

15.2/83

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

BASSETT v HOST

Hope, Reynolds and Mahoney JJA

12 March 1982 — (1982) 1 NSWLR 206

PRACTICE AND PROCEDURE – CONDUCT OF A CIVIL TRIAL – PLAINTIFF UNABLE TO RECOLLECT THE COLLISION AND THE DEFENDANT DID NOT GIVE EVIDENCE NOR WAS A THIRD PARTY CALLED AS A WITNESS – WHETHER JUDGE SHOULD CONSIDER WHETHER THE PROCEDURAL POWER SHOULD BE EXERCISED TO ENSURE THAT EACH PARTY HAS FREE ACCESS TO QUESTION A WITNESS.

The court heard an appeal from a case where damages were allowed for personal injuries arising out of an accident between a moped and a motor car. The plaintiff motor cyclist had no recollection of the collision; the defendant motor car driver did not give evidence; and a third person who was also on the motor cycle, was not called by either party.

MAHONEY JA: (at p213) "... This led to the trial judge, and this Court, having to consider the issue on the basis of speculation rather than fact. This is something which in my opinion, ordinarily should not be allowed to happen. It is not necessary to consider whether or in what circumstances a trial judge may, without consent, call or direct a party to call a witness: *Titheradge v R* [1917] HCA 76; (1917) 24 CLR 107; 24 ALR 77; see generally *Cross on Evidence*, 2nd Aust ed (1979), per 10.1, pp 211-212; Halsbury's *Laws of England*, 4th ed vol 17 par 281, at pp155, 195.

But a trial judge faced with such a situation as faced the trial judge in this case should, in my opinion, consider carefully whether action should be taken by him to ensure that the necessary evidence is before the court. There are, in my opinion, circumstances in which a trial judge may and should exercise his influence to this end. What philosophy should inform a trial judge's participation in a trial (whether he should be an umpire or something more) will no doubt require reconsideration from time to time. But, whatever philosophy be adopted, a trial judge has the right and, in my opinion, the duty, in the proper case, to use his influence to see that the court has before it the evidence necessary for the proper determination of the issues. I do not mean by this that each judge must be a Sirica in pursuit of Watergate. But, whatever be the philosophy adopted, it places no premium on gaps in the evidence.

I appreciate the niceties of trial practice and the right of parties to the presentation of the case of their choice. What a judge will do will depend upon the circumstances of the case and there will sometimes be reasons why he will not intervene. But often this will not be so. Thus, on occasions a judge may suspect that a witness is not called because each party fears the other and not he, will have the cross-examination of him. In such cases, a trial judge may, in my opinion, properly, ascertain what the position is and, if it is such, may make clear to the parties that his procedural powers will be exercised to ensure that each party has fair access to and an appropriate right to question the witness, by whomever called..."