[HIGH COURT OF AUSTRALIA.]

CHADWICK . . . . . APPELLANT;
DEFENDANT,

AND

BRIDGE AND ANOTHER . . . . RESPONDENTS.
PLAINTIFF AND NOMINAL DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1951.

SYDNEY, *April* 9, 10.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Practice—Pleading—Tort—Joinder of nominal defendant and other defendant in one action—Inconsistent claims—Alternative relief—Motor Vehicles (Third Party Insurance) Act 1942 (*N.S.W.*) (*No.* 15 *of* 1942), *s.* 30 (2)—*Law Reform (Miscellaneous Provisions) Act* 1946 (*N.S.W.*) (*No.* 33 *of* 1946), *s.* 2.

The *Motor Vehicles (Third Party Insurance) Act* 1942 (N.S.W.), s. 30 (2) (a) provides that "Where the death of or bodily injury to any person is caused by or arises out of the use of a motor vehicle but the identity of the motor vehicle cannot after due inquiry and search be established, any person who could have enforced a claim for damages against the owner or driver of the motor vehicle in respect of the death or bodily injury may enforce against the nominal defendant the claim which he could have enforced against the owner or driver of the motor vehicle." The *Law Reform (Miscellaneous Provisions) Act* 1946 (N.S.W.), s. 2 (1), provides that in an action of tort "(a) All persons may be joined as defendants against whom the right to any relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly or severally or in the alternative where if separate actions were brought against such persons any common question of law or fact would arise . . ."

Held that a proceeding instituted under s. 30 (2) (a) of the *Motor Vehicles (Third Party Insurance) Act* is an action of tort, and that the nominal defendant can be sued in one action with an identified and named defendant alleged to be a tortfeasor "in the alternative" within the meaning of s. 2 (1) (a) of the *Law Reform (Miscellaneous Provisions) Act*.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

Whilst driving a motor car along the Pacific Highway between Sydney and Gosford at night time, George Edwin Bridge sustained injury from a vehicle proceeding in the opposite direction. The injury, it was alleged, was caused by a piece of timber projecting from the other vehicle and penetrating the windscreen of the car driven by Bridge. The other vehicle did not stop. The evidence suggested that the driver involved in the accident in the sense indicated was unaware of the happening. Later, Clarence Sydney Chadwick was interviewed by the police. Partly from statements made by him that he was on the Pacific Highway on the day in question and was proceeding south, and partly from an inspection of timber on the vehicle (a lorry) a prosecution of Chadwick followed and he was convicted of two offences, namely, a failure to keep his motor vehicle as near as practicable to the left-hand side of the road, and of having a loading of timber projecting more than six inches beyond the extreme outer portion of the vehicle on the driver's right-hand side. Chadwick appealed to the Court of Quarter Sessions against the conviction and the appeal was upheld on 27th October 1948. An affidavit filed in connection with a chamber summons referred to below revealed that the Chairman of Quarter Sessions held that there was not any case to answer. It appeared that the Chairman was at least not satisfied that the injury sustained by Bridge was caused by Chadwick or that his lorry was in any way involved.

On 12th May 1949 a writ of summons was issued out of the Supreme Court of New South Wales on behalf of Bridge claiming damages from Chadwick and also from the nominal defendant, the latter by virtue of the provisions of the *Motor Vehicles (Third Party Insurance) Act* 1942 (N.S.W.).

On 8th June 1949 a declaration was filed containing two counts. The first was framed in negligence averring that the defendant Chadwick so negligently drove a motor vehicle upon a highway that the vehicle and certain timber loaded thereon were forced and driven against the plaintiff, who was then driving a vehicle upon the highway. The second count was restricted to the nominal defendant and set forth that " bodily injury to the plaintiff was caused by or arose out of the use of a motor vehicle but the identity of the said motor vehicle could not be and was not after due inquiry and search established and the plaintiff is a person who could have enforced a claim for damages against the owner or driver of the said motor vehicle in respect of the said bodily injury ". Then followed the necessary allegations of negligence

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against the driver of the unidentified motor vehicle and a statement of damage.

An application in chambers was made on behalf of Chadwick, in effect to be struck out of the proceedings. It was opposed by both the plaintiff and the nominal defendant, and was dismissed, and that decision was upheld on appeal by the Full Court of the Supreme Court (*Maxwell, Owen and Herron* JJ.).

The grounds of that appeal were that the defendants could not both be sued by virtue of the provisions of s. 2 (1) of the *Law Reform (Miscellaneous Provisions) Act* 1946; that the plaintiff could not invoke the aid of s. 2 (1) (a) and proceed against the two defendants "in the alternative"; and that the plaintiff could not claim to be in doubt as to the person from whom he was entitled to redress within the meaning of s. 2 (1) (c).

By s. 2 (1) in an action of tort "(a) All persons may be joined as defendants against whom the right to any relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly or severally or in the alternative where if separate actions were brought against such persons any common question of law or fact would arise. . . .". By par. (c) "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties".

The presence of a nominal defendant in this action was due—so far as relevant—to the provisions of s. 30 (2) (a) of the *Motor Vehicles (Third Party Insurance) Act* 1942, which are in these terms:—"Where the death of or bodily injury to any person is caused by or arises out of the use of a motor vehicle but the identity of the motor vehicle cannot after due inquiry and search be established, any person who could have enforced a claim for damages against the owner or driver of the motor vehicle in respect of the death or bodily injury may enforce against the nominal defendant the claim which he could have enforced against the owner or driver of the motor vehicle".

Chadwick appealed, by leave, to the High Court.

The grounds of the appeal were, *inter alia*, that the Supreme Court was in error in holding:—(a) that Bridge as plaintiff in the action was entitled under s. 2 of the *Law Reform (Miscellaneous Provisions) Act* 1946, to join the appellant with the nominal defendant as a defendant in the action; (b) that s. 2 of the Act entitled a plaintiff to join an identified and named defendant

with the nominal defendant in an action of tort; (c) that the nominal defendant could be sued in the one action with an identified and named defendant alleged to be a tortfeasor " in the alternative " within the meaning of s. 2 (1) (a) of the Act; (d) that there was nothing inconsistent in a plaintiff suing in one action an identified and named defendant alleged to be a tortfeasor and the nominal defendant in respect of the same injury; (e) that in this action the plaintiff was entitled to proceed in one action against the appellant and the nominal defendant " in the alternative " within the meaning of s. 2 (1) (a); (f) that in the action a " common question of law or fact " within the meaning of s. 2 (1) (a) would arise; (g) that s. 2 (1) (c) of the Act entitled Bridge as plaintiff to join the appellant and the nominal defendant as appellants therein; (h) that the presence of the two counts in the declaration was an illustration of an instance where " the plaintiff is in doubt as to the person from whom he is entitled to redress " within the meaning of s. 2 (1) (c); and (i) that the doubt of the plaintiff as to whom of the two defendants was liable might be resolved only at the trial of the action. A further ground of appeal was that the Supreme Court should have held that the words " to what extent " in s. 2 (1) (c) did not involve a division of the amount of compensation and contribution between defendants who had been joined and were liable.

W. J. Bradley K.C., *G. Wallace* K.C. and *A. Bridge*, for the appellant.

G. E. Barwick K.C. and *M. D. Healy*, for the respondent Bridge.

C. McLelland K.C. and *M. E. Warburton*, for the respondent nominal defendant.

The following judgments were delivered :—

DIXON J. This is an appeal by leave from an order of the Full Court of the Supreme Court of New South Wales. The order under appeal dismissed an appeal from an order dealing with a summons. The summons was dismissed by the judge in chambers. The summons was issued in an action in which the plaintiff proceeded against an individual defendant by name and against a nominal defendant. The action proceeded to the stage of pleading, a declaration was filed and pleas were filed. The declaration contains two counts. By the first of the two counts a cause of action for negligence in the management of a truck was framed against

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the named defendant. By the second of the two counts a cause of action was framed against the nominal defendant in purported pursuance of s. 30 (2) of the *Motor Vehicles (Third Party Insurance) Act* 1942. The count against the named defendant, Chadwick, necessarily stated explicitly that he did carelessly, negligently and unskilfully drive and manage a motor vehicle by which the injury was done. The second count, that against the nominal defendant, necessarily stated that due inquiry and search had been made as s. 30 (2) requires and that the identity of the motor vehicle could not after that inquiry be established.

The summons which was issued challenged the propriety of proceedings in this form and sought an order that the action be stayed or that the defendant Chadwick be struck out of the proceedings or dismissed from the proceedings. The summons was issued by Chadwick. The summons was, of course, opposed by the plaintiff and it was also opposed by the nominal defendant. The justification for proceedings in this form which is put forward lies in the *Law Reform (Miscellaneous Provisions) Act* 1946. Section 2 of that Act deals with alternative defences, as well as with third-party proceedings. The provisions of s. 2 are founded upon rules contained in Order XVI. of the English Rules of the Supreme Court but it adopts by no means the whole of Order XVI. It deals with defendants only; and, unlike those rules, it is confined expressly to actions of tort. Section 2 is divided into five paragraphs, the first four of which state the substance of the English Rules 4, 5, 7 and 11, but some words which are to be found in Rule 1 of Order XVI. are introduced into these paragraphs which relate to the position of defendants. Their Honours in the Supreme Court were of opinion that these provisions justified the procedure.

The appeal to this Court is instituted for the purpose of establishing that where there is a nominal defendant who is joined the case falls outside the scope of the procedure which these provisions enable. It is procedure which is of course familiar in jurisdictions where the *Judicature Act* has prevailed, but perhaps it is a little incongruous with principles maintained under the *Common Law Procedure Act*. The reasons why the appellant Chadwick says that the procedure falls outside the scope of s. 2 of the *Law Reform (Miscellaneous Provisions) Act* 1946 are to be found in the character or elements of the cause of action which is expressed in s. 30 (2) in relation to a nominal defendant. The principle upon which that provision proceeds is that where a plaintiff is injured as a result of the use of a motor vehicle and he is unable after due inquiry to identify the motor vehicle he then may proceed against the

nominal defendant and in effect recover damages from a public authority. It is said that the very hypothesis on which the cause of action is founded is the complete inability on the plaintiff's part at the time the writ was issued after due inquiry of ascertaining the identity of the motor vehicle. Therefore to allow in one proceeding the introduction of two counts, one of which asserts that the identity of the motor vehicle is known to the plaintiff, and the other of which necessarily says that it is not, is to allow of quite inconsistent positions, the first of which necessarily destroys the cause of action which is founded on s. 30 (2). The view which is put forward for the appellant does not concede the proposition that the proceeding under s. 30 (2) may properly be described as an action of tort. Indeed, as I understood Mr. *Bradley*, he disputed it; although, if I correctly understood Mr. *Wallace*, he was inclined to concede it. But, be that as it may, I think that a proceeding under the provisions of s. 30 (2) of the *Motor Vehicles (Third Parties Insurance) Act* 1942 should be considered an action of tort. The basis of the action is the commission of a tort by an undiscovered person. Upon that basis is established a liability in a public authority because of the inability of the plaintiff to ascertain the identity of the actual tortfeasor. It is no doubt correct that the nominal defendant himself has not committed a wrong, but in a classification of causes of action it seems right to describe the proceedings against him as an action of tort.

The purpose of s. 2 (1) (a) (b) and (c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 is to make it possible to dispose in one action of claims against two or more persons when those claims arise out of one transaction and it is uncertain which of them, if not all of them, are responsible for the relief which the plaintiff claims. It is, I think, not a proper way of construing s. 2 to take every paragraph of the section separately and deal with it as if each paragraph was to cover a different case. The purpose of the paragraphs is to make plain how the general policy of the provision operates and to ensure as far as language may do that plaintiffs are not to be defeated because of their uncertainty at the commencement of the action as to the correct party against whom they ought to claim. Fundamentally the appellant Chadwick's objection depends on a conception that it is impossible to allege inconsistent matters in different counts based upon a cause of action arising out of the same transaction. There is no principle now existing under the Judicature Rules which prevents the allegation of inconsistent alternatives. In the case, which has been referred to, of *Evans* v. *Buck* (1) the decision of the Master of

(1) (1876) 4 Ch. D. 432.

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Rolls, Sir *George Jessel*, relates to the joinder of a new party upon a counter claim and should be restricted to that situation. Instances are to be found almost in daily practice under the *Judicature Act* procedure of inconsistent allegations forming the foundation of causes of action against different persons who are joined as co-defendants. The situation here is one in which the plaintiff is aware of an injury done by a motor vehicle and alleges a cause of action based upon the assumption that there was negligence in the management of that motor vehicle, but is uncertain whether he has correctly identified the motor vehicle and therefore correctly identified the defendant who is responsible for its management. In those circumstances the case appears clearly enough to come within s. 2 (1) (c) of the *Law Reform* (*Miscellaneous Provisions*) *Act*. Section 2 (1) (c), however, is explanatory in a sense of s. 2 (1) (a) and there does not appear any reason why these causes of action should not be treated as existing in the alternative against the unknown person and the known person, the nominal defendant being placed upon the record as the person responsible if it turns out that the unknown person is the person against whom redress would be sought. The case falls within the general principle to which s. 2 is addressed and presents no features which justify an argument excluding its application to a proceeding of this character where one defendant is sued under the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942, s. 30 (2).

The appeal should be dismissed.

WILLIAMS J. I am of the same opinion. I agree with my brother *Dixon* that the statement of *Jessel* M.R. in *Evans* v. *Buck* (1) that the words " in the alternative " do not include an inconsistent alternative, are only intended to apply to a counter claim and do not govern the construction of the same words in s. 2 (1) (a) of the *Law Reform* (*Miscellaneous Provisions*) *Act* 1946. In this connection I should like to refer to the decision of the Court of Appeal in *Child* v. *Stenning* (2). There the alternative relief claimed in the amended statement of claim was plainly inconsistent, and on this ground *Hall* V.C. held on demurrer that the amended statement of claim was bad. But in the Court of Appeal, presided over by *Jessel* M.R., it was held to be good and that a plaintiff was not confined under the rules of court to cases in which the alternative relief claimed against one defendant was consistent with that claimed against the other. The rules were not the same rules as the present English rules, the meaning

(1) (1876) 4 Ch. D., at p. 434. (2) (1877) 5 Ch. D. 695.

of which was discussed in *Richardson* v. *Trautwein* (1), on which the provisions of s. 2 (1) of the *Law Reform (Miscellaneous Provisions) Act* are based. The causes of action under the present declaration are separate actions of tort. The right to relief claimed against the defendants is inconsistent, but it is claimed against them either severally or in the alternative. It arises out of the same transaction and common questions of fact will arise. The joinder of these defendants is therefore justified by the section. I feel that the reasons why the joinder is justified are fully covered, not only by the judgment of my brother *Dixon* but also by the judgments of their Honours in the court below and to these reasons I have nothing to add.

The appeal should be dismissed.

WEBB J. I agree with the judgment of *Dixon* J., but I had some difficulty in coming to the conclusion that a proceeding against the nominal defendant is an action of tort. However, I think it does not lose the quality of an action of tort merely because of the substitution of the nominal defendant in the place of the actual wrongdoer. In a broad sense the cause of action remains the same.

FULLAGAR J. I agree. I would only add this with reference to one argument put by Mr. *Wallace* yesterday. I can see no reason whatever why an allegation of facts necessary to bring a case within s. 30 (2) of the *Motor Vehicles (Third Party Insurance) Act* should not appear in a declaration as alternative to other allegations disclosing a cause of action against an identified defendant such as Chadwick in the present case.

The fact that both sets of allegations cannot be true appears to me to be immaterial for the purposes of s. 2 of the *Law Reform (Miscellaneous Provisions) Act*.

KITTO J. I agree and have nothing to add.

Appeal dismissed with costs.

Solicitors for the appellant, *Abbott, Tout, Creer & Wilkinson.*

Solicitor for the respondent Bridge, *Adrian C. R. Twigg.*

Solicitors for the respondent nominal defendant, *J. W. Maund & Kelynack.*

J. B.

(1) (1942) 65 C.L.R. 585.