Vlietstra v Range & Anor [2005] NTSC 6

PARTIES:	MARK VLIETSTRA
	v
	ANDREW MARK RANGER FAI ALLIANZ LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 7 of 2004 (20401205)
DELIVERED:	18 February 2005
HEARING DATES:	17 February 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

PROCEDURE – SUPREME COURT PROCEDURE

R47.4 Supreme Court Rules – separate trial of preliminary issue – resident of the Territory – residence – negligence – statement of engagement – utility, economy and fairness – expense and inconvenience

Motor Accidents (Compensation) Act (NT) s 4, s 4(1), s 5; *Motor Vehicle Accident Insurance Act (QLD)*

Buric v Transfield PBM Pty Ltd (1992) 112 FLR 189; *Carlo Nobili SpA Rubinetterie v Militaire Nominees Pty Ltd* [2004] WASC 47; *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669; *Tepko Pty Ltd v Water Board* [2001] 206 CLR 1; referred to

REPRESENTATION:

Counsel:

Plaintiff:	N. Christrup
Defendant:	C. Ford

Solicitors:

Plaintiff:	Priestleys
Defendant:	Cridlands

Judgment category classification:	B
Judgment ID Number:	SOU 0501
Number of pages:	11

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Vlietstra v Ranger & Anor [2005] NTSC 6
No. 7 of 2004 (20401205)

BETWEEN:

MARK VLIETSTRA
Plaintiff

AND:

ANDREW MARK RANGER
First Defendant
FAI ALLIANZ LIMITED
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 18 February 2005)

Introduction

[1] This is an interlocutory application made by Summons filed by the First and Second Defendants on 5 January 2005. The question for determination by the Court is whether pursuant to r 47.04 of the Supreme Court Rules there should be a separate trial of the issue of the Plaintiff's residency which is raised by par 5 of the Defence of the First and Second Defendants.

[2] The application is opposed by the Plaintiff.

[3] The following matters are pleaded in par 5 of the Defence of the First and Second Defendants:

"At all material times:

(a) The place of the incident referred to in par 3 of the Statement of Claim was within the borders of the Northern Territory of Australia;

(b) In the premises the law of the Northern Territory applies to the Plaintiff's right of action to pursue damages for any negligence the Plaintiff may prove arising from the incident referred to in par 3 of the Statement of Claim;

(c) The Plaintiff's right of action and the Plaintiff's entitlement to damages is to be determined in accordance with the provisions of the Motor Accidents (Compensation) Act 1979 (NT) (as amended) (hereinafter called in this defence "the Northern Territory Act");

(d) The Plaintiff was a "resident of the Territory" within the meaning of that term as defined in s 4 of the Northern Territory Act

Particulars

(i) Prior to the 14 January 2001 the Plaintiff had entered the Northern Territory to take up residence pursuant to a written agreement for his employment;

(ii) The Plaintiff had entered into a written agreement for employment with AA Company Pty Ltd dated 14 November 2000;

(iii) The Plaintiff's written agreement for employment with AA Company Pty Ltd required his services as a station cook at a property known as "Brunette Downs" within the borders of the Northern Territory for a period of not less than three (3) months.

(e) In the premises pursuant to the provisions of s 5(1)(a) of the Northern Territory Act the Plaintiff, as a resident of the Northern Territory, has no right of action against the First Defendant and the Second Defendant."

[4] In substance the defendants say that the Plaintiff was a resident of the Territory because after last entering the Territory prior to the motor vehicle accident which is the subject of this proceeding the Plaintiff entered into a written agreement for his employment that would require his services in the Territory for a period of not less than three months calculated from the date that he last entered the Territory before entering into the agreement. In so doing they rely on par (a)(iii) of the definition of "resident of the Territory" in s 4(1) of the Motor Accidents (Compensation) Act (NT).

[5] If the plaintiff was a resident of the Territory then he has no right to bring an action for damages against the defendants for the injuries he sustained as a result of the motor vehicle accident that occurred in the Territory at place approximately 36 kilometres north of the intersection of the Tablelands Highway and the Barkly Highway on 14 January 2001 (see s 5 Motor Accidents (Compensation) Act).

[6] The defendants say that the issue of residency should be tried as a preliminary issue because if the issue is found in favour of the defendants the remaining issues of negligence and damages are irrelevant as the provisions of the Motor Accidents (Compensation) Act will apply. They further state that the issue involves a discrete question of law and it would

only take one day for this Court to try the issue. Consequently there could be a considerable saving in time and cost of the proceeding.

[7] The Plaintiff says that the law on the issue of residency as currently declared by the Supreme Court is in his favour, he is entitled to the benefit of the law as it has been declared and the separate trial of the issue would only cause him hardship and delay.

The principles applicable to determining whether there should be a trial of a preliminary issue

[8] The Court's discretion to make an order pursuant to r 47.04 is a general discretion. However, it is a judicial discretion and there must be sufficient reason for exercising the discretion.

[9] In *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669 the Full Court of the Supreme Court of Victoria considered that although every case must depend on 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 one party or the other will end the litigation, or where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issues in the case is likely to save inconvenience and expense.

[10] As Counsel for the defendants submitted the criteria which are commonly considered by a Court prior to the exercise of the discretion to order the trial of a separate question have been usefully summarised by McKechnie J in

Carlo Nobili SpA Rubinetterie v Militaire Nominees Pty Ltd [2004] WASC 47 as follows:

- A separate trial of issues is only appropriate in clear and simple cases.
- Separate trials of issues should only be embarked on when the utility, economy and fairness is beyond question.
- The fact that the separate trial may determine the litigation is relevant.
- Separate trials of issues may be appropriate where it is likely to save expense and inconvenience.
- There is a focus in the Rules of the Supreme Court on the expedition of determination of matters before the Court and separate trials of issues may advance the expedition.
- A possibility that the determination of issues tried separately may lead to settlement should be taken into account even though the issues may not finally dispose of the action.
- In many cases the formulation of specific questions to be tried separately, from and in advance of other issues, will assist in the resolution of the matters in issue if the questions are capable of final answer in accordance with the judicial process.

- Separate trials are inappropriate where the result depends on complex issues of fact or when a preliminary question is one of mixed fact and law.

- The procedure should be confined generally to cases where facts are complicated and the legal issues are short, otherwise it can be a treacherous short cut.

- Separate trials may be productive of delay, extra expense and uncertainty of outcome, which they are intended to avoid. Saving sometime is often illusory when the parties have the necessity of making full preparation and factual matters relevant to one issue are relevant to others which overlap.

- There is potential for further appeals

[11] The relevance of the potential for further appeals to the exercise of the discretion was considered by the High Court in *Tepko Pty Ltd v Water Board* [2001] 206 CLR 1. In a joint decision Kirby and Callinan JJ stated that the procedure has the indirect disadvantage of prolonging the litigation where the determination of the preliminary issue is subject to appeal, so that the remainder of the trial must await the conclusion of a lengthy appeal process. Their Honours observed that "the attraction of trials of issues rather than of cases in their totality, are often more chimerical than real". They further stated that the separate trial of issues should "only be embarked upon when there utility, economy and fairness to the parties are beyond question".

The facts

[12] The facts revealed by the affidavits which were read and the admissions contained in the pleadings are as follows.

[13] The First Defendant was the driver of a 1990 Mitsubishi 4 wheel drive registered in Queensland number 411-FGH. The motor vehicle carried a policy of insurance in accordance with the Motor Vehicle Accident Insurance Act (QLD) and the First Defendant was the insured for the purposes of the Queensland Act. The Second Defendant was the compulsory third party insurer of the motor vehicle in accordance with the Queensland Act.

[14] On 14 January 2001, the First Defendant was driving the motor vehicle in a northerly direction along the Tablelands Highway approximately 36 kilometres north of the intersection of the Tablelands Highway and the Barkly Highway at the Barkly Homestead, in the Northern Territory. The Plaintiff was in the tray of the motor vehicle when the First Defendant drove the motor vehicle to the left hand side of the road where it rolled over and the Plaintiff was thrown out of the motor vehicle and was injured.

[15] As at the date of the above motor vehicle accident the Plaintiff had been in the Territory for less than 3 months. After entering the Territory from Queensland where he had been living the Plaintiff signed a "Statement of Engagement" dated 14 November 2000 to be engaged as a station cook with AA Company Pty Ltd. The Statement of Engagement is part of the

documents comprising annexure 'E' to the affidavit of Mark David Rowbotham sworn on 5 January 2005. The Statement of Engagement also appears to have been signed by a representative of the AA Company Pty Ltd that employed the Plaintiff at the time of the Accident.

[16] The Statement of engagement contained the following clause:

> "4. There shall be an initial trial period of three months from the date of commencement during which time either party may terminate this engagement by one (1) week's notice."

[17] It is common ground between the parties that at the time of the motor vehicle accident the trial period of three calendar months had not been completed by the Plaintiff.

[18] There is a factual dispute between the parties as to whether the Statement of Engagement contained all of the terms of the Plaintiff's employment by the AA Company Pty Ltd. The Plaintiff says that it does not do so. Counsel for the Plaintiff told the Court that apart from the Plaintiff's own evidence it would be necessary to call 3 other witnesses to establish this fact.

[19] The Plaintiff further contends in reliance upon:

- cl 4 of the Statement of Engagement,
- the allegation that the Statement of Engagement is incomplete and does not contain all of the terms of the Plaintiff's engagement by the AA Company Pty Ltd, and

- Mildren J's decision in *Buric v Transfield PBM Pty Ltd* (1992) 112 FLR 189 at 193–194,

that there was nothing in the Statement of Engagement or in the oral terms of the Plaintiff's employment with the AA Company Pty Ltd that required the Plaintiff's services in the Territory for a period of not less than 3 months. Consequently it is said that the Plaintiff was not a resident of the Territory within the meaning of the definition contained in s 4 of the Motor Accidents (Compensation) Act.

[20] The proceeding was commenced by Writ filed on 13 January 2004. A Statement of Claim was filed on 1 April 2004. The Defence of the First and Second Defendants was filed on 6 May 2004. An Amended Statement of Claim was also filed on 13 January 2005.

[21] It is alleged that the First Defendant was negligent as he fell asleep while driving the motor vehicle. This allegation appears to be supported by a record of interview that the Police conducted with the first defendant. The record of interview is annexure "MRD – 5" to the affidavit of Melissa Rhona Dunn sworn on 3 February 2005.

[22] The Plaintiff claims that he sustained substantial injuries as a result of the negligent driving of the First Defendant. He claims general damages in the amount of $150,000.00, special damages to the date of the statement of claim in the amount of $108,059.50, future economic loss in the amount of $401,284.70 plus interest, medical expenses and other incidental expenses.

[23] The First and Second Defendants deny any negligence or liability on the part of the First or Second Defendants and allege contributory negligence on the part of the Plaintiff. Although it is a discrete issue, the question of the Plaintiff's residence is not the only issue going to the liability of the defendants.

[24] Counsel for the parties estimate that the substantive hearing of this proceeding would take from 5 to 7 days and that the hearing of the issue of residency would take from one to two days. Given that the issue of residency is likely to involve mixed fact and law and the calling of at least four witnesses, I think it is more likely that the trial of the issue would take more than one day. It is unlikely that all of the necessary facts for the resolution of the issue of the Plaintiff's residency can be agreed.

Conclusion

[25] Having considered each of the affidavits that were relied on by the parties and having heard both counsel it is my preliminary view that the decision of Mildren J in *Buric v Transfield PBM Pty Ltd* (supra); does apply to the facts of this case and if that decision is correct the Plaintiff was not a resident of the Territory at the time of the motor vehicle accident. Indeed counsel for the defendants virtually conceded that the primary purpose of seeking a separate trial of the issue was to challenge the correctness that decision and that there was a real likelihood of an appeal should the defendants be unsuccessful in that challenge at first instance. This does not constitute a

sufficient reason for exercising the Court's discretion to order the trial of a separate question in the circumstances of this case where if the Plaintiff is successful the resolution of the issue of residency will not end the litigation of the defendant's liability.

[26] The ordering of a separate trial of the question of residency is not likely to save inconvenience or expense. Particularly as the issue involves mixed questions of fact and law, will involve considerable preparation and will take one to two days to hear at first instance and additional time on appeal. It is likely that such an order would fragment and delay the proceeding and hinder settlement negotiations. The resolution of the question of the Plaintiff's residency does not assist the resolution of the remaining issues should the plaintiff be successful on the issue. The most convenient course in circumstances where the substantive hearing of the proceeding is only likely to take from five to seven days is for the hearing to proceed in the ordinary course.

[27] The utility, economy and fairness to the parties of a separate trial of the issue of the Plaintiff's residency are not beyond question. The Plaintiff should be entitled to the benefit of the law as it is currently declared by this Court.

[28] The defendants' application for a separate trial of the question of the Plaintiff's residency is dismissed. I will hear the parties as to the costs of the application.