CITATION:	*Motor Accidents (Compensation) Commission v Insurance Commission of Western Australia & Anor* [2019] NTSC 68
PARTIES:	MOTOR ACCIDENTS (COMPENSATION) COMMISSION v INSURANCE COMMISSION OF WESTERN AUSTRALIA and AURELIA HEYMAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	101 of 2018 (21841564)
DELIVERED:	29 August 2019
HEARING DATE:	23 May 2019 and 25 July 2019
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Pleadings – Amendment of Pleadings – Principles applicable to applications for leave to amend pleadings – Factors to be considered – Refusal of leave if the amended pleading is liable to strike out – Courts concerned only with the proper raising of issues – Merits of issues, if arguable are a matter for trial.

Practice and Procedure – Pleadings – Statement of Claim – A Statement of Claim should not plead facts in respect of an anticipated defence – Appropriate pleading of limitation issues – Necessity to plead facts which would take another party by surprise if not pleaded – A pleading is to

contain allegations of material facts but not the evidence by which those facts are to be proved – A Statement of Claim must plead all material facts which show satisfaction of any preconditions to the right to claim – Where strict compliance with technical pleading rules is not required – Court's discretion in relation to pleadings.

Limitation Act (NT) ss 6, 12, 44(4)
Motor Accidents Compensation Act ss 17(5), 38(1) and (8)
Limitation Act (WA) 2005
Motor Accidents Compensation Regulations r 6
Supreme Court Rules rr 5.04(2), 13.01, 13.02. 13.07, 13.09, 22.01, 23.02, 36.01, 46.04(2)
Practice Direction 6 of 2009 – Trial Civil Procedure Reforms

Wickham Point Development Pty Ltd v The Commonwealth of Australia [2018] NTSC 7.
Hall v Eve (1876) 4 Ch D 341.
Spicers and Detmold Ltd v Australian Automatic Cigarette Paper Co Pty Ltd [1942] VLR 97.
Fortescue Metals Group Ltd v Australian Securities and Investment Commission (2012) 247 CLR 486.
Banque Commerciale SA v Akhil Holdings Ltd (1980) 169 CLR 279.
Power And Water Authority v Alice Springs Abattoirs Pty Ltd (unreported, Supreme Court NT, Martin CJ, 8 August 1997).
NT Power Generation Pty Ltd v Power And Water Authority (2004) 219 CLR 90.
Northern Territory of Australia v John Holland Pty Ltd & Ors [2008] NTSC 4.
McDonnell Shire Council v Miller [2009] NTSC 46.
Brooks v Wyatt (1993) 99 NTR 12.
Northern Territory Fuels Pty Ltd v Hart (1985) 73 FLR 405.
The Commonwealth of Australia v Verwayan (1990) 170 CLR 394.
Monck v The Commonwealth of Australia [2017] NTSC 49.
Nibbs v Australian Broadcasting Corporation [2010] NTSC 52.
RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors [2019] NTSC 103.
Outback Civil Pty Ltd v Francis [2011] NTCA 3.
Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.
Agricultural And Rural Finance PTY Ltd v Gardiner (2008) 238 CLR 570.
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

Wickham v Tacey (1985) 36 NTR 47.
Buric v Transfield PBM Pty Ltd (1992) 112 FLR 189.

REPRESENTATION:

Counsel:

Plaintiff:	T Anderson
Defendant:	M Grove

Solicitors:

Plaintiff:	Sparke Helmore
Defendant:	Ward Keller

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

Motor Accidents (Compensation) Commission v Insurance Commission of Western Australia & Anor [2019] NTSC 68

No. 101 of 2018 (21841564)

BETWEEN:

MOTOR ACCIDENTS (COMPENSATION) COMMISSION
Plaintiff

AND:

INSURANCE COMMISSION OF WESTERN AUSTRALIA
First Defendant

AND:

AURELIA HEYMAN
Second Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 29 August 2019)

[1] The Plaintiff has, by summons filed 14 May 2019, sought leave to file and serve an Amended Statement of Claim. The form of the proposed Amended Statement of Claim, at least as at the date of the application, was in evidence as Annexure IYJ-A to the affidavit of Ian Robert James made 9 May 2019.

[2] The Defendants objected to most of the proposed amendments on two bases. I will refer to the first basis as the futility principle. The second is that the proposed amendments do not satisfy the requirements of pleadings in that they do not plead all material facts necessary to establish a prima facie case.

[3] At the conclusion of the hearing on 23 May 2019 the parties agreed to make a further attempt to agree the amendments based on indications given by me in the course of argument. The hearing was adjourned for that purpose.

[4] A further Amended Statement of Claim was then proposed by the Plaintiff. Although that resolved some differences, the core disputes remained. I was informed of that at a hearing held on 25 July 2019. I consequently gave directions for further material to be put on file, particularly the latest version of the proposed Amended Statement of Claim. The parties agreed that my decision will be based on the latest version of the proposed Amended Statement of Claim.

[5] A brief summary of the background facts is necessary to put the issues in context.

[6] The Plaintiff is what is vernacularly known as the third party insurer of all Northern Territory registered motor vehicles. The entitlement to benefits for persons injured in any motor vehicle accident in the Northern Territory is regulated by the *Motor Accidents (Compensation) Act* ("*MACA*").

[7] A motor vehicle accident occurred on 11 October 2010 on the Victoria Highway near Timber Creek in the Northern Territory. It was a single vehicle accident. The Second Defendant was the driver of the vehicle. The vehicle was registered in Western Australia. The First Defendant is the third party insurer of that vehicle. A passenger in that vehicle was injured in the accident and he subsequently claimed and received benefits under *MACA*.

[8] Over time, payments of statutory benefits have been made to the claimant and in particular a payment of $1,927.90 was made on 19 July 2012 in respect of some medical expenses. That payment was paid to the claimant's solicitors in Western Australia.

[9] Section 38 of *MACA* gives the Plaintiff a right to indemnity for statutory benefits paid under *MACA* against any person who would otherwise be liable in damages to the claimant in respect of the motor vehicle accident. The parts of section 38 of *MACA*, relevant to this decision, are now reproduced namely:-

> 38 Indemnification of the Commission for statutory benefits
>
> (1) A person (the *indemnifier*) is liable to indemnify the Commission for statutory benefits paid to another person in relation to death or injury arising from a motor accident if:
>
> (a) the motor accident was caused by, or arose from, the use of a motor vehicle registered in another jurisdiction; and
>
> (b) the indemnifier is:
>
> (i) a person who would, assuming this Act had never existed, have been liable in damages, in tort or contract, for the death or injury arising from the motor accident; or

(ii) a person who is liable to indemnify such a person for that liability under an insurance contract or a statutory insurance scheme.

(2) – (7) Omitted.

(8) The Commission may recover an indemnity under this section as a debt owed to the Commission by the indemnifier.

(9) Omitted.

[10] The Plaintiff alleges that the motor vehicle accident in question resulted entirely from the negligence of the Second Defendant and that is the basis of the claim to indemnity. Section 38(1)(b)(i) relates to the Second Defendant and section 38(1)(b)(i) relates to the First Defendant. By letter dated 28 October 2011 the Plaintiff wrote to the First Defendant and claimed the indemnity. The First Defendant thereupon admitted liability in a letter from its solicitors dated 14 December 2011. The key parts of that letter provided as follows:

> *We refer to your letter dated 28 October 2011, to our client, Insurance Commission of Western Australia.*
>
> *Our client admits liability pursuant to the provisions of s 38 of the Motor Accidents (Compensation) Act ("the Act"). Our client's liability is limited by any exclusions or relevant sections under the Act.*

[11] The Defendants now deny liability under the indemnity. Although nothing turns on it in respect of the current application, I believe the denial is because the Defendants dispute that the Second Defendant was negligent.[1] Therefore the Plaintiff must prove negligence. The Plaintiff has commenced the current proceedings to enforce the indemnity.

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1 A position which on its face appears difficult to maintain given that the motor vehicle accident was a single vehicle accident and the claimant was a passenger.

[12] In part, the proposed amendments raise matters related to the extension of a statutory limitation period. That part of the amendments was also opposed based on the futility principle. As I did not think that the Plaintiff had taken the correct approach to pleading the limitation issues, I raised the correct approach during the course of argument.

[13] In *Wickham Point Development Pty Ltd v The Commonwealth of Australia*[2] (*Wickham Point*) I noted that it is an accepted principle[3] that a Plaintiff should not plead a Statement of Claim so as to meet an anticipated defence. That has been most recently confirmed by the High Court in *Fortescue Metals Group Ltd v Australian Securities and Investment Commission*.[4] The expiry of a statutory limitation period does not extinguish the cause of action. It simply provides for a possible statutory bar to an otherwise available remedy. It does not become an issue unless it is raised in a Defence. Therefore in such cases, ordinarily a Plaintiff should not plead anything concerning an extension of a limitation period unless it is raised in the Defence. The Plaintiff then deals with that by way of Reply.

[14] Three things flow from this in the context of the current application. Firstly, I agreed to deal with the pleading of the limitation issues notwithstanding that I considered that those issues had not been properly raised on the pleadings. That was for convenience. Otherwise, the issue would have to be

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2 [2018] NTSC 7.

3 Since *Hall v Eve* (1876) 4 Ch D 341; more recently see *Spicers and Detmold Ltd v Australian Automatic Cigarette Paper Co Pty Ltd* [1942] VLR 97.

4 (2012) 247 CLR 486.

re-ventilated after the Defence and Reply. Hence dealing with the pleading aspects of those issues now avoids a subsequent further application.

[15] Secondly, section 44(4) of the *Limitation Act* (NT) requires an endorsement on a Writ where a Plaintiff is seeking an extension of time pursuant to section 44 of that Act. That is nicely workable when there is a Writ endorsed pursuant to rule 5.04(2)(b) of the *SCR* but it is problematic where a Writ is endorsed with a full Statement of Claim pursuant to rule 5.04(2)(a) of the *SCR.* The Writ in the current proceedings was endorsed with a full Statement of Claim. In my view, it is sufficient and proper for a Statement of Claim in that instance to merely recite that such an extension is sought. If the Defence then denies that the Plaintiff is entitled to that relief, then the Plaintiff can plead all the required material facts by way of Reply. However, other than not being technically required by common law pleading rules, given the requirements of section 44(4) of the *Limitation Act* (NT), a Plaintiff would not be criticised if there was a full plea of all matters relating to an extension in the case of a Writ endorsed with a full Statement of Claim pursuant to rule 5.04(2)(a) of the *SCR* in cases where section 44(4) of the *Limitation Act* (NT) applies.

[16] Thirdly, one of the requirements of pleadings is that a party is required to plead any matter which would take the other side by surprise if not pleaded. This is simply a logical extension of the general pleading principle that pleadings are intended to inform the other side of the case that has to be

met.[5] Rule 13.07(1)(b) of the *Supreme Court Rules* ("*SCR*") reflects this requirement.

[17] The Plaintiff intends to argue that its cause of action is founded in Western Australian law. Some further context needs to be set for this purpose. The limitation period in the Northern Territory applying to the cause of action in the current case is three years.[6] In Western Australia the limitation period applying to the corresponding cause of action is six years.[7] The Defendants argue that the *Limitation Act* (NT) applies and that cause of action arises when the indemnity is first sought so that the time of any actual payment of benefits is irrelevant. If the Defendants are correct that will mean that the Plaintiff will require an extension in respect of recovery of all amounts the subject of the indemnity. The Plaintiff takes a different view and argues that, at worst, and if the *Limitation Act* (NT) applies, only the recovery of the payment referred to in paragraph 8 above requires an extension of time.

[18] The basis of the Plaintiff's argument that the *Limitation Act* (WA) applies is that the amount referred to in paragraph 8 above was paid to the claimant by way of his solicitors in Western Australia. If that is correct in law then the Plaintiff does not require an extension as the proceedings were commenced within the longer limitation period provided for by the *Limitation Act* (WA).

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5 *Banque Commerciale SA v Akhil Holdings Ltd* (1980) 169 CLR 279.

6 Section 12 *Limitation Act* (NT). No limitation period however applies for the cause of action in an action by the Crown pursuant to section 6 of that Act.

7 *Limitation Act* (WA) 2005.

[19] The Plaintiff has an alternative position in the event that Northern Territory law applies. Section 6 of the Northern Territory *Limitation Act* (NT) provides as follows:-

> 6 Application to Crown
>
> (1) Subject to subsections (3) and (4), this Act binds the Crown and the Crown has the benefit of this Act.
>
> (2) Omitted.
>
> (3) This Act does not apply to:
>
> (a) an action by the Crown:
>
> (i) for the recovery of a fee, tax, duty or other sum of money or interest on a fee, tax, duty or other sum of money; or
>
> (ii) in respect of the forfeiture of a ship; or
>
> (b) a prosecution for an offence whether it be an offence at common law or created by statute.
>
> (4) Omitted.

[20] The parties do not agree on the interpretation and application of section 6(3)(a)(i). Each party relied on a different authority to support their position.[8] The Defendants argued against the application of that provision on the basis that the action relates to an indemnity. The Plaintiff argued that the provision applies by reason of section 38(8) of *MACA* which makes the indemnity recoverable as a debt.

[21] In my view, rule 13.07(1)(b) of the *SCR* applies to the issue of whether Western Australian law applies and the issue of the application of section 6

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8 *Power And Water Authority v Alice Springs Abattoirs Pty Ltd* (unreported, Supreme Court NT, Martin CJ, 8 August 1997) in the case of the Plaintiff and *NT Power Generation Pty Ltd v Power And Water Authority* (2004) 219 CLR 90 in the case of the Defendants.

of the *Limitation Act* (NT). Therefore the Plaintiff needs to plead the relevant facts in respect of both issues notwithstanding that it relates to a limitation issue. Although that might also be said to be anticipating a defence, I am of the view that these issues should be pleaded in the Amended Statement of Claim as otherwise the Defendant would be taken by surprise, at least if that was considered devoid of knowledge by reason of the Defendants' argument on the current application. Although on authority of *Wickham Point*, in certain circumstances that knowledge might serve as a substitute for pleading requirements, nonetheless the Plaintiff should, for these discrete issues, properly plead the issues with all material facts and necessary particulars. That would satisfy another purpose of pleadings namely to inform the Court, and the trial Judge, of the issues.[9]

[22] As the Defendants dispute the Plaintiff's proposition that Western Australian law has application, although related to a limitation issue and despite what I have said above, in this instance it is nonetheless necessary to satisfy rule 13.07(1)(b) of the *SCR* for the Plaintiff to plead the relevant matters to support the Plaintiff's proposition that the limitation period that applies is that set by the *Limitation Act* (WA). To the extent that this pleads matters of law, they are necessary and permitted by rules 13.02(1)(b) and 13.02(2)(a) of the *SCR*.

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9 *Northern Territory of Australia v John Holland Pty Ltd & Ors* [2008] NTSC 4.

[23] I now deal with the substantive issues in respect of the proposed amendments. Notwithstanding the Plaintiff's failure to comply with 46.04(2) of the *SCR*, it is apparent that the application is made pursuant to Rule 36.01 of the *SCR* which provides as follows:-

> 36.01 General
>
> (1) For the purpose of determining the real question in controversy between the parties to a proceeding or of correcting a defect or error in a proceeding or of avoiding multiplicity of proceedings, the Court may at any stage order that a document in the proceeding be amended or that a party have leave to amend a document in the proceeding.
>
> (2) In this Order *document* includes originating process, an endorsement of claim on originating process and a pleading.

[24] Rule 36.01(1) gives the Court a broad discretionary power to allow amendments to pleadings. I discussed the principles in respect of that rule, and amendments generally in *Wickham Point*. Amongst other things that decision relied on *McDonnell Shire Council v Miller*[10] where Mildren J set out the three recognised factors to be considered on an application for leave to amend pleadings. That authority in turn derives from earlier authorities of similar dicta,[11] including the dicta of Dawson J in *The Commonwealth of Australia v Verwayan*[12] ("*Verwayan*")

[25] In summary, the authorities provide that, subject to case management requirements and the public interest in finalising litigation promptly and

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10 [2009] NTSC 46.

11 See for example, *Brooks v Wyatt* (1993) 99 NTR 12 and *Northern Territory Fuels Pty Ltd v Hart* (1985) 73 FLR 405.

12 (1990) 170 CLR 394.

properly utilising the Court's resources, Courts liberally allow amendments to pleadings provided that the application is made in good faith, any prejudice to the other party can be adequately addressed with an order for costs and the amendment is not futile.

[26] Only the last of those provisos has application in the current case and that is the factor I have designated as the futility principle. In *MacDonnell Shire Council v Miller* Mildren J described the test for the principle as being "…whether or not the amendments are so obviously bad in law that it would be futile to allow an amendment".[13] Dawson J in *Verwayan* said

> In granting leave to amend a court is concerned with the raising of issues and not with their merits. Of course, an amendment which is futile because it is obviously bad in law will not be allowed.[14]

Therefore if a proposed amendment is so flawed that it would inevitably result in the Plaintiff failing on that issue, leave will be refused as it would be futile to allow the amendment.

[27] This principle forms the primary basis of the Defendants' objection to the proposed amendments. There is an interplay between the futility principle and the principles applicable to applications to strike out a pleading[15] and for summary judgment.[16] In general terms summary judgment will be given, and the strike out of a pleading will be ordered, where it is obvious that

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13 [2009] NTSC 46 at para 9.

14 (1990) 170 CLR 394 at p 456.

15 Rule 23.02 of the *SCR*.

16 Pursuant to rule 22.01 of the *SCR*.

either a claim or a defence will inevitably fail and therefore the matter ought not proceed to trial.

[28] I discussed the law in respect of summary judgment applications most recently in *Monck v The Commonwealth of Australia*.[17] In *Outback Civil Pty Ltd v Francis*[18] the Court of Appeal held that an order for summary judgment will only be enlivened where the Plaintiff's case is "*so clearly untenable that it could not possibly succeed*".[19] The same approach, operating in a converse way, applies to consideration of the futility principle. Succinctly, in the pleading amendment setting, if a proposed pleading is arguable then clearly it can "*possibly succeed*", hence it cannot be said to be futile.

[29] Subject to proper compliance with pleading requirements, a Plaintiff can put in issue any matter which is arguable on the available facts. That is entirely a matter for the Plaintiff. Provided it is arguable, whether an issue raised by a Plaintiff in a Statement of Claim will be successful is a matter for trial. The Court is concerned with the proper raising of issues, not the merits of the issues.[20] That a claim may not have much chance of success is not sufficient reason to refuse leave on that account alone.[21] The Court will not

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17 [2017] NTSC 49; see also *Nibbs v Australian Broadcasting Corporation* [2010] NTSC 52 and *RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors* [2019] NTSC 103.

18 [2011] NTCA 3.

19 [2011] NTCA 3 at para 10.

20 *McDonnell Shire Council v Miller* [2009] NTSC 46 at paragraph 9 and *The Commonwealth of Australia v Verwayan* (1990) 170 CLR 394 at p 456 per Dawson J.

21 *McDonnell Shire Council v Miller* [2009] NTSC 46 at paragraph 9 and *The Commonwealth of Australia v Verwayan* (1990) 170 CLR 394 at p 456 per Dawson J.

determine matters on an interlocutory application which properly are a matter for determination at trial.

[30] I have already referred to the various limitation issues and the basis for those issues in the context of pleading requirements. Those issues are firstly, whether section 6 of the *Limitation Act* (NT) applies and secondly, whether the *Limitation Act* (NT) or the *Limitation Act* (WA) applies. Applying the futility principle to those issues, despite the extent of argument (which I think only reinforced that the Plaintiff's position was arguable), I am in no doubt that there are arguable positions on both sides. That means that the Court will leave determination of that question to trial and more relevantly in terms of the current application, for that reason, it cannot be said that it would be futile to allow the Plaintiff's proposed amendment.

[31] The second challenge to the proposed amendments based on the futility principle relates to the issue of estoppel, (either common law estoppel or equitable estoppel), waiver or election, as the appropriate case may be. For simplicity of reference, hereafter I will cumulatively refer to these issues as "the estoppel issue". In short this relates to the apparent admission of liability made by the First Defendant referred to in paragraph 10 above, namely the letter from its solicitors of 14 December 2011.

[32] The Plaintiff proposes to plead the estoppel issue based on that admission. The Plaintiff claims firstly, that the letter is an admission of the negligence of the Second Defendant. Secondly, that the Plaintiff relied on the admission

to its detriment. Two instances of detriment are alleged firstly, that the Plaintiff did not pursue any enquiries in respect of liability issues and has made payments to the claimaint on the assumption that it would not be required to prove negligence. Secondly, that the effluxion of time will adversely affect the quality of the evidence it will be able to produce to the Court to establish the negligence.

[33] The Plaintiff argues an entitlement to such relief based on *Verwayan*. Counsel for the Defendants went to great lengths to argue against the application of that case, and instead to rely on *Walton Stores (Interstate) Ltd v Maher*[22] and *Agricultural And Rural Finance PTY Ltd v Gardiner*.[23] The Defendants argue that estoppel under *Verwayan* is not applicable and that the Plaintiff actually needs to rely on the equitable principle of election.[24] Even if the Defendants are correct, the Plaintiff would be able to plead a case on the basis of the principle of election in any event.[25] As I have already said, it is up to the Plaintiff to plead its case as it chooses and, in the current context, to amend its Statement of Claim to plead such a case, as long as there is no futility.

[34] In my assessment there are points for and against both sides in respect of the estoppel issue. Again, the extent of the argument on the application serves

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22 (1988) 164 CLR 387.

23 (2008) 238 CLR 570.

24 This was submitted during the course of argument and at that time the proposed version of the Amended Statement of Claim was that referred to in paragraph 1 above.

25 The Plaintiff attempts to do so as is evident by paragraph 24A of the latest version of the proposed Amended Statement of Claim.

to reinforce that the Plaintiff's position is arguable. Therefore the futility principle is not a basis for denying the proposed amendments in respect of that issue.

[35] The third basis on which the futility principle was argued relates to section 17(5) of *MACA* which is in the following terms:-

> 17 Compensation for loss of limb or other permanent impairment
>
> (1-4) Omitted.
>
> (5) Compensation for a permanent impairment may only be paid under this section to, or for the benefit of, a person who is, at the time of the payment, in Australia.

[36] That provides that the statutory benefits to which that section applies are only payable to a person who is in Australia at the time of the payment. The claimant moved back to his native France sometime after the accident and some payments in respect of which the Plaintiff claims indemnity were paid after that time. The Defendants argue that as the claimant was not entitled to a payment pursuant to section 17 of *MACA* for that reason, the Plaintiff cannot claim any amount representing that payment against the Defendants pursuant to the indemnity. The Defendants argue effectively that only legitimate and permitted payments pursuant to *MACA* can be the subject of an indemnity. On its face that would appear to be trite.

[37] In answer, the Plaintiff relies on regulation 6 of the *Motor Accidents Compensation Regulations* which, inconsistently with section 17(5) of *MACA*, provides for commutations for foreign residents. The Plaintiff

argues, in accordance with *Project Blue Sky Inc v Australian Broadcasting Authority*,[26] that section 17 therefore is to be read harmoniously with the regulations and therefore must be read as applying to foreign residents.

[38] The Defendants dispute the application of *Project Blue Sky Inc v Australian Broadcasting Authority*, partly because the Defendants argue that a commutation is not a payment of a statutory benefit but is a discretionary and discounted conversion of the potential future liability to pay statutory benefits. I am not convinced that the distinction matters, or that it makes a difference in the current case. Nonetheless the Plaintiff's position is arguable, and therefore the futility principle is not an appropriate basis to refuse the amendment sought in respect of that issue.

[39] Dealing next with the Defendants' objection to the amendments on the basis that the pleadings do not comply with the pleading requirements. This basis of objection derives from the dicta of Mildren J in *MacDonnell Shire Council v Miller*, where his Honour observed that part of a proposed amended pleading in that case failed to plead material facts disclosing a prima facie case. His Honour expressed the view that the defect could not be cured by further amendment and accordingly decided that leave for that part of the amendment should be refused. His Honour acknowledged the need to

26 (1998) 194 CLR 355.

ensure that a proposed amendment is properly pleaded.[27] With respect, I agree and that view is a common thread in many of the pleadings cases.[28]

[40] I think it is instructive to set out the pleadings rules which relate to this objection. They are:-

- a pleading should state all material facts relevant and necessary to establish the cause of action but not the evidence by which those facts will be proved;[29]
- the pleading should identify specific provisions of any Act relied on;[30]
- a plaintiff must plead all material facts necessary to establish any precondition or entitlement to a cause of action;[31]
- inconsistent allegations of fact may be pleaded provided it is clear that they are pleaded in the alternative;[32]
- a conclusion of law may be pleaded if the material facts supporting the conclusion are pleaded;[33]
- otherwise conclusions must not pleaded;[34]

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27 [2009] NTSC 46 at paragraph 11.

28 *Banque Commerciale SA v Akhil Holdings Ltd* (1980) 169 CLR 279 and *Northern Territory of Australia v John Holland Pty Ltd & Ors* [2008] NTSC 4.

29 Rule 13.09(1) of the *SCR*.

30 Rule 13.02(1)(b) of the *SCR*.

31 *Wickham v Tacey* (1985) 36 NTR 47; *Buric v Transfield PBM Pty Ltd* (1992) 112 FLR 189.

32 Rule 13.09(1) of the *SCR*.

33 Rule 13.02(2)(b) of the *SCR*.

- a pleading may raise a point of law but may not allege matters of law;[35]

- a statement of claim should not anticipate a defence.[36]

[41] The object of informing the other side of the case to be met can, by reason of modern case management, be satisfied independently of the pleadings in appropriate cases. I discussed the relevant authorities in *Wickham Point* and I also pointed out that Practice Direction 6 of 2009 – Trial Civil Procedure Reforms ("*PD6*") is particularly relevant in the Northern Territory in this respect, albeit dependent on the extent of proper compliance with its requirements.

[42] *Wickham Point* is also authority for the proposition that the Court has a broad discretion to allow pleadings which might otherwise be non-compliant in cases where the Court is otherwise satisfied that proper notice of the case that must be met has been given, either by the pleadings themselves or extrinsically. That leaves scope for otherwise permitting some aspects of the proposed Amended Statement of Claim which, although not technically compliant, sufficiently informs the Defendants of the case they must meet and avoids costs and delays associated with amendments made only to correct technical defects.

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34 *Northern Territory of Australia v John Holland Pty Ltd & Ors* [2008] NTSC 4.

35 Rule 13.02(2) of the *SCR*.

36 This is discussed in detail at paragraph 13 above.

[43] I agree with the submission of Defendants that, on whatever basis the cause of action is founded, all of the essential elements of the cause of action must be the subject of material facts in the pleading. In the case of both types of estoppel, the requisite elements required to be pleaded are not markedly different notwithstanding the differences in the law between the two types of estoppel. Essentially there must be a pleading of material facts to show a representation (in the case of common law estoppel), or a promise (in the case of equitable estoppel), made to another party, whereby the other party is induced to rely on it and acts on it to his detriment. In addition there is the need to plead causation factors common to both types of estoppel. There are more significant differences in respect of the cause of action of estoppel compared to waiver and/or election.

[44] In fairness, counsel for the Defendants' submissions were made at the hearing and were therefore based on the proposed Amended Statement of Claim referred to in paragraph 1 above. The latest version of the proposed Amended Statement of Claim has partly addressed some of those concerns.

[45] The first complaint in respect of the pleading of the estoppel issue was that it pleaded the admission yet the requisite element of the cause of action is a representation, in the case of common law estoppel, or a promise in the case of equitable estoppel. The submission was that the admission pleaded was the evidence by which the material fact would be proved and not the material fact itself. I agree. That has in part been carried over into the latest version of the proposed Amended Statement of Claim and will require

further amendment before it can be relied on. This is a clear example of a breach of the pleading rule that material facts ought to be pleaded and not the evidence by which the material facts are to be established.[37]

[46] I also agree with the submission of the Defendants, at least in respect of the version of the proposed Amended Statement of Claim referred to in paragraph 1 above, that one aspect of the pleading is defective and does not support a pleaded claim. The defect referred to was that, as there are two Defendants, the Amended Statement of Claim referred to in paragraph 1 pleaded estoppel allegations in respect of both Defendants but only recited actions by the First Defendant as founding the estoppel. If that had been left as initially proposed, that would obviously be defective. However, that has been corrected in the latest version of the proposed Amended Statement of Claim.[38]

[47] The second objection relates again to section 17(5) of *MACA*. That section has already been discussed above in connection with the futility principle. Relevant to this objection is the apparent requirement in that subsection that statutory benefits concerned are not payable to a person who is not in Australia at the time.[39] The Defendants' argument is that the indemnity provided for by *MACA* is only for statutory benefits payable under *MACA*. Therefore it was argued that it is necessary for the Plaintiff to plead all

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37 Rule 13.02(1)(a) of the *SCR*.

38 In paragraphs 11A, 14A, 14B and 20 of the latest version, see para 51 below.

39 See paragraphs 35-38 above.

material facts necessary for the Plaintiff to demonstrate that the Plaintiff was entitled to claim the indemnity.

[48] This raises the principle in *Wickham v Tacey*.[40] That case concerned the now repealed provision of *MACA* whereby "*a resident of the Territory*", as that term was defined, was not entitled to claim damages at common law and was limited to claiming statutory benefits, albeit on a no-fault basis. At that time only persons who were not residents of the Territory were entitled to claim at common law. In *Wickham v Tacey* the Plaintiff sought common law damages but had not pleaded that the Plaintiff was not "a resident of the Territory". It was held that it was incumbent upon a Plaintiff who wished to claim damages at common law for personal injuries to inter alia plead, and prove, that the Plaintiff was not a resident of the Territory within the meaning of *MACA*.[41] The effect of that in general pleading terms is that any precondition to entitlement to claim must be pleaded.

[49] There can be a fine line between a pre-condition to entitlement in the *Wickham v Tacey* sense and a plea in anticipation of a defence. That is particularly so on the current facts. I think the proposed amendment falls foul of the requirements set by *Wickham v Tacey*. Although there is a reference to the claimant not being in Australia at the time of a payment of statutory benefit in paragraph 28 of the proposed pleading, I think that is pleaded for a different purpose and that does not go far enough to satisfy

40 (1985) 36 NTR 47.

41 See also *Buric v Transfield PBM Pty Ltd* (1992) 17 MVR 234.

Wickham v Tacey. Although I think that is the technically correct position, having said that, I believe that pleading this in a technically correct way will be awkward given that it relates to statutory interpretation issues and authorities relevant to that. For that reason I would be prepared to allow some latitude in the exercise of my discretion.

[50] I now turn to consider the individual paragraphs of the latest proposed Amended Statement of Claim. For reference purposes I now set out the relevant parts of that document, namely:-

> 11A. At all times, the first defendant acted in the interests of, and as agent of, the second defendant.
>
> 12. On or about 25 January 2011, Mr Guillain applied to the plaintiff for statutory benefits under the Act.
>
> 13. On 28 October 2011 the plaintiff wrote to the first defendant giving notice that it had accepted a claim from Mr Guillain and intended to seek recovery of payments made on his behalf pursuant to s 38 of the Act.
>
> 14. On 14 December 2011, the First Defendant admitted liability (the admission) pursuant to the provisions of s 38 of the Act.
>
> Particulars
>
> The first and second defendants' solicitors wrote to the plaintiff on 14 December 2011 in the following terms:
>
> *"We refer to your letter dated 28 October 2011, to our client, Insurance Commission of Western Australia.*
>
> *Our client admits liability pursuant to the provisions of s 38 of the Motor Accidents (Compensation) Act ("the Act"). Our client's liability is limited by any exclusions or relevant sections under the Act.*
>
> *Please provide me with all medical reports or documentation in relation to the claimant's claim".*
>
> 14A. The admission was made by the first defendant as agent for the second defendant and bound the second defendant:
>
> (a) As principal;
>
> (b) In her own right;

(c) Under the legislation referred to in paragraph 2 above.

14B. The admission was made by the second defendant's solicitors for the second defendant.

15. On 19 December 2011, the first and second defendants' solicitors asked the plaintiff whether Mr Guillain was pursuing a claim for commutation.

16. On 27 June 2012 the plaintiff advised the first and second defendants' solicitors that Mr Guillain was residing outside Australia, they had closed their file on the matter, however should he pursue a commutation of his benefits in the future, they would be obliged to re-open their file and consider his request, which may result in further payments being made to him. At that time, the plaintiff also requested payment from the first defendant of $1,927.90, Act, (*sic*) being recovery of medical expenses occurred (*sic*) in relation to Mr Guillain's injuries.

17. The first defendant made an unconditional payment to the plaintiff in the sum of $1,927.90 on 19 July 2012 (recovery payment) following the admission.

18. At all times thereafter, the plaintiff assumed that the defendants would not put the plaintiff to proof of negligence by the second defendant in respect of any claims or proceedings seeking recovery of sums paid to Mr Guillain under the Act relating to the accident because of the admission and the recovery payment.

19. In reliance on the admission and the recovery payment, the plaintiff:

    (a) took no step to secure evidence relevant to the question of the second defendant's negligence; and

    (b) made payments to Mr Guillain

    on the assumption that it would be unnecessary to prove negligence on the part of the second defendant by virtue of the admission made on her behalf by the first defendant.

20. The first defendant, in its own right and as insurer and agent of the second defendant, knew or intended that the plaintiff would

    (a) take no steps to secure evidence to prove negligence on the part of the second defendant; and

    (b) make such payments as it considered appropriate in accordance with the Act, on the basis that it would be unnecessary to prove negligence on the part of the second defendant in respect of any claims or proceedings against it seeking recovery of such sums.

21. If the defendants are permitted to resile from the admission and the plaintiff is required to establish negligence on the part of the second defendant for the purposes of these proceedings, the plaintiff will suffer detriment:

    (a) on account of having made the payments referred to below on the assumption that it would not be required to prove the second defendant's negligence;

    (b) by having to prove negligence;

    (c) the effluxion of time will have adversely affected the quality of the evidence able to be produced to the Court on the subject of the second defendant's negligence.

22. The defendants now seek to resile from the admission and intend to put the second defendant's negligence in issue in these proceedings.

23. In the circumstances, the defendants are estopped from disputing the second defendant's negligence.

24. Alternatively, the defendants waived reliance on the need for there to be, or for the plaintiff to prove, negligence but for the Act.

24A. The first and second defendants:

    (a) Elected to concede liability;

    (b) Represented that they did not require proof of liability;

    (c) Are estopped from denying liability;

    (d) Renounced the requirement to prove liability;

    (e) Abandoned the requirement to prove liability.

25. By letter dated 28 October 2013 from Mr Guillain's solicitors, Mr Guillain made an application to the plaintiff to commute his rights.

26. By letter dated 2 April 2014 from Mr Guillain's solicitors, Mr Guillain made a further application to the Plaintiff to commute his rights.

27. On 23 April 2014 the plaintiff made a benefit entitlement decision for the payment of a permanent impairment benefit under s 17 of the Act in the sum of $160,524.47, based on the plaintiff's assessment of Mr Guillain's permanent impairment resulting from the accident at 71 percent.

28. On 2 May 2014 the plaintiff paid the sum of $160,524.47 to Mr Guillain (s 17 payment). At the time of the s 17 payment Mr Guillain was not in Australia.

29. On 29 September 2015, the plaintiff's liability to pay statutory benefits under ss 13, 18 and 18B to Mr Guillain was commuted to

> a liability to make a single payment by way of lump sum pursuant to s 25 of the Act and regulation 6 of the *Motor Accidents (Compensation) Regulations*.

[51] Firstly, the amendments affected by paragraphs 11A, 14A, 14B and 20 address the properly made complaint by the Defendants of a lack of pleading connecting the Second Defendant to the allegations on which the estoppel is based.

[52] Paragraphs 12 and 13 plead more than is required. The material fact is a payment or payments pursuant to *MACA* and to which the right of indemnity given by section 38(1) of *MACA* relates. The details of the application by the claimant are mode of proof and not a material fact.

[53] Paragraph 14 does not contain a material fact but, given that it is necessary to put the admission on which the estoppel claim is based into context, I would be prepared to allow that in part at least on discretionary grounds. Absent the connection to the estoppel plea, as a claim to indemnity is not a precondition under section 38(1) of *MACA*, the paragraph would be objectionable. However it remains necessary to plead that there was a representation, not that the correspondence amounted to an "admission". Although arguably conclusionary in any case, as worded, this is a plea of mode of proof rather than of material facts.

[54] Paragraphs 15 and 16 do not appear to plead any material facts. It is not apparent from the pleading if those paragraphs relate to estoppel, election or waiver. Certainly it is not apparent that any request for information

regarding the claim by the Defendants, and the Plaintiff's response to that request, is material to the pleading.

[55] Paragraph 17 appears to be pleaded to bolster the admission. If it is pleaded for that purpose, it is mode of proof and therefore impermissible. However, that paragraph may be relevant to the issue of whether Western Australian law applies as discussed in paragraphs 17-18 above. If that is the case then in part that paragraph will serve to satisfy the requirements of rule 13.07(1)(b) of the *SCR* in relation to that issue. Having said that, as it currently stands it still does not go far enough for that purpose but I accept that with greater detail and further amendment, it could form part of a proper pleading for that purpose.

[56] Paragraph 18 lacks clarity. I am not sure what is intended by the expression "*the plaintiff assumed*". Looking at the estoppel setting to illustrate this point, pleading an assumption is insufficient. Reliance on a promise or representation is required and that should be clearly stated. Paragraph 18 is arguably no more than the pleading of mode of proof. If it is intended to plead reliance, then it lacks clarity for that reason also.

[57] Paragraph 19 appears to be the attempt to plead reliance. The reliance alleged is on both the admission pleaded in paragraph 14 and the payment in paragraph 17 of the pleading. The fault with this is that it must be established and pleaded that there was reliance on a representation. Therefore this paragraph suffers a similar fault as with the proposed

paragraph 14. Further, if this paragraph is the appropriate reliance pleading, then paragraph 18 would appear to be otiose.

[58] Paragraph 20 appears to relate to the estoppel issue. The paragraph pleads that the First Defendant, in its own right and on behalf of the Second Defendant (that part is acceptable), "*knew*" or "*intended*" certain actions by the Plaintiff. As best I can tell this is intended to plead the inducement element of the cause of action but he lacks clarity as it does not state any inducement and only raises what appear to be irrelevant allegations. What is relevant and material is the effect, i.e., the inducement, not the representor's or promisor's intention.

[59] Paragraph 21 also relates to detriment. I do not see how subparagraph (a) can be an acceptable allegation of detriment. It implies that the Plaintiff would not have paid the claimant some or all of statutory benefits he was apparently entitled to under *MACA* if the Plaintiff was required to prove negligence for its indemnity claim against the Defendants. That cannot be correct. The Plaintiff is obliged to pay benefits to the claimant if the claimant is entitled to receive them. That entitlement exists independently of what might be required for the Plaintiff to subsequently establish an indemnity claim under section 38 of *MACA*. Therefore it cannot be said that the payments were made in reliance of the representation or promise. Without more, in that form that is to be disallowed on the futility principle.

[60] Subparagraphs (b) and (c) of paragraph 21 I think are acceptable allegations of detriment, subject to my comments above in respect of correcting the inappropriate use of the term "admission" in the pleading in respect of a representation or promise, as the case may be.

[61] Paragraph 22, although curious in its wording, would be acceptable with further amendment to make it clearer if, as I suspect, it is intended to plead context for one of the elements of the equitable estoppel namely, that it precludes the promisor from resiling from a promise without avoiding or addressing the detriment.

[62] Paragraphs 23 and 24 are arguably acceptable. Paragraph 24A could, I think, be put into an acceptable form if it were to plead the three related causes of action (estoppel, waiver and election) separately rather than attempting to plead them in a composite way.

[63] Paragraph 24A(a) clearly relates to the cause of action of election but it is a bare allegation without reference to the applicable paragraphs of the pleading. Subparagraph (b) could relate to both election and estoppel and that needs to be clarified. Subparagraph (c) relates to estoppel and appears duplicitous with paragraph 23. On its own it is no more than a bare conclusion. Subparagraphs (d) and (e) appear to be duplicitous as both seem to be the same allegation in respect of waiver.

[64] Overall in respect of paragraphs 20 to 24A I think the composite pleading of all material facts related to the three causes of action, without separating out

the requirements and the material facts in respect of the separate causes of action, renders that pleading embarrassing. Therefore it is also futile to allow that amendment in current form as it is liable to be struck out.

[65] Paragraphs 25-28 contain more evidence than material facts. Although regulation 6 of the *Motor Accidents Compensation Regulations* could be read as requiring an application, I am not convinced that it is a pre-requisite to a commutation requiring the pleading of facts to demonstrate entitlement. Although it can be argued to be necessary for that purpose, in its current form it goes beyond material facts. A single allegation that the commutation was paid following a request and with brief particulars would suffice in that case. However, paragraph 27 even goes so far as to recite the actual percentage impairment on which the amount of the payment was based. Although obviously relevant to proof, that cannot be a material fact.

[66] The reference to the claimant not being in Australia in paragraph 28 of the pleading may be intended to satisfy rule 13.07(1)(b) of the *SCR* in respect of the application of the principle in *Project Blue Sky Inc v Australian Broadcasting Authority*. If that is the intention, with greater detail and further amendment that could be acceptable.

[67] Paragraph 29 appears to also be entirely mode of proof although again the Plaintiff may be setting the context for the *Project Blue Sky Inc v Australian Broadcasting Authority* principle and the argument that Western Australian

law applies in the context of the rule 13.07(1)(b). If so, it needs to be clearer and it is currently insufficient.

[68] In the end, I am prepared to grant leave to the Plaintiff to file and serve an Amended Statement of Claim provided that it properly addresses the matters in these reasons.

[69] I will hear the parties as to consequential orders.