thomas JJ

CATCHWORDS:

Appeal and new trial - Interference with trial Judge's discretion - unfair delay of trial - Motor vehicle accident - Fundamental threshold question of applicable law - Appeal allowed

Jurisdiction of Courts Cross-Vesting Act 1989 (NT)
Motor Accident Compensation Act 1979 (NT)

Oldfields Pty Ltd v Alfar (1996) 70 ALJR 560 considered
Ramton v Cassin (1995) 38 NSWLR 88 considered

REPRESENTATION:

Counsel:

Appellant:	T J Riley QC, B Krupka
Respondent:	K C Fleming, J B Waters

Solicitors:

Appellant:	Cridlands
Respondent:	Waters James McCormack

Judgment category classification:	B - local distribution
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP13 of 1997

BETWEEN:

JAMES JUSTICE ROBERTSON (by his litigation guardian) WILLIAM IVEY ROBERTSON

Applicant

AND:

MELISSA JANE BARNES & GAVIN CECIL KUHL

Respondents

CORAM: Angel, Mildren and Thomas JJ

REASONS FOR JUDGMENT

(Delivered 2 June 1997)

THE COURT:

On 27 May 1997 Bailey J adjourned the trial of an assessment of damages which had commenced the day before. He did so on the application of the defendants, the respondents before us, to enable them to seek leave to appeal from an earlier ruling whereby he had refused leave to the defendants to amend their defence. On Thursday 29 May 1997 on the plaintiff's application

and for the reasons which we now publish, we granted leave to appeal from the decision of Bailey J to adjourn the trial, allowed the appeal and directed that the trial resume on Monday next at 10.00am. We also ordered that the defendants pay the plaintiff's costs of and incidental to the application for leave to appeal and appeal.

On 12 November 1983 the plaintiff, a Northern Territory resident, was a passenger in a Northern Territory motor vehicle driven by one defendant when it collided with a Queensland registered vehicle driven by the other defendant. The collision occurred in Queensland. As a consequence of the collision the plaintiff is severely brain damaged. His affairs are being managed by the Public Trustee of the Northern Territory and he sues by his father as litigation guardian. The plaintiff commenced proceedings for common law damages for negligence by issuing a writ in the Supreme Court of Queensland at Townsville on 1 April 1986. On 21 July 1994 the defendants admitted liability. By order of the Supreme Court of Queensland made on 2 August 1996 the proceedings were cross-vested to the Supreme Court of the Northern Territory. At a directions hearing before Kearney J on 9 October 1996, orders were made as to the further conduct of the proceedings and the action was listed for hearing for four weeks to commence in May 1997. Further directions hearings were held before Kearney J and Bailey J at various times between 12 November 1996 and 12 May 1997. On 22 April 1997 the plaintiff obtained judgment against the defendants for damages to be assessed.

The trial commenced before Bailey J on 26 May 1997. On that date counsel for the defendants informed the Court for the first time that there was the prospect of an application for an amendment to the defence. At 2.00pm on that day senior counsel for the defendants made application to amend the defence by adding a paragraph in terms that, by operation of the *Jurisdiction of Courts Cross-Vesting Act* 1989 (NT) and the *Motor Accident Compensation Act* 1979 (NT) and the choice of law rules (a) the plaintiff's damages are those monies payable pursuant to the *Motor Accident Compensation Act* 1979 (NT) and (b) the plaintiff has no common law right to damages. Bailey J refused to grant the amendment. He held, in substance, that the proposed amendment was inconsistent with the existing judgment in favour of the plaintiff. The defendants have sought leave to appeal from that refusal in an application that is not before us. The defendants also now seek leave to extend the time within which to appeal from the order giving judgment. That matter likewise is not before us.

Consequent upon Bailey J rejecting the application of the defendants to amend the defence, counsel for the defendants sought an adjournment of the trial to enable leave to appeal to be pursued against the decision of his Honour in respect of refusing the amendment and to enable the defendants to seek an extension of time within which to mount an appeal against the entry of judgment. The application for an adjournment of the trial was opposed by the plaintiff.

Bailey J, “with a good deal of reluctance”, granted the adjournment and made cost orders against the defendants. The application before us was to set aside the order for adjournment and direct the hearing of the trial to continue.

The learned trial judge’s reasons for granting the adjournment were essentially twofold, first, that the issue raised by the defendants’ proposed challenge to the judgment was in his Honour’s view “a fundamental threshold question” and secondly, that the costs of the continued trial (fixed four weeks duration) would be “enormous”, and potentially all wasted.

The principles regarding applications for adjournment are well settled. A party is generally entitled to have a case heard when it comes into the list for hearing but an adjournment will be granted where failure to do so would prejudice a party seeking it, unless the other party would be prejudiced by the granting of the adjournment. It is a matter for the discretion of the trial judge in every case and an appellate court is always slow to interfere with the exercise of it. The question for this Court is whether the learned trial judge’s decision to adjourn the trial in the circumstances before him was an unjust or an improper exercise of his undoubted discretion to adjourn or not to adjourn the hearing. Although an appellate court will rarely intervene to review a trial judge’s decision to grant or to refuse an adjournment, it is right that it do so if the trial judge’s discretion has not been exercised judicially, or where it is exercised upon erroneous principle, or where it has resulted in injustice.

In the present case we are of the view that the exercise of discretion miscarried. Granting the adjournment effectively meant the plaintiff's action would suffer further substantial delay before going on for trial again. There would have been no procedural unfairness to the defendants in refusing the adjournment. The plaintiff is, through lack of funds, living in accommodation which the plaintiff's medical advisers consider is stressful to him and injurious to his health. The plaintiff's father (who is the next friend) and his mother, the intended first witness, were under strain and wanting and expecting the long awaited trial to proceed to conclusion. Witnesses from various parts of Australia - medical, mining, actuarial, carers, allied health and lay witnesses - had all been arranged to give evidence. There had been great effort by many to get this matter to trial and an expectation that the trial would proceed. The matter had been case managed since October 1996 and it was only on the first day of trial and after the plaintiff's opening that the defendants first made mention of the proposed applications. Judgment had been entered for the plaintiff against the defendants for damages to be assessed without any objection from the defendants. The time to lodge an appeal against entry of judgment had expired. The defendants had not sought, let alone obtained, an extension of time to lodge an appeal against the entry of judgment. Whatever rights of appeal or of seeking leave to appeal that are available to the defendants against the trial judge's refusal to grant leave to amend the defence remain available to them. There is substantial debate between the parties as to the question of amendment. The merits of that debate are not before us but the chances of the defendants' applications being ultimately successful do not appear to us to be strong. There is substantial authority to the effect that any

leave to appeal application in respect of the refusal to amend should await an appeal after trial on the substantive issues; only special compelling reasons would justify halting the trial on account of an interlocutory issue arising in the course of the trial: see, eg, *Ramton v Cassin* (1995) 38 NSWLR 88, *Oldfields Pty Ltd v Alfar* (1996) 70 ALJR 560. The plaintiff wishing to proceed with the trial and being prejudiced by an adjournment and such prejudice not being entirely salved by the order for costs, and there being no obvious prejudice to the defendants in refusing to adjourn and proceeding with the hearing, we see no good reason why the plaintiff in the present case should have lost his hearing. The fact the defendants now seek leave to appeal from the trial judge's decision to dismiss the defendants' application to amend their defence and now wish to contest judgment having been given in favour of the plaintiff against the defendants for common law damages to be assessed seems to us to be no good reason to deny the plaintiff his hearing. Nor do we see the defendants' proposed application for leave to extend time within which to set aside that judgment sufficient ground to warrant disentitling the plaintiff from having his case heard. In our view the learned trial judge failed to have sufficient regard to the prejudice to the plaintiff of granting the adjournment and the lack of any prejudice to the defendants if the trial proceeded.

So far as any question of costs potentially wasted the plaintiff and the defendants are equally at risk. The plaintiff wishes to proceed and run the risk. There are mechanisms open to the defendants under the Rules of the Court to protect themselves as regards costs. To the extent that the lateness of

the application may have a bearing on the defendants' ability to so protect themselves is not the fault of the plaintiff.

We think there was appealable error, and that the order for adjournment led to a miscarriage of justice. We do not think that there were good reasons to grant the adjournment, nor do we consider that justice was done to the plaintiff, nor are we of the view that any injustice to the defendants would have been done if the adjournment had been refused and the trial proceeded. As regards the matters the defendants seek to agitate they are fully protected by the avenue of appeal after trial.

For these reasons we took the view that we should grant leave to appeal, allow the appeal and order that the trial proceed. We made these orders at the conclusion of argument and also ordered that the plaintiff have his costs of the application for leave and of the appeal.
