Apitzsch v Gayle [1999] NTSC 112

PARTIES:	RICO BERND APITZSCH v JUNIOR ERROL GAYLE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	104 of 1991 (9105280)
DELIVERED:	26 October 1999
HEARING DATES:	14 October 1999
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Plaintiff:	J Kelly
Defendant:	J Reeves QC

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Cridlands

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Apitzsch v Gayle [1999] NTSC 112
No.104 of 1991 (9105280)

BETWEEN:

RICO BERND APITZSCH
Plaintiff

AND:

JUNIOR ERROL GAYLE
Defendant

CORAM: Bailey J

REASONS FOR JUDGMENT

(Delivered 26 October 1999)

[1] This is an appeal (pursuant to 077.05 of the Supreme Court Rules) from an order of the Master made 30 September 1999 refusing an application that an issue of contributory negligence be tried separately from and prior to the issue of damages.

[2] The appeal, pursuant to 077.05(7) is by way of re-hearing *de novo* of the application to the Master.

[3] In brief terms, the background to the application is that the plaintiff claims damages for injuries suffered in a motor vehicle accident that occurred on 15 April 1988. By its amended defence the defendant admits that the plaintiff was a passenger in the rear of the vehicle, a panel van, and suffered injury when the defendant lost control of the vehicle, which then overturned.

It is also admitted that the defendant was negligent, but it is alleged that the plaintiff was also negligent in failing to take reasonable care for his own safety by "riding as a passenger in the back of a panel van with no restraining device such as a seat belt". The amended defence provides other particulars of the plaintiff's alleged contributory negligence, but these were not referred to during submissions on the present appeal (nor in evidence or argument before the Master).

[4] The plaintiff's application by way of appeal seeks to set aside the Master's order of 30 September 1999 and substitute an order:

> "that the question raised in the pleadings of the plaintiff's contribution to the injuries he suffered ("the preliminary question") be tried prior to and separately from the questions of the extent of the plaintiff's injuries, and the quantum of damages to be assessed";

[5] The plaintiff relies on 047.04 which provides:

> (a) a question in a proceeding be tried before, at or after the trial of the proceeding and may state the question or give directions as to the manner in which it shall be stated; and
>
> (b) different questions be tried at different times or places or by different modes of trial.

[6] The evidence suggests that as a result of his injuries the plaintiff is severely incapacitated and that the hearing of his claim for damages is likely to occupy a matter of weeks rather than days. The plaintiff resides in Germany and there will be a need to adduce expert evidence (medical, rehabilitation, accounting and legal) from German residents.

[7] The principal issues to be decided at trial are:

(a) the extent and seriousness of the plaintiff's injuries;

(b) damages;

(c) whether the plaintiff was guilty of negligence in failing to take reasonable care for his own safety in the circumstances; and

(d) if so, whether this contributed to his injuries and to what extent.

[8] Ms Kelly, on behalf of the plaintiff, submitted that the question of contributory negligence (issued (c) of at para [7] above) is a discrete issue, would not require evidence from the plaintiff or other witnesses resident overseas and its resolution would enhance the prospects of settlement. Ms Kelly emphasized that the plaintiff's application for a separate trial as to the issue of contributory negligence is confined to that issue alone. In particular, the application does not encompass issue (d) at para [7] above, namely, that if the plaintiff was guilty of contributory negligence, whether such negligence contributed to his injuries and to what extent. The intention of the plaintiff is that if the plaintiff is found to be guilty of contributory negligence, the question of whether this contributed to his injuries and, if so, to what extent, would be dealt with at the trial as to damages.

[9] Both Ms Kelly for the plaintiff and Mr Reeves QC for the defendant referred to the following passage from *Dunstan v Simmie & Co Pty Ltd* [1978] vr 669

@ 671 as a correct statement of the principles to be applied to applications of the present nature:

> "Nevertheless, although every case must depend upon its own facts, [it will as a general rule only be appropriate to order that a preliminary issue be isolated for determination before trial where the determination of the issue in favour of the plaintiff or the defendant will put an end to the action *or* where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issued in the case is likely to save inconvenience and expense:] cf. *Polskie v Electric Furnace Co Ltd* [1956] 1 W.L.R. 562, especially at p.569".

[10] The above passage was cited with approval by Kearney J in *Gaye (No.1) Pty Ltd v Allen Rowlands Holdings Pty Ltd*, No. 281 of 1985, unreported, delivered 11 August 1987. With respect, I also would agree that the passage from *Dunstan*, supra, is a correct statement of the applicable principles.

[11] Mr Reeves QC, however, also emphasized that Kearney J in *Gaye (No.1) Pty Ltd*, supra at p.9, observed:

> "it is true that, in general, separate trials of issues of liability and damages are unsatisfactory because both contain factors consideration of which contribute to a just and careful resolution of the order. A plaintiff's attitude towards his damages may be such as to go to his credibility on the issue of liability.

[12] In the present case, the plaintiff's credibility does not appear to be of material significance in the light of evidence as to his disabilities and absence of any memory as to the circumstances of the accident.

[13] In *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 606, Kirby P observed:

> "care must also be taken in utilising the procedures now available for the determination of preliminary points to avoid such determination in cases which are not ripe for this treatment. A matter is "ripe" for separate and preliminary determination where it is a central issue in contention between the parties, the resolution of which will either obviate the necessity of litigation altogether or substantially narrow the field of controversy".
>
> And later at 607:
>
> "it is my view that the court should be facultative in the matter of separate decisions on questions arising in the course of the trial. The rules now provide for it. Where the exceptional circumstances exist that make it sensible to do so (and no reason exists to suggest the contrary) the procedure can be beneficial. It can contribute not only to the prompt disposal of crucial issues in the litigation (sometimes resulting in disposal of the whole action and even judgment for a party). It can also contribute to the saving of time and costs where an authoritative decision narrows the issues for trial substantially, excluding the necessity to explore factual matters which, on one determination of the preliminary question, are entirely unnecessary. Such may be the present case. Additionally, there is a practical consideration. If the court provides an authoritative determination of a key question in difference between the parties, it is quite likely that it will, in some cases at least, contribute to the settlement of the litigation because the parties know the basis upon which the remaining disputes will be dealt with by the court".

[14] In Ms Kelly's submission, the above observations are particularly relevant to the present application. She submitted that the issue of contributory negligence is likely to occupy court time of a matter of days rather than weeks; that the issue is a major source of contention between the parties and that a preliminary trial of the issue would save (potentially) save considerable time and costs by substantially excluding the necessity to explore factual matters which (if the plaintiff succeeds on the preliminary issue) would be entirely unnecessary. A favourable outcome for the

plaintiff on the issue of contributory negligence would exclude the need for additional expert evidence as to causation (namely, did the plaintiff's negligence contribute to his injuries) and damages (namely, if so, to what extent were the plaintiff's injuries caused or contributed to by his negligence). Ms Kelly submitted that a preliminary ruling in favour of the contributory negligence issue would also substantially increase the prospects of a settlement between the parties. On the other hand, in Ms Kelly's submission, if a preliminary ruling went against the plaintiff on the issue of contributory negligence, the discrete nature of the issue would not result in substantial inconvenience, costs or expense.

[15] I agree with the submissions made by Ms Kelly on behalf of the plaintiff. A separate trial confined to the issue of whether the plaintiff was guilty of contributory negligence (and not extending to the further issues of whether such negligence contributed to the plaintiff's injuries and, if so, to what extent) is a discrete issue the determination of which is likely to same inconvenience and expense. The saving of time and costs is likely to be very considerable if the plaintiff succeeds on the preliminary issue (by elimination of the need for expert evidence as to whether the plaintiff's injuries are more severe than they would have been if he had not been negligent). On the other hand, if the plaintiff does not succeed on the preliminary issue, any small increase in time and costs, would in my view be outweighed by the enhanced prospects for settlement of the litigation once the issue of contributory negligence has been determined.

[16] For these reasons, I make the following orders;

(i) that the order of the Master made on 30 September 1999 be set aside;

(ii) that the question raised in the pleadings of the plaintiff's contribution to the injuries he suffered ("the preliminary question") be tried prior to and separately from the questions of the extent of the plaintiff's injuries, and the quantum of damages to be assessed;

(iii) that the preliminary question be referred to the Registrar on a date to be advised to the solicitors for the parties, to be listed for hearing;

(iv) that the costs and incidental to the plaintiff's application filed 16 August 1999 and heard by the Master on 19 August 1999, and the costs of and incidental to this appeal, be costs in the cause to be taxed in default of agreement, certified fit for senior counsel.

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