SUPREME COURT OF QUEENSLAND

CITATION:	*Brew v WorkCover Qld* [2003] QCA 504
PARTIES:	**BENJAMIN ANDREW BREW** (applicant/appellant) **v** **WORKCOVER QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 11762 of 2002 SC No 940 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	14 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2003
JUDGES:	Jerrard JA and Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	INSURANCE – THIRD PARTY LIABILITY INSURANCE – MOTOR VEHICLES – whether the *WorkCover Queensland Act* 1996 or the *Motor Accident Insurance Act* 1994 applies to the appellant's injury – whether the injury suffered by the appellant was caused by an act or omission in respect of a motor vehicle *Motor Accident Insurance Act* 1994 (Qld) s 280, s285 *WorkCover Queensland Act* 1996 (Qld) s 5(1)(a), s 5(1)(b), s 11(2) *Boath v Central Queensland Meat Export Co Pty Ltd* [1995] 1 Qd R 142, cited *Curtain Bros (Qld) Pty Ltd v FAI General Insurance Company Limited* (1995) 1 Qd R 142, discussed *McEwan v Council of the City of the Gold Coast* (1987) 1 Qd R 337, considered *Manning v Taroom Shire Council & Ors* [1994] QCA 430; Appeal No 35 of 1994, 26 October 1994, considered *Patullo v Grays Sawmills Pty Ltd* [1995] 2 Qd R 528, cited *SGIO (Qld) v Workers' Compensation Board (Qld)* (1988) 5 ANZ Insurance Cases 75,436, cited

Stevens v Nudd [1978] Qd R 96, cited
Suncorp Insurance & Finance v Workers' Compensation Board of Queensland (1990) 1 Qd R 185, considered
Technical Products Pty Ltd v State Government Insurance Office (1989) 167 CLR 45, followed

COUNSEL: A J Moon for the appellant
R J Douglas SC, with K F Holyoak, for the respondent

SOLICITORS: Connolly Suthers for the appellant
Blake Dawson Waldron for the respondent

[1] **JERRARD JA:** In this appeal I have had the advantage of reading the reasons for judgment of Dutney J, and respectfully agree with those and with the order his Honour proposes. I add the following comments. In *Manning v Taroom Shire Council & Ors* [1994] QCA 430, Pincus JA and Derrington J observed at page 3 of their joint judgment that there is ample authority to the effect that an employer may be liable in respect of a vehicle because of a defective system of work involving that vehicle. Their Honours cited *McEwan v Council of the City of the Gold Coast* (1987) 1 Qd R 337 at 341, and *Suncorp Insurance & Finance v Workers' Compensation Board of Queensland* (1990) 1 Qd R 185 at 190. In the latter case Derrington J held at first instance[1] that:

> "Once…the lack of the provision of proper instructions and the safe system of work in relation to the parking of the Toyota vehicle [is established] it must be said that the liability of the defendant is in respect of the Toyota vehicle…"

and Connolly J in delivering the judgment of the Full Court wrote:[2]

> "That the defendant's liability to the plaintiff was a liability in respect of the insured Toyota is, to my mind, clear, at least in so far as the liability was founded upon the defendant's breach of duty adequately to warn the plaintiff in relation to his management of that vehicle…"

[2] A perhaps different but consistent approach can be discerned in the decision in *Curtain Bros. (Qld) Pty Ltd v FAI General Insurance Company Limited* (1995) 1 Qd R 142. In that case this court held that a finding of liability in respect of a vehicle was not excluded because of liability as an employer in respect of an unsafe place of work. In that case the injured plaintiff had used a vehicle supplied by her employer, and it had not warned the plaintiff of a danger (which it had created as an occupier) in the road along which she was required to drive, of which danger the employer was aware and the plaintiff was not. This court held that it could not be doubted that the liability was "in respect of" the vehicle and that:

> "One basis of liability is not exclusive of the other and the correct view is that the appellant was negligent, and liable, in respect of both."[3]

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1 (1990) 1 Qd R 185 at 191.
2 (1990) 1 Qd R 185 at 193.
3 At Qd R 146-7.

[3] That principle made clear in *Manning v Taroom Shire Council*, and not relevantly contradicted at all in *Curtain Bros v FAI*, means that in this matter the appellant's submission that his injury was caused by his employer's unsafe system of work necessarily leads to the conclusion that if that is correct, his injuries were caused, wholly or partly, by a wrongful act in respect of the particular motor vehicle he was driving when injured; that wrongful act being the employer's request that he drive it when and where he did, and its failure thereby to provide him with a safe system of work. This means the appeal must be dismissed.

[4] **DUTNEY J:** The short point with which this appeal is concerned is whether the injury suffered by the appellant was caused by an act or omission in respect of a motor vehicle.

[5] The appellant was injured in a motor vehicle accident in the course of his employment on 18 November, 1999. He gave a notice of claim under s 280 of the *WorkCover Queensland Act* 1996 ("WQA") to his employer. The employer responded by denying liability under s 285 of the WQA on the basis that the incident was governed by the *Motor Accident Insurance Act* 1994 ("MAIA") and by virtue of s11(2) of the WQA the appellant's claim was not a proper claim for "damages" within the meaning of that Act.

[6] The facts, as described by the appellant, are as follows:

1. "I was injured in a single vehicle accident which occurred at about 4.30 a.m. on 19 November 1999 on the Bruce Highway, approximately 3 kilometres north of Ingham. I cannot recall the precise details of the accident and believe I fell asleep just before the accident occurred.

2. I had started work the previous day, 18 November 1999, at 8 am, and worked until 11 a.m. I recommenced work at 2.30pm and worked through to 6.30pm. Another driver called in sick and I was asked to do the Townsville to Halifax run that evening which I agreed to do.

3 In the days leading up to the accident I had worked normal day shifts. I had done extra shifts like the one I did that night once every two weeks or so usually when another driver called in sick. I felt I had to accept the extra work that was offered to keep my job although nothing like that was ever said to me, I thought it was implied by what had been said on previous occasions when I refused the work.

4. I tried to sleep between finishing work at 6.30 p.m. and starting again at 11 p.m. on the evening of 18 November 1999 but found I could not sleep. When I arrived at the loading dock of the Townsville Bulletin, I asked another truck driver if he had any Nodose to help keep me awake but he did not have any.

5. On that particular night I was to do a paper run from Townsville to Halifax. I drove to Ingham and delivered papers to the various newsagents in Ingham and then drove to Halifax to deliver papers to

a newsagent there. I felt tired driving form Ingham to Halifax. After delivering the papers at Halifax I had to do one further drop at the Herbert River Express in Ingham and I was then intending to stop the truck and have a sleep. The company policy allowed a driver to pull up and sleep if they are tired as long as the papers are delivered first. That is what I was intending to do.

6. The accident happened on the return journey from Halifax to Ingham. I can remember doing the delivery at Halifax and I can remember driving to the Halifax-Bruce Highway turn-off. From that turn-off to the scene of the accident I have a very vague memory. I can recall swerving on the Bruce Highway to try and bring the vehicle under control.

7. After that, all I can remember is getting into an Ambulance and heading to Ingham hospital."

[7] Section 5(1) of the MAIA provides:

> *"This Act applies to personal injury caused by, through or in connection with a motor vehicle if, and only if, the injury –*
> *(a) is a result of –*
> *(i) the driving of the motor vehicle; or*
> *(ii) a collision, or action taken to avoid a collision, with the motor vehicle; or*
> *(iii) the motor vehicle running out of control; or*
> *(iv) a defect in the motor vehicle causing loss of control of the vehicle while it is being driven; and*
> *(b) is caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person."*

[8] It is not contested that the appellant's injury is a result of the driving of the relevant motor vehicle. There is therefore no issue concerning the requirements of s 5(1)(a). The appellant's submission, however, is that his injury was caused by the adoption of an unsafe system of work being one which required him to work excessive hours with inadequate rest. It is submitted that in this case there was no wrongful act or omission in respect of the motor vehicle by the employer but rather a wrongful act or omission in respect of the system of work. The appellant argued that the nature of the equipment being used by him was immaterial to the real cause of the accident which was excessive fatigue. Thus, it is argued, the requirements of s 5(1)(b) are not met.

[9] The appropriate test as to whether the act or omission identified as causing the injury is "in respect of the motor vehicle" is set out in *Technical Products Pty Ltd v State Government Insurance Office*[4] where at 47 the majority adopted the test formulated by Connolly J in the Full Court in the judgement appealed from where Connolly J said[5]:

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4 (1989) 167 CLR 45.

5 [1986] 1 Qd R 139 at 143.

> "If the liability of the respondent in this case is to be described as being in respect of the trailer, there must, in my opinion, be more than the mere presence of the trailer at the scene. As McPherson J observed in *Tonga v John Holland (Construction) Pty Ltd* (reported as *SGIO (Qld) v Workers' Compensation Board (Qld),*[6] '*Stevens v Nudd*[7] and *Boath v Central Queensland Meat Export Co Pty Ltd*[8] may be taken as establishing that it is not sufficient, in order to satisfy the requirement that the person entitled to the benefit of the cover be "legally liable … in respect of such motor vehicle", that there be no more than a connexion or relation in time or sequence between the motor vehicle and events which in law give rise to the liability. What is required is that there be a relationship between the motor vehicle and the very act or omission which gives rise to the liability.'"

[10] Authority establishes that the existence of an alternative basis of liability other than one in relation to the motor vehicle, such as, for example, a failure to provide a safe system of work, does not exclude the operation of the MAIA. In *Curtain Bros. (Qld) Pty Ltd v FAI General Insurance Company Limited*[9] this Court said at 146:

> "Shortly stated, the appellant supplied the plaintiff with a vehicle and employed her to drive it along the relevant route without warning her of a danger in the road of which the appellant was aware and she was unaware. If the road was not a private road occupied by the appellant or it had not itself created the danger by its operations, it could scarcely be doubted that the appellant's legal liability to the plaintiff was "in respect of" the vehicle with which it had supplied her for use in the course of her employment.
>
> It is fallacious to seek to subsume this specific basis of legal liability into some wider or different basis merely because the presence of additional factors makes the other basis of the appellant's liability also available. Thus for example, it does not exclude the particular basis of the appellant's liability to the plaintiff in respect of the vehicle if it is also liable to her as an occupier in respect of the dangerous excavation or as an employer in respect of the unsafe place of work. The trial judge drew a false dichotomy when he said that 'the negligence of the appellant was in respect of the roadway and not in respect of the [vehicle]'."

[11] In my opinion the accident and consequent injury in this case are intimately connected with the motor vehicle driven by the appellant at the time he suffered the injury. Whatever other bases might exist for the intended action it is clear that the specific wrongful act of the employer which caused the injury was directing or requiring the appellant to undertake the delivery run to Halifax when the appellant was unfit to drive by reason of fatigue. Such a wrongful act in this case is plainly "in respect of the vehicle" in which the appellant was injured. The connection between the wrongful act and the motor vehicle is thus no mere coincidence or extraneous connection. In my opinion, the injury here falls within the wording of s 5(1)(b) of the MAIA and the WQA has no application.

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6 (1988) 5 ANZ Insurance Cases 75,436, at p 75,437.
7 [1978] Qd R 96.
8 [1986] 1 Qd R 139.
9 [1995]1 Qd R 142.

[12] The appeal should be dismissed with costs.

[13] **PHILIPPIDES J**: I have had the advantage of reading the reasons for judgment of Dutney J and the additional reasons of Jerrard JA. I also agree, for the reasons stated therein, that, on the basis of the facts that the learned judge at first instance was asked to assume, the injury suffered by the appellant was caused by an act or omission in respect of a motor vehicle for the purpose s 5(1)(b) of the *Motor Accident Insurance Act* 1994 ("the Act") and that the appeal should be dismissed with costs.

[14] In order to establish the requisite nexus between legal liability and the motor vehicle for the purposes of s 5(1)(b) of the Act, there must "be some discernible and rational link between the basis of legal liability and the particular motor vehicle."[10] A "merely coincidental or extraneous connexion" is insufficient.[11] In the present case, the requisite nexus between the respondent's legal liability and the motor vehicle is satisfied. The wrongful act relied upon as causing the injury was the respondent's conduct in directing and requiring the appellant to drive the vehicle when he was unfit to do so by reason of fatigue. The wrongful acts or omissions relied upon by the appellant as causing the injury thus point to a discernible and rational link between the basis of legal liability and the particular motor vehicle; the connexion is not merely extraneous or coincidental.

[15] Moreover, the fact that the appellant relied upon a failure to provide a safe system of work does not preclude the conclusion that the appellant's case asserted a wrongful omission in respect of a motor vehicle, such that s 5(1) of the Act is attracted. As the authorities indicate, an employer may be liable "in respect of a motor vehicle" because of a defective system of work involving that vehicle.[12] Furthermore, a liability to a plaintiff in respect of a motor vehicle for the purposes of the Act is not excluded by the existence of an alternative basis of liability, for example, as an occupier or as an employer in respect of an unsafe place of work.[13] Accordingly, the learned judge at first instance was correct in finding that the injury was, on the facts before him, caused wholly or partly by a wrongful act or omission in respect of a motor vehicle, so that s 5(1) of the Act applied.

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10 *Technical Products Pty Ltd v State Government Insurance Office (Queensland)* (1989) 167 CLR 45 per Brennan, Dean and Gaudron JJ at 47.

11 *Technical Products Pty Ltd v State Government Insurance Office (Queensland)* (1989) 167 CLR 45 per Dawson J at 51.

12 *McEwan v Gold Coast City Council* [1987] 1 Qd R 337 at 341; *Suncorp Insurance & Finance v Workers' Compensation Board of Queensland* [1990] 1 Qd R 185 at 190, 193; *Manning v Taroom Shire Council* [1994] QCA 430 at p3 per Pincus JA and Derrington J.

13 See *Curtain Bros. (Qld) Pty Ltd v FAI General Insurance Company Limited* [1995] 1 Qd R 142 at 146; *Patullo v Grays Sawmills Pty Ltd* [1995] 2 Qd R 528 at 532.